

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

SUBJECT:

Request that the Board approve the statement of scope for Board Order WT-17-12, proposed rules affecting the creation of NR 119 related to the development of site-specific numeric phosphorus water quality criteria for lakes, reservoirs, and streams.

FOR: September 2012 Board meeting

PRESENTER'S NAME AND TITLE: Ken Johnson, Water Division Administrator

SUMMARY:

This rulemaking attempts to specify the methodology and procedures to derive site-specific numeric phosphorus criteria. This rulemaking is needed to streamline the process for establishing site-specific criteria and to specify public participation procedures in rule. If this rulemaking were not completed, internal staff and externals could still derive site-specific criteria for phosphorus. However, expectations would not be clearly defined, making these criteria more susceptible to scrutiny, challenge, and inconsistency.

The existing policy for deriving site-specific phosphorus criteria is found in s. NR 102.06 (7), Wis. Adm. Code, which provides that the Department can promulgate by rule phosphorus site-specific criteria. The purpose of this proposed rule is to clarify and streamline this already available procedure. The Department is proposing to promulgate the methodology and process for calculating a phosphorus site-specific criterion rather than promulgating each and every site-specific numeric criterion by rule. In addition to specifying the scientifically defensible methods required to derive phosphorus site-specific criteria, this rule will also identify the process internal staff as well as externals should follow to derive phosphorus site-specific criteria and participate in site-specific criteria decisions.

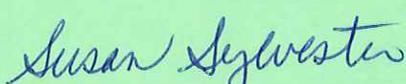
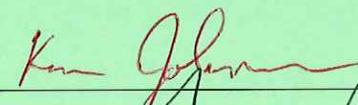
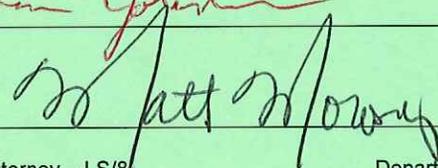
The applicable statewide phosphorus criteria under s. NR 102.06, Wis. Adm. Code, are sufficiently protective in most cases. However, in cases where a statewide criterion is more stringent than reasonably necessary to protect the designated uses of the water, a less stringent site-specific criterion would likely be warranted. If designated uses are not being supported by the statewide criterion, a more stringent site-specific criterion may be necessary. Deriving site-specific criteria for surface waters may alter WPDES permit limits for point source discharges at or upstream of these specific surface water segments. Therefore, the creation of Chapter NR 119 is considered a moderate, Level II, economic impact.

There has been no previous board action on this proposal.

RECOMMENDATION: That the Board approve the statement of scope for Board Order Board Order WT-17-12.

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

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

Approved by	Signature	Date
Susan Sylvester, Bureau Director		8/9/12
Ken Johnson, Administrator		8/14/12
Cathy Stepp, Secretary		8/23/12

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

DATE: ~~July 3, 2012~~

8/23/12

TO: Natural Resources Board

FROM: Cathy Stepp, Secretary



SUBJECT: Scoping Statement Related to Creation of Chapter NR 119, relating to the development of site-specific numeric phosphorus water quality criteria for lakes, reservoirs, and streams.

Subject/Objective of Proposed Rule

This rulemaking pertains to the development of site-specific numeric phosphorus water quality criteria for Wisconsin's waters including lakes, reservoirs, and streams. A site-specific criterion may be developed in place of the generally applicable phosphorus criteria in s. NR 102.06, Wis. Adm. Code, where site-specific, scientifically defensible data and analysis demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody, and downstream waters. The purpose of this rulemaking is to:

1. Specify, in rule, the scientifically defensible methods and sound scientific rationale required to develop a criterion and demonstrate that a different phosphorus criterion is protective and warranted for a specific surface water segment or portion of a waterbody;
2. Streamline the process to establish site-specific criteria for phosphorus by promulgating the procedure and methodology for calculating a site-specific criterion rather than promulgating each and every site-specific numeric criterion by rule; and,
3. Establish public participation procedures.

Description of Policy Issues/Analysis of Policy Alternatives

The existing policy for deriving site-specific phosphorus criteria is found in s. NR 102.06 (7), Wis. Adm. Code, which provides that the Department can promulgate by rule phosphorus site-specific criteria. The proposed rule is not a change from past policy, but rather establishes a methodology and process for establishing a site-specific criterion. This rule will also identify the process internal staff as well as externals should follow to derive phosphorus site-specific criteria and participate in site-specific criteria decisions. The process will include public participation opportunities and review by the Environmental Protection Agency (EPA). Additionally, this rulemaking will streamline the site-specific criterion process for internal staff as well as externals by promulgating the procedure and methodology for calculating a site-specific criterion rather than promulgating each and every site-specific numeric criterion by rule. The site-specific criterion methodology and process established in the rule may be created for water segments throughout the state, or the Department may choose to narrow the applicability of the methodology and procedures to a specific waterbody type or situation.

Site-specific criteria for phosphorus can adjust statewide phosphorus criteria in s. NR 102.06 (7), Wis. Adm. Code, that are either over- or under-protective of Wisconsin's waters. The statewide phosphorus criteria are sufficiently protective in most cases. However, there are instances where the applicable phosphorus criteria under s. NR 102.06, Wis. Adm. Code, need to be adjusted to ensure that the applicable designated uses are being reasonably protected. If designated uses are not being supported by the statewide criterion, a more stringent site-specific criterion may be necessary. In cases where a statewide criterion is more stringent than reasonably necessary to protect the designated uses of the water, a less stringent site-specific criterion would likely be warranted. Deriving site-specific criteria for these

waters may alter WPDES permit limits for point source discharges at or upstream of these specific surface water segments.

There are two policy alternatives available- no action and developing site-specific criteria guidance without rulemaking. If this rulemaking were not completed, internal staff and externals could still derive site-specific criteria for phosphorus pursuant to s. NR 102.06(7), Wis. Adm. Code. Currently, there is no complimentary guidance or additional rule language available to specify the requirements for deriving phosphorus site-specific criteria at the Federal or State level. Without additional clarification, expectations would not be clearly defined, making these criteria more susceptible to scrutiny, challenge, and inconsistency. Externals may also conduct studies using inappropriate scientific methods, resulting in wasted resources. Rulemaking is also necessary in order streamline the process to establish site-specific criteria. Without rulemaking, each and every site-specific criterion for phosphorus must be promulgating by rule before it can be implemented. Additionally, this rulemaking would define the public participation opportunities for externals including EPA. After reviewing the available policy alternatives, it is recommended that action be taken to create Chapter NR 119 and corresponding guidance.

Economic Impact

The creation of Chapter NR 119 would be considered a moderate, Level II economic impact. As mentioned, a site-specific criterion may be developed in place of the generally applicable phosphorus criteria pursuant to s. NR 102.06 (7), Wis. Adm. Code. The purpose of this rulemaking is to simply clarify and streamline this already available procedure. Therefore, the only economic factor to consider as part of the economic impact assessment is the number externals willing to conduct a site-specific criterion study given this streamlined process. It is projected that by streamlining the phosphorus site-specific criteria process, more externals and regulated entities would choose to pursue this option. Costs associated with developing a site-specific criterion include staff time, consultant fees, monitoring costs, and modeling costs. Additionally, developing a site-specific criterion may alter, either positively or negatively, WPDES permit limits for point source discharges at or upstream of these specific surface water segments. Given these costs, it is projected that this rulemaking will have a moderate economic impact. Therefore, a Level 2 Economic Impact Analysis process will be followed.

Statutory Authority

Section 281.15, Wis. Stats, provides the authority for the Department to promulgate by rule water quality standards for surface waters or portions of surface waters in the state. Pursuant to s. 281.15, Stats., water quality standards are comprised of designated uses and criteria. The Department has promulgated designated uses and criteria for various pollutants and parameters in chs. NR 102 through 105. The criteria for phosphorus that were approved by USEPA are promulgated in s. NR 102.06.

In s. NR 102.06(7), Wis. Adm. Code, the Department recognized that it may be appropriate to promulgate site-specific criteria for phosphorus for some surface water segments. These proposed rules will establish detailed procedures and a methodology for developing a site-specific criterion for a portion of a water body under s. 281.15, Wis. Stats. The proposed rules will also ensure that the requirement in s. 281.15(2)(c), Wis. Stats., is met in specific water segments. Namely, that proposed rules will help ensure that criteria are no more stringent than reasonably necessary to assure attainment of the designated use of a water body.

Estimate of Time Needed to Develop the Rule

The Department estimates that approximately 1000 hours of existing staff time will be needed to complete the rule revision process. This time includes meeting with stakeholders, drafting rule language,

completing an economic impact analysis, conducting statewide public hearings, collecting public input at those hearings, and providing information for the Natural Resources Board, and legislature.

Summary and Comparison of Applicable Federal Regulations

The Federal water quality standards regulation at 40 CFR 131.11(b)(1)(ii) provides States with the opportunity to adopt water quality criteria that are “modified to reflect site-specific conditions.” Wisconsin has used this authority, as well as the authority under 281.15, Wis. State Stat., to promulgate the existing narrative phosphorus site-specific criteria language in s. NR 102.06(7), Wis. Adm. Code.

Entities Affected by the Rule

Deriving site-specific criteria for phosphorus is not a mandate, but a voluntary option to modify phosphorus criteria that may be either over- or under-protective of Wisconsin’s waters in a given water segment. Groups likely to be impacted by this potential rulemaking include a) regulated point source discharges with WPDES permits b) citizen lake groups, and c) environmental groups.

Deriving site-specific water quality criteria for phosphorus can have several benefits: 1. In some cases, point source discharges at or upstream of the proposed criteria may receive relaxed WPDES permit limits; 2. Realistic and protective targets can be set to base water assessment and water quality attainment decisions; 3. A clear process is available for Department staff and externals to ensure that sufficient protection is given for specific waters of interest.

Negative consequences of site-specific phosphorus criteria include: 1. State and private financial costs for deriving site-specific phosphorus criteria; 2. In cases where a more restrictive phosphorus criterion is warranted, point source discharges at or upstream of the proposed criteria may receive more stringent WPDES permit limits.

Agency Contact Person

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cc: Bob Masnado
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Linda Haddix- rules coordinator

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: Creation of Chapter NR 119 WT-17-12

Relating to: Phosphorus site-specific water quality criteria methodology and procedures

Rule Type: Permanent

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

This rulemaking pertains to the development of site-specific numeric phosphorus water quality criteria for lakes, reservoirs, and streams. It attempts to specify methodology and procedures to derive site-specific numeric phosphorus criteria.

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

A site-specific criterion may be developed in place of the generally applicable phosphorus criteria in s. NR 102.06, Wis. Adm. Code, where site-specific, scientifically defensible data and analysis demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody. The purpose of this rulemaking is to specify, in rule, the scientifically defensible methods and sound scientific rationale required to develop a criterion and demonstrate that a different phosphorus criterion is protective and warranted for a specific surface water segment or portion of a waterbody. The proposed rules will also streamline the process to develop site-specific criteria for phosphorus and establish public participation procedures.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The existing policy for deriving site-specific P criteria is found in s. NR 102.06 (7), Wis. Adm. Code, which provides that the Department can promulgate by rule phosphorus site-specific criteria. The proposed rule is not a change from past policy, but rather establishes a methodology and process for establishing a site specific criterion. Instead of promulgating the numeric value for each site specific criterion in a rule, the Department is proposing to promulgate the methodology and a process for calculating a site specific criterion which would then be used as a basis for a limit calculation in a permit. Deriving site-specific criteria for phosphorus is not a mandate, but a voluntary option to modify phosphorus criteria that may be either over- or under-protective of Wisconsin's waters in a given water segment. The phosphorus criteria are sufficiently protective in most cases. However, there are instances where the applicable phosphorus criteria under s. NR 102.06, Wis. Adm. Code, need to be adjusted to ensure that the applicable designated uses are being reasonably protected. If designated uses are not being supported by the statewide criterion, a more stringent site-specific criterion may be necessary. In cases where a statewide criterion is more stringent than reasonably necessary to protect the designated uses of the water, a less stringent site-specific criterion would likely be warranted. Deriving site-specific criteria for these waters may alter WPDES permit limits for point source discharges at or upstream of these specific surface water segments. The site specific criterion methodology and process established in the rule may be created for water segments throughout the state, or the Department may choose to narrow the applicability of the methodology and procedures to a specific waterbody type or situation.

This rule will specify the scientifically defensible methods required to derive phosphorus site-specific criteria. This rule will also identify the process internal staff as well as externals should follow to derive

phosphorus site-specific criteria and participate in site-specific criteria decisions. The process will include public participation opportunities and review by the Environmental Protection Agency (EPA). If this rulemaking were not completed, internal staff and externals could still derive site-specific criteria for phosphorus. However, expectations would not be clearly defined, making these criteria more susceptible to scrutiny, challenge, and inconsistency. By not developing the methodology by rule, externals may conduct studies using inappropriate scientific methods, resulting in wasted resources. Additionally, this rulemaking will streamline the site specific criterion process for internal staff as well as externals by promulgating the procedure and methodology for calculating a site specific criterion rather than promulgating each and every site specific numeric criterion by rule.

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

Section 281.15, Wis. Stats, provides the authority for the Department to promulgate by rule water quality standards for surface waters or portions of surface waters in the state. Pursuant to s. 281.15, Stats., water quality standards are comprised of designated uses and criteria. The Department has promulgated designated uses and criteria for various pollutants and parameters in chs. NR 102 through 105. The criteria for phosphorus that were approved by USEPA are promulgated in s. NR 102.06.

In s. NR 102.06(7), Wis. Adm. Code, the Department recognized that it may be appropriate to promulgate site specific criteria for phosphorus for some surface water segments. These proposed rules will establish detailed procedures and a methodology for developing a site specific criterion for a portion of a water body under s. 281.15, Wis. Stats. The proposed rules will also ensure that the requirement in s. 281.15(2)(c), Wis. Stats., is met in specific water segments. Namely, that proposed rules will help ensure that criteria are no more stringent than reasonably necessary to assure attainment of the designated use of a water body.

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

The Department estimates that approximately 1000 hours of existing staff time will be needed to complete the rule revision process. This time includes meeting with stakeholders, drafting rule language, completing an economic impact analysis, conducting statewide public hearings, collecting public input at those hearings, and providing information for the Natural Resources Board, and legislature. A moderate economic impact is expected from the proposed rule revisions.

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

Deriving site-specific criteria for phosphorus is not a mandate, but a voluntary option to modify phosphorus criteria that may be either over- or under-protective of Wisconsin's waters in a given water segment. Groups likely to be impacted by this potential rulemaking include a) regulated point source discharges with WPDES permits b) citizen lake groups, and c) environmental groups.

Deriving site-specific water quality criteria for phosphorus can have several benefits: 1. In some cases, point source discharges at or upstream of the proposed criteria may receive relaxed WPDES permit limits; 2. Realistic and protective targets can be set to base water assessment and water quality attainment decisions; 3. A clear process is available for Department staff and externals to ensure that sufficient protection is given for specific waters of interest.

Negative consequences of site-specific phosphorus criteria include: 1. State and private financial costs for deriving site-specific phosphorus criteria; 2. In cases where a more restrictive P criterion is warranted, point source discharges at or upstream of the proposed criteria may receive more stringent WPDES permit limits.

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

The Federal water quality standards regulation at 40 CFR 131.11(b)(1)(ii) provides States with the opportunity to adopt water quality criteria that are "modified to reflect site-specific conditions." Wisconsin has used this authority, as well as the authority under 281.15, Wis. State Stat., to promulgate the existing narrative phosphorus site-specific criteria language in s. NR 102.06(7), Wis. Adm. Code. At the Federal and State level, no complimentary guidance or rule language is currently available to specify the requirements for deriving phosphorus site-specific criteria.

8. Anticipated economic impact of implementing the rule:

The proposed rule will have a moderate (Level 2) economic impact. As mentioned, a site-specific criterion may be developed in place of the generally applicable phosphorus criteria pursuant to s. NR 102.06 (7), Wis. Adm. Code. The purpose of this rulemaking is to simply clarify and streamline this already available procedure. Therefore, the only economic factor to consider as part of the economic impact assessment is the number externals willing to conduct a site-specific criterion study given this streamlined process. It is projected that by streamlining the phosphorus site-specific criteria process, more externals and regulated entities would choose to pursue this option. Costs associated with developing a site-specific criterion include staff time, consultant fees, monitoring costs, and modeling costs. Additionally, developing a site-specific criterion may alter, either positively or negatively, WPDES permit limits for point source discharges at or upstream of these specific surface water segments. Given these costs, it is projected that this rulemaking will have a moderate economic impact. Therefore, a Level 2 Economic Impact Analysis process will be followed.

Contact Person: Amanda Minks 608-264-9223



Department Head or Authorized Signature

5/21/12

Date Submitted



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. BOX 7863
MADISON, WI 53707

June 29, 2012

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
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RE: Scope Statement for WT-17-12 regarding phosphorous site-specific water quality criteria methodology and procedures

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on June 8, 2012, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule creating Chapter NR 119 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker
Governor