

Modifications From Agency

REPORT TO LEGISLATURE

NR 102, Wis. Adm. Code
Board Order No. WY-23-13
Clearinghouse Rule No. 19-094

Basis and Purpose of the Proposed Rule

The federal Clean Water Act requires states to develop and update water quality standards protective of waterbodies' designated uses, and requires states to conduct waterbody assessments based on these standards every two years. U.S. EPA has been working with states over the last two decades to develop robust biological metrics for use in these assessments, and supports states in implementing these procedures as part of their assessment protocols.

Like most states, Wisconsin uses biological metrics to assess the health of waterbodies' aquatic life communities, such as fish, insect, plant and algae communities. This rule establishes general expectations for waterbodies' biological health and provides transparency on the types of assessments done and how they fit under the Clean Water Act. This rule also establishes assessment thresholds for algae (chlorophyll *a*) that are needed to protect recreation, and dissolved oxygen criteria to protect lakes with coldwater fish for which existing criteria were not appropriate.

Another portion of this rule contains detailed procedures for evaluating whether waterbodies attain the phosphorus criteria that were promulgated in 2010. It incorporates an approach that assesses a waterbody's algal and plant responses to phosphorus levels ("phosphorus response indicators") before making an impairment determination.

Germane Modifications

The Natural Resources Board adopted Board Order WY-23-13 on December 11, 2019. After Governor approval, the rule was submitted for legislative review on December 23, 2019. The Assembly Committee on Forestry, Parks, and Outdoor Recreation held a hearing on February 4, 2020, and received comments. The rule was recalled by the department on February 28, 2020 to make germane modifications to address those comments.

The primary comments received at the legislative hearing were:

1. A concern that biological metrics might impact permit limits.
2. A preference for including numeric biological thresholds instead of only narrative statements of general policy.
3. Concerns about methods used to develop the algae (chlorophyll *a*) thresholds.

Comments were also received in support of the rule from multiple organizations.

The department reviewed each concern raised and made germane modifications to the rule to address items 1 and 2. The department conducted significant review of item 3 and confirmed that the original approach was scientifically sound and consistent with methods used by other states.

1. The germane modifications addressing item 1 restructure the rule to further clarify that biological metrics are not considered to be part of the state's water quality criteria, but are instead part of the state's waterbody assessment protocols. Although these metrics never affected permit limits, the intent of these changes (using different terminology and reorganizing the chapter) is to further clarify that biological metrics are applied differently from water quality criteria and are not used in developing effluent permit limits. These modifications include the following:

- Several sections of the rule language were relocated from their previous locations under the water quality criteria portion of the code to proposed Subchapter III, Waterbody Assessments and Reporting. This restructuring necessitates numerous, but minor, language revisions to follow Wisconsin’s legislative drafting style.
 - Terminology was revised from “biocriteria” to “biological assessment thresholds” throughout the rule, and related language was reframed accordingly.
 - Minor language updates were made for clarity.
2. The germane modifications addressing item 2 are as follows:
- A new section was created for numeric biological assessment thresholds for lakes, reservoirs, and impounded flowing waters. This section contains relocated material as well as new biological assessment thresholds for aquatic plants in lakes and reservoirs. Together, this forms a complete suite of numeric assessment thresholds for these waterbody types.
 - For streams and rivers, the department is currently working with EPA on updating biological metrics for fish and aquatic insects. Once updated, those numeric biological assessment thresholds for streams and rivers may be proposed for promulgation in a future rule package.

Appearances at the Public Hearing on Germane Modifications

There were twenty attendees at the public hearing on germane modifications, on October 25, 2021; one registered in support of the rule and provided verbal comments. Six comment letters were received, from a total of nine organizations and two individuals.

Summary of Public Comments on Germane Modifications

See attached “Public Comments and DNR Responses on Germane Modifications to: NR 102: Waterbody assessments, biological assessment thresholds, phosphorus response indicators, and dissolved oxygen criteria (Natural Resources Board Order No. WY-23-13).”

Modifications Made in Response to Public Comments

See the following item numbers in the “Public Comments and DNR Responses on Germane Modifications” document referenced above describing revisions made to the rule or Technical Support Document in response to comments:

- 3b: A sentence was added to specify that listing a waterbody as having “observed effects” of biological degradation does not require development of a total maximum daily load for a waterbody unless a specific pollutant with a water quality standard is identified by the department as a cause of the observed effect. Related language was also revised accordingly in a few other portions of the code.
- 4e: Rule language was revised to specify that phosphorus criteria and lake chlorophyll *a* biological assessment thresholds for aquatic life are calculated using an arithmetic mean.
- 5b: Language was revised to clarify the application of dissolved oxygen thresholds to waters with a use attainability analysis.
- 6a: The definition of “Stratified two-story fishery lake” was revised to specify that the documentation required to support a two-story fishery lake classification applies to documentation that a coldwater fish population was sustained “at any time” since 1975. The Technical Support Document was also revised to correct an error noted by the commenter.

Changes to Rule Analysis and Fiscal Estimate

No changes were made based on the germane modification comment period.

Final Regulatory Flexibility Analysis

No changes were made based on the germane modification comment period. The department expects this rule package to have minimal economic impacts, and the rule is not expected to incur additional costs for small businesses.

Response to Small Business Regulatory Review Board Report

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