

Report From Agency

REPORT TO LEGISLATURE

NR 106, Wis. Adm. Code

Board Order No. WT-31-10
Clearinghouse Rule No. CR15-084

Basis and Purpose of the Proposed Rule

The primary purpose of these proposed rule changes to ch. NR 106, Wis. Adm. Code, is to be consistent with federal requirements for calculating and implementing water quality based effluent limitations for point source discharges to surface waters included in WPDES permits.

In a letter dated July 18, 2011, U.S. Environmental Protection Agency (EPA) identified 75 potential issues or deficiencies in Wisconsin's statutory and regulatory authority for the WPDES permit program. EPA directed the department to either make rule changes to address these inconsistencies or deficiencies or address these issues through other avenues. The proposed rules address four of the 75 issues identified in EPA's July 18, 2011, letter.

In addition to making some minor clarifications and cross-referencing corrections to the Administrative Code for uniformity, these proposed rule changes will:

- Revise s. NR 106.06(2) to phase out (with some exceptions) mixing zone allowances for discharges of bioaccumulative chemicals of concern (BCCs) in the Great Lakes system. While Wisconsin is already adhering to the requirements of the federal Great Lakes Water Quality Initiative (GLI), the proposed rules formally adopt the GLI requirements. When Wisconsin last made changes to NR 106, a footnote in the rule indicated that such changes would be promulgated.
- Modify s. NR 106.06(6) provisions that regulate pollutant discharges when a pollutant is present in the intake water used as the water supply for industrial and municipal dischargers. The proposed rules adopt the federal requirements for establishing effluent limitations.
- Remove the exemption from regulation in ss. NR 106.10(1) and (2) for noncontact cooling water (NCCW) containing chlorine or other chemical additives present at levels consistent with those in public water supplies, as required by a Dane County Circuit Court Stipulation and Order in Case No. 12-CV-0569, *Midwest Environmental Defense Center v. WDNR* (March 2, 2012) and federal regulations.
- Remove the special definition of "representative data" for purposes of determining reasonable potential to exceed effluent limitations for mercury in s. NR 106.145(1) and (2), as required by a Dane County Circuit Court Order in Case No. 12-CV-3654, *Midwest Environmental Defense Center v. WDNR*, (July 1, 2014) and federal regulations.

Summary of Public Comments

The notice for public hearing was dated November 10, 2015. A public hearing was held on December 7, 2015 in Madison, Wisconsin. Two members of the public attended, none gave oral comments. Written comments were received from Wisconsin Manufacturers & Commerce (WMC) during the comment period that concluded on December 18, 2015. The Wisconsin Legislative Council Rules Clearing House provided comments on December 4, 2015. EPA also commented on the proposed rule changes. The "Response to Comments on Rule Package 3" includes a full summary of the comments received and the department's response.

Modifications Made

The department made changes to reflect all Clearinghouse comments related to style, rule referencing or language clarity and were incorporated into the rule language as suggested, with six exceptions. This included additional clarity to the definitions and the description of expanded discharge for style and language clarity in the final rule. The department made other minor nonsubstantive changes related to style, rule referencing or language clarity. In addition, the department completed a more detailed review of regulations in Minnesota, Michigan, Iowa and Illinois at the request of the Wisconsin Manufacturers & Commerce (WMC). This review was included in the Response to Comments document.

EPA indicated that the proposed rule language did not comply with 40 C.F.R. 122.44(d)(1)(vii) requiring WQBELs for all pollutants which cause or have the reasonable potential to cause or contribute to an excursion above any state water quality standard. The department added the proposed provisions to meet the conditions in s. NR 106.06(6)(b) 3. to 5. to s. NR 106.06(6)(c)(2), Wis. Adm. Code. This addition changes the limitations required for permittees outside the Great Lakes system that discharge to the same waterbody as their source water. EPA has provided written confirmation that the additional provisions resolve their concern with consistency with federal law.

Appearances at the Public Hearing

Elisha Thompsen, UW student

Vanessa Wishart, Stafford Rosenbaum LLP, representing MEG

Changes to Rule Analysis and Fiscal Estimate

The department completed additional review of regulations in Minnesota, Michigan, Iowa and Illinois at the request of the Wisconsin Manufacturers & Commerce (WMC). This review found that the rule package is consistent with Federal Code and with adjacent Great Lakes states of Minnesota, Michigan, and Illinois, as well as Iowa, as applicable. The findings were recorded in the Response to Comments document. Based on feedback prior to and during the public notice period the department included additional detail in the Fiscal Estimate on the cost of dechlorination and the approximate number of facilities that will get new or more restrictive limits in the future.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on December 4, 2015.

Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse, except for those discussed below.

The Department did not incorporate the following Clearinghouse comments:

2a. Comment 2a. in the *Form, Style and Placement in Administrative Code* section recommended considering moving the criterion in NR 106.06 (2) (br) 3. d. to a separate subdivision.

Response: The decision was made to change the provisions in NR 106.06 (2) (br) 3. d. by creating two separate provisions now listed as NR 106.06 (2) (br) 3. d. and NR 106.06 (2) (br) 3. e. The department may determine additional monitoring and/or an evaluation for alternative means of reducing the bioaccumulative chemical of concern (BCC) from other sources is required when approving a mixing zone under NR 106.06 (2) (br). These requirements would be requirements of the approval and therefore the decision was made to retain the location of these provisions at NR 106.06 (2) (br) (3).

2d. Comment 2d. in the *Form, Style and Placement in Administrative Code* section recommended providing a specific deadline for submission of comments on the proposed rule.

Response: The Notice of Public Hearing published on November 10, 2015 provides December 18, 2015 as the deadline for submission of comments.

4. Comment 4 in the *Adequacy of References to Related Statutes, Rules and Forms* section recommended consideration of referencing terms in s. 281.346, Stats., rather than creating new terms to reference waters within the Great Lakes basin.

Response: The decision was made to retain the definition for “Great Lakes system” in the proposed order. The definitions for Great Lakes basin and Great Lakes basin ecosystem found in s. 281.346, Stats., are not directly applicable. The department decided to add a definition of “Great Lakes” to address this comment. In addition, the department changed the definition of “Great Lakes system” to conform to requirements in the Administrative Rules Procedure Manual. The proposed definitions in the Board Order for this rule are consistent with the federal Great Lakes Initiative (GLI) and federal Clean Water Act requirements.

5b. Comment 5b. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section recommended use of an active format style which, though described in the Administrative Rules Procedure Manual, is not consistent with the other, unrevised sections of NR 106.

Response: The decision was made to retain the existing format style rather than introduce the new, recommended one in order to minimize any confusion or misunderstanding that might be caused by mixing format styles.

5c. Comment 5c. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section suggested a change to the definition of “same waterbody” to remove “two” and change the term “points” to waterbodies.

Response: The decision was made to change the term “points” to waters of the State to align more closely with definition of same waterbody from the federal code. The department removed the limitation of two points from the definition, as suggested.

5h. Comment 5h. in the *Clarity, Grammar, Punctuation and Use of Plain Language* section indicated the provisions in NR 106.06 (2) (br) 3. b., c., e., f., and also in NR 106.06 (2) (c) 2, should use active verbs such as “contains” instead of “shall contain.”

Response: The decision was made to retain the existing format style rather than introduce the new, recommended one in order to minimize any confusion or misunderstanding that might be caused by mixing format styles.

Final Regulatory Flexibility Analysis

There will be no regulatory flexibility analysis for this rule. The department is currently required to use the procedures in the federal law when developing water quality based effluent limits. The proposed rules are consistent with and no more restrictive than federal law. As a result, many of the facilities impacted by these proposed rule changes have already had permits reissued in compliance with the proposed rules. While some small businesses with noncontact cooling water outfalls or certain substances present in their intake water may have economic impacts from changes required to meet WPDES permit limits, these impacts will be no greater than those that would be required to comply with the federal law.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.