Report From Agency

REPORT TO LEGISLATURE

NR 856, Wis. Adm. Code
Water Use Registration and Reporting

Board Order No. DG-25-10
Clearinghouse Rule No. 10-059

Basis and Purpose of the Proposed Rule

NR 856 Water Use Registration and Reporting is being proposed to further define and clarify new statutory requirements (s. 281.346, Stats.) for statewide registration and reporting of water withdrawals and diversions of water from the Great Lakes Basin. The rule was triggered by the adoption of 2007 Wisconsin Act 227. The rule provides specific processes and methods for measuring, registering, and reporting statewide water withdrawals and diversions of water from the Great Lakes Basin.

Summary of Public Comments and Modifications Made

Information on the proposed rule was posted on the department website on June 2, 2010 and information was sent to approximately 620 people using GovDelivery on June 3, 2010. The public comment period closed on July 7, 2010. The department received public comments from 17 individuals and organizations. All of the comments, along with the department's response are included as Attachment 1.

There were six comments related to s. NR 856.15, "Open Records Requests". The concerns centered on how the department would release location and personal information about registered withdrawals. The comments were from two perspectives. One perspective asked that the rule provide further protections for this information and a second perspective asked the department to add language that would allow for the release of enough of the information to reasonably assess impacts. The department made several changes to the rule language based upon the comments. The changes provide additional guidance for protecting information that may impact domestic security while preserving the state's public policy in favor of the release of public records.

The department made several modifications to the rule based upon comments concerning the information required for registration and reporting. The department eliminated the requirement to submit the federal employer identification number and added a requirement to annually submit an estimated volume of withdrawal for each water use.

Three groups submitted comments concerning the methods for measuring withdrawals. The department made several changes to the rule to make it clear that water withdrawn and then re-used was not to be included in the calculation for the monthly volume of withdrawal.

The department also made additional changes to the rule based upon a number of general comments including language clarifications and a correction to the applicability section.

Department staff met with the Wisconsin State Cranberry Grower's Association (WSCGA) on July 20, 2010 to discuss their concerns with the rule and potential resolutions. Department staff will continue to work with the WSCGA over the next several months to develop tools to assist them with measuring their withdrawals. The department could not, however, alleviate WSCGA's concerns related to protecting withdrawal location information from public open records requests. The rule was modified to the extent possible to afford greater protection to the location information while still meeting Wisconsin's open records policy. However, the department does not have the statutory authority to provide a blanket exemption against the release of the location information.

Department staff also spoke to the Wisconsin Aquaculture Association (WAA) on July 22, 2010 about their concerns. The department will continue to work with the WAA and other groups to provide training and assistance in measuring withdrawals.

Appearances at the Public Hearing

Five hearings were held to solicit comments. The hearings were held jointly with the hearings for NR 850 Water Use Fees and NR 852 Water Conservation and Water Use Efficiency. All of the hearings were at 6:00 p.m. The first hearing was in Milwaukee on June 28, 2010. The hearings in Green Bay and Ashland were conducted together using videoconferencing on June 29, 2010. The final two hearings in Wausau and Madison were also conducted together using videoconferencing on June 30, 2010. Department staff who assisted at the hearings included Eric Ebersberger, Dino Tsoris, Kristy Rogers, Steve Elmore, Shaili Pfeiffer, and Judy Ohm. There was low participation at the hearings with a total of 24 participants. Eighteen people registered with two people indicating in support, three in opposition, and seven as interest may appear. Three persons provided oral comments. Most participants at the hearing were primarily interested in how the rules would impact their operations. The following table lists the registered participants at the hearings.

Hearing Participant	Oral Statement	Position			
		In support	In opposition	As interest may appear	None indicated
Patrick Harrington – Representing Wisconsin Rural Water Association (WRWA)					X
Dan Peplinski				X	
Mike Hahn – Representing Southeastern Wisconsin Regional Planning Commission		X			
Ed Glatfelter – Representing Alliance for the Great Lakes	X			X	
Kenneth Graves – Representing Georgia Pacific				X	
Randy Kraemer				X	
Heidi Schmitt Marquez		X			
Dean Freeberg					X
Trevor Petermann				X	
Julie Maas					X
Eric Van Laanen – Representing WRWA					X
Edward Hendzel – Representing WRWA					X
Mary Vendiola – Representing Midwest Environmental Advocates	X			X	
Ed Morse – Representing WRWA					X
Darrin Pope – Representing Vierbicher				X	
Tom Lochner – Representing Wisconsin State Cranberry Growers Association	X		X		
Jeff LaBelle			X		
Andrew Aslesen – Representing WRWA			X		

Changes to Rule Analysis and Fiscal Estimate

None.

Response to Legislative Council Rules Clearinghouse Report

The department made all changes recommended by the Legislative Council Rules Clearinghouse. The following addresses the questions raised by the Clearinghouse. The department added language to s. NR 856.11 to include persons who propose to increase the capacity of a water supply system or public water supply and added s. 281.343(4) and s. 281.346(7) to the rule preface under number 2, “Statutes Interpreted”. Section 281.343(4) requires the department to develop a water resources inventory that contains information on all diversions. The department is requiring existing diverters to register to obtain the necessary information for the required water resources inventory. The statutory authority for the exemptions listed in s. NR 856.11 is in s. 281.346(7). In s. NR 856.21(1)(b), the word “and” should not be replaced by the word “or”. The required information is required for both the owner and operator. The department also added language to NR 856.22(2)(a) to clarify the phrase “reduced in size permanently”.

Final Regulatory Flexibility Analysis

The proposed rule does not have a significant economic impact on small businesses. This rule will affect small businesses that supply their own water with water supply systems that have the capacity to withdraw over 100,000 gallons per day. Small businesses, like other entities that are affected by this rule, will have to determine 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. The registration, withdrawal measurement, and reporting requirements are straightforward and can be accomplished by most individuals with no specific professional background.

Attachment 1 – Summary of Public Comments

PUBLIC COMMENTS

OPEN RECORDS REQUESTS

1. The Farm Bureau Federation is ..."concerned about the proprietary information that is collected being used for other purposes". The Bureau requested that the open records request section of the rule be strengthened to protect individual businesses.

2. From the Wisconsin Cranberry Growers Association: *Amend NR 856 to include a prohibition against posting any water use registration or reporting information on an Internet-accessible database if that information will disclose personal information about a water user or water system owner, will provide information about commodity-type, or will provide any information that reveals the withdrawal's location, the diversion's location or any specific locational information related to the withdrawal, diversion, or discharge. Providing this information on a publicly accessible Internet database poses risks for water use associated with agricultural production and food processing with regard to safety of the food supply.*

3. From the Wisconsin Cranberry Growers Association: *Amend NR 856 to further tighten the open records request protections for information collected from water users who are engaged in production agriculture and food processing in order to ensure that food supply safety is maintained when such information is disclosed by the State of Wisconsin.*

4. From the Wisconsin Cranberry Growers Association: *Request an evaluation of the proposed statewide water use registration and reporting system by the National Center for Food Protection and Defense, which is housed at the University of Minnesota, in order to assess potential risks that disclosure of this information could pose to food supply safety, commodity supply chains and food distribution.*

5. From the Community of Environmental Groups: *Because of domestic security concerns regarding the location of withdrawals and diversions, NR 856.15 allows the Department to request additional information from the public when making an information request, and to place conditions on the use of, or change the format of location data provided to the public. While we recognize that the location of withdrawals and diversions can be sensitive, knowledge of the location of withdrawals and diversions is critical for the public to understand the impacts on natural resources. In order to ensure the public's ability to have that understanding, NR 856.15(3) should include the following sentence at the end: "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."*

6. From the Community of Environmental Groups: *The rule should require that the water withdrawal and use data required to be reported by NR 856.30 (2) be placed into a state-wide database system accessible to the public. This will provide the additional benefits of greater transparency, enhanced public engagement, and heightened water user compliance with program objectives.*

Department Response: The new registration and reporting 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 department made several changes to the language in s. NR 856.15 based upon the submitted comments to provide 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 changes to s. NR 856.15 also include a requirement for the department to annually report water use data in an easily accessible format. The easily accessible format may or may not include access in a database depending on cost and security issues and will not include personal information other than a person's name or location information at a scale more detailed than the public land survey section level.

REGISTRATION AND REPORTING INFORMATION REQUIREMENTS

1. The Farm Bureau Federation …"believes that the information being collected under NR 856.20 is too site specific and too detailed for the needs of the department" and suggested that more general information be collected from the responsible party.

2. The Wisconsin State Cranberry Growers Association expressed concern with the collection of the federal employer identification number and a map showing the location of the property or public water supply, sources and discharges as part of the registration. The Association asked that the amount of information that needs to be provided for both registration and reporting be simplified and reduced to make the rule easy for farmers to comply with and that both the requirement to supply the federal employer identification number and map showing the location of the property be deleted from the rule because they do not relate to purposes of the compact. The Association stated that providing a map entails additional expense and paperwork for the applicant and it does not provide additional information that isn't already required.

Department Response: The department eliminated the requirement to submit the federal employer identification number in s. NR 856.20(4). This requirement was originally included to facilitate delinquent fee collections. The department did not make any other changes to the required information. The information requirements in the rule are consistent with the information requirements set forth in the statute [Wis. Stat. s. 281.346(3)]. The rule requires that location information be submitted in the form of a map. Department staff has found that requiring a map provides the most accurate location information compared with requiring public land survey information or global positioning system coordinates. By early next year, withdrawers will be able to register electronically using the Internet. The department's Internet based registration system will collect location information through a map based tool. Users of the online system will not have to supply a map but will instead use the online tool to identify the needed location information.

3. From the Community of Environmental Groups: *Persons required to register under this rule must include in registration information the uses made of the withdrawn water, and they must amend their registration whenever there is a change in use. This registration information would seem to require water use only by type of use and not to require the quantity of water uses. The only water use quantity required to be reported annually by the rule is consumptive use. That limited amount of water use information is insufficient for effective state water use management. Water use volumes reported by broad use categories is commonly tracked by public water supplies who report this information annually to the Public Service Commission under Water Operating Revenues – Sales of Water using the water use categories: residential, commercial, industrial and public authority uses. The following amendments are suggested to NR 856.30 Measurement and Reporting Requirements:*
(1) Any person registered under this chapter shall determine the monthly volume of water withdrawn from the property or public water supply, or the monthly volume of water diverted, <u>and the volume of the uses made of the withdrawn and diverted water</u>, using methods and procedures set forth in s. NR 856.31.
(2) Any person registered under this chapter that makes a withdrawal that averages 100,000 gallons per day or more in any 30-day period, or diverts any amount of water, shall annually report to the department the monthly volumes of the withdrawal or diversion, <u>and the volume of the uses made of the withdrawn and diverted water</u>. Reports shall be submitted to the department in the manner prescribed by the department by March 1 of every year and shall contain the following information about the previous year's withdrawals:
<u>(f) The volume of the uses made of the withdrawn and diverted water.</u>

Department Response: The department has modified the annual reporting requirements in s. NR 856.30(2) to additionally require the submittal of the estimated volumes of each use made of the withdrawn

water. The Public Service Commission also collects more detailed water use information for public water systems that may be used for greater analysis on water use.

DEFINITION OF WITHDRAW AND WITHDRAWAL MEASUREMENTS

1. The Wisconsin Aquaculture Association along with several of their members including Linda Krepsky, Tad Storm, and Herby Radmann provided comments that they do not believe that aquaculture is a withdrawal. They state that the …"activity of aquaculture occurs within the water, it does not "take" nor does the process of "taking" occur". The Association suggests that the rule define aquaculture as not being a withdrawal.

2. The Wisconsin State Cranberry Growers Association expressed concerns with the methods and costs associated with measuring withdrawals. They asked the department to …"(1) clarify how cranberry farmers, who use and recycle the water withdrawn from a surface water using a flow system, can measure their monthly water volumes; (2) explain how those monthly volumes will account for water that is recycled or reused; and (3) provide farmers with an estimate of how it will cost to measure these volumes when flow systems are used. (Note: The fiscal note associated with this rule proposal does not address these costs, as it appears to assume that all withdrawals are made with pumping equipment.)"

3. The Aggregrate Producers of Wisconsin and Wisconsin Transportation Builders Association expressed concerns with how withdrawals are measured and asked that …"only the first gallon of water withdrawn as a part of an aggregate wash operation that recycles that same gallon be counted…" for the purpose of reporting.

4. The Aggregrate Producers of Wisconsin and Wisconsin Transportation Builders Association also asked that the registration amendment requirements be …"broad enough to avoid triggering a registration amendment…" for portable wash plants and mining sites. The locations of the ponds, wash plants, and discharge locations can change with each "set-up".

Department Response: "Withdraw" means to take water from surface water or groundwater [s. 281.346(1)(y), Stats.]. When someone withdraws water it is taken out of or redirected from its natural course making it unavailable for other purposes. In-stream uses of water are not considered withdrawals, nor is the temporary impoundment of water that does not redirect water from its natural course. Some older aquaculture facilities, for example, are constructed directly in a natural spring pond or stream channel. The water use for aquaculture at these facilities would not be considered withdrawals. The department will work with each facility to determine if a facility has a withdrawal or would be classified as an in-stream use.

The department added language to s. NR 856.31 to clarify that water that is reused on a property is not to be included in the monthly volumes of withdrawal. The department will work with all industries including cranberry growers, aggregate producers, and aquaculture operations to develop a consistent approach for measuring withdrawals versus water reuse. The department also modified the rule language in s. NR 856.21 to allow registration amendments to be completed at the end of the year instead of requiring them within 30 days of a change or modification.

The rule does not require the installation of new metering devices and allows for alternative methods of measuring withdrawals to be approved by the department. The fiscal note addresses differing options including the costs required to hire a professional consultant to assist with the development of a measurement method. The fiscal note states that consultant costs will vary and may range between $500 and $2000.

GENERAL

1. From Wisconsin Paper Council: *Do facilities that have previously registered with the department need to re-register once the new rule takes effect? We urge that re-registration not be required in this situation, although it may be appropriate to ask for additional information.*

Department Response: Currently registered facilities will be required to log into the new registration system and supply any missing information from the original registration.

2. From Wisconsin Paper Council: *The registration submittal must include "the uses made of the water" and an amendment is required when changes or modifications are made to "the uses made of the water." Our understanding of the information being sought is the general use of the water, such as papermaking or cooling or irrigation, not every internal use of water within the papermaking process. In order to prevent the need for amendments every time a minor change in use is made, we suggest that the word "general" be inserted in front of "uses" in both places in the rule.*

Department Response: An amendment would only be required if the water use changes. Water uses are broken down into general codes. For example, there is currently only one code for industrial paper manufacturing so internal changes to the process would not require a change in water use.

3. From Wisconsin Paper Council: *NR 856.30(2) refers to both a 30-day average and a monthly average. It appears that the intent is for these to be two different things and that "monthly" refers to a calendar month. Is this correct? We would support this interpretation.*

Department Response: That is the correct interpretation.

4. From Wisconsin Paper Council: *The same paragraph requires reports to be submitted by March 1 of every year. We are not sure why March 1 is such a popular reporting deadline (SARA, air emissions inventory, greenhouse gas reporting, hazardous waste reporting, etc.), but our members would very much appreciate a later deadline, such as April 1, to allow workload to be spread out.*

Department Response: The deadline of March 1 was chosen to be consistent with the high capacity well reporting requirements in NR 820. The department did not make any changes to this date.

5. From Wisconsin Paper Council: *The wording in NR 856.30(2)(c) and (d) is confusing. Both reference withdrawal from a single property "or a public water supply…". It reads as though reporting of water taken from a public water supply must be reported, even though water taken from a public water supply would not be covered by the Compact or by this rule. It appears that the intent was to cover a public water supply system, not someone taking water from a public water supply system. We suggest simply using the same language here as is used in NR 856.11.*

Department Response: The department modified the language in s. NR 856.30(2) to address this comment.

6. From Wisconsin Paper Council: *NR 856.30(2)(d) specifies that water loss and consumptive use estimations and calculations follow procedures in department rules and guidelines. Our understanding is that the department will propose a rule addressing these estimation and calculation procedures later this year. When that rule is developed, it is important that the use of industry-specific procedures be allowed and that a "one size fits all" approach not be followed. For example, we have previously submitted to the department a document prepared by the National Council for Air and Stream Improvement, Inc. entitled Estimating Water Consumption at Pulp and Paper Mills (Technical Bulletin #946, February 2008). We urge that this document and similar information be allowed on a site-specific basis.*

Department Response: The department modified s. NR 856.30(2) to state that water loss from consumptive use is to be calculated according to NR 142. The methods for calculating consumptive use are not addressed by this rule.

7. From Wisconsin Paper Council: *NR 856.31 specifies procedures for measuring withdrawals. Some mills may have systems in place that meet one of the specified methods, but some may not. NR 856.31(1)(a)5. provides for the use of alternative methods and monitoring frequencies. It is important that this provision be interpreted broadly and that it not be used to force metering. Even if a paper mill does not have one of the specified measurement methods in place, the mills typically measure water*

use at other parts of the process in sufficient detail to accurately determine withdrawal amounts. This type of back-calculation should be allowed.

Department Response: The rule allows for site specific methods for measuring, which may include back calculating.

8. From the Community of Environmental Groups: *All withdrawals at or greater than 100,000 gallons per day (gpd) must be registered in accordance with Section 4.3 of the Compact. The proposed rule clearly requires registration of such existing withdrawals and of new withdrawals at or greater than 100,000 gpd. But it is unclear whether a person with an existing withdrawal that is increased to at or greater than 100,000 gpd is covered. This is clarified by adding to NR 856.11(1) a new subsection (c), with existing subsection (c) becoming subsection (d): (c) Any person who proposes to increase an existing withdrawal from the waters of the state using a water supply system or systems on one property or a public water supply to a capacity to withdraw an amount averaging 100,000 gallons per day or more in any 30-day period.*

Department Response: The department added language to s. NR 856.11 to correct the missing applicability.

9. From the Community of Environmental Groups: *WDNR's proposed registration and reporting rule requires registration and reporting by all diverters and by existing withdrawers and those who propose withdrawing with capacities of 100,000 gallons per day or more in any 30-day period. Section 281.346 (1) (y) of Wisconsin law defines "withdraw" to mean "to take water from surface water or groundwater." The registration and reporting rule, with one exception, does not include water systems who do not "withdraw" water from a surface or groundwater but purchase water on a wholesale basis from another system. The only members of that group the rule includes are those that divert. WDNR will need to know if a diverter is a withdrawer or a wholesale purchaser to keep from double-counting withdrawals.*

Department Response: The department concurs with the comment and will track this information to avoid double counting.

10. From the Community of Environmental Groups: *The consumptive use data required in NR 856.30 (2) (d) asks for estimated or actual consumptive use from reporting public water supplies. The definition of public water supply in this rule does not include the systems of wholesale purchasers (consecutive users), so their consumptive use would not be reported, except for diverters, leaving a gap in statewide consumptive use data. The ratio of consumptive use to withdrawal for public water supplies selling wholesale will be distorted. Public water supplies who sell on a wholesale basis typically do not have the information needed to report the consumptive use of their wholesale customers.*

    Wholesale purchasers could be required to register and report separately, thus capturing all consumptive use data. DNR would need to segregate the water source numbers for wholesale purchasers from the water withdrawal numbers of the wholesale sellers to avoid double-counting. And it would need to ensure that the wholesale sellers report total withdrawals, not just the portion of withdrawal utilized in their public water supply retail system, to avoid under-reporting of withdrawals. Depending upon how that separation is to be accomplished, it might require DNR to have information about all wholesale purchaser/seller relationships.

    An alternative to filling the consumptive use data gap is to calculate a consumptive use factor for all reporting entities, and apply it to the amount of water purchased by wholesale purchasers.

Department Response: There is no statutory authority to require wholesale customers of water withdrawers to report information. Alternate measures, including the one suggested, will have to be used to fill the data gaps for consumptive use.