

Report to
Legislative Council Rules Clearinghouse
NR 102, 104 and 219, Wis. Adm. Code
Natural Resources Board Order No. WY-17-15

Wisconsin Statutory Authority

Sections 281.12, 281.13, 281.15, 283.31, 283.13, 283.37, 283.55, 283.83, and 227.11, Wis. Stats.

Revisions to the recreational use, updated recreational water quality criteria, and newly developed impaired waters listing protocols will be promulgated pursuant to ss. 281.12, 281.13, and 281.15, Wis. Stats.:

- Section 281.12, Wis. Stats., grants the WDNR general supervision and control to carry out the planning, management, and regulatory programs necessary for prevention/reduction of water pollution and for improvement of water quality.
- Section 281.13(1)(a) and (b), Wis. Stats., give the department the authority to create rules to research and assess water quality in the state.
- Section 281.15, Wis. Stats., mandates that the department promulgate water quality standards, including water quality criteria and designated uses. It recognizes that different use categories and criteria are appropriate for different types of waterbodies, and that the department shall establish criteria which are not more stringent than reasonably necessary to ensure attainment of the designated use for the waterbodies in question.

The Wisconsin Pollutant Discharge Elimination System (WPDES) permit program procedures to implement the revised standards will be promulgated under the following authority:

- Section 283.31(3) and (4), Wis. Stats., state that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation, state water quality standards, and total maximum daily loads.
- Section 283.13(5), Wis. Stats., states that the department shall establish more stringent limitations than required under subs. 283.13(2) and (4) when necessary to comply with water quality standards.
- Section 283.37, Wis. Stats., gives the department authority to promulgate rules regarding permit applications.
- Section 283.55, Wis. Stats., gives the department authority to impose monitoring and reporting requirements.
- Section 283.83, Wis. Stats., requires the department to establish a continuing planning process and that plans shall include implementation procedures including compliance schedule for revised water quality standards.
- Section 227.11(2), Wis. Stats., provides the department with the authority to promulgate rules that are necessary to administer the specific statutory directives in ch. 283, Wis. Stats.

Federal Authority

Clean Water Act

- Section 303(i)(1)(B) requires states with coastal waters (including the Great Lakes) to promulgate criteria for pathogens/pathogen indicators (including bacteria) and submit

these criteria to EPA for approval.

- Section 303(c) states to periodically review and modify or adopt, if necessary, water quality standards. This requirement applies to all surface waters in the state.
- Section 301(b)(1)(C) requires compliance with effluent limits needed to meet water quality standards.

Federal regulations

- 40 CFR 131.10 and 11 require states to develop water quality standards comprised of designated uses and criteria to protect the uses.
 - 40 CFR 131.10(j) requires states to conduct a use attainability analysis to remove or modify the designated uses specified in Section 101(a)(2) of the Clean Water Act, which include recreation.
 - 40 CFR 131.11(b) states that the criteria must be based on federal guidance, federal guidance modified to reflect site-specific conditions, or other scientifically-defensible methods.
- 40 CFR 122.44(d) requires that water quality based effluent limits be established when discharge levels have the potential to cause or contribute to an exceedance of a water quality standard.
- 40 CFR 122.45(d) requires that effluent limits be expressed as average weekly and average monthly values for publicly owned treatment works (POTWs) with continuous discharges.

Comparison of Adjacent States

In this rule package, the department has selected an approach that is consistent with neighboring states, selecting *E. coli* as the pathogen indicator. All neighboring coastal states (Michigan, Minnesota, Indiana, Ohio) except Illinois currently use *E. coli* as the pathogen indicator. Illinois is currently in the process of revising their criteria to use *E. coli*. Iowa is not a coastal state and is therefore not subject to the same BEACH Act regulations, but also uses *E. coli* as its indicator. The states vary in certain specifics associated with the criteria and permit implementation, since some states' criteria and implementation procedures are based on older EPA recommendations or they have selected different illness rates, etc. The department is generally consistent with the other states in approach but follows the most recent federal recommendations, similar to Ohio.

Court Decisions Directly Relevant

N/A

Analysis of the Rule - Rule Effect - Reason for the Rule

The Clean Water Act (CWA) requires states to adopt water quality standards to protect recreation in and on the water. Water quality standards include a recreation designated use and water quality criteria that protect this use. In addition to the CWA requirements, the Beaches Environmental Assessment and Coastal Health (BEACH) Act requires States with coastal waters (e.g., the Great Lakes) to adopt new or revised criteria for pathogens (including bacteria) to protect recreation not later than three years after the United States Environmental Protection Agency (EPA) publishes revised criteria. The EPA published revised national recommended recreation water quality criteria for bacteria in 2012.

Human feces contain a number of pathogens that can be spread through water and cause a wide range of diseases. The EPA employs the pathogen indicator concept for these criteria in which the indicator does not itself cause disease, but instead signals the potential for illness caused by human fecal contamination. Pathogen indicators, such as certain bacteria, are used because they tend to be more numerous than pathogens in human fecal matter and are cheaper, safer, and easier to measure. In their 2012 recommended criteria, EPA provides a choice for states to use either *E. coli* or enterococci as their pathogen indicator.

The goals of this rule package are to adequately protect the public while recreating in and on Wisconsin's waters; revise Wisconsin's bacteria water quality criteria to be consistent with EPA's latest recommendations; and update the permit requirements for sewage treatment works to ensure consistency with EPA's policies. To accomplish these goals, the department proposes to revise the bacteria water quality criteria for recreation in ch. NR 102, Wis. Adm. Code, remove fecal coliform criteria for individual waters from ch. NR 104, Wis. Adm. Code, and revise the permit requirements for publicly owned and privately owned domestic sewage treatment works in ch. NR 210, Wis. Adm. Code.

Agency Procedures for Promulgation

The department will hold hearings on April 18, 2019 at 2:00 p.m. at WI Department of Natural Resources, 101 S. Webster St., Madison, WI 53707, Room G27A; and April 23, 2019 at 1:00 p.m. at WI Department of Natural Resources, 1300 W. Clairemont, Eau Claire, WI 54701. The hearings will be followed by board adoption expected in June 2019, followed by a request for the governor's signature and legislative review.

Description of any Forms (attach copies if available)

N/A

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