Report From Agency

REPORT TO LEGISLATURE

NR 102, 103, 105, 106, 108, 110, 114, 200, 203, 205, 210, 214, 299, 328, 341, and 812, Wis. Adm. Code

Board Order No. WT-15-09
Clearinghouse Rule No. CR-09-123

Basis and Purpose of the Proposed Rule

The Bureau of Watershed Management has not previously updated rules for clean-up of errors or common housekeeping changes needed to keep their rules current. There are many codes included in this package for that reason. Future housekeeping clean-up rule packages will be much smaller once these rules are updated.

Summary of Public Comments

Department of Natural Resources Response to Public Comments on Revisions to chs. 102, 103, 105, 106, 108, 110, 114, 200, 203, 205, 210, 214, 299, 328, 341, and 812, Wis. Adm. Code

Overview

The Natural Resources Board authorized a public hearing on the proposed Watershed Bureau Housekeeping Rule Revisions at the December 2009 meeting. A public hearing was held in Madison, Wisconsin on January 28, 2010. The public comment period ended February 5, 2010.

At the hearing on January 28, 2010, two people attended this hearing, but no oral or written comments were presented. During the public comment period, written comments were submitted by U.S. Environmental Protection Agency-Region 5, City of Superior-Public Works Department, Midwest Environmental Advocates, Municipal Environmental Group, Wisconsin Liquid Waste Carriers Association, and Duane Schuettpelz. In addition, on January 26, 2010, the Legislative Council Rules Clearinghouse reported to the Department on its review of this proposed rule.

The Department originally proposed a number of technical code modifications within NR 110 that were considered to be "minor" in nature because, although not codified, the requirements were for design features that have become common practice in the wastewater industry or are commonly required by the Department in accordance with existing program guidelines. For example, providing telemetering of alarms at sewage pumping stations, instead of relying on an outside alarm light. Comments were received, however, indicating concerns about cost impacts about even the "minor" changes. As a result, the Department has further revised ss. NR 110.14 and NR 110.15 such that they closely accord with existing code language, removing nearly all of the "minor modifications". The remaining modifications are primarily for formatting and updating purposes.

Comments and Responses

Included below are the comments submitted (in italics) and the Department's responses.

Comment on s. NR 106.07 (2): *DNR improperly proposes to remove from Wis. Admin. Code NR 106.07 (2) the requirement that WPDES permits contain water quality based mass limits for chlorine discharges. According to DNR, chlorine is exempt from EPA's Great Lakes Water Quality Initiative ("GLWQI") and, therefore, the requirement to calculate mass limits for chlorine when concentration limits are established in permits is not applicable.*

While Chlorine is one of the fourteen pollutants listed as exceptions to certain requirements of the GLWQI, DNR must ensure that "any procedures applied in lieu of GLWQI implementation procedures shall conform with all applicable Federal, State, and Tribal requirements." 40 CFR 132.4 (e) (2). Additionally, Great Lakes States must apply specific implementation procedures or alternative procedures consistent with all applicable Federal, State, and Tribal laws. 40 CFR 132.4 (g) (2).

Response: The Department disagrees with this comment. In addition to the GLWQI exemption for chlorine, mass limits are not needed or appropriate for the protection of water quality. Except for zones of initial dilution, the chlorine criteria and effluent limits are, in most cases, below the expected level of detection for chlorine in a laboratory test. Therefore, chlorine is effectively a "no-detect" limit, which means if chlorine is detected in a discharge, the permittee will be in violation of the permit limit as a concentration because the level of detection is higher than the limit. For municipalities, s. NR 210.06(2)(b) contains a chlorine limit of 100 ug/L which is still the commonly accepted level of detection for chlorine, while the water quality based limits are in the range of 7 to 37 ug/L depending on dilution. Chlorine is unique because of the GLI exemption and the level of detection is greater than the water quality based effluent limit. No change was made to the final rule.

Comment on ss. NR 106.10 (1) and NR 106.145 (2) (b) 2., (3), and (7) (b): *DNR must repeal Wis. Admin. Code NR 106.10 (1) and 106.145(2)(b)2.,(3), and (7)(b).*

Response: Repealing these codes would be very controversial and outside the scope of this "Housekeeping" rule package. The department is planning to revise ch. NR 106 this year and will take these comments under advisement for that rule package.

Comment on s. NR 106.33 (2): *This rule provides that ammonia effluent limitations may not be included in permits for sewage treatment works in cases when Wisconsin calculates limits that are greater than or equal to 20 milligrams per liter (mg/L) for the summer or 40 mg/L for the winter. EPA is concerned that this rule may be interpreted to mean that the State is prohibited from including appropriate limitations in permits in such circumstances. 40 CFR s. 122.44 (d) (made applicable to States by 40 CFR s. 123.25 (a) (15)) requires permit issuing agencies to include water quality-based effluent limitations in permits when a discharge has a reasonable potential to cause or contribute to excursions beyond water quality standards. It further requires that such limitations be derived from and comply with water quality standards. We request that Wisconsin strike NR 106.33 (2) from ch. NR 106.*

Response: The department disagrees with this comment. In order to qualify for the exception in s. NR 106.33 (2) the discharge must be "primarily domestic wastewater." If, in an unusual circumstance, there was an industrial discharger that led to a higher concentration being discharged to a municipal treatment plant, the wastewater would no longer be characterized as primarily domestic wastewater and therefore, would not be eligible for the exception. Municipal effluents that are primarily domestic wastewater do not exceed 20/40 and therefore higher permit limits than the 20/40 limits are not needed based on the reasonable potential results we would expect in a normal situation. This is a very conservative reasonable potential approach, since data dating back to the 1980's has shown that the influent total nitrogen from domestic wastes is less than 40 mg/L and in summer time incidental ammonia removed reduces discharge levels to well below 20 mg/L. To make a change to this rule would be considered significant and outside the scope of the "housekeeping rule" package. No changes to the proposed rules were made.

Comment on s. NR 110.03 (12g): *The word "flow" in this section means or is implied to mean a "rate of flow" (e.g., volume/time). In Section 23, and perhaps elsewhere, the word "flow" is used and expressed only as a volume without reference to time. The rules (both NR 100 and 200 series) should be consistent in terminology when using the term "flow" or "flow rate" or "rate of flow".*

Response: The word "flow" is currently used extensively in ch. NR 110 and other codes without making a distinction in terminology between "flow" and "flow rate". A valid definition of "flow" is the amount of discharge over time. The department is not proposing to revise s. NR 110.03 (12g)

or to add a new definition, however, a revision to s. NR 110.15(4)(c) has been made to improve consistency in the use of these terms.

Comment on s. NR 110.05 (4): *In paragraph (b), it is stated that "…compliance with a compliance schedule…" in a permit is deemed compliance with applicable WQBELs for purposes of implementing this section of the rule. What happens if a compliance schedule is related to biosolids or some other issue other than WQBELs? Could the permittee argue that compliance with these unrelated compliance schedule items satisfy the conditions in this paragraph? Adding a sentence that says: "Compliance schedules for actions specifically unrelated to WQBELs shall not be considered in compliance with the conditions in this paragraph.*
Response: The sole intent of the proposed revision was to eliminate outdated language or references, and then to reorganize the subsection accordingly. The language referring to "…compliance with a compliance schedule…" is currently code language and its revision would constitute a more substantive change, which is considered to be beyond the scope of this "housekeeping" revision package. The department does not propose any revision in response to this comment.

Comment on s. NR 110.09 (2) (j) 4. b.: *A new term – "initial average flow" – is introduced here, but not defined (unless there is a definition in another part of NR 110.) A definition should be provided, if not already in the code.*
Response: The department believes the proposed change to "initial average flow" is sufficiently clear and does not propose any revision in response to this comment.

Comment on s. NR 110.13 (1) (d): *In par. (1) (d), and elsewhere in the rule proposal (e.g., Section 55), there is reference to "community public water supply well." Please cross-check the contemporary terminology in the ch. NR 800 series to assure compatibility with the terms used in those rules. The ch. NR 800 series uses terms like "community systems", "non-community systems", "transient systems", etc.*
Response: In this Section and elsewhere in the code, the department has made revisions to provide consistent use of the term "community water system well" as it is currently defined and used in ch. NR 811.

Comment on s. NR 110.13 (1) (d) 1. and 2.: *The two sentences in subpar. 2 are incompatible. The first sentence compels compliance with the separation distance requirement in all cases. Therefore, there will never be an instance in which the condition in the second sentence will occur (i.e., a sewer within 15 meters of a private well).*
Response: The department agrees with this comment and is proposing to delete the second sentence in s. NR 110.13 (1) (d) 2.

Comment on s. NR 110.14 (3) – (5): *Sections NR 110.14 (3) to (5) are completely repealed and recreated. There are several new design requirements which may impose additional costs that have no stated rationale or implementation plan.*

- *For example, NR 110.14 (3) (b) includes structural design requirement and among other things requires "the exterior of steel factory built lift stations shall be provided with a suitable water proof epoxy coating or water proof painting system or protected using other appropriate methods." There is no reference to the time period in which existing facilities must comply with this new standard, if at all. Similar concerns exist with respect to the changes to the other subsections including changes to ventilation 3 (c), piping (3) (h), control (3) (i), and electrical equipment (5) (c).*
- *In particular, the changes to the control subsection may prove to be costly for some of our members. The proposal would require that "alarm signals shall be telemetered, to responsible authorities."*

Response: The Department has revised s. NR 110.14(3)(b), (c), (e), (h), (i), (4)(c), and (5)(c), (d), in order to more strictly accord with existing code language. Sections were removed that had new design requirements from the rule.

Comment on s. NR 110.14 (3) (b) 3.: *In subp. (3) (b) 3., the phrase "possible exception" is used in reference to stairways in build-in-place lift stations. The rule should specify the criteria the department might use to grant the "possible exception" to the general requirement of the paragraph.*
Response: The department agrees with this comment and is proposing additional language to clarify what is a "possible exception."

Comment on s. NR 110.14 (12): *This section changes the requirements for emergency operation. Paragraph (12) (b) addresses generator and pump backups at lift stations. Under the new requirement, portable pumps and generators cannot be used for more than three lift stations unless certain conditions are met. …Many of our members from communities over 10,000 in population report that one to three portable generators have been more than adequate.*
Response: The Department has revised s. NR 110.14(12) to remove the reference to portable generators not serving more than three lift stations.

Comment on s. NR 110.15 (5) (c): *Imposing this new requirement on existing treatment facilities—particularly where plant design and/or hydraulic profile does not allow for installation of additional flow metering—will be costly, potentially very costly, and may offer little benefit….The proposed changes to this Section do not consider Combined Sewage Treatment Plants (CSTPs), facilities that receive and discharge flow intermittently, only during significant events of rainfall or snowmelt. Placement of a second flow meter in these facilities is not technically reliable and is not cost-effective; therefore, this section, if implemented should not be applicable to CSTPs. The proposed changes should clarify that flow monitoring requirements apply only to secondary treatment facilities or facilities receiving continuous flow. We respectfully request that the proposed changes to Section NR `110.15 (5) (c) be withdrawn from the rule.*
Response: The propose rule for s. NR 110.15 (5) (c) has been deleted from this rule package.

Comment on s. NR 114.18*: These proposed rules would create a master operator licensing category and also revise the continuing education requirements for certified septage operators. We are in favor of these changes and believe they would be beneficial to the industry. We request that DNR implement these changes as part of CR 09-123 package.*
Response: The Department has kept these proposed changes in the final rule.

Comment on s. NR 200.06 (2*): DNR is correct to require electronic submissions on permit reissuance applications and discharge monitoring reports.*
Response: The Department kept this part of the propose rule in the final rule.

Comment on s. NR 203.02 (3): *This rule describes the required content of public notices of permit actions. On review, EPA found that the notice content as described in the rule does not include all the items that need to be included in a notice under 40 CFR s. 124.10 (d) (made applicable to States by 40 CFR s. 123.25 (a) (28)). Wisconsin should amend the rule such that notices include the following additional items: (1) the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application, and (2) requirements applicable to cooling water intake structures under 33 USC s. 1316 (b), in accordance with 40 CFR part 125, subparts I, J, and N.*
Response: The department agrees with this comment and has made the change in the rule package.

Comment on s. NR 203.03 (3) and (4): *These rules identify government agencies that are to receive notice of permit actions. They identify the information to be included in a notice, including that EPA should receive a copy of a draft permit. EPA found that the list of agencies in s. NR 203.03 (4) is not as comprehensive as required under 40 CRF s. 124.10 (c) (1) (iii) (made applicable to States by 40 CFR s. 123.25 (a) (28). Wisconsin should amend these rules so they conform to 40 CFR s. 124.10 (c) and (e).*
Response: The department agrees to make this modification to our rule in this rule package to be consistent with federal rules.

Comment on s. NR 203.06 (2): *This rule describes the required content of a notice of a public hearing. EPA found that the notice content as described in the rule does not require a reference to previous public notices relating to the permit, as required by 40 CFR 124.10 (d) (2) (i). Wisconsin should amend the rule so that hearing notices include this information.*
Response: The department agrees to make this modification to our rule in this rule package to be consistent with federal rules.

Comment on s. NR 203.13 (2) (g): *EPA found that this rule does not meet 40 CFR s. 124.17 (a) and (c) (made applicable to States by 40 CFR s. 123.25 (a) (31)) because it does not require the State to: (1) describe and respond to significant comments on the draft permit, (2) explain the reasons for changes between the draft and final permit, and (3) make the response to comments available to the public. Wisconsin needs to amend the rule so it conforms to 40 CFR s. 124.17 (a) and (c).*
Response: The department agrees that we need to conform to the federal rule and has made these changes in the final rule package.

Comment on s. NR 205.03 (27): *The term "point source" is defined in this rule. The rule includes a list of conveyances that qualify as point sources. Landfill leachate collection systems are not included in this list despite the fact that they are included in the 40 CFR s. 122.2 definition of "point source". ..Wisconsin should amend s. NR 205.03 (27) to expressly include landfill leachate collection systems in the definition of the term "point source"…*

The Wisconsin definition includes the following sentence: " point source does not include diffused surface drainage or any ditch or channel which serves only to intermittently drain excess surface water and is not used as a means of conveying pollutant into waters of the state." This sentence does not appear in the federal definition and the meaning of the words, "not used as a means of conveying pollutants," is not clear. …We request that Wisconsin strike this sentence from the definition.
Response: Although the term "landfill leachate" may be in federal regulations, the term is not in the federal statute for the definition of a point source. There may be some federal case law that addresses the issue of landfill leachate as a point source, but the Department has received no specific explanation on why this change is needed and the Department does regulate point source discharges of landfill leachate. Accordingly, no change to our proposed rule package is made at this time.

As for the language in the point source definition that excludes "diffused surface drainage or any other ditch or channel which serves only to intermittently drain excess surface water", the Department does not intend to delete this language at this time. This language is intended to exclude nonpoint source pollution. If EPA has questions regarding the meaning of this language, the Department can provide EPA with a more detailed explanation of the scope of this language.

Comment on s. NR 205.07 (1) (b): *This rule allows Wisconsin to terminate a permit. EPA did not find companion rules that set out the criteria and procedures for termination. Federal critera and procedures appear in 40 CFR s. 122. 64 (made applicable to States by 40 CFR 123.25 (a) (23)). Wisconsin needs to establish such criteria and procedures.*
Response: The department believes this change to be significant and beyond the scope of the "housekeeping rule" change. No changes to proposed rules were made.

Comment on s. NR 205.07 (1) (g): *…Certification language in the Wisconsin rule is less stringent and therefore not equivalent to the certification required by 40 CFR s. 122.22(d). Wisconsin's rule does not establish conditions and procedures, as required by 40 CFR s. 122.23 (b) and (c), through which a person can sign as a duly authorized representative. Wisconsin needs to amend the rule to conform to 40 CFR s. 122.22 (b) through (d).*

Response: The recommended change would impose additional requirements on permittees and is more than a minor modification. Therefore, this change is outside the scope of the rule package. The Department will consider making this change in a future rule package.

Comment on s. NR 205.07 (1) (q): *This rule requires permittees to report to the State in certain circumstances. A time when a permittee anticipates noncompliance is not listed among the circumstances. Under 40 CFR s. 122.41 (1) (2), permittees must give advance notice to the Director of any planned changes which may result in noncompliance with permit conditions. Wisconsin needs to include this provision in its rules.*
Response: This is required under s. 283.59, Wis. Stats. We do not propose to make any revisions to our code at this time as it is required under our statute.

Comment on s. NR 205.07 (1) (u), 1 (v), and (2) (d): *I do not disagree that correcting the mistakes in the placement of certain items in the rule is a reasonable idea. However, I am concerned that these changes, without significant accompanying rule additions or modifications relating to sanitary sewer overflows, may result in some confusion in the regulated community and the public. Without these additional changes and additions, the proposed language may leave the impression that the department's longer-term approach to this subject is as stated here, when there is, I believe much more to resolution of this issue.*

"Scheduled bypassing" does not appear in the federal rule. The prohibition on unscheduled bypassing in the State rule is not consistent with 40 CFR s. 122.41(m)(4).

Response: The proposed changes relating to sanitary sewer overflows ("unscheduled bypassing") certainly do not represent the department's long-term intentions which are being addressed by a separate rule revision effort. The language change in s. NR 205.07 (2) (d) is strictly intended to provide improved consistency with federal requirements and the current language already used in DNR WPDES permits. The department does not propose any revision in response to this comment.

Changing the language to be consistent with the federal rule would be a significant modification and is outside the scope of this "housekeeping" rule clean-up package.

Comment on s. NR 210.08 (1) (a) and (b): *Is this change necessary or compatible with other language in NR 210 or the definitions in NR 205 that govern the WPDES program? It may be helpful to cross-reference the term used here (sewage treatment facilities) to the definition in NR 110.*
Response: The department agrees with this comment and has added the definition for "sewage treatment facilities" to ch. NR 210.

Comment on s. NR 214.16 (6): *It may be helpful in implementing this subsection of the rule to be more explicit in defining what conditions will be considered in determining if alternative investigations"…certain types of conditions" will be acceptable.*
Response: The department agrees with this comment and has added additional language to clarify the meaning of the reference to "…certain types…of conditions".

Comment on s. NR 328.35 (3)(p)(1): *The notation "etc." should be replaced by a phrase such as "and similar materials." Also in sub. (3)(p)2., the note is substantive and should be placed in the text of the Administrative Code. Finally, because the introductory material in par. (p) does not grammatically lead into the following subunits, the introductory material should be renumbered as subd. 1.; the remaining subdivisions and internal cross-references should be renumbered accordingly; and the subdivisions should not be written in the imperative form.*
Response: The proposed revision is intended to make the rule language in s. NR 328.35 (3) (p) consistent with other sections of the code, i.e., chs. NR 320, 323, 328, 329, 341, 343, and 345. Therefore, no change was made in response to this comment.

Clearininghouse comments: All Clearinghouse comments not specifically responded to in this document have been incorporated into the rule language as suggested.

Modifications Made

Modifications were made to the rule package based on written comments received as described in the comments and response in the previous section.

Appearances at the Public Hearing

One public hearing was held in Madison on January 28, 2010, and no written or oral comments were submitted or presented.

Changes to Rule Analysis and Fiscal Estimate

There has been no change to the rule analysis and fiscal estimate from the proposed rule package.

Responses to Legislative Council Rules Clearinghouse Report

Corrections to the rules were made as suggested except the following: Comment on NR 328.35 (3)(p)(1): *The notation "etc." should be replaced by a phrase such as "and similar materials." Also in sub. (3)(p)(2)., the note is substantive and should be place in the text of the Administrative Code. Finally, because the introduction material in par. (p) does not grammatically lead into the following subunits, the introductory materials should be renumbered as subd. 1.; the remaining subdivisions and internal cross-references should be renumbered accordingly; and the subdivisions should not be written in the imperative form*.

The proposed revision is intended to make the rule language in s. NR 328.35 (3)(p) consistent with other sections of the code, i.e., chs. NR 320, 328, 329, 341, 343, and 345. Therefore no change was made in response to this comment.

Final Regulatory Flexibility Analysis

The rule revisions are not expected to have a significant economic impact on small business.