



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2019 Senate Bill 91

**Senate Amendment 1,
as Amended**

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BACKGROUND

Under state law implementing the federal Clean Water Act, any discharge to a navigable water from a point source¹ must be authorized by a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. Among other requirements, a WPDES permit specifies “effluent limitations,” which limit the specific pollutants that may be discharged from the point source. [s. 283.31 (3) and (4), Stats.]

The Clean Water Act also requires states to address nonpoint sources of pollution.² Nonpoint source pollution is not subject to WPDES permitting requirements. Instead, the state primarily addresses nonpoint source pollution through incentive programs such as cost-sharing, adaptive management, and water pollution credit trading.

Under current law, the Department of Natural Resources (DNR) implements a water quality credit trading program. Through the program, the DNR may allow a WPDES permit holder to exceed otherwise applicable effluent limitations if the person negotiates a binding, written agreement with another WPDES permit holder, the DNR, a local government, or a nonpoint source. The DNR may authorize a permit holder to discharge pollutants at above-permit levels only if all of the following criteria are satisfied:

- The agreement results in an improvement in water quality.

¹ A “point source” is any discernible, confined, and discrete conveyance from which pollutants are or may be discharged. [33 U.S.C. s. 1362 (14).]

² A “nonpoint source” is “a land management activity which contributes to runoff, seepage or percolation which adversely affects or threatens the quality of waters of this state and which is not a point source.” [s. 281.65 (2) (b), Stats.]

- The increase in pollutants and offsetting reduction in pollutants involve the same pollutant or water quality standard.
- The increase in pollutants and offsetting reduction in pollutants occur within the same basin or portion of a basin.³

[s. 283.84 (1m), Stats.]

In a February 2019 letter, the U.S. Environmental Protection Agency (EPA) encouraged states to explore flexible options in credit trading programs, including encouraging credit banking and trades across larger geographic areas.⁴

2019 SENATE BILL 91

2019 Senate Bill 91 retains the existing water pollution credit trading program but adds two new options for facilitating trades through the program. Specifically, the bill authorizes trades to be facilitated by: (1) a third party; or (2) a clearinghouse operating under a contract negotiated by the Department of Administration (DOA). The bill sets forth requirements for the contract and duties of the clearinghouse. The bill also establishes a minimum credit trading ratio of 1.2 to 1 for trades through the clearinghouse and directs the DNR to allow clearinghouse-facilitated trades to be made over the largest geographic area allowed under state and federal law.⁵

SENATE AMENDMENT 1, AS AMENDED

Senate Amendment 1, as amended, makes several changes to the bill. Specifically, it does all of the following:

- Requires the contract between DOA and the clearinghouse to be approved by the DNR, rather than a consultation requirement under the bill.
- Specifies that, for purposes of the contract between DOA and the clearinghouse, “credits” refer to credits through the DNR’s trading program.

³ “Basin” is not specifically defined for purposes of the credit trading program. Elsewhere in the same chapter of the statutes, “basin” is defined to mean the drainage area identified by an eight-digit hydrologic unit code as part of the U.S. Geological Survey. The DNR’s 2013 guidance documents regarding credit trading instead specify that credit generators and users must discharge into the same waterbody and specify that locational criteria are incorporated as part of the credit-trading ratio.

⁴ The EPA letter is available at: <https://www.epa.gov/sites/production/files/2019-02/documents/trading-policy-memo-2019.pdf>.

⁵ The bill does not affect trades made pursuant to agreements that the DNR has already approved through the existing trading program, and it retains options for trading under current law. The bill also does not directly affect other existing pollution control strategies, such as adaptive management or the EPA-approved multi-discharger variance for phosphorus.

- Removes language authorizing the clearinghouse to “establish” methods for determining credit amounts, and clarifies that the clearinghouse must use methods established by the DNR.
- Requires the clearinghouse to establish a maintenance schedule for credits, and to verify credits with the DNR, subject to a 45-day⁶ DNR review period, before making credits available for sale.
- Applies the directive to allow trades over the largest possible geographic area to trades negotiated by third parties, rather than just the clearinghouse.
- Requires the DNR to evaluate the clearinghouse within four years.
- Specifies that, if the clearinghouse ceases to function, the DNR will continue to administer all credits then in effect until a new clearinghouse is established or contracts expire.
- Directs the DNR to consult with the EPA regarding the possibility of allowing long-term or permanent credits in more situations than are currently allowed in an area subject to an EPA-approved total maximum daily load (TMDL).⁷

BILL HISTORY

Senator Cowles introduced Senate Amendment 1 on March 26, 2019. On March 27, 2019, at the suggestion of Senator Miller, the Senate Committee on Natural Resources and Energy introduced Senate Amendment 1 to Senate Amendment 1 to extend the DNR’s timeline for verifying credits facilitated by the clearinghouse or a third party from 30 days to 45 days. The committee then voted unanimously to recommend the adoption of Senate Amendment 1, as amended, and it likewise unanimously voted to recommend the passage of Senate Bill 91, as amended.

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⁶ Senate Amendment 1 to Senate Amendment 1 modified this timeline from 30 days to 45 days.

⁷ The Clean Water Act requires states to develop TMDLs for all impaired surface waters. [33 U.S.C. s. 1313 (d) (1).] A TMDL is the amount of a pollutant that a waterbody segment can assimilate and not exceed water quality standards.