

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Adoption of Board Order DG-34-10, creation of Wisconsin Administrative Code NR 860 Water Use Permitting.

FOR: APRIL 2011 **BOARD MEETING**

TO BE PRESENTED BY / TITLE: Kristy Rogers, Bureau of Drinking Water and Groundwater

SUMMARY:

Board Order DG-34-10 creates NR 860 Water Use Permitting. NR 860 supports the implementation of 2007 Wisconsin Act 227, 2009 Wisconsin Act 28, and the Great Lakes-St. Lawrence River Basin Water Resources Compact (Compact) by defining the process, requirements, and criteria for water use permitting in the Great Lakes Basin. Beginning on December 8, 2011, coverage under a general permit or an individual permit is required for all persons who withdraw water from the Great Lakes Basin in an amount that averages 100,000 gallons per day or more in any 30-day period.

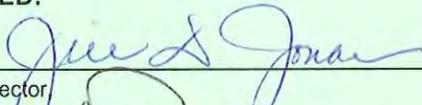
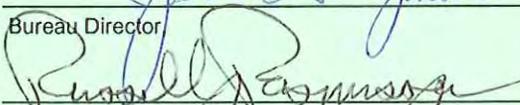
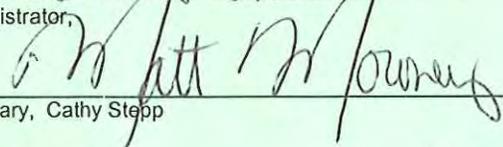
The rule establishes definitions, application information requirements, review time limits, required permit conditions, criteria for permit issuance, procedures for amending and terminating permits, and standards and procedures for public participation for the water use permitting program.

RECOMMENDATION: Adoption of Board Order DG-34-10, creation of NR 860 Water Use Permitting.

LIST OF ATTACHED MATERIALS:

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|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input type="checkbox"/> | Fiscal Estimate Required | Yes | <input checked="" 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:

 Bureau Director	<u>3/28/11</u> Date
 Administrator	<u>3/28/11</u> Date
 Secretary, Cathy Stepp	<u>4/4/11</u> Date

- cc: NRB Liaison
- DNR Rules Coordinator
- Eric Ebersberger - DG/5
- Linda Haddix - LS/8
- Judy Ohm - LS/8

Kristy Rogers - DG/5

CORRESPONDENCE/MEMORANDUM

DATE: March 28, 2011 FILE REF: DG-34-10

TO: Members, Natural Resource Board

FROM: Cathy Stepp, Secretary

SUBJECT: Recommendation for adoption of Wisconsin Administrative Code NR 860 Water Use Permitting.

1. Why is the rule being proposed?

NR 860 Water Use Permitting is being proposed to define the process, requirements, and criteria for water use permitting in the Great Lakes basin. 2007 Wisconsin Act 227 and 2009 Wisconsin Act 28 require the department to draft rules to implement the water use permitting program by December 8, 2011.

2. Summary of the rule.

This rule supports the implementation of 2007 Wisconsin Act 227, the relevant portions of 2009 Wisconsin Act 28, and the Great Lakes—St. Lawrence River Basin Water Resources Compact (Compact) by defining the process, requirements, and criteria for water use permitting in the Great Lakes basin. Beginning on December 8, 2011, water use permits are required in the Great Lakes basin for persons making withdrawals above certain thresholds. Coverage under a general water use permit is required for withdrawals averaging 100,000 gallons per day or more in any 30-day period but less than 1,000,000 gallons per day for 30 consecutive days. Individual water use permits are required for withdrawals that equal at least 1,000,000 gallons of water per day for any 30 consecutive days.

General Permits - The department is required to issue one or more general water use permits to cover withdrawals averaging 100,000 gallons per day or more in any 30-day period but less than 1,000,000 gallons per day for 30 consecutive days. The department may issue general water use permits based on geographical areas or based upon a category or group of water withdrawals. The department will propose at least two general water use permits after the adoption of the rule in early 2011. One of the general permits will cover withdrawers that qualify for automatic coverage and the second general permit will cover new withdrawers or existing withdrawers that do not qualify for automatic coverage.

All existing withdrawers that had a withdrawal at the level requiring a general permit before December 8, 2008 will qualify for automatic coverage under a general water use permit. The department will contact or issue automatic coverage to those withdrawers that have received previous department approvals. Withdrawers that did not have a previous department approval must register by November 1, 2011 to ensure the issuance of automatic coverage. The statute requires that automatic coverage be issued by December 8, 2011.

Existing withdrawers that do not qualify for automatic coverage and new withdrawers that are required to obtain coverage under a general water use permit must apply to the department. The department will review a complete application within 45 days and issue a notice of coverage under the general water use permit to those withdrawers that have an approved water

conservation plan and the required permits from other department programs. The department intends to streamline the review of applications for coverage consistent with the Water Division's streamlining initiatives.

Individual Permits - Individual water use permits are required for withdrawals equaling at least 1,000,000 gallons of water per day for any 30 consecutive days. Existing withdrawers that had a withdrawal at the level requiring a general or individual permit before December 8, 2008 will qualify for the automatic issuance of a permit. The automatic issuance process is the same process as that for automatic coverage under a general permit and has the same statutory deadline of December 8, 2011.

Existing withdrawers that do not obtain an automatic permit and new withdrawers that are required to obtain an individual water use permit must apply to the department. The individual water use permit process varies based upon the volume of the proposed withdrawal. As the volume of the withdrawal increases, the required information and review standards increase. New and increased withdrawals of 1,000,000 gallons per day or more have to meet the state decision making standard. New and increased withdrawals of 10,000,000 gallons per day or more that have a water loss of 5,000,000 gallons per day or more have to meet the compact decision making standard.

The state decision making standard requires applicants to:

- Demonstrate that there is no significant adverse impact to the waters of the state from the withdrawal.
- Demonstrate the need for the withdrawal.
- Implement cost effective water conservation measures.
- Obtain the necessary permits from other department programs.

The compact decision making standard requires applicants to:

- Return all of the withdrawn water to the source watershed less an allowance for consumptive use.
- Demonstrate that there is no significant adverse individual or cumulative impact to the Great Lakes basin, the source watershed, and water dependent natural resources.
- Implement environmentally sound and economically feasible water conservation measures.
- Comply with all applicable local, state, federal laws and interstate and international agreements.
- Demonstrate that the water use is reasonable.

Public participation including a public notice, comment period, and opportunity for a hearing is required for the issuance of general permits and individual permits that require compliance with the state or compact decision making standard. Withdrawals that have a new or increased consumptive use of 5 million gallons per day or greater average in any 90-day period must also be reviewed by the other Great Lakes states and Canadian Provinces of Ontario and Quebec.

The rule also establishes the minimum permit conditions for all permits, the process for making an open records request, the process for requesting a modification to the permitted withdrawal amount, and the specific public participation procedures.

3. How does this proposal affect existing policy?

The board order creates a new rule that implements new regulations. The new rule is not expected to affect existing policy. The requirements of the rule were designed to work in concert and avoid duplication with overlapping department regulations including the high capacity well and Chapter 30 surface water withdrawal programs.

4. Hearing Synopsis, Public Comments, Rules Clearinghouse Comments, and Post Hearing Contacts.

Public Hearings

Three hearings were held to solicit comments. All of the hearings were at 2:00 p.m. The first hearing was in Milwaukee on October 13, 2010. The hearings in Green Bay and Ashland were conducted together using videoconferencing on October 14, 2010. There was low participation at the hearings with a total of 6 participants. Five people registered with three people indicating a position of "as interest may appear" and two people not indicating a position. One person provided oral comments.

Public Comment

Information on the proposed rule was posted on the department website on September 13, 2010 and information was sent to approximately 950 people using GovDelivery on September 21, 2010. The public comment period closed on October 31, 2010. The department received public comments from 6 individuals and organizations. All of the comments, along with the department's response, are included in Attachment 1.

The department received a large number of excellent comments. The comments were sorted by subject material and are grouped in Attachment 1 by rule subchapter. The department incorporated or made changes to the rule to address the majority of the comments.

The comments on NR 860 Subchapter 1 – General Provisions, included a request to add definitions for clarity, concerns with the open records request section, and questions or concerns on a number of the required permit conditions. The department added definitions and also amended or deleted several of the required permit conditions based on the comments including removing the required permit condition that the withdrawal shall not injure public rights in navigable waters and the permit condition that stated that the department may require additional conditions in a general permit. The department did not make any changes to s. NR 860.14, "Open Records Requests". Section NR 860.14 contains the same open records requirements as s. NR 856.15. The language developed for s. NR 856.15 provided additional guidance for protecting information that may impact domestic security while preserving the state's public policy in favor of releasing public records.

There were a large number of comments pertaining to NR 860 Subchapter II – General Water Use Permits and Subchapter III – Individual Water Use Permits. The comments included proposed modifications to provide clarity to the permit processes and concerns and suggestions related to the criteria and conditions for obtaining permits. The department made a substantial number of changes to address the comments.

The department also made several changes to NR 860 Subchapter IV – Public Participation to provide additional clarity. There were a number of comments that expressed concern with when public participation was required for general permits versus notice of coverage issued under a general permit. Public participation is only required for the initial department issuance of the general permits. There is no public participation required when the department issues notice of coverage under a general permit to an individual withdrawer.

Rules Clearinghouse Comments

The department made all changes recommended by the Legislative Council Rules Clearinghouse. Clearinghouse comment 5.d. suggested removing the phrase “in the manner described by the department”. This phrase is used throughout the rule to describe the manner in which applicants submit information to the department. The Clearinghouse commented that the phrase “...is unnecessary because the rule goes on to specify the types of information that must be included in an application”. The phrase “in the manner described by the department” is intended to provide flexibility on how the department receives an application or information. It allows the Department to accept applications and information via paper forms, email, internet submittal, etc. The phrase does not impact the actual information that is required to be submitted. The department changed the phrase throughout the rule to “using the method prescribed by the department” to provide clarity.

Post Hearing Contacts

Department staff met with the Lawrie Kobza from Municipal Environmental Group to briefly discuss their comments on February 23, 2011.

5. Information on environmental analysis, if needed.

No environmental analysis is required. This action is a Type III action under ch. NR 150, Wis. Adm. Code.

6. Final Regulatory Flexibility Analysis

The proposed rule is not expected to have a significant economic impact on small businesses. The rule affects small businesses that supply their own water with water supply systems that on average withdraw over 100,000 gallons per day in any 30-day period. Small businesses, like other entities that are affected by this rule, will have to obtain a permit, follow the permit conditions, measure the amount of water used on a monthly basis, and report that water use annually. Small businesses that receive water solely from a public water supply will not be directly impacted by this rule. Most small businesses regulated by this rule are expected to fall within the general permit category. The general permit requirements are straightforward and can be accomplished by most individuals with no specific professional background. The application for an individual permit may require the hiring of a professional environmental consultant to assist with the evaluation of impacts from a proposed withdrawal.

Attachment 1 – Summary of Public Comments

PUBLIC COMMENTS¹

GENERAL PROVISIONS (NR 860 Subchapter I)

1. From the Wisconsin Paper Council: Page 5; NR 860.11(10). The definition of "property" incorrectly cross-references sub. (7). The correct cross-reference is sub. (6).

Department Response: The department corrected the rule.

2. From Municipal Environmental Group – Water Division: NR 860.11. Definitions.
 - a. Add a definition of "baseline." The use of the term is often confusing, and a definition in the rule would help regulated entities understand who the term applies to, and how it is determined. MEG-Water suggests the following definition. (XX) "Baseline" means the baseline for a preexisting withdrawal determined by the department pursuant to s. 281.346(4e).

Department Response: The department added a definition of baseline.

- b. Add a definition of "preexisting withdrawal." This term is relevant for purposes of determining the baseline, automatic coverage under general permits, and automatic coverage under individual permits. (XX) "Preexisting withdrawal" means a withdrawal prior to December 8, 2008.

Department Response: The department changed all references to an "existing" withdrawal to "preexisting", deleted the definition of "existing withdrawal" and added a definition for "preexisting withdrawal". The definition of "preexisting withdrawal" is the same as the original definition of "existing" withdrawal.

- c. Add a definition of "public water supply system." This term is used throughout the rule and it is not defined.

Department Response: The department changed all references to "public water supply system" to "public water supply". "Public water supply" is already defined in the rule and has the same definition as the statute.

- d. Add a definition of "withdrawal amount." This term is used throughout the rule. A definition would assist regulated entities in understanding what the term means, and how it relates to the baseline. (XX) "Withdrawal amount" means the amount of water a permittee is permitted to withdraw. For a pre-existing withdrawal, the withdrawal amount shall not be less than the baseline.

Department Response: The department added a definition of withdrawal amount.

¹ The Alliance for the Great Lakes submitted all of their comments five days after the comment deadline.

3. From the Natural Resources Defense Council: Under "NR 860.14 Open Records Requests," we urge the Department to reconsider a request made by a community of environmental groups, including the Milwaukee RiverKeeper, Clean Wisconsin, Sixteenth Street Community Health Center, the Alliance for the Great Lakes, and the National Wildlife Federation) on July 7, 2010. The groups suggested the addition of this sentence: "The department shall explain its reasons for why conditions or special formats are necessary to protect the public's interest in domestic security in its response to the requester. Conditions on use, or special formats shall not prevent reasonable assessment and understanding of the impacts of withdrawals and diversions on natural resources." We recognize that the location of withdrawals and diversions can be sensitive; however, knowledge of the location of withdrawals and diversions is critical for the public to understand the impacts on natural resources. We urge the Department to add this language to support the public's ability to better understand water use in the State.
4. From the Wisconsin Potato & Vegetable Growers Association: NR 860.14 – Open Records. Consistent with comments filed by other agricultural organizations on related Compact rule, NR 856, we are concerned about open records requests related to water use permits. We understand that Wisconsin statutes prescribe the boundaries within which the Department must review open records requests for information related to water use permitting. However, we do reiterate the concern that information regarding a withdrawal's location or any specific locational information related to the withdrawal be subject to the highest open records protection for those associated with food production in order to maintain food supply safety when information is disclosed by the State of Wisconsin. Specifically, we request that this information not be included on any Internet-accessible database.

Department Response (Comments #3 and #4): The new statute [s. 281.346(3)(cm), Stats.] gives the department the authority to consider domestic security concerns when determining if information relating to the locations of withdrawals and diversions may be released to the public. This authority must be balanced with Wisconsin's policy on public records that "...all persons are entitled to the greatest possible information regarding the affairs of government" and there is "a presumption of complete public access..." (s. 19.31, Stats.). The open records procedures in this draft rule are consistent with NR 856. The language developed for NR 856 provided additional guidance for protecting information that may impact domestic security while preserving the state's public policy in favor of releasing public records. Individuals also have the option to request confidentiality of their records following the process under s. NR 2.19. The department made no changes to the draft rule.

5. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(a) provides that any permit noncompliance is a violation of the permit and could be grounds for permit suspension or revocation. This is inconsistent with the statute which provides that a permit may be suspended or revoked for cause, including "substantially violating the terms of the permit." (§§ 281.346(4s)(h) and 281.346(5)(p)). I believe the intent of the statute was to limit permit suspension or revocation to those situations where there is a significant violation. The rule should contain comparable language.

Department Response: The department made changes to this section by removing “is” and replacing it with “may be” to be consistent with the statutory intent.

6. From the Wisconsin Potato & Vegetable Growers Association: NR 860.15- Required Permit Conditions. This section of the proposed rule specifies permit conditions for both general and individual permits. Within this section, the permittee is required to allow an authorized representative of the Department to “sample or monitor at reasonable times, for the purposes of assuring permit compliance.” NR 860.15(1)(c)4. It is our understanding that this rule is related to withdrawal volumes and monitoring the amount of water that is withdrawn from the Basin. To that extent, what will “sampling” be used for? Is there a water “quality” aspect to this permit? What purposes will “monitoring” serve? What type of monitoring is expected? We ask that this section either be further defined and that the word “monitoring” be removed from NR 860.15(1)(c)4.

Department Response: The department removed this subdivision (s. NR 860.15(1)(c)4.) from the rule draft.

7. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: **NR 860.15 [(1)] (e)** provides that *“An individual permit and coverage under a general permit is not transferable without prior approval from the department.”* (emphasis added). We recognize that s. 281.346 (5) (q) directs that an individual permit is not transferable except after notice to the department — but no similar transfer restriction is applicable to general permits under s. 281.346 (4s). As drafted, the rule goes beyond statutory authority and should be modified to limit the transfer restriction only to individual permits. We see no legislative direction or compelling reason to subject a general permit holder to such a transfer restriction and request that the phrase *“...and coverage under a general permit...”* be deleted. **Note:** Comment also applies to related rule section **NR 860.23 (3)**. Property transfer should not trigger a whole new application under NR 860 (22) (2) nor department review or new notice of coverage timelines or procedures. Such restrictions are not authorized by the statute and unnecessarily cloud and delay property transactions. If the department feels there is an extraordinary case involving the transfer of a general permit — NR 860.21 (4) and NR 860.23 (4) provide adequate safeguard in that the department reserves the right to suspend or revoke coverage under any general permit, at any time, for cause, consistent with s. 281.346 (4s) (h).
8. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(f) requires a permit holder to notify the DNR of any changes to the information submitted in the application. This requirement seems too broad given the variety of information included in NR 860.31(2). MEG-Water suggests that subsection (1)(f) only apply to certain specifically identified changes, or to material changes to the information in the application.

Department Response (Comments #7 and #8): The department made several changes based on the comments. Section NR 860.15(1)(e) was changed by removing “and coverage under a general Permit”. The department added a section titled “Amendments and Transfers”. This new section contains the specific requirements and process for amending the information in a notice of coverage or an individual permit. The

requirements for transferring coverage under a general permit to a new owner set forth under s. NR 860.23(3) were eliminated. The requirements for transferring an individual permit to a new owner set forth under s. NR 860.32(6) was moved to the new "amendments and transfers" section (s. NR 860.16(4).) The permit amendment procedures are consistent with the registration amendment procedures in NR 856.

9. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(g) requires a modification to the permit or notice of coverage to increase the established withdrawal amount. MEG-Water would like the rule to be clear that the established withdrawal amount will not be less than the baseline amount.

Department Response: The department amended s. NR 860.23(2) and s. NR 860.32(3) to include the following sentence: "The withdrawal amount for an automatically issued notice of coverage shall not be less than the baseline unless specifically requested by the owner."

10. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: NR 860.15 [(1)] (i) provides that —"*The withdrawal shall not injure public rights in navigable waters.*" Our concern here is simply that the phrase seems overly broad and vague. We are not sure what the phrase is intended to mean — or how far it could be construed or interpreted by a court. If the intent is to capture the statutory direction under s. 281.346 (2) (g), which states: *(g) Public trust doctrine. Nothing in this section may be interpreted to change the application of the public trust doctrine under article IX, Section 1, of the Wisconsin Constitution or to create any new public trust rights.*" — then the rule should be modified to more closely reflect that language, which at least provides a frame of reference and some legal parameter. In the alternative, NR 860.15 (i) could be deleted and a note could be inserted with a reference to the applicable statute and public trust doctrine language.

11. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(i) provides that the permitted withdrawal shall not injure public rights in navigable waters. MEG-Water is concerned about including this condition in the permit because it would be unclear to a permit holder when and how this condition would be violated. Presumably a permit holder could be acting in accordance with the permit, and an allegation could still be made that the permit holder is acting in a way that injures public rights in navigable waters. This vagueness about what is a violation of a permit condition would likely lead to litigation over whether a permit holder's action rise to the level of a permit violation. MEG-Water believes the better approach is to have the DNR establish specific conditions on the withdrawal to protect against injury to public rights in navigable water, and to retain the authority to revise these conditions if necessary. If that is done, subsection (1)(i) could be deleted.

Department Response (Comments #10 and #11): The department removed this required permit condition from the rule.

12. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(h) requires the permittee to implement the applicable water conservation and water efficiency requirements of an approved conservation plan. Under

NR 852, a water conservation plan is only required for entities seeking a new or increased withdrawal. Therefore, MEG-Water's understanding of this subsection (1)(h) is that there would be no applicable water conservation and water use efficiency requirements under this subsection for an existing entity that is not seeking a new or increased withdrawal.

Department Response: This is a correct interpretation; there are no water conservation and water use efficiency requirements for preexisting withdrawals. To provide additional consistency, the requirement to have a department approved water conservation plan, if applicable, was added to s. NR 860.32(1).

13. From Municipal Environmental Group – Water Division: NR 860.15(1). Required Permit Conditions. Subsection (1)(j) requires a withdrawal by a public water supply system that serves a population of 10,000 or more to be consistent with an approved water supply service area plan. For existing withdrawers not seeking an increase, a plan is not required until 2025. It should be clear that this subsection does not require existing withdrawers to prepare a plan sooner - although they may choose.

Department Response: The department modified this requirement to make it clear that the withdrawal must be consistent with a water supply service area plan if a water supply service area plan is required by the statute. In addition, this requirement was added to s. NR 860.23(1), to provide consistency.

14. From the Wisconsin Potato & Vegetable Growers Association: In addition, under s. NR 860.15(2), the rule states, "The department may require conditions in a general permit or individual permit *in addition to those under sub. (1).*" [Emphasis added.] This provision is of great concern to us. During the time that the Compact's implementing statute was being negotiated, all of the parties involved were diligent in reviewing the proposed statutory language to ensure that it provided regulatory certainty and that it not provide a broad, undefined grant of rulemaking authority to the Department. However, this section of the rule reverses that goal. The rulemaking authority defined in authorizing legislation was specifically defined in order to avoid this type of language. Accordingly, in order to preserve the intent of the Compact implementing statute itself, we request that NR 860.15(2) be entirely removed from the rule.
15. From the Wisconsin Paper Council: Page 8; NR 860.15(2). This language allows the department to require unspecified additional general or individual permit conditions. This broad authority is not authorized in s.281.346. In fact, during negotiations on the statutory language, numerous references to "other conditions specified by the department by rule" were deleted in order to make clear to all parties what the requirements would be. Now, the department appears to be attempting, through rulemaking, to change the terms agreed to during negotiations on the authorizing legislation. NR 860.15(2) is not authorized by statute and should be deleted.
16. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: **NR 860.15 (2)** provides that — "*The department may require conditions in a general permit or individual permit in addition to those under sub. (1).*" While we recognize the need to reserve some flexibility to accommodate one or more types of general permits, the rule provision gives the impression that the department is authorized

to require virtually any condition it wishes to impose. At a minimum, we suggest the provision be modified by adding the phrase — “*necessary to meet the requirements of ch. 281 Stats.*” at the end of the provision.

Department Response (Comments #14, #15, and #16): The department removed this requirement from the rule. Section 281.346(5)(b), Stats., directs the department to include specific requirements in individual permits. These specific requirements, if not already outlined in the required permit conditions under s. NR 860.15(1), were added to s. NR 860.32(2).

GENERAL AND INDIVIDUAL PERMITS (NR 860 Subchapters II and III)

17. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: The first “**Note**” under **NR 860.20 (1) (b)**, which explains that the department may require a person who withdraws water at the general permit level to obtain an individual permit if the person is located in a groundwater protection area or a groundwater management area, is helpful and should be retained to properly inform the regulated community of other statutory requirements that may be applied. However, we believe the note should be expanded to also articulate the state’s responsibility to fully fund the mitigation expenses associated with obtaining and operating under an individual permit for certain wells, in keeping with s. 281.34 (8) (d) and (9) (d). Our view is that — if the department requires a person who constructed a high capacity well in a groundwater protection or groundwater management area before May 7, 2004 to obtain an individual permit rather than be covered under a general permit — the department must then provide full funding for mitigation expenses associated with obtaining and operating under the individual permit. A clarification of the department’s position on this point is requested.

Department Response: The requirements in s. 281.34(8)(d) and (9)(d), Stats., only apply to those specific sections and do not apply to s. 281.346(4s)(dm), Stats. There are no similar mitigation provisions in s. 281.346. The statutes do not require the department to provide mitigation expenses associated with obtaining an individual permit if one is required in a groundwater protection area or groundwater management area.

18. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: **NR 860.20 (2) (a)** and **NR 860.30 (3) (a)** raise a question relative to the withdrawal of water to supply water trucks for the purpose of dust suppression management practices at quarry and crushing operations, or dust suppression activities relating to road projects. The rule indicates that a withdrawal of water to supply a vehicle for “other needs related to the operation of the vehicles” is exempt from the general and individual permit requirements. As we read the exemption, we believe water for water trucks would fall under this permit exemption but would appreciate the department’s response or clarification on this question.

Department Response: The exemption under s. 281.346(7) pertains to water withdrawals to supply vehicles “...for the needs of the persons or animals being transported or for ballast or other needs related to the operation of the vehicles.” The water that is withdrawn and transported in the trucks is not needed for the persons or animals being transported, for ballast, or for the operation of the vehicle but rather is

specifically used for the purpose of dust suppression. These withdrawals must be included in the annual reporting and authorized under a notice of coverage under a general permit or an individual permit if applicable.

19. From the Alliance for the Great Lakes¹: While (2) above [NR 860.21(2)] defines certain category or group types, since the department can define categories or groups on other attributes, I suggest that the following language be added to provide some standard: "There shall be a reasonable commonality among members of a category or group that is related to water withdrawal or use."

Department Response: The department added the suggested language.

20. From Municipal Environmental Group – Water Division: NR 860.21. General Water Use Permits. Subsection (4) contains a reference to NR 860.52, which should be NR 860.42. MEGWater also questions whether the hearing referred to in NR 860.52 is sufficient if an entity's coverage under a general permit is to be suspended or revoked. MEG-Water suggests that Wis. Stat. § 281.93, which provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346, also be referred to in the rule.

Department Response: The department incorporated the suggested edit and inserted a note advising of the rights of an applicant or permit holder to a hearing pursuant to s. 281.93, Wis. Stats. concerning the modification, suspension, or revocation of a general permit.

21. From Municipal Environmental Group – Water Division: NR 860.21. General Water Use Permits. Subsection (4) provides that a general permit issued by the DNR may be modified, suspended or revoked. The standards for modifying, suspending, or revoking a general permit should be set out. Wisconsin Stat. § 281.346(4s)(h) allows the DNR to suspend or revoke coverage under a general permit for cause, including obtaining coverage under the permit by misrepresentation or failure to disclose material facts or substantially violating the terms of the permit. MEG-Water suggests that these statutory standards for suspension or revocation be incorporated into the rule.

Department Response: The department removed this subsection. Section NR 860.21(4) was intended to be specific to the general permits issued by the department. This subsection did not apply to notice of coverage that is issued to withdrawers so the standards for modifying, suspending, and revoking the general permits as set forth in s. 281.346(4s)(h) would not be the same. The department has the legal authority to suspend or revoke a permit following the process under s. 227.51(3).

22. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: **NR 860.21 (5)** provides that —"*All general water use permits shall contain the permit conditions in s. NR 860.15 and any additional conditions necessary to meet the requirements of ch. 281, Stats. or the Great Lakes – St Lawrence River Basin Water Resources Compact.*" (emphasis added). The reference to the Compact seems open ended in that it does not contain a reference date or other point of reference. The rule should not leave the impression that any future modifications to the multi-state Compact

would automatically be required to be included in a Wisconsin general water use permit. In addition, if the intent is to tie the provision to the existing Compact, the rule language as proposed is unnecessary. The existing Compact is defined and referenced in s. 281.346 (1) (dm) and means the Compact that is adopted under s. 281.343. We recommend that the reference be deleted — since it is already subsumed by reference to ch. 281 — or that it be clarified by adding — “as defined in s. 281.346 (1) (dm).” — after Compact at the end of the sentence.

23. From Municipal Environmental Group – Water Division: NR 860.21. General Water Use Permits. Subsection (5) provides that the general water use permit shall contain any additional conditions necessary to meet the requirements of ch. 281, Stats., or the Great Lakes - St. Lawrence River Basin Water Resources Compact. Are there any such requirements? If there are, those requirements should be identified. This broad reference is too vague here to give regulated entities reasonable notice of what may be included.

Department Response (Comments #22 and #23): The department revised the rule by eliminating the reference to meeting the requirements of the Great Lakes – St. Lawrence River Basin Water Resources Compact.

24. From the Alliance for the Great Lakes: The note above [NR 860.22(1)(a) note] needs some clarification. How far back before 12/8/08 will the department look to consider data that qualifies a person for an automatic notice of coverage? I suggest some period of time, at least a year, maybe as much as 5 years, be specified in the Note.

Department Response: The purpose of a note is to provide explanatory information only. Notes may not include substantive requirements and do not have the effect of law. The statute, as referenced in NR 860.22(1)(a), sets forth those withdrawers that will qualify for automatic notice of coverage. It is the department’s opinion that the statute does not provide the authority to place a time limit on when the withdrawal had to have occurred prior to 12/8/08 to qualify. No changes were made to the rule.

25. From Municipal Environmental Group – Water Division: NR 860.22. Application and Review Process for Notice of Coverage. Subsection (1)(b) should be clarified. Currently it is unclear whether DNR’s notification is to occur by August 1, 2011, or the water withdrawer is to provide additional information by August 1, 2011.
26. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. Subsection (1)(b) should be clarified. Currently it is unclear whether DNR’s notification is to occur by August 1, 2011, or the water withdrawer is to provide additional information by August 1, 2011.
27. From the Wisconsin Paper Council: Page 15; NR 860.31(1). In general, the wording in (a), (b), and (c) is confusing, particularly as it relates to deadlines and submittal requirements. We discussed this issue with you previously, understand the department’s intent, and think the intent is perfectly reasonable. We suggest this language be re-written as follows. Paragraph (b) should become paragraph (a) and should be clarified to reflect that the department will review information for facilities that have already been issued an interim approval. If any information required by the new rule is missing or needs to be

updated, the department will request that information by August 1, 2011. Paragraph (a) should become paragraph (b) and the reference to "and that have submitted all of the information in sub. (2)(a) before November 1, 2011" should be changed to "and that have submitted, before November 1, 2011, any information requested by the department under par. (a)." Regarding paragraph (c), we note that there is no accommodation in the timeline for gathering additional information due to an incomplete application or for some other reason. We do not have a suggestion for addressing this, but wanted to point out this potential problem. One additional point relating to these deadlines is that there is no language allowing the applicant to request an extension of a deadline. While we think the need for extensions will be limited, we also think that it is prudent for the rule to include an extension provision and recommend that such language be added to the rule.

Department Response (Comments #25, #26, and #27): The department revised s. NR 860.22(1)(a) and (b) and s. NR 860.31(1)(a) and (b) to simplify and clarify the process for automatic issuance of permits. The process was simplified to ensure that automatic notices of coverage and permits are issued by the December 8, 2011 deadline. The revised rule language clarifies that the department will issue the automatic permits by the deadline, even if withdrawers that qualify for automatic issuance of permits are not able to submit the necessary information in time to meet the deadline. The department retains the ability to request any missing information from preexisting withdrawers but may not be able to obtain everything necessary before automatic permit issuance.

28. From Municipal Environmental Group – Water Division: NR 860.22. Application and Review Process for Notice of Coverage. Subsection (2) identifies the information that a water withdrawer is to submit to the DNR in order to obtain coverage under a general water use permit. The information identified seems to be more focused on existing withdrawals as opposed to new withdrawals. MEG-Water recommends this subsection be revised to also include new proposed withdrawals that are not yet constructed.

Department Response: The department added clarifying language.

29. From Municipal Environmental Group – Water Division: NR 860.22. Application and Review Process for Notice of Coverage. Based upon the information submitted under subsection (2), will the DNR be able to tell whether an applicant is entitled to a general permit - as opposed to needing an individual permit? How will the DNR know whether the applicant will be likely to withdraw at least 1,000,000 gallons per day for any 30 consecutive days?

Department Response: The withdrawer has the responsibility to apply for the correct permit, either coverage under a general permit or an individual permit. The department will be providing informational materials and customer service to help withdrawers apply for the appropriate permit. Application materials will also specifically ask if the withdrawer intends to use more than 1,000,000 gallons per day for any 30 consecutive days to help verify that the applicant has applied for the correct permit.

30. From the Alliance for the Great Lakes: I suggest adding the following sentence to the above subsection 3. (NR 860.22(2)(a)3) and to NR 860.31(2)(a)3 so that it is clear for all

current and future users what part of the system is the most restrictive component: "The most restrictive component shall be identified."

Department Response: The department modified the rule to include this clarification.

31. From the Wisconsin Paper Council: Page 11; NR 860.22(2)(a)4.; and Page 16; NR 860.31(2)(a)4. These two provisions require permit applications for general or individual permits to include information on the withdrawal schedule, average and maximum rates of withdrawal, and expected peak use. Of what value is this information? What regulatory purpose is served by requiring the permit applicant to speculate on this level of detail relating to future withdrawal activities? All information necessary to permit the withdrawal is covered in other requirements under sub. (2). Unless there is a clear regulatory purpose, this application requirement should be deleted.

Department Response: The department removed the requirement to provide a withdrawal schedule for notice of coverage applications. Information on the proposed withdrawal schedule however, is required for individual permits to determine if any permit conditions associated with limits on dates, seasons, or amounts of the withdrawal are necessary to comply with the state or compact decision making standard (see s. 281.346(5)(a)5 and 6, Stats.).

32. From Municipal Environmental Group – Water Division: NR 860.22. Application and Review Process for Notice of Coverage. Subsection (2)(b)-(d) refers to the dismissal of an application. The term "dismissal" seems to suggest that no action was taken. In order for an applicant to challenge DNR action (Wis. Stat. § 281.93), there needs to be a decision or determination by the DNR. MEG-Water suggests the term "dismiss" be replaced with another term that better reflects that a DNR decision has been made on the application. This same comment applies to other sections where the term "dismiss" is used.

Department Response: A department action to "dismiss" an application is a formal decision that can be challenged pursuant to s. 281.93, Wis. Stats. No changes were made to the rule.

33. From Municipal Environmental Group – Water Division: NR 860.22. Application and Review Process for Notice of Coverage. Subsection (2)(d) refers to the DNR determining if a withdrawal qualifies for coverage under a general water use permit. What are the grounds for qualifying for coverage under a general water use permit? Is the volume criteria - more than 100,000 gpd for any 30 consecutive days, and less than 1,000,000 gallons for 30 days -- the only criteria, or are there other criteria that would apply? MEG-Water would like this subsection to be more specific on the criteria to be applied.

Department Response: The department added additional clarifying language to s. NR 860.22(2)(d) and a new requirement under s. NR 860.21(5). The new requirement under s. NR 860.21(5) reads: "All general water use permits shall identify the criteria that must be met in order to qualify for coverage under the general permit. The criteria shall be limited to the requirements and authority provided under s. 281.346(4s)."

34. From Municipal Environmental Group – Water Division: NR 860.23. Notice of Coverage Decision. After automatic coverage under a general permit ends, how is subsequent coverage handled? Subsection (1) begins with the phrase that the "department shall issue notice of coverage, other than an automatic notice of coverage, only when all of the following have been completed." Does subsequent coverage have to following the requirements of subsection (1), or is subsequent coverage treated as an automatic notice of coverage? If subsequent coverage is not treated as an automatic notice of coverage, and instead is subject to the same requirements as new withdrawals, MEG-Water believes this would be inconsistent with Wis. Stats. § 281.346(4s)(g). MEG-Water suggests that subsection (1) be revised to state: (1) The department shall issue notice of coverage under NR 860.22(2) only when all of the following have been completed:

Department Response: The department incorporated the suggested edit.

35. From Municipal Environmental Group – Water Division: NR 860.23. Notice of Coverage Decision. Subsection (1)(c) refers to water quality standards. MEG-Water is unclear on how these provisions apply. The rule should provide more guidance on what water quality standards are applicable to this chapter.
36. From the Wisconsin Paper Council: Page 12; NR 860.23(1)(c). This provision specifies that the department may issue a notice of coverage under a general permit only if the applicant complies with the water quality standards of chs. NR 102 and 103, if applicable. We understand the intent behind the provision and have no problem with that intent. However, use of the word "complies" is troubling in that it implies continuous, 100% compliance, with no recognition that best performing permit applicants may have occasional, temporary periods of non-compliance due to circumstances beyond their control. Use of the term "is in substantial compliance" may be an option for accomplishing the regulatory end, while recognizing compliance realities.

Department Response (Comments #35 and #36): The intent of s. NR 860.23(1)(c) was to ensure ongoing compliance with applicable water quality standards. The applicable water quality standards however, are associated with other required approvals from the DNR listed in s. NR 860.23(1)(b). The department removed this provision because the other department regulatory programs have the direct authority to ensure compliance with those standards.

37. From Municipal Environmental Group – Water Division: NR 860.23. Notice of Coverage Decision. Subsection (2) should indicate that the withdrawal amount for an automatically issued notice of coverage shall not be less than the baseline.

Department Response: The department incorporated the suggested edit.

38. From the Alliance for the Great Lakes: A permit should be subject to suspension or revocation before violations become "substantial". Lesser offenses, especially if there is a history of violations, should qualify. I don't know what common law allows before something is considered "substantial", but specifically allowing that as the minimum threshold for enforcement to protect the environment is far to high. I suggest something like the following amended language for the above paragraph [NR 860.23(4)] and for NR

860.32 (5): "...or ~~substantially~~ violating the terms of the permit with material effects, after ..."

Department Response: The language in NR 860.23(4) and NR 860.32(5) is directly from s. 281.346(4s)(h), Wis. Stats. The department does not have the authority to change this standard.

39. From Municipal Environmental Group – Water Division: NR 860.23. Notice of Coverage Decision. Subsection (4) appears to repeat some of what is in NR 860.21(4). This subsection (4), however, follows the language of Wis. Stat. § 281.346(4s)(h) more closely and MEG-Water would recommend that this section be retained. One suggested addition, however, is a reference to Wis. Stat. § 281.93, which provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346.

Department Response: Section NR 860.21 establishes a process for the department to modify, suspend, or revoke a general permit that the department has issued. There is no direction in s. 281.346 for this type of action. The statutory requirements in s. 281.346(4s)(h), Wis. Stats., sets forth the requirements for suspending or revoking coverage under a general permit. These requirements are currently spelled out in s. NR 860.23(4). A note was also added to this section to reflect the previous comment by MEG.

40. From Municipal Environmental Group – Water Division: NR 860.24. Modifications to the Withdrawal Amount - Notice of Coverage. Subsection (3) provides that if the DNR determines that a requested modification does not qualify for continued coverage under a general permit, the DNR shall dismiss the request. What would be the grounds for determining a requested modification does not qualify for continued coverage under a general permit? Would the volume criteria -- 1,000,000 gallons for 30 days -- be the only criteria, or are there other criteria that would apply? MEG-Water would like this subsection to be more specific on the criteria to be applied.

Department Response: The approval requirements for an application to increase a withdrawal amount under a general permit are already specifically listed in s. NR 860.24(2).

41. From the Aggregate Producers of Wisconsin and the Wisconsin Transportation Builders Association: NR 860.25 Redetermination of Coverage — and NR 860.34 Individual Water Use Permit Reissuance Under the enabling statutes and the proposed rules, general permits are good for 25 years and individual permits are good for 10 years before they have to be renewed or reissued. These rule sections provide that permittees have to make application for reissuance of a permit at least 180 days in advance of permit expiration. Our concern is that permittees could inadvertently miss the 180 day deadline and end up in non-compliance, and could potentially end up forfeiting preexisting baseline amounts. We recommend that these renewal provisions be modified to incorporate a requirement that the department provide notice to the permittee by no later than 12 months (360 days) in advance of permit expiration — notifying the permittee of the 180 day deadline and process for renewal. In addition, the rule should be modified to include a permit shield for withdrawals occurring after late submission of application to renew or

after expiration of the existing permit if the department fails to properly notify the permittee of the expiration date and renewal process.

Department Response: The department added a requirement for the department to provide a one year advance notification of permit expiration. The statute specifically requires that permittees apply 180 days prior to the expiration of the permit. The department can not change this requirement in the rule. The department added a sentence that states that "...failure to apply for redetermination at least 180 days prior to the expiration of the general permit shall not result in the loss of an established baseline or specified withdrawal amount."

42. From Municipal Environmental Group – Water Division: NR 860.25. Redetermination of Coverage. From a logistically point of view, how will the DNR handle having almost all general permits expiring at the same time?

Department Response: The department's new electronic water use system will track withdrawal reporting information through time and will provide at a minimum annual communication with general permittees. The system will provide efficient mass communication tools that will be used to issue redeterminations.

43. From Municipal Environmental Group – Water Division: NR 860.25. Redetermination of Coverage. In subsection (2), should a reference to the applicant withdrawing less than 1 mgd for 30 consecutive days be included here?

Department Response: The department incorporated the suggested edit.

44. From Municipal Environmental Group – Water Division: NR 860.25. Redetermination of Coverage. Subsection (3) provides that the owner applying for redetermination needs to qualify for coverage under the new general permit. What will the criteria be to qualify for coverage? Will these criteria be different than what was required under the prior general permit? Could the DNR determine that an owner who has been in compliance with a prior permit is no longer qualified to be covered under the new general permit?

Department Response: The criteria to qualify for coverage under a general permit will be outlined in the general permit itself and will follow the statutory authority under s. 281.346(4s). The criteria to qualify for coverage under a general permit will only change if the statutory requirements change. If an owner changes their operation and no longer meets the criteria, they will no longer qualify for coverage under a general permit. For example, if an owner increases their withdrawal amount to the level requiring an individual permit or decreases their withdrawal to below the level requiring coverage under a general permit.

45. From Municipal Environmental Group – Water Division: NR 860.25. Redetermination of Coverage. A subsection should be added to this section to make it clear that the DNR will not reduce a permit holder's withdrawal amount in a subsequent permit - unless the permit holder requests such a reduction.

Department Response: The department incorporated the suggested addition.

46. From Municipal Environmental Group – Water Division: NR 860.30. Applicability. Subsection (2) authorizes the DNR to require an entity located within a groundwater protection area or a groundwater management, who is otherwise eligible for a general permit, to obtain an individual permit. If an entity is initially covered by a general permit, can the DNR require that entity switch to an individual permit during the term of the general term - even if there has been no violation of the terms of the general permit?

Department Response: The statute provides the department the authority to require an individual permit for withdrawals in a groundwater protection area or a groundwater management area at any time. (s. 281.346(4s)(dm), "*Requiring individual permit*". The department may require a person who is making or proposes to make a withdrawal that averages 100,000 gallons per day or more in any 30-day period, but that does not equal at least 1,000,000 gallons per day for any 30 consecutive days, to obtain an individual permit under sub. (5) if the withdrawal is located in a groundwater protection area, as defined in s. 281.34 (1) (a), or a groundwater management area designated under s. 281.34 (9).)

47. From the Alliance for the Great Lakes: It is not clear to me what the information requested in NR 860.31 (2) (a) 12 (b.) is to cover. I'm assuming it is for the source water, and suggest that the following words be added at the end of the existing sentence. If that is not the case, and you want discharge conditions or others as well, this needs some specific clarification. "... and habitat of the source water.

Department Response: The department added additional clarifying language.

48. From the Natural Resources Defense Council: Under "NR 860.31 [(2)(a)12.e. and g.), Application and Review Process for Individual Water Use Permits:" Two sections, e & g, request assessments and analyses from the applicants, but do not define what should be contained within each analysis. We urge the Department to develop strong standards for what should be included in each of the following assessments: "e. An assessment of the impacts of the withdrawal on economic development, social development, and environmental protection taking into consideration other existing and planned withdrawals from the same source." "g. An analysis of the efficiency of the proposed water use, and if there is an expected increase in water loss, an analysis of the efficiency of the use of existing water supplies." The Department has already developed standards for cost-effectiveness and economic feasibility. Those standards are contained in "NR 852.09 Cost-Effectiveness Analysis" and "NR 852.10 Environmental Soundness and Economic Feasibility Analysis," which define the parameters of what a Tier 2 or Tier 3 applicant should include in their submission. The Department should adapt those standards for individual water use permits to comply with section "e." For section "g," the Department should define a standard for water efficiency and identify the parameters an applicant should use to assess the efficiency of a proposed water use. The development of strong standards will enable the Department to more accurately assess the applications and enable the applicant to fully understand what is required to have a complete application.

Department Response: The department added language to identify specific requirements for the requested analysis including time frames for the impact analysis and a definition of significant adverse environmental impact.

49. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. e. Subsection (2)(a)12 requires additional information for certain withdrawals. This subsection should be revised in several ways. First, it should be clear that this subsection only applies to new or expanded withdrawals, and not continuing withdrawals. Second, withdrawals covered by the state decision-making standard should be handled separately from withdrawals covered by the compact decision-making standard. The compact decision-making standard is more onerous and should only be applied to those withdrawals that trigger that standard. Third, the information required should be tied to the applicable decision-making standard. The information required from entities seeking a new or increased withdrawal covered by the state decision-making standard should only be required to provide the information needed to make a decision under Wis. Stats. § 281.346(5m). Similarly, the information required from entities seeking a new or increased withdrawal covered by the compact decision-making standard should be required to provide the information needed to make a decision under Wis. Stats. § 281.346(6). The two sections should not be handled as one. For withdrawals covered by the state decision-making standard, the provisions of Wis. Stat. § 281.346(5m) apply. Subsection (2)(a)12.a. & e. are relevant to these state decision-making standards. The other provisions in subsection (2)(a)12 do not appear to be relevant to the state decision-making standard. In Wis. Stat. § 281.346(5m)(e), the state decision-making standard requires compliance with one of four criteria listed in the statute. One of the listed criteria is the receipt of an approval to install a new well under Wis. Stat. § 281.34. Another listed criteria is receipt of an approval to install a new water intake under Wis. Stat. § 30.12. Since the receipt of these approvals or permits is specifically required under NR 860.31(2)9, there is no need to require separate documentation on the receipt of these approvals for purposes of subsection (2)(a)(12). Furthermore, since receipt of these approvals will satisfy the requirement of Wis. Stat. § 281.346(5m)(e), there is no need for subsection (2)(a)(12) to reference the other two criteria in Wis. Stat. § 281.346(5m) -- one of which is the "no significant adverse environmental impacts" criteria. For withdrawals covered by the compact decision-making standard, the provisions of Wis. Stat. § 281.346(6) apply. The provisions currently set out in Subsection (2)(a)12 generally appear to be relevant to these compact decision-making standards. MEG-Water is concerned, however, with the provision in Subsection (2)(a)12.c. which provides that the department may require modeling to document the anticipated hydrologic impacts of the proposed withdrawal. A model would likely cover a relatively large area with many withdrawals. One applicant should not be required to fund a hydrologic model which has regional benefits and which would cover many other withdrawals. Taking all these comments together, MEG-Water recommends that subsection (2)(a)12 be revised as follows: 12. For new or expanded withdrawals that require compliance with the state decision-making standard under s. 281.346(5m), Stats., the following information is required: a. Documentation that the proposed withdrawal amount is needed to meet the applicant's projected needs. b. Documentation of compliance with applicable conservation provisions required by ch. NR 852. c. An alternatives analysis comparing other potential water sources for cost-effectiveness and environmental effects. 13. For new or expanded withdrawals that require compliance with the compact decision-making

standard under s. 281.346(6), Stats., the following information is required: a. The information submitted under subd.12. b. A description of the baseline conditions including hydrologic flow, water quality, and habitat. c. An assessment of the potential impacts of the withdrawal on the waters of the state and water dependent natural resources including wetlands. d. An assessment of the impacts of the withdrawal on economic development, social development, and environmental protection taking into consideration other existing and planned withdrawals from the same source. e. Documentation of compliance with all applicable local, state, and federal laws, and interstate and international agreements, including the Boundary Waters Treaty of 1909. f. An analysis of the efficiency of the proposed water use, and if there is an expected increase in water loss, an analysis of the efficiency of the use of existing water supplies. g. The supply potential of the water source including quality, quantity, and reliability taking into consideration interconnected water sources and water dependent natural resources. h. A description of mitigation measures that will be implemented to prevent or eliminate significant impacts.

Department Response: The department made changes to this section to address the differences between the information that is needed to document compliance with the state decision-making standard versus the compact decision making standard. The department also made changes to exempt the need to submit certain information if permits had been issued by other programs.

50. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. In subsection (1)(a), the phrase "all of the information in sub. (2)(a)," should be revised to state "the information required by sub. (2)(a)." It should be clear that an applicant does not need to submit all the information listed in sub. (2)(a) if certain provisions in sub. (2)(a) are inapplicable.
51. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. For subsection (1)(c), MEG-Water has the same comment as that provided for subsection (1)(a).

Department Response (Comments #50 and #51): The department incorporated the suggested edits.

52. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. Subsection (2) identifies the information that a water withdrawer is to submit to the DNR in order to obtain coverage under an individual water use permit. The information identified seems to be more focused on existing withdrawals as opposed to new withdrawals. MEGWater recommends this subsection be revised to also include new proposed withdrawals that are not yet constructed.

Department Response: The department added clarifying language to state that the information required is for an existing or proposed withdrawal.

53. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. For subsection (2)(b), MEG-Water suggests the first sentence be revised to read as stated below. This revision is suggested

in order to avoid the implication that the DNR is to determine whether the state decision-making standard, or compact decision-making standard is met at this stage. (b) If the application does not include the information required by par. (a), it may be deemed incomplete.

Department Response: The department incorporated the suggested edit.

54. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. Subsection (2)(c) refers to the dismissal of an application. For the reasons discussed previously, MEG-Water suggests the terms "dismiss" be replaced with another term which better reflects that the DNR has taken action on the application.

Department Response: A department action to "dismiss" an application is a formal decision that can be challenged pursuant to s. 281.93, Wis. Stats. No changes were made to the rule.

55. From Municipal Environmental Group – Water Division: NR 860.31. Application and Review Process for Individual Water Use Permits. Subsection (2)(f) refers to the DNR determining if a withdrawal meets the standards of an individual permit. Are the applicable standards the state decision-making standards, the compact decision-making standards, or compliance with an approved water supply plan? MEGWater would like it to be clear what the applicable standards are at this stage.

Department Response: The department added clarifying language stating that an application for an individual permit for a withdrawal that does not meet the standards under s. 281.346(5), Stats. will be disapproved. The standards differ depending on whether or not you are a public water supply system, an unpermitted withdrawal, or a withdrawal covered by a general permit.

56. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. a. After an automatically issued individual permit expires, how is subsequent reissuance handled? Subsection (1) begins with the phrase that the "department shall issue an individual water use permit, other than an automatic issuance of an individual water use permit under NR 860.31(1), only when all of the following have been completed." Does subsequent issuance have to following the requirements of subsection (1), or is subsequent reissuance treated as an automatic issuance of a permit? If subsequent issuance is not treated as an automatic issuance of a permit, and instead is subjected to the same requirements as a new withdrawal, MEGWater believes this would be inconsistent with Wis. Stats. § 281.346(5)(j). MEG-Water suggests that subsection (1) be revised to state: (1) The department shall issue an individual water use permit under NR 860.31 only when all of the following have been completed:

Department Response: The department incorporated the suggested edit.

57. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. In subsection (1)(a), the phrase "all of the information in s. NR 860.31(2)(a)" should be revised to state "the information required by s. NR 860.31(2)(a)."

It should be clear that an applicant does not need to submit all the information listed in NR 860.31(2)(a) if certain provisions in sub. (2)(a) are inapplicable. This change goes along with the immediately preceding change requested by MEG-Water.

Department Response: The department incorporated the suggested edit.

58. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. Subsection (1)(d) refers to the applicant having "complied" with the state decision-making standard or the compact decision-making standard. MEG-Water believes it is more accurate to say that the department determines the applicant's proposed withdrawal meets the state decision-making standard or compact decision-making standard, if applicable.

Department Response: The department incorporated the suggested edit.

59. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. Subsection (2) provides that the individual water use permit shall contain any additional conditions "necessary" to meet the requirements of ch. 281, Stats., the Great Lakes - St. Lawrence River Basin Water Resources Compact, and the state or compact decision-making standard. This subsection should be clarified. First, what are the requirements of ch. 281, Stats., and the Compact that are to be included in the permit? Those requirements should be identified either specifically or by cross-reference in this rule. Second, the rule should be revised to clarify those conditions necessary to meet the state or compact decision-making standards will only be included in permits for permittees subject to those standards.

Department Response: Section 281.346(5)(b), Stats., directs the department to include specific requirements in individual permits. These specific requirements, if not already outlined in the required permit conditions under s. NR 860.15(1), were added to s. NR 860.32(2). In addition, the department modified the rule to clarify that permit conditions necessary to meet the state or compact decision-making standard only apply to those that need to meet the state or compact decision-making standard.

60. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. Subsection (3) should indicate that the withdrawal amount for an automatically issued individual water use permit shall not be less than the baseline.

Department Response: The department added this sentence to s. NR 860.32(3), "The withdrawal amount for an automatically issued individual permit shall not be less than the baseline unless specifically requested by the owner".

61. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. f. Subsection (4) refers to the DNR modifying an individual permit to ensure compliance with the state or compact decision-making standard. MEG-Water is unclear on how this subsection would work. It was our understanding that the DNR would make a determination on whether a proposed withdrawal subject to the state or compact decision-making standards met those standards, and then would include permit conditions

to ensure those standards are met. MEG-Water is concerned that this subsection (4) suggests that the DNR could revise those permit conditions after the permit was issued. This would be difficult and unfair to a withdrawer who invested the capital in the withdrawal facilities, and was operating in compliance with the permit based upon the DNR's determination that the proposal and the permit conditions would fulfill the decision-making standards.

62. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. g. In subsection (4), MEG-Water also believes it would be appropriate to refer to a contested case hearing under Wis. Stat. § 281.93. The type of hearing referred to in s. NR 860.42 does not seem sufficient for a situation where a permit may be modified.

Department Response (Comments #61 and #62): Section NR 860.32(4) reflects the statutory language in s. 281.346(5)(o), Stats. The hearing process required pursuant to NR 860.42 is a process that would have to be completed prior to the department issuing a decision on a permit modification. This provides additional formal opportunities for the owner or others to submit information and evidence concerning a proposed modification and allows the department to gather additional information. After the department issues a decision, the owner still has the right to challenge the department's decision using the process under s. 281.93, Stats. A note was added after s. NR 860.32(5) to provide information on the owner's rights to challenge the department's decisions.

63. From Municipal Environmental Group – Water Division: NR 860.32. Individual Water Use Permit Decisions. h. In subsection (5), MEG-Water suggests that a reference to Wis. Stat. § 281.93, be added. This statute provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346.

Department Response: The department added a reference to s. 281.93, Stats., as a note.

64. From Municipal Environmental Group – Water Division: NR 860.33. Modification to the Withdrawal Amount - Individual Water Use Permits. a. In subsection (3), MEG-Water recommends the language be revised to be more specific with regard to the standards for issuance of an individual permit. MEG-Water suggests language similar to subsection (2) be used: If the department determines that the requested modification does not meet the requirements of s. NR 860.31(2), the department shall deny the application in writing and state the reasons for the denial.

Department Response: The department changed the rule as suggested.

65. From Municipal Environmental Group – Water Division: NR 860.34. Individual Water Use Permit Reissuance. a. How will permit reissuance be handled when almost all individual permits will be expiring 10 years from December 8, 2011?

Department Response: The department's new electronic water use system will track withdrawal reporting information through time and will provide at a minimum annual

communication with permittees. The system will provide efficient mass communication tools that will be used to re-issue permits.

66. From Municipal Environmental Group – Water Division: NR 860.34. Individual Water Use Permit Reissuance. b. In subsection (3), should the reference be to s. 281.346(5)(j) instead of (5)(g)?

Department Response: The department corrected the rule to reflect the correct statutory citation.

PUBLIC PARTICIPATION (NR 860 Subchapter IV)

67. From the Wisconsin Potato & Vegetable Growers Association: NR 860.41 – Public Notice and Comment. Under NR 860.41, the public notice and comment procedures for both general and selected individual permits, we notice that the publication requirement is imposed upon the applicant and that the delivery requirement may be imposed upon the applicant. We find these requirements unprecedented in Department rules with regard to general permits. First it is difficult to comprehend how, after the Department completes a draft general permit, every applicant who will potentially be covered under that general permit will publish the notice of the draft general permit in accordance with Wis. Stat. Chap. 985. NR 860.41(2)(a). We believe that it would make more sense for the Department to publish the draft general permits in accordance with the statutory requirements, as opposed to every potential permittee across the Basin publishing a notice. Accordingly, we ask that the publication requirement for general permits be imposed upon the Department and not upon the applicant under NR 860.41. In addition, we are concerned about the delivery requirement for general permits being imposed on “the department or applicant”. NR 860.41(2)(b) and (c) [emphasis added]. When will the department, as opposed to the applicant, assume this burden? How will this be established? For clarity and certainty within this rule, we respectfully request that the Department assume sole responsibility for delivery of general permit public notices.

Department Response: The public participation process is only required for the department issuance of the general permits. Public participation is not required for the issuance of notice of coverage under a general permit. It is the intention that the department publishes and delivers the necessary public notices for the general permits. The department modified s. NR 860.41(1) to make this clearer.

68. From the Wisconsin Paper Council: Page 20; Subchapter IV – Public Participation. Our reading of NR 860.40(1) relating to applicability is that subchapter IV applies to only those individual permits to which the state or compact decision-making standards apply (that is, selected individual permits, but not all individual permits) and to all general permits. Is that correct? If so, NR 860.41(1) should be clarified in the third sentence to refer to “...individual water use permit applications specified in NR 860.40(1)...”.

Department Response: The department changed the rule as suggested.

69. From Municipal Environmental Group – Water Division: NR 860.40. Applicability (Public Participation Requirements). a. Regarding subsection (1)(a), does the public participation

requirement apply to permit reissuances where no change in the withdrawal amount is requested? MEG-Water's position is that the public participation requirements should not apply where there is no change in the withdrawal amount, provided the withdrawer has complied with the terms of the prior permit. If this is not result, there will be a large number of public notices issued when the first round of individual permits expire in ten years.

Department Response: The public participation requirement for individual permits only applies when the withdrawal has to meet the state or compact decision making standard. No public participation is required for individual permit re-issuance when there is no change in the withdrawal amount. The department added "applicable" to s. NR 860.34(3) to provide additional clarity.

70. From Municipal Environmental Group – Water Division: NR 860.40. Applicability (Public Participation Requirements). b. It is assumed that subsection (1)(a) is intended to cover requests for modifications that will trigger the state decision-making standard or compact decision-making standard. MEGWater recommends that this be made more explicit in this section.

Department Response: The department modified the wording to provide additional clarity.

71. From Municipal Environmental Group – Water Division: NR 860.40. Applicability (Public Participation Requirements). c. For subsection (1)(b), how does the public participation requirement apply to general water use permits? Is the intent for the DNR to develop a "form" general permit, and then cover entities under that form permit? Will the public participation requirements only apply to the development of the form permit, and not to the issuance of the general permit to specific entities -- or will the public participation requirements apply to the actual issuance of the general permit to specific entities? This should be clarified.

Department Response: The public participation process is only required for the department issuance of the general permits. Public participation is not required for the issuance of notice of coverage under a general permit. It is the intention that the department publishes and delivers the necessary public notices for the general permits. The department added a note to provide additional clarity.

72. From Municipal Environmental Group – Water Division: NR 860.40. Applicability (Public Participation Requirements). d. For subsection (2), is the development of a form general permit a DNR "decision"? It does not appear that this would be a decision that would trigger an entity's right to challenge a DNR action.

Department Response: The department's issuance of a general permit is a decision that may be challenged using the process in s. 281.93, Stats.

73. From the Wisconsin Paper Council: NR 860.41 is confusing. Sub. (1) states that the department shall draft and issue a public notice. Sub. (2) states that the public notice is to be published by the applicant. We see no substantive difference between "issuing" and "publishing". Further, the fulfillment of public notice and comment obligations has

traditionally fallen to the regulating agency. We view that as appropriate. The rule should be clarified to make clear that it is the department's responsibility to issue or publish (or whatever) the specified information.

Department Response: The terms issue and publish describe two distinct actions. The term "issue" was used to describe the action of providing the notice to the applicant so it can be published. "Publish" was used to describe the action of actually publishing the notice. The department changed the rule by using the term "provide" instead of "issue" to create greater clarity. The requirement for the applicant to publish the required notices is a typical process for a number of department programs including Chapter 30 permits and water quality certifications. No changes were made to this requirement.

74. From Municipal Environmental Group – Water Division: NR 860.41. Public Notice and Comment. a. Subsection (1) provides that the DNR will draft and issue a public notice regarding each "permit application" under s. NR 860.40(1). Based upon this language, it appears that each application for coverage under a general permit will go through this public notice process, is that correct? Subsection (1) also provides that "For general permits, the department shall issue a public notice when a draft general permit has been completed." What is the draft general permit referred to? Is this the "form" permit, or the general permit to be issued to a specific user? If this applies to a "form" general permit, how does this fit with the comment in the immediately preceding paragraph?

Department Response: The public participation process is only required for the department issuance of the general permits. Public participation is not required for the issuance of notice of coverage under a general permit. The general permit is issued by the department and applicants must obtain "coverage" under that general permit. The general permit contains the eligibility criteria and the permit conditions that all withdrawers that are covered by the permit must follow. The Department added clarifying language throughout subchapter IV to clarify the different requirements between general permits and individual permits.

75. From Municipal Environmental Group – Water Division: NR 860.41. Public Notice and Comment. b. Subsection (2)(a) requires the public notice to be published in the counties "impacted by" the activity. It is unclear what "impacted" means. MEG-Water suggests this be replaced with a more definite description of the counties in which the notice must be published. MEG-Water suggests the following: Be published by the applicant as a class 1 notice under ch. 985, Stats., in all counties within which water from the proposed new or expanded withdrawal will be used, and in all counties within five (5) miles of the location of the proposed new or expanded withdrawal.

Department Response: The department modified the rule to incorporate the suggestion of requiring the notice to be published in counties where the withdrawal will be used and counties within five miles of the withdrawal.

76. From Municipal Environmental Group – Water Division: NR 860.41. Public Notice and Comment. c. Subsection (2)(b) and (c) should be revised to make it clear when the department is responsible for providing notice, and when the applicant is responsible for providing notice. MEG-Water suggests the following: (b) Be delivered by the department

to any person, group, local governmental unit, or state agency upon request to the department. Be delivered by the applicant to any person, group, local governmental unit, or state agency upon request to the applicant. The applicant shall provide proof of delivery in the form of an affidavit or documentation from the delivery method or person.
(c) Be delivered by the department to persons or groups on a formal department water use permit application mailing list.

Department Response: This section was intentionally written to provide the flexibility for either the department or applicant to deliver the notices. The department intends to deliver the notices if inexpensive tools are available such as web notification systems like GovDelivery. It is difficult to predict the department's ability to provide that type of service into the future so the flexibility is important. No changes to the rule were made.

77. From Municipal Environmental Group – Water Division: NR 860.41. Public Notice and Comment. d. Subsection (3)(c) provides that for general permits, the public notice is to include a description of the types of withdrawals and the waters of the state or areas of the state covered by the general permit. This seems to indicate the notice is for a permit "form," and not related to an application filed for coverage by the general permit. This does not seem consistent with subsection (1) which refers to the department drafting and issuing a notice regarding "each permit application".

Department Response: The department added language to s. NR 860.41(1) to make it clear that the notice is required for "...each general permit proposed by the department and each individual permit application."

78. From Municipal Environmental Group – Water Division: NR 860.42. Public Hearings. a. Subsection (3) provides that the DNR shall schedule a public hearing if the hearing request complies with sub. (2) and the DNR determines that there is a significant public interest in holding a hearing. MEG-Water's position is that for a permit renewal, there is no significant public interest in holding a hearing if no change in the withdrawal amount is requested, and the withdrawer is in compliance with the terms of the prior permit.

Department Response: The public participation requirement for individual permits only applies when the withdrawal has to meet the state or compact decision making standard. No public participation is required for individual permit re-issuance when there is no change in the withdrawal amount.

79. From Municipal Environmental Group – Water Division: NR 860.42. Public Hearings. b. Subsections (9)(e) and (g) appear to be duplicative.

Department Response: The department removed s. NR 860.42(9)(g).

GENERAL COMMENTS

80. From the Natural Resources Defense Council: It is our understanding that the Department is developing a voluntary statewide water conservation program, complementary to and supported by NR 852. We commend the Department for developing a statewide program and look forward to commenting on that as well.

Department Response: Thank you for this compliment. It has been shared with the department staff currently working on the water conservation program.

Fiscal Estimate — 2009 Session

<input checked="" type="checkbox"/> Original	<input type="checkbox"/> Updated	LRB Number	Amendment Number if Applicable
<input type="checkbox"/> Corrected	<input type="checkbox"/> Supplemental	Bill Number	Administrative Rule Number DG-34-10

Subject
 Water Use Permitting and Public Participation

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- | | |
|--|---|
| <input type="checkbox"/> Increase Existing Appropriation | <input type="checkbox"/> Increase Existing Revenues |
| <input type="checkbox"/> Decrease Existing Appropriation | <input type="checkbox"/> Decrease Existing Revenues |
| <input type="checkbox"/> Create New Appropriation | |

Increase Costs — May be possible to absorb within agency's budget.

Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
 Counties Others Water Utilities
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

20.370 (4)(ai)

Assumptions Used In Arriving at Fiscal Estimate

Rule Summary

This rule supports the implementation of 2007 Wisconsin Act 227 and the Great Lakes—St. Lawrence River Basin Water Resources Compact (Compact) by defining the process, requirements, and criteria for water use permitting in the Great Lakes Basin. Beginning on December 8, 2011, coverage under a general permit or an individual permit is required for all persons who withdraw water from the Great Lakes Basin in an amount that averages 100,000 gallons per day or more in any 30-day period. The rule establishes definitions, application information requirements, review time limits, required permit conditions, criteria for permit issuance, procedures for amending and terminating permits, and standards and procedures for public participation for the water use permitting program.

State Fiscal Effect

Annual Costs:

All costs that the Department will incur are the result of the Great Lakes Basin water use permitting requirements enacted in 2007 Wisconsin Act 227, and as amended in 2009 Wisconsin Act 28. These costs will be covered by the staffing and funding provided in 2009 Wisconsin Act 28.

Annual costs to the Department are expected to increase by an estimated \$236,300 for salary, supplies, travel, and related expenditures. This estimate is based upon the following expected costs associated with administering the new requirements:

- 1) Salary and fringe for 2.0 FTEs classified as Water Supply Specialist Advanced at an estimated cost of approximately \$183,040 [2,080 hours x \$44/hour (salary and fringe) x 2 FTE] and 0.5 FTE classified as Natural Resources Staff Specialist at an estimated cost of approximately \$45,760 [1,040 hours x \$44/hour (salary and fringe)]. The FTEs will provide outreach, develop information and education materials, review and issue permit decisions, conduct permit compliance, review reporting information, prepare summary reports and analysis, investigate complaints and non-compliance, and maintain the data system.

Long-Range Fiscal Implications

No long range fiscal implications are expected.

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-08-10

Fiscal Estimate — 2009 Session

**Page 2 Assumptions Narrative
Continued**

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number DG-34-10

Assumptions Used in Arriving at Fiscal Estimate – Continued

2) Travel and supply costs of \$7,500 (\$3,000 x 2.5 FTE). The travel will include field investigations of permit applications, complaints and non-compliance, and travel associated with providing training and customer service to the regulated community.

One-Time Costs:

One time costs are estimated to be \$29,000. These costs are for developing necessary functions within an existing database and online system to accept permitting information. This includes computer contractor costs of \$7,000 (1 IS contractor @ 100 hours x \$70/hour) and DNR staff time at a cost of \$22,000 (500 hours x \$44/hour average salary and fringe). DNR staff time is required from an IS Systems Developer and Water Supply Specialist-Advanced.

Local Government Fiscal Impact

A. Existing Withdrawers

The new law provides for the automatic issuance of permits to most existing withdrawers therefore the initial fiscal impact is expected to be minimal. For existing withdrawers to obtain automatic issuance of a permit, they may be required to submit additional information to the Department in 2011. Submittal of the information is expected to take on average, less than 2 hours.

If a permitted withdrawer proposes to increase their permitted withdrawal amount, they will need to apply to the Department for a modification to their permit. The application preparation may require the hiring of a consultant. The costs for a consultant will vary depending on the size of the withdrawal and the potential impacts. Consultant costs are expected to range from \$5,000 to several times that amount.

There is little-to-no expected increase in annual costs. In most cases, the withdrawal measurement and annual reporting requirements are consistent with other existing Department requirements. For some individual water use permittees, there may be additional reporting requirements. The costs for the additional reporting requirements are expected to be minimal.

B. New Withdrawers

A person who proposes a new withdrawal in the Great Lakes Basin that averages 100,000 gallons per day or more in any 30 day-period will need to apply to the Department for a permit. The application preparation may require the hiring of a consultant. The costs for a consultant will vary depending on the size of the withdrawal and the potential impacts. Consultant costs are expected to range from \$5,000 to several times that amount.

There is little to no expected increase in annual costs. In most cases, the withdrawal measurement and annual reporting requirements are consistent with other existing Department requirements. For some individual water use permittees, there may be additional reporting requirements. The costs for the additional reporting requirements are expected to be minimal.

C. Public Participation

The permit process for some individual permits requires public participation. The applicant will be required to publish a class 1 notice in the local newspaper and deliver copies of the notice to interested persons. This cost is expected to range from \$25 to \$500.

Private Sector Fiscal Impact

The fiscal impacts on the private sector are expected to be the same as those for local units of government as set forth above.

Fiscal Estimate Worksheet — 2009 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number DG-25-10

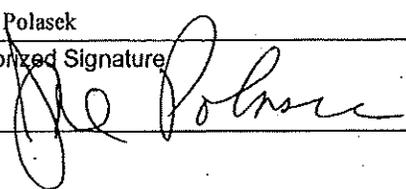
Subject
 Water Use Permitting and Public Participation Rule

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$	\$ -
(FTE Position Changes)		(FTE)	(FTE)
State Operations — Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$	\$ -
B. State Costs by Source of Funds			
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S			-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		\$	\$ -

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ _____	\$ _____
Net Change in Revenues	\$ _____	\$ _____

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-08-10

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCE BOARD
CREATING RULES

The Wisconsin Natural Resource Board proposes an order to create chapter NR 860 Water Use Permitting relating to the application and permit process for withdrawals of Great Lakes basin water and affecting small business.

DG-34-10

Analysis Prepared by the Department of Natural Resources

1. **Statutes Interpreted:** Sections 281.346(4m), 281.346(4s), 281.346(5), 281.346(5m), 281.346(6), and 281.346(9), Stats.
2. **Statutory Authority:** Sections 227.11(2)(a), 281.346(4s), 281.346(5), and 281.346(9), Stats.
3. **Explanation of Agency Authority:** Section 227.11 (2) (a), Stats. expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Section 281.346(4s), Stats., directs the Department to promulgate rules associated with the creation of General Water Use Permits for the Great Lakes basin. The rules are to establish permit application information requirements; permit review time limits; and requirements for estimating, monitoring, and reporting of water withdrawals from the Great Lakes basin.

Section 281.346(5), Stats., directs the Department to promulgate rules associated with the creation of Individual Water Use Permits for the Great Lakes basin. The rules are to establish permit application information requirements; permit review time limits; permit limits on the location and times and uses of withdrawals; and requirements for estimating, monitoring, and reporting of water withdrawals from the Great Lakes basin.

Section 281.346(9) Stats., directs the Department to promulgate rules for public notice and participation procedures for applications for general and individual water use permits.

4. **Related Statute or Rule:** Sections 30.18, 281.343, 281.344, 281.346, and 281.35, Stats., Chapters NR 850, 852, and 856, Wis. Adm. Code, and the following rules under development Water Loss from Consumptive Uses, and Water Supply Service Area Plans.
5. **Plain Language Analysis:** This rule supports the implementation of 2007 Wisconsin Act 227 and the Great Lakes—St. Lawrence River Basin Water Resources Compact (Compact) by defining the process, requirements, and criteria for water use permitting in the Great Lakes basin. Beginning on December 8, 2011, coverage under a general permit or an individual permit is required for all persons who

withdraw water from the Great Lakes basin in an amount that averages 100,000 gallons per day or more in any 30-day period.

The rule establishes definitions, permit application information requirements, permit review time limits, required permit conditions, criteria for permit issuance, procedures for amending and terminating permits, and standards and procedures for public participation for the water use permitting program.

6. Federal Regulatory Analysis: There are no comparable federal regulations pertaining to withdrawals of Great Lakes basin water.

7. Comparison with Rules in Adjacent States: The following table compares permitting requirements for water withdrawals in adjacent states. In addition, all Great Lakes states have agreed through the Great Lakes Compact to have management programs for water withdrawals from the Great Lakes Basin.

Wisconsin	Michigan	Illinois	Iowa	Minnesota
A water use general permit is required for withdrawals from the Great Lakes basin that average 100,000 gallons per day or more in any 30-day period. A water use individual permit is required for withdrawals from the Great Lakes basin that equal at least 1,000,000 gallons per day for any 30 consecutive days.	Permits are required for new and increased withdrawals of more than 2,000,000 gallons per day, new or increased withdrawals of more than 1,000,000 gallons per day if the withdrawal will have a certain type of impact (Zone C withdrawal), and new or increased intrabasin transfers of more than 100,000 gallons per day average over any 90-day period.	An allocation permit is required for withdrawals from the Great Lakes basin.	Water use permits are required of any person or entity that withdraws at least 25,000 gallons in a 24-hour period during any calendar year.	Water Use permits are required for withdrawals greater than or equal to 10,000 gallons per day or 1 million gallons per year from surface or groundwater.

8. Summary of the Factual Data and Analysis that Support the Proposed Rule: Information from the Great Lakes-St. Lawrence River Basin Water Resources Council, other Great Lakes states, existing state statutes, and existing department rules and procedures were used to guide the development of the proposed rule.

9. Analysis and Supporting Documentation in Support of the Determination of the Rule's Effect on Small Business: The department lacks complete data on the number and nature of operations withdrawing water above the thresholds requiring a permit. However, based upon the withdrawal data that does exist (e.g. high capacity well pumpage data), most small businesses are expected to fall within the general permit category with very few needing to obtain an individual permit.

10. Effect on Small Business: This rule will affect small businesses that supply their own water with water supply systems that withdraw an average of 100,000 gallons per day. Small businesses, like other entities that are affected by this rule, will have to obtain a permit, measure the amount of water used on a monthly basis, and report

that water use annually. Small businesses that receive water solely from a public water supply will not be impacted by this rule. Most small businesses regulated by this rule are expected to fall within the general permit category. The general permit requirements are straightforward and can be accomplished by most individuals with no specific professional background. The application for an individual permit may require the hiring of a professional environmental consultant to assist with the evaluation of impacts from a proposed withdrawal.

11. Agency Contact Person:

Kristy J. Rogers, Water Supply Specialist
Wisconsin Department of Natural Resources
Bureau of Drinking Water & Groundwater
(608) 266-9254
Kristy.Rogers@wisconsin.gov

12. Place where comments are to be submitted and deadline for submission:

Comments were submitted to Kristy Rogers, Bureau of Drinking Water and Groundwater, P.O. Box 7921, Madison, WI 53707 by October 31, 2010.

SECTION 1. Chapter NR 860 is created to read:

**CHAPTER NR 860
WATER USE PERMITTING**

SUBCHAPTER I– GENERAL PROVISIONS

- NR 860.10 Purpose
- NR 860.11 Definitions
- NR 860.12 Responsible Parties and Eligible Permittees
- NR 860.13 Interim Approvals
- NR 860.14 Open Records Requests
- NR 860.15 Required Permit Conditions
- NR 860.16 Amendments and Transfers
- NR 860.17 Terminations
- NR 860.18 Enforcement

SUBCHAPTER II – GENERAL WATER USE PERMITS

- NR 860.20 Applicability
- NR 860.21 General Water Use Permits
- NR 860.22 Application and Review Process for Notice of Coverage
- NR 860.23 Notice of Coverage Decisions
- NR 860.24 Modifications to the Withdrawal Amount – Notice of Coverage
- NR 860.25 Redetermination of Coverage

SUBCHAPTER III – INDIVIDUAL WATER USE PERMITS

- NR 860.30 Applicability
- NR 860.31 Application and Review Process for Individual Water Use Permits
- NR 860.32 Individual Water Use Permit Decisions
- NR 860.33 Modifications to the Withdrawal Amount – Individual Water Use Permits
- NR 860.34 Individual Water Use Permit Reissuance

SUBCHAPTER IV – PUBLIC PARTICIPATION

- NR 860.40 Applicability
- NR 860.41 Public Notice and Comment
- NR 860.42 Public Hearings

SUBCHAPTER I – GENERAL PROVISIONS

NR 860.10 Purpose. The purpose of this chapter is to implement s. 281.346(4m), (4s), (5), (5m), (6), and (9), Stats. This chapter establishes the process, requirements, and criteria for water use permitting.

NR 860.11 Definitions. In this chapter:

(1) “Baseline” means the amount of a preexisting withdrawal, as determined by the department under s. 281.346(4e), Stats.

(2) “Consumptive use” has the meaning specified in s. 281.346(1)(e), Stats.

Note: Section 281.346(1)(e), Stats., defines “consumptive use” to mean “a use of water that results in the loss of or failure to return some or all of the water to the basin from which the water is withdrawn due to evaporation, incorporation into products, or other processes.”

(3) “Days” means calendar days unless otherwise specified.

(4) “Department” means the department of natural resources.

(5) “Great Lakes basin” has the meaning specified in s. 281.346(1)(je), Stats.

Note: Section 281.346(1)(je), Stats., defines “Great Lakes basin” to mean “the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivieres, Quebec, within the jurisdiction of the parties.”

(6) “One property” has the meaning specified in s. NR 812.07(68).

Note: Section NR 812.07(68), Wis. Adm. Code, defines “one property” to mean “all contiguous land controlled by one owner, lessee, or any other person having a possessory interest. Lands under single ownership bisected by highways or railroad right-of-ways are considered contiguous.”

(7) “Owner,” for water supply systems other than public water supply, means a person who owns property on which a water supply system is located or proposed to be located or the designated representative of such a person. For public water supply, “owner” means a person who owns the public water supply or designated representative of such a person.

(8) “Permittee” means an owner that is issued a permit.

(9) “Person” has the meaning specified in s. 281.346(1)(nm), Stats.

Note: Section 281.346(1)(nm), Stats., defines “person” to mean “an individual or other entity, including a government or a nongovernmental organization, including any scientific, professional, business, nonprofit, or public interest organization or association that is neither affiliated with nor under the direction of a government.”

(10) “Preexisting withdrawal” means a withdrawal that started prior to December 8, 2008.

(11) “Property” has the same meaning as “one property,” as specified in sub. (6).

(12) “Public water supply” has the meaning specified in s. 281.346(1)(pm), Stats.

Note: Section 281.346(1)(pm), Stats., defines “public water supply” to mean “water distributed to the public through a physically connected system of treatment, storage, and distribution facilities that serve a group of largely residential customers and that may also serve industrial, commercial, and other institutional customers.”

(13) “Significant adverse environmental impact” means alteration of groundwater levels, groundwater discharge, surface water levels, surface water discharge, groundwater temperature, surface water temperature, groundwater chemistry, surface

water chemistry, or other factors to the extent such alterations cause significant degradation of environmental quality including biological and ecological aspects of the affected water resource.

(14) "Source" means an individual location where water is withdrawn from groundwater or surface water, such as a well or surface water intake.

(15) "Water loss" has the meaning specified in s. 281.346(1)(wm), Stats.

Note: Section 281.346(1)(wm), Stats., defines "water loss" to mean "the amount of water that is withheld from or not returned to the basin from which it is withdrawn as a result of a diversion or consumptive use or both."

(16) "Water supply system," has the meaning specified in s. 281.346(1)(wp), Stats.

Note: Section 281.346(1)(wp), Stats., defines "water supply system", when not preceded by "public", to mean "one of the following: 1. Except as provided in subd. 2., the equipment handling water from the point of intake of the water to the first point at which the water is used. 2. For a system for providing a public water supply, the equipment from the point of intake of the water to the first point at which the water is distributed."

Note: The water supply system includes all points of intake of water into a water supply system.

(17) "Water use intensity" has the meaning specified in s. NR 852.03(29).

Note: Section NR 852.03(29), Wis. Adm. Code, defines "water use intensity" to mean "a measure of water use per unit production, sales unit, or customer served."

(18) "Waters of the state" has the meaning specified in s. 281.01(18), Stats.

Note: Section 281.01(18), Stats., defines "waters of the state" to include "those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction."

(19) "Withdraw" has the meaning specified in s. 281.346(1)(y), Stats.

Note: Section 281.346(1)(y), Stats., defines "withdraw" to mean "to take water from surface water or groundwater."

(20) "Withdrawal" has the meaning specified in s. 281.346(1)(z), Stats.

Note: Section 281.346(1)(z), Stats., defines "withdrawal" to mean "the taking of water from surface water or groundwater, including the taking of surface water or groundwater for the purpose of bottling the water."

(21) "Withdrawal amount" means the permitted amount of a withdrawal in a notice of coverage under a general permit or an individual permit as specified by the

department under s. 281.346(4g), (4s), or (5), Stats. The withdrawal amount for an automatically issued notice of coverage under a general permit or an individual permit shall not be less than the baseline unless specifically requested by the owner.

(22) "Well" has the meaning specified in s. 281.34(1)(h), Stats.

Note: Section 281.34(1)(h), Stats., defines "well" to mean "any drillhole or other excavation or opening deeper than it is wide that extends more than 10 feet below the ground surface and is constructed for the purpose of obtaining groundwater."

NR 860.12 Responsible Parties and Eligible Permittees. (1) The owner is the person responsible for obtaining, modifying, terminating, and complying with notice of coverage under a general permit or with an individual permit.

(2) The department shall issue notice of coverage under a general permit or issue an individual permit only to the responsible party under sub. (1).

NR 860.13 Interim Approvals. All interim approvals issued under s. 281.344(5m), Stats., expire on December 8, 2011. Any person regulated under this chapter shall obtain notice of coverage under a general permit or an individual permit no later than December 7, 2011.

NR 860.14 Open Records Requests. (1) The locations of withdrawals are sensitive information that may impact domestic security.

(2) Open records requests received by the department under ss. 19.21 to 19.39, Stats., that request information on the locations of withdrawals may be subject to greater scrutiny by the department because of domestic security concerns, as allowed under s. 281.346(3)(cm) and (9)(e), Stats. The department may request all of the following with respect to open records requests seeking information on the locations of withdrawals, in order to address domestic security concerns:

(a) That the request be put in writing.

(b) The name, mailing address, telephone number, and email address of the requester and the company or organization that the requester represents.

(c) The specific information requested.

(d) The reason the information is requested and how it will be used.

(3) In considering the public's interest in domestic security when reviewing requests submitted under sub. (2), the department may place conditions on the use of

the information, or may provide the requested information in a different format, when necessary to protect the public's interest in domestic security.

NR 860.15 Required Permit Conditions. All general and individual water use permits issued by the department shall at a minimum contain all of the following conditions:

(1) The permittee shall comply with all conditions of the permit. Permit noncompliance is a violation of the permit and may be grounds for enforcement action, permit suspension or revocation, or denial of a redetermination or reissuance. If a permittee violates any terms of the permit, the permittee is subject to the penalties established in ch. 281, Stats.

(2) The permit does not convey any property or water rights of any sort, or any exclusive privilege. The permit does not authorize any injury or damage to private property or any invasion of personal rights, or any infringement of federal, state, or local laws, rules, or regulations.

(3) The permittee shall allow an authorized representative of the department, upon presentation of credentials, to do all of the following:

(a) Enter, upon reasonable notice, the owner's premises where a regulated withdrawal is located or conducted, or where records are required under the conditions of the permit.

(b) Have access to and copy, at reasonable times, any records that are required under the conditions of the permit.

(c) Inspect at reasonable times any facilities, equipment, including monitoring and control equipment, practices or operations regulated or required under the permit.

(4) The permittee shall measure and record the amounts of withdrawal and annually report to the department following the requirements in ss. NR 856.30 and 856.31. Annual reporting is required each calendar year for all permittees.

(5) An individual permit is not transferable without prior approval from the department.

(6) The permittee shall by March 1 notify the department of changes made in the previous calendar year to the information submitted in the application that require amendment following the requirements in s. NR 860.16.

(7) A modification to the permit or notice of coverage is required to increase the established withdrawal amount set forth in the permit or notice of coverage.

(8) The permittee shall implement the applicable water conservation and water use efficiency requirements of an approved water conservation plan under ch. NR 852.

(9) If a water supply service area plan is required by s. 281.346 or 281.348, Stats., the withdrawal shall be consistent with the approved water supply service area plan.

NR 860.16 Amendments and Transfers. (1) A permit amendment is required when changes or modifications are made to any of the following:

(a) Property boundaries.

(b) Property ownership or public water supply ownership of withdrawals covered by a general permit.

Note: Changes in property ownership or public water supply ownership for withdrawals authorized by an individual permit require an approved transfer meeting the requirements of sub. (4).

(c) The name, mailing address, telephone number, and email address of the owner and operator, if applicable.

(d) The locations and sources of the withdrawal.

(e) The daily withdrawal capacity of the water supply system or individual source or sources.

(f) The uses made of the water.

(g) The places at which the water is used.

(h) The places at which any of the water is discharged.

(2) The owner shall amend the permit using the method prescribed by the department by March 1 of the year following the change or modification.

Note: Permit amendments may be completed as part of the annual reporting process.

(3) An owner is not required to amend a permit when replacing equipment with equipment of the same capacity and operating parameters.

(4) Department approval is required for the transfer of an individual permit to a new property owner or public water supply owner. A person who proposes to assume responsibility for an individual permit for a permitted withdrawal, shall submit an application meeting the requirements of s. NR 860.31(3)(a) and a statement acknowledging acceptance of the terms of the current permit. The department shall review the request for a transfer and make a decision to either approve the transfer or require a new permit, following the requirements of s. NR 860.31(3).

NR 860.17 Terminations. (1) A permittee may request termination of an individual permit or coverage under a general permit if the withdrawal amount decreases below the thresholds requiring a permit or notice of coverage under this chapter.

(2) Terminating a water use registration under ch. NR 856 constitutes a termination of an individual permit or coverage under a general permit.

(3) Terminating an individual permit or coverage under a general permit terminates the baseline established under s. 281.346(2)(e), Stats., for persons with preexisting withdrawals.

NR 860.18 Enforcement. (1) Violations of this chapter may be prosecuted by the department under s. 281.346(14), Stats.

(2) Any violation of this chapter shall be treated as a violation of the statutes they interpret or under which they are promulgated.

(3) Persons violating this chapter are subject to penalties as specified in s. 281.346(14), Stats.

SUBCHAPTER II – GENERAL WATER USE PERMITS

NR 860.20 Applicability. (1) Unless authorized by an individual permit or unless exempted under sub. (2), all of the following persons who withdraw water from the Great Lakes basin shall obtain coverage under a general water use permit:

(a) Any person who on December 8, 2011, has a water supply system or systems on one property or a public water supply that withdraws an amount averaging 100,000 gallons per day or more in any 30-day period but that does not equal at least 1,000,000 gallons per day for any 30 consecutive days.

(b) Any person who after December 7, 2011 proposes a withdrawal with a water supply system or systems on one property or a public water supply that averages 100,000 gallons per day or more in any 30-day period but that does not equal at least 1,000,000 gallons per day for any 30 consecutive days.

Note: Pursuant to s. 281.346(4s)(dm), Stats., the department may require a person who is making or proposes to make a withdrawal at the general permit level listed in sub.(1)(a) or (b) to obtain an individual permit if the withdrawal is located in a groundwater protection area, as defined in s. 281.34(1)(a), Stats., or a groundwater management area designated under s. 281.34(9), Stats.

Note: Persons with a permit under s. 30.18 Stats., must also obtain a water use permit, if applicable.

(2) This chapter does not apply to withdrawals for any of the following purposes:

(a) To supply vehicles, including vessels and aircraft, for the needs of the persons or animals being transported or for ballast or other needs related to the operation of the vehicles.

(b) To use in a noncommercial project that lasts no more than 3 months for fire fighting, humanitarian, or emergency response purposes.

(3) Separate coverage under a general water use permit is required for each property and each public water supply.

NR 860.21 General Water Use Permits. (1) The department may issue a general water use permit that applies only to certain categories or groups of water withdrawals, or only to withdrawals located in a designated area of the Great Lakes basin, or both.

(2) For purposes of this section, a category or group of withdrawals may be defined by amount of withdrawal, water use sector, type of withdrawal or water use, geographic or watershed area, or other attribute that the department determines is appropriate for defining a category of coverage. There shall be a reasonable commonality among members of a category or group that is related to water withdrawal or use.

(3) The department shall solicit public comment following the public participation procedures in subch. IV prior to issuing a general water use permit.

(4) All general water use permits shall identify the criteria that must be met in order to qualify for coverage under the general permit. The criteria shall be limited to the requirements and authority provided under s. 281.346(4s), Stats.

(5) All general water use permits shall contain the permit conditions in s. NR 860.15 and any additional conditions necessary to meet the requirements of ch. 281, Stats.

NR 860.22 Application and Review Process for Notice of Coverage. (1) A person required to have coverage under a general water use permit under this subchapter shall obtain a notice of coverage decision following the applicable process under sub. (2) or (3).

(2) AUTOMATIC NOTICE OF COVERAGE FOR PREEXISTING

WITHDRAWALS. (a) The department shall issue automatic notice of coverage no later than December 8, 2011 to persons with a preexisting withdrawal that qualify for automatic notice of coverage as set forth in s. 281.346(4s)(c), Stats., and that have one of the following:

1. An interim approval under s. 281.344(5m), Stats.
2. A registration under chapter NR 856 completed no later than November 1, 2011.

Note: Persons with a preexisting withdrawal that made a withdrawal that averaged 100,000 gallons per day or more in any 30-day period but did not equal 1,000,000 gallons per day for any 30 consecutive days before December 8, 2008 qualify for automatic notice of coverage under a general permit.

Note: The department can not guarantee that automatic notice of coverage will be issued in time to meet the December 8, 2011 deadline for registrations received after November 1, 2011 for preexisting withdrawals that qualify for automatic notice of coverage.

(b) The department may request any missing information required by sub. (3)(a) from persons that qualify for automatic notice of coverage.

(d) Persons with a preexisting withdrawal that do not receive automatic notice of coverage on or before December 8, 2011 shall apply for notice of coverage following the process in sub. (3).

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

(3) NOTICE OF COVERAGE. (a) Any person required to obtain notice of coverage under a general water use permit under this subchapter that did not receive automatic notice of coverage under sub. (2) shall submit an application to the department using the method prescribed by the department, and the application shall include all of the following information about the existing or proposed withdrawal:

1. The name, mailing address, telephone number, and email address of the owner and operator.
2. The locations and sources of the withdrawal.
3. The daily withdrawal capacity of the water supply system, the daily withdrawal capacity from each source, identification of the most restrictive component of the water supply system or systems, and an estimate of the maximum hydraulic capacity of the most restrictive component of the water supply system or systems.
4. The uses made of the water.

5. The places at which the water is used.

6. The places at which any of the water is discharged.

7. Whether the person holds an approval or permit under s. 30.12, 30.18, 281.34, 281.35, 281.41, or 283.31, Stats., or s. 281.17, 2001 Stats., or other statutes and any specified withdrawal conditions set forth in the approval or permit.

8. A map showing the location of the property or public water supply, sources, and discharges if the applicant is submitting an application using a paper form.

9. If required by ch. NR 852, a water conservation plan.

Note: A water conservation plan is required by ch. NR 852 for new and increased withdrawals in the Great Lakes basin and withdrawals statewide that will result in a water loss averaging more than 2,000,000 gallons per day in any 30-day period.

(b) If the application does not include all of the information under par. (a), it may be deemed incomplete. Within 30 days of receipt, the department shall notify the applicant in writing that the application is incomplete and shall describe the information that must be submitted in order for the application to be complete.

(c) The department may dismiss an application if the information needed to complete the application is not received within 30 days after the department notifies an applicant that its application is incomplete.

(d) The department shall determine if the withdrawal qualifies for coverage under a general water use permit and issue notice of coverage or dismiss the application within 45 days of receipt of a complete application. A withdrawal qualifies for coverage under a general water use permit when the requirements of s. NR 860.23(1) are completed and the withdrawal meets the criteria established in the general permit.

(e) If the department determines that an activity does not qualify for coverage under a general permit, the department shall dismiss the application in writing and state the reasons why the project does not qualify for coverage under the general permit.

(f) The department may investigate or visit a property and facility to determine whether a withdrawal qualifies for coverage under a general permit.

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

NR 860.23 Notice of Coverage Decisions. (1) The department shall issue notice of coverage only when all of the following have been completed:

(a) The department has received a complete application containing all of the information in s. NR 860.22(3)(a).

(b) The applicant has received all the necessary permits or approvals for the withdrawal under s. 30.12, 30.18, 281.34, or 281.41, Stats., or s. 281.17, 2001 Stats.

(c) The applicant receives department approval of a water conservation plan under ch. NR 852, if applicable.

(d) The applicant has complied with an approved water supply service area plan under s. 281.348, Stats., if applicable.

(2) The department shall specify a withdrawal amount for each notice of coverage. The department shall also specify a baseline for each automatically issued notice of coverage under s. NR 860.22(2). The withdrawal amount and baseline shall be determined by following the procedures in s. 281.346, Stats. The withdrawal amount for an automatically issued notice of coverage shall not be less than the baseline unless specifically requested by the owner

(3) The department may suspend or revoke coverage under a general permit issued under this subchapter for cause, including obtaining coverage under the permit by misrepresentation or failure to disclose material facts or substantially violating the terms of the permit, after the opportunity for a hearing following the procedures in s. NR 860.42.

Note: An applicant or permit holder may challenge a modification, suspension, or revocation in whole or part of a notice of coverage under a general permit following the requirements under s. 281.93, Stats.

NR 860.24 Modifications to the Withdrawal Amount – Notice of Coverage.

(1) If a permittee proposes to increase the amount of a withdrawal over the established withdrawal amount in the notice of coverage but does not propose to withdraw at least 1,000,000 gallons per day for any 30 consecutive days, the permittee shall apply to the department using the method prescribed by the department for a modification to the withdrawal amount.

(2) The department shall review the application following the requirements under s. NR 860.22(3) and approve the requested modification if the increased withdrawal meets the requirements of s. NR 860.23 and s. 281.346(4s)(e), Stats.

(3) If the department determines that the application does not qualify for continued coverage under a general permit, the department shall dismiss the request in

writing and state the reasons why the requested modification does not qualify for coverage under the general permit.

(4) The department shall keep records in a database of all approved modifications to the withdrawal amount.

NR 860.25 Redetermination of Coverage. (1) Coverage under a general permit ends on the date that the term of the general permit ends.

Note: Under s. 281.346(4s)(am), Stats., the term of a general permit is 25 years.

(2) The department shall send notification to owners at least 365 days prior to the expiration of the general permit that the general permit will expire and that redetermination of coverage is required. The department shall send notification to owners using the most economical communication tool available and the most recent contact information submitted by the owner.

Note: The most economical communication tool used by the department on the effective date of this chapter . . . [LRB inserts date] is email.

(3) Owners that have received notice of coverage under a general permit that intend to continue a withdrawal that averages 100,000 gallons per day or more in any 30-day period but that does not equal at least 1,000,000 gallons per day for any 30 consecutive days, shall apply to the department using the method prescribed by the department for redetermination of coverage under a new general permit at least 180 days before the end of the term of the general permit. The failure of an owner to apply for redetermination at least 180 days prior to the expiration of the general permit shall not result in the loss of an established baseline or specified withdrawal amount.

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

(4) If the owner applying for a redetermination is in substantial compliance with the current general permit and qualifies for coverage under a new general permit, the department shall issue notice of coverage under the new general permit.

(5) The department shall follow the requirements of s. NR 860.22(3), when reviewing the request for redetermination of coverage.

(6) A redetermination of coverage shall specify a withdrawal amount equal to the withdrawal amount of the previous issuance of coverage unless the owner requests a reduced amount.

Note: For proposed increases to a withdrawal amount, the owner must apply to the department following s. NR 860.24.

SUBCHAPTER III – INDIVIDUAL WATER USE PERMITS

NR 860.30 Applicability. (1) Unless exempted under sub. (3), all of the following persons who withdraw water from the Great Lakes basin shall obtain an individual water use permit:

(a) Any person who on December 8, 2011, has a water supply system or systems on one property or a public water supply that withdraws at least 1,000,000 gallons of water per day for any 30 consecutive days.

(b) Any person who after December 7, 2011 proposes a withdrawal with a water supply system or systems on one property or a public water supply that equals at least 1,000,000 gallons per day for any 30 consecutive days.

(2) The department may require a person who is making or proposes to make a withdrawal at the general permit level under s. NR 860.20(1) to obtain an individual permit if the withdrawal is located in a groundwater protection area, as defined in s. 281.34(1)(a), Stats., or a groundwater management area designated under s. 281.34(9), Stats.

(3) This subchapter does not apply to withdrawals for any of the following purposes:

(a) To supply vehicles, including vessels and aircraft, for the needs of the persons or animals being transported or for ballast or other needs related to the operation of the vehicles.

(b) To use in a noncommercial project that lasts no more than 3 months for fire fighting, humanitarian, or emergency response purposes.

(4) A separate individual water use permit is required for each property and each public water supply.

NR 860.31 Application and Review Process for Individual Water Use Permits. (1) A person required to have an individual water use permit under this subchapter shall obtain a permit decision following the applicable process under sub. (2) or (3).

(2) **AUTOMATIC ISSUANCE OF AN INDIVIDUAL WATER USE PERMIT FOR PRE-EXISTING WITHDRAWALS.** (a) The department shall issue an automatic individual water use permit no later than December 8, 2011 to persons with a preexisting

withdrawal that qualify for automatic issuance of an individual water use permit as set forth in s. 281.346(5)(c), Stats., and that have one of the following:

1. An interim approval under s. 281.344(5m), Stats.
2. A registration under chapter NR 856 completed no later than November 1, 2011.

Note: Persons with a preexisting withdrawal that are required to obtain an individual permit and that made a withdrawal that averaged 100,000 gallons per day or more in any 30-day period before December 8, 2008 qualify for automatic issuance of an individual permit.

Note: The department can not guarantee that automatic issuance of an individual permit will be issued in time to meet the December 8, 2011 deadline for registrations received after November 1, 2011 for preexisting withdrawals that qualify for issuance of an individual permit.

(b) The department may request any missing information required by sub. (3)(a) from persons that qualify for automatic issuance of an individual permit.

(d) Persons with a preexisting withdrawal that do not receive automatic issuance of an individual water use permit on or before December 8, 2011 shall apply for an individual permit under sub. (3).

(3) INDIVIDUAL WATER USE PERMITS. (a) Any person required to obtain an individual permit under this subchapter that did not receive automatic issuance of an individual water use permit under sub. (2) shall submit an application to the department using the method prescribed by the department, and the application shall include all of the following information about the existing or proposed withdrawal:

1. The name, mailing address, telephone number, and email address of the owner and operator.
2. The locations and sources of the withdrawal.
3. The daily withdrawal capacity of the water supply system, the daily withdrawal capacity from each source, identification of the most restrictive component of the water supply system or systems, and an estimate of the maximum hydraulic capacity of the most restrictive component of the water supply system or systems.
4. The projected withdrawal schedule including the average and maximum amounts and rates of the withdrawal per month and a description of any expected peak use in terms of gallons per day.
5. The uses made of the water.
6. The places at which the water is used.
7. The places at which any of the water is discharged.

8. An estimate and the method or methods used to determine the estimate, of the water loss from consumptive use from the property or a public water supply. Water loss and consumptive use estimations and calculations shall follow the procedures set forth in department rules and guidelines.

9. Whether the person holds an approval or permits under s. 30.12, 30.18, 281.34, 281.35, 281.41, or 283.31, Stats., or s. 281.17, 2001 Stats., or other statutes and any specified withdrawal conditions set forth in the approval or permit.

10. A map showing the location of the property or public water supply, sources, and discharges, if the applicant is submitting an application using a paper form.

11. If required by ch. NR 852, a water conservation plan.

Note: A water conservation plan is required by ch. NR 852 for new and increased withdrawals in the Great Lakes basin and withdrawals statewide that will result in a water loss averaging more than 2,000,000 gallons per day in any 30-day period.

12. For withdrawals that require compliance with the state decision-making standard under s. 281.346(5m), Stats., all of the following information is required, in addition to the information in subds. 1. to 11.:

a. Documentation that the proposed withdrawal amount is needed to meet the applicant's projected needs.

Note: Public water systems that are required to have an approved water supply service area plan may use that plan as the required documentation.

b. Documentation of compliance with the applicable provisions of ch. NR 852.

c. An alternatives analysis comparing other potential water sources for cost-effectiveness and environmental effects.

d. A description of the baseline conditions of the source including hydrologic flow, water quality, and for surface water sources, habitat of the source. This information is not required if the department has issued a permit under s. 30.18, Stats.; an approval under s. 281.34, Stats., for the new or increased withdrawal; or has issued a permit under s. 30.12, Stats., for the structure that will be used for the new or increased withdrawal.

e. An assessment of the potential impacts of the withdrawal on the waters of the state. The department may require modeling to document the anticipated hydrologic impacts of the proposed withdrawal and any return flow or may require a water quality evaluation to determine if the withdrawal or return flow will meet established water quality standards, or may require both. This information is not required if the department

has issued a permit under s. 30.18, Stats.; an approval under s. 281.34, Stats., for the new or increased withdrawal; or has issued a permit under s. 30.12, Stats., for the structure that will be used for the new or increased withdrawal.

13. For withdrawals that require compliance with the compact-decision making standard under s. 281.346(6), Stats., all of the following information is required, in addition to the information in subd. 1. to 11.:

a. An assessment of the potential impacts of the withdrawal on the waters of the state and water dependent natural resources including wetlands. The department may require modeling to document the anticipated hydrologic impacts of the proposed withdrawal and any return flow or may require a water quality evaluation to determine if the withdrawal or return flow will meet established water quality standards, or may require both.

b. Documentation of compliance with the applicable provisions of ch. NR 852.

c. Documentation of compliance with all applicable local, state, and federal laws, rules, and regulations, and interstate and international agreements, including the Boundary Waters Treaty of 1909.

d. An analysis of the efficiency of the proposed water use, and if there is an expected increase in water loss, an analysis of the efficiency of the use of existing water supplies. The analysis shall include a comparison of the proposed water use intensity with the water use intensity of similar facilities or operations. The analysis may include information from the water conservation plan prepared in compliance with s. NR 852.07.

Note: The water conservation plan contains a description and quantification of current water use and reuse as identified by a water use audit, a calculation of water use intensity, a description of the water conservation and water use efficiency goals, documentation of the implementation of conservation and efficiency measures, and a monitoring plan.

e. An analysis of the impacts of the withdrawal over the next ten years on economic development, social development, and environmental protection taking into consideration other existing and planned withdrawals from the same source. The analysis shall include the impact of the withdrawal on the quantity and quality of the water supply for existing withdrawers and the quantity and quality of the water supply for future users, the economic impact of the water use including the number of individuals that will be employed and potential tax revenues, the social impact of the project on people living in the area of the withdrawal including access to jobs, and whether or not

the withdrawal is capable of being maintained at a steady level without exhausting natural resources or causing significant adverse environmental impact.

f. The supply potential of the water source including quality, quantity, and reliability taking into consideration interconnected water sources and water dependent natural resources.

g. A description of mitigation measures that will be implemented to prevent or eliminate significant impacts.

(b) If the application does not include the information required in par. (a), it may be deemed incomplete. Within 30 days of receipt, the department shall notify the applicant in writing that the application is incomplete and shall notify the applicant of the information that shall be submitted in order for the application to be complete.

(c) The department may dismiss an application if the information needed to complete the application is not received within 30 days after the department notifies an applicant that its application is incomplete.

(d) If the proposed withdrawal requires prior notice or regional review by the provinces of Ontario and Quebec, Canada and the states that are a party to the Great Lakes – St. Lawrence River Basin Water Resources Compact under s. 281.346(5)(L), Stats., or s. 281.346(5)(m), Stats., the department shall forward the application to the appropriate parties for review within 60 days after the end of the public comment period under subch. IV.

(e) The department shall determine if the withdrawal meets the standards for an individual permit and issue a permit or disapprove the application within the following timeframes:

1. For individual permits that do not require public participation under s. NR 860.40, within 60 days of receipt of a complete application.
2. For individual permits that require public participation under s. NR 860.40, within 60 days after the end of the public comment period.
3. For individual permits that require prior notice under s. 281.346(5)(L), Stats., or regional review under s. 281.346(5)(m) Stats., within 90 days of the completion of the prior notice and regional review.

(f) If the department determines that a withdrawal does not meet the requirements under s. NR 860.32 and s. 281.346(5) for the issuance of an individual permit, the department shall disapprove the application in writing and state the reasons for the disapproval.

(g) The department may investigate or visit a property and facility to determine whether a withdrawal meets the standards for an individual permit.

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

NR 860.32 Individual Water Use Permit Decisions. (1) The department shall issue an individual water use permit under s. NR 860.31(3), only when all of the following have been completed:

(a) The department has received a complete application containing the information required by s. NR 860.31(3)(a).

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

(b) Public participation has been completed following the procedures in subch. IV, if applicable.

(c) The applicant has received all the necessary permits or approvals for the withdrawal under s. 30.12, 30.18, 281.34, or 281.41, Stats., or s. 281.17, 2001 Stats.

(d) The department determines that the withdrawal meets the state decision-making standard under s. 281.346(5m), Stats., or the compact decision-making standard under s. 281.346(6), Stats., if applicable.

(e) The applicant receives department approval of a water conservation plan under ch. NR 852, if applicable.

(f) The applicant has complied with an approved water supply service area plan under s. 281.348, Stats., if applicable.

(g) Prior notice under s. 281.346(5)(L), Stats., and regional review under s. 281.346(5)(m) Stats., has been completed, if applicable.

(2) All individual water use permits shall contain the permit conditions in s. NR 860.15 and additional permit conditions that may be required that include any of the following:

(a) Requirements for estimating, and if necessary, monitoring substantial increases in water loss resulting from increases in withdrawal amounts and reporting the results to the department.

(b) Limitations on the location and dates or seasons of the withdrawal.

(c) The allowable uses of the withdrawal.

(d) Limits on the amount of the withdrawal necessary to ensure compliance with the decision-making standard under s. 281.346(5m) or s. 281.346(6), Stats.

(e) If the owner also has an approved diversion under s. 281.346(4), the conditions of that diversion approval.

(f) If the withdrawal requires a water loss approval under s. 281.35(4), the conditions of that water loss approval as required under s. 281.35(6)(a).

(g) If the withdrawal is from a surface water body tributary to one of the Great Lakes and would result in a water loss of more than 95 percent of the amount of water withdrawn, conditions that ensure the withdrawal does not cause significant adverse environmental impact.

(3) The department shall specify a withdrawal amount for each individual water use permit. The department shall also specify a baseline for each automatically issued individual water use permit under s. NR 860.31(2). The withdrawal amount and baseline shall be determined by following the procedures in s. 281.346, Stats. The withdrawal amount for an automatically issued individual permit shall not be less than the baseline unless specifically requested by the owner.

(4) The department may, after an opportunity for a hearing conducted following the procedures under s. NR 860.42, modify an individual permit to ensure compliance with the state or compact decision-making standard, if applicable.

(5) The department may suspend or revoke an individual water use permit for cause including obtaining the permit by misrepresentation or failure to disclose material facts or substantially violating the terms of the permit.

Note: An applicant or permit holder may challenge a modification, suspension or revocation in whole or part of an individual permit following the requirements under s. 281.93, Stats.

NR 860.33 Modifications to the Withdrawal Amount – Individual Water Use Permits. (1) If a permittee proposes to increase the amount of a withdrawal over the established withdrawal amount in the individual permit, the permittee shall apply to the department using the method prescribed by the department for a modification of the permit and submit any missing or outdated information required under s. NR 860.31(3)(a).

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

(2) The department shall review the application following the requirements of s. NR 860.31(3) and approve the modification if the increased withdrawal meets the requirements of s. NR 860.32(1).

Note: Department review of a proposed modification may require compliance with the state decision-making standard under s. 281.346(5m), Stats., or the compact decision-making standard under s. 281.346(6), Stats.

(3) If the department determines that the requested modification does not meet the requirements of s. NR 860.32(1), the department shall disapprove the application in writing and state the reasons for the disapproval.

(4) The department shall keep records in a database of all approved modifications to withdrawal amounts.

NR 860.34 Individual Water Use Permit Reissuance. (1) Individual water use permits expire 10 years from the date of department issuance.

(2) The department shall send notification to owners at least 365 days prior to the expiration of the permit that the individual permit will expire and that reissuance of the permit is required. The department shall send notification to owners using the most economical communication tool available and the most recent contact information submitted by the owner.

Note: The most economical communication tool used by the department on the effective date of this chapter . . . [LRB inserts date] is email.

(3) Permittees that intend to continue to withdraw at least 1,000,000 gallons of water per day for any 30 consecutive days shall apply to the department using the method prescribed by the department for reissuance of a permit at least 180 days before the expiration of the permit. The application shall include an update to the information originally submitted to the department for a permit. The failure of an owner to apply for reissuance at least 180 days prior to the expiration of the individual permit shall not result in the loss of an established baseline or specified withdrawal amount.

Note: Applications and information should be sent to: DNR Water Use Program DG/5, P.O. Box 7921, Madison, WI 53707-7921.

(4) If the permittee applying for a reissuance is in substantial compliance with the current permit, the department has completed the applicable public participation requirements under subch. IV, and the withdrawal meets the requirements under s. NR 860.32(1) and s. 281.346(5)(j), Stats., the department shall issue a new permit.

(5) The department shall follow the requirements of s. NR 860.31(3), when reviewing the reissuance request.

SUBCHAPTER IV – PUBLIC PARTICIPATION

NR 860.40 Applicability. (1) The public participation requirements outlined in this subchapter apply to all of the following:

(a) Individual water use permits under s. 281.346(5), Stats., that require the applicant to meet the state decision-making standard under s. 281.346(5m), Stats., or compact decision-making standard under s. 281.346(6), Stats., except for a public water supply that has an approved water supply service area plan under s. 281.348, Stats.

(b) General water use permits under s. 281.346(4s), Stats.

Note: Public participation is only required for the department issuance of the general permit itself. The issuance of notice of coverage under a general permit to a withdrawer does not require public participation.

(2) The department shall not issue a decision regarding a permit covered under sub. (1) until the requirements of this subchapter have been met.

NR 860.41 Public Notice and Comment. (1) The department shall draft and provide a public notice regarding each general permit proposed by the department and each individual permit application under s. NR 860.40(1). The public notice shall allow 30 days for public comment. For individual water use permit applications specified in NR 860.40(1), the notice shall be provided within 90 days of the department receiving a complete application. For general permits, the department shall provide, publish, and deliver the public notice when a draft general permit has been completed.

(2) The public notice shall comply with all of the following:

(a) Be published by the applicant as a class 1 notice under ch. 985, Stats., in the counties where water from the withdrawal will be used and in counties within five miles of the location of the withdrawal. For actions involving individual water use permits, the applicant shall provide proof of publication of the notice in the form of an affidavit from the newspaper certifying publication and documenting the date of publication.

Note: The department is responsible for publishing the required notice for general permits.

(b) Be delivered by the department or applicant to any person, group, local governmental unit, or state agency upon request. The applicant for an individual water use permit shall provide proof of delivery in the form of an affidavit or documentation from the delivery method or person.

(c) Be delivered by the department or applicant to persons or groups on a formal department water use permit application mailing list. The applicant for an individual water use permit shall provide proof of delivery in the form of an affidavit or documentation from the delivery method or person.

(3) The public notice shall include all of the following information:

(a) For individual water use permits, the name and address of each applicant.

(b) For individual water use permits, a brief description of the proposal for which the application is made, including the amount of the proposed withdrawal and the amount of any water loss from consumptive use.

(c) For general permits, a description of the types of withdrawals and the waters of the state or areas of the state covered by the general permit.

(d) A brief description of the procedures to be used to formulate a final determination on the proposed action, including the 30-day period for public comment and the 30-day period for requesting a public hearing.

(e) The process, location, and timeframes to obtain additional information, submit written comments, or request a public hearing.

(4) The public comment period is 30 days starting on the date the notice is published.

(5) Any person may submit written comments. All comments shall be submitted to the department at the address specified in the public notice by the end of the 30-day public comment period. Comments are submitted on the date they are postmarked using U.S. mail or on the date they are delivered to the address specified in the public notice.

(6) All comments shall address facts relevant to whether the proposed withdrawal complies with the applicable legal standards.

(7) The department shall retain all written comments submitted during the 30-day comment period and shall consider the comments in making its decisions on the application.

NR 860.42 Public Hearings. (1) Any interested person or group of persons, any affected local unit of government, or any state agency, may request a public hearing regarding a permit covered under s. NR 860.40(1).

(2) Requests for a public hearing under this section shall comply with all of the following:

(a) Be in writing and dated and include the applicant name or number of the proposed permit or application.

(b) Be submitted to the department at the address specified in the public notice by the end of the 30-day public comment period. A request is submitted on the date it is postmarked using U.S. mail or on the date it is delivered to the address specified in the public notice.

(c) Indicate the interests of the requestor and the reasons why a hearing is warranted. The reasons shall relate to the legal requirements for water use permits.

(3) The department shall schedule a public hearing if the request complies with sub. (2) and if the department determines that there is a significant public interest in holding a hearing.

(4) The department shall schedule the public hearing within 30 days after the completion of the 30-day public comment period.

(5) Public notice for a public hearing shall be issued by the department and follow the requirements of s. NR 860.41(2) and include the information in s. NR 860.41(3) and the time, date, and the location of the hearing.

(6) The applicant for an individual water use permit shall publish and provide the notice to persons or groups identified in s. NR 860.41(2)(b) and (c) no later than 10 days before the scheduled hearing date.

(7) Whenever possible, public hearings shall be held in the area affected by the proposed withdrawal or general permit.

(8) Any interested members of the public or representatives of government agencies may participate in a public hearing with respect to the issuance of the proposed permit subject to the procedures in sub. (9). Persons and government agencies participating need not be represented by legal counsel.

(9) Public hearings held under this subsection are not contested case hearings under ch. 227, Stats. and shall be conducted according to all of the following procedures:

(a) Public informational hearings held under this section shall be conducted by a hearing examiner designated by the secretary or secretary's designee.

(b) The hearing examiner shall open the hearing by concisely stating the scope and purpose of the hearing and explaining the procedures to be used in the hearing. The hearing examiner shall explain how and to whom notice of the final decision approving or disapproving a permit or approval will be provided and how a person may seek administrative or judicial review of the final decision.

(c) Appearance slips shall be submitted by all persons that present an oral statement at the hearing.

(d) Any person may direct informational or clarifying questions through the hearing examiner to a person making oral statements, but cross-examination is not allowed at the hearing.

(e) The hearing examiner may place time limits on individual oral statements to prevent undue repetition or insure that all persons who wish to make a statement can do so in a reasonable period of time.

(f) The hearing examiner may limit the number of representatives that may make oral statements on behalf of any individual or organized group.

(g) Even if oral statements are scheduled, unscheduled oral or written statements also shall be allowed at the hearing.

(h) Any person submitting a written statement at the hearing shall submit at least one legible copy to the hearing examiner.

(i) The hearing examiner may use additional or alternative procedures deemed necessary to insure that the hearing will be conducted in an orderly and expeditious manner, provided the measures are consistent with broad public participation in the hearing.

(j) The hearing examiner may exclude from the hearing a person who engages in loud, noisy, disruptive or contemptuous conduct.

(10) When a public hearing is conducted, the public comment period shall be extended for 10 days starting from the date of the hearing.

(11) The department shall consider the comments received at the hearing and following the hearing in making its decision.

SECTION 2. 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 3. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resource Board on _____.

Dated in Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

(SEAL)

By _____

Cathy Stepp, Secretary