Report From Agency

REPORT TO LEGISLATURE

NR 200, 201, 203, and 205, Wis. Adm. Code

Board Order No. WT-13-12
Clearinghouse Rule No. 14-027

Commented [CNH1]: The content of this form are prescribed under Wis. Stat. § 227.19(3).

Basis and Purpose of the Proposed Rule

Commented [CNH2]: Cut and paste from scope statement or plain language analysis of Board order (if scope statement is too general). See Wis. Stat. § 227.19(3)(a)

The purpose of the proposed rule changes is to ensure that the state's regulations are consistent with federal regulations as well as recent statutory revision in 2011 Act 167. The rule changes will establish clear regulatory requirements for the processing of WPDES permits. Minor clarifications and corrections will also be made to these chapters.

Specifically, the proposed rule package will address EPA's issues with the state authority regarding permit processing and other permit issuance procedural matters. In a letter dated July 18, 2011, the U.S. Environmental Protection Agency (EPA) identified 75 potential issues with Wisconsin's statutory and regulatory authority for the WPDES permit program. EPA directed the department to either make rule changes to address this inconsistency or obtain a statement from the Attorney General's Office verifying that the existing rule is consistent with federal regulations. The department believes adoption of these rule changes (referred to as Rule Package 6) will address EPA's concerns for 13 of the issues. The item number of the applicable EPA issue is indicated in each rule section that addresses an EPA issue.

Following is a brief summary of changes to NR 200, NR 201, NR 203, and NR 205, Wis. Adm. Code:

Chapter NR 200 - This chapter contains the requirements for permit applications and water quality standards variances. A new section was created to add the federal regulations for the preparation of a draft permit after the receipt of a complete application, which were lacking in the rule as cited in EPA issue 65.

Chapter NR 201 - This chapter contains the requirements for the contents of the fact sheet for WPDES permits. Because of several changes needed to update the existing rule this chapter was repealed and recreated. It now includes all the federal regulations to address EPA issues 21 and 66. It is also consistent with s. 283.45, Stats. A note states that if the public notice includes some of the information specified in the fact sheet it may be omitted from the fact sheet because it is more appropriate in the public notice (decision to issue or deny a permit and the beginning and end dates of the comment period). The recreated rule was written compliant with the format procedures for drafting rules that the existing rule did not follow.

Chapter NR 203 - This chapter contains the processes for public noticing a draft permit, informational hearing, final determination to issue or deny a permit, and public adjudicatory hearing. Following are the significant changes to this rule:

- The rule was revised to address EPA issues 3, 22, 50, and 51 to be consistent with federal regulations. This consists of language clarifying the processes for permit actions (modifications, revocation and reissuance, or termination), identifying the causes for permit actions, the notification of government agencies and others, and public informational hearing requests.
- The rule was revised to address 2011 Act 167 changes to ch. 283 and ch. 285, Stats., and changes initiated by the department to clarify public notice procedures. This consists of language to identify what is to be included in the public notice, allows use of the department's Internet Web site to post public notices and documents, proposed variances to water quality standards may be included in the public notice, the term notification replaces circulation to reflect the broader use of electronic media, and permit actions related to substantial changes to concentrated animal feeding operation nutrient management plans.

Chapter NR 205 - This chapter contains WPDES program definitions, general conditions applicable to WPDES permits, and requirements for the issuance of WPDES general permits. The rule was revised to address EPA issues 18, 45, 47, 48, 49, and 62 to be consistent with federal regulations. This consists of language that added termination of the permit for certain violations, replaced the use of the term suspension with termination, clarified the signatory requirements for permit documents, revised the reporting requirements for facility

changes, and added general conditions that permit compliance constitutes compliance for purposes of enforcement and affirmative defense.

Summary of Public Comments

Commented [CNH3]: The background memo attached to the green sheet for Board adoption should include a summary of public comments and the Department's response to those comments. Cut and paste that here. See Wis. Stat. § 227.19(3)(b).

The notice for public hearing was dated March 12, 2014. A public hearing was held May 1, 2014 in Madison. No one appeared in person.

Two comment letters were received during the comment period that concluded Mar 12, 2014. Their comments and the department's response are provided below.

Stafford Rosenbaum Attorneys:

1. Revisions to the Signatory Requirement.

   Comment - The rules should maintain a municipality's ability to authorize an individual to submit an application, as is allowed for corporate signatories, instead of the change that limits individuals that can sign on behalf of a municipality. The process for delegation also needs to be included similar to corporations.

   Response - The department agrees and revised s. NR 205.07 (1) (g) by making the municipal requirements equivalent to the corporate, and clarified what the process is for a duly authorized representative.

2. Revision to the Threshold for a Request for Public Information Hearing.

   Comment - The department changed the criteria for when a public information hearing is required that's inconsistent with s. 283.49 (1) (b), Stats. An unnecessary change was made by including language for a petition from "a small group", and then the term is undefined.

   Response - The department agrees and revised s. NR 203.05 (1) and (2) to correct the language.

3. Statutes Interpreted.

   Comment - In the citation of statutes interpreted in the board order, ss. 285.61 and 285.62, Stats. were identified. This statute relates to air permits so it's unclear why they're listed in the citation.

   Response - The reference to the statutes related to air permits was a mistake and will be corrected.

Wisconsin Electric Power Company:

1. Clarification of Language in s. NR 203.135 (5) (b).

   Comment - Use of the adjective "unmodified" has the potential to create confusion about the permit, and suggest it be replaced with "existing". Use of existing would also be consistent with the other uses of existing in this paragraph.

   Response - The department agrees with the suggested change.

2. Scope of Proposed Change to s. NR 203.136 (1) (c).

   Comment - An objection is made to the inclusion of "a decision or stipulation from a contested case hearing" as a reason to reopen a permit for modification. The reason being an administrative law judge does not have the authority to stay or remand a DNR rule in a contested case process.

   Response - Clarifying language was added to address this comment. The Department concurs that an administrative law judge does not have the authority to change or stay a standard in a rule or statute. The intent of the proposed rule language was to acknowledge that an administrative law judge can direct a permit modification that complies with promulgated rules or existing statutes. In its comments, We Energies concurs that an administrative law judge has the authority to direct a change to the permit. Consequently, paragraph (c) was revised and a separate paragraph (d) was created to clarify that administrative law judges can direct changes to permit terms and that an order from an administrative law judge (or other judicial entity or a stipulation) can be the basis for modifying a permit. If the permittee believes an administrative law judge has exceeded statutory or regulatory authority in its decision directing

a permit modification, the permittee can challenge the administrative judge's decision through judicial review.

3. Change in Description of Authorized WPDES Signatory in s. NR 205.07 (1) (g) 2.

Comment - The duly authorized representative who may be delegated authority must have overall operational authority for the facility or overall responsibility for environmental matters for the company. Because environmental matters may be the responsibility of several individuals, specific reference should be made to WPDES instead of the more generic use of environmental matters.

Response - The Department agrees with the suggested change.

Modifications Made

Since the public notice of the rule package the department made a few minor corrections and clarifications to three subsections in NR 205.08 that should have been included in the initial draft of the rule. The changes are consistent with the scope statement and are not substantive. The changes were made to be consistent with recent changes in s. 283.39, Stats., and the federal regulations. These minor corrections and clarifications include:

Amended the following introduction and paragraphs:

NR 205.08 (intro) - Replaced "suspended or revoked" with the correct expression "revoked and reissued, or terminated".

NR 205.08 (8) (a) - Included an alternative to the newspaper public notice in all counties where a discharge may occur, by adding "or in the official state newspaper and on the department's Internet Web site. This is consistent with s. 283.39, Stats. and the current department practice.

NR 205.08 (8) (h) - Added the "U.S. fish and wildlife service" to the permit distribution list to be consistent with federal regulations.

NR 205.08 (8) (j) - Replaced "revocation or suspension" with the correct expression "termination".

NR 205.08 (9) (a) - Corrected an error in a statutory reference.

NR 205.08 (9) (b) - Replaced "suspension or revocation" with a reference to the relevant procedural requirements.

NR 205.08 (10) (a) and (e) - Replaced "suspension" with the correct expression "termination", and added "reissue" and "revoke and reissue" that are actions that need to be included.

Created the following paragraph:

NR 205.08 (8) (k) - Added language regarding mailing requirements and the use of the department's Internet Web site, which is also included in s. NR 203.02 (4) (f), and is consistent with s. 283.39, Stats.

A minor correction was also made to the recreated ch. NR 201, with the deletion of paragraph (e) in s. NR 201.02 (12). This subsection addresses supplemental attachments to the fact sheet, and (e) required the attachment of land application or land treatment management plans, if applicable. These plans may be very large documents and outside the purpose of the fact sheet. The following paragraph (f) for the ground water evaluation would be the appropriate place for any discussion about management plans. There's no need to attach the management plans, but these documents can be referred to.

Appearances at the Public Hearing

None.

Changes to Rule Analysis and Fiscal Estimate

None.

Response to Legislative Council Rules Clearinghouse Report

Commented [CNH4]: Describe any modifications made to the proposed rule as a result of public comments and testimony received at the public hearing. See Wis. Stat. § 227.19(3)(b)

Commented [CNH5]: Identify the persons who appeared or registered for or against the proposed rule at the public hearing. This does not apply to persons who submitted written comments. See Wis. Stat. § 227.19(3)(c). If practicable, list the names and affiliations of persons, as listed on the appearance slip.

Commented [CNH6]: This section refers to the plain language rule analysis contained in the Board order, as required under Wis. Stat. § 227.14(2)(a). Highlight what changes, if any, were made to this analysis or the fiscal estimate as a result of public comments and testimony. Although it is not statutorily required, you should also explain changes made to the economic impact analysis.

The Legislative Council Rules Clearinghouse submitted comments on April 8, 2014. The comments were in the following two categories:

2. Form, style and placement in administrative code.

5. Clarity, grammar, punctuation and use of plain language.

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

2.b. Paragraph (h) of s. NR 201.02 (12) was changed to a new sub. (13), but the "section" reference is still appropriate because the information that may be omitted applies to the entire section not just sub. (12). The language in sub. (13) was revised to indicate what items are typically included in the public notice that may likely be omitted from the fact sheet.

5.a. The language identified to be edited in s. NR 200.11 (2) wasn't made. It's correct as written, and is in accordance in 40 CFR 124.6 (b), which EPA instructed the department to include.

5.h. Instead of defining what a "small group" is under s. NR 203.05 (1) (e), the expression was removed and replaced with "fewer than 5 persons".

5.i. Specifying in s. NR 203.05 (2) (d) how the department will determine whether "there is significant public interest in the permit application" in deciding on whether an informational hearing is needed will not be included in the rule as suggested. It would be difficult to define what is significant and would eliminate any flexibility in making this determination. In the past, questions on whether a hearing should be held have not been a problem. A petition signed by 5 persons under s. NR 203.05 (2) (c) is a relatively easy threshold to show public interest for when a hearing must be held.

5.l. Clarification was requested on this sentence. None is needed. The code reference s. NR 203.015 contains the information about the exemption "without a draft permit or public review". It's unnecessary to repeat that here.

5.m. The question of "to whom is the notice provided?" … is addressed in the following sentence in the reference to s. NR 200.11.

5.q. The comment was to replace phrase "in accordance with" and instead use "under". Three changes were made. But, this change wasn't always appropriate as it depends on the specific sentence where it's used. The existing rule language used "in accordance with" twice at s. NR 203.02 (k) and s. NR 203.03 (1), but it wasn't changed because it wouldn't read right.

Final Regulatory Flexibility Analysis

Not applicable. The department's determination is that proposed Rule Package 6 will not have an economic impact, and we do not anticipate any entity will be economically affected. The requirements of this rule package establish permit processing procedures that are implemented by the department and affect the department staff, not the permit applicants. The solicitation notice for comments on the economic impact analysis was posted on November 4, 2013. The department has not received any comments or requests for information about Rule Package 6.

Response to Small Business Regulatory Review Board Report

Not applicable. The requirements of this rule package establish permit processing procedures that are implemented by the department and affect department staff, not the permit applicants.

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

Commented [CNH7]: Wis. Stat. § 227.19(3)(d). requires the Department to provide reasons for rejecting changes proposed by the LCRC. Be sure to refer to comments by the specific number they are assigned in the LCRC report.

Commented [CNH8]: Cut and paste from background memo attached to the green sheet for Board adoption. See Wis. Stat. § 227.19 (3) (e) for required content.

Commented [CNH9]: If the SBRRB prepared a report on the proposed rule, you must include a response. Otherwise, write: "The Small Business Regulatory Review Board did not prepare a report on this rule proposal." See Wis. Stat. §227.19(3)(h).