Report From Agency

REPORT TO LEGISLATURE

NR 111, Wis. Adm. Code

Board Order No. WY-19-14
Clearinghouse Rule No.19-105

Basis and Purpose of the Proposed Rule
The purpose of the proposed rule is to ensure that the state's regulations are consistent with federal regulations. Minor clarifications and corrections will also be made.

Under the federal water pollution control act (Clean Water Act), the U.S. Environmental Protection Agency (EPA) has a responsibility to promulgate rules addressing the impingement and entrainment of aquatic organisms at cooling water intake structures. Effective January 17, 2002 and October 14, 2014, the EPA promulgated rules that specify requirements for New Facilities and Existing Facilities that address impingement and entrainment at cooling water intake structures. In order to be consistent with the EPA-promulgated New Facilities and Existing Facilities Rules, the Department of Natural Resources (the department) is proposing to create ch. NR 111, Wis. Adm. Code.

Summary of Public Comments
Twenty six unique written comments were received and no verbal comments were received on the proposed creation of ch. NR 111, Wis. Adm. Code, concerning board order WY-19-14. The following is a summary of comments and the department's response.

1. Some facilities had an overarching concern of being penalized for taking early action.

   Response
   The department recognizes that some facilities took early action to upgrade intake structures either under previous (now remanded) regulations or in anticipation of coming regulations. However, the department must implement the federal regulations currently in effect. With this said, there are opportunities within the rule to use recently installed technologies for BTA determinations for both impingement (i.e. system of technologies) and entrainment on site specific basis, even in instances where the technologies do not fall underneath one of the *explicitly* identified allowable compliance technologies such as 0.5 fps, modified traveling screens, offshore velocity caps, or closed cycle recirculating systems. The department will review the proposed BTA determinations on a site specific basis in accordance with the rule. No changes were made to the rule as a result of this overarching comment.

2. NR 111.03 (26) Definition of "Maximum design intake velocity" – This definition is not found in the § 316(b) Rule and could have implications for facilities with cooling water intake structure configurations other than those with screens that have a mesh with a maximum opening distance of 0.56 inches. This definition as currently written could render facilities with certain types of intake structures noncompliant. For example, Port Washington Generating Station, located on the shore of Lake Michigan, utilizes a porous dike intake structure as the point of cooling water withdrawal from the source waterbody. The porous dike is an engineered structure constructed of various sized quarried stone (smaller stone in the core, larger armor stone on the exposed outer layer) and designed such that the velocity through the structure would be no more than 0.5 feet per second (fps) under all conditions. The design intake velocity was determined through physical modeling and verified by field measurements. Because the structure does not have

uniform openings of a specific size, the intake velocity cannot be calculated using the equation specified in s. NR 111.03 (26). To avoid excluding intake structures that are not screens with a specified mesh size, we request that the definition of maximum design intake velocity be augmented to say, "If the above equation cannot be applied, the maximum design intake velocity shall be determined using an alternative method approved by the Department.".

Response
The department agrees that more flexibility ought to be made in this definition for extenuating circumstances that still fulfill the intent of this provision. Language in the rule was adjusted to allow for more flexibility.

3. NR 111.12 Impingement mortality BTA standards - The description of the "0.5 Feet per second maximum design intake velocity" standard at s. NR 111.12 (1)(a)2 specifies that the maximum design intake velocity shall be calculated using the equation specified in s. NR 111.03 (26). However, that description as currently written limits the applicability of the standard to screens with a specific mesh size and prevents other types of intake structures from being able to utilize low intake velocity as a compliance method. We request that the description of the maximum design intake velocity standard be augmented to say, "The maximum design intake velocity shall be determined using the equation specified in s. NR 111.03 (26) or another method approved by the Department."

Response
The department agrees that more flexibility ought to be made in this definition for extenuating circumstances that still fulfill the intent of this provision. Language in the rule was adjusted to allow for more flexibility.

4. NR 111.14 Monitoring requirements – NR 111.14 (3) requires the permittee to monitor the total volume of water withdrawn and the percent used for cooling on a daily basis. The federal rule does not require daily monitoring of the percent used for cooling. Direct monitoring of the percent used for cooling is often not feasible, and estimation can be complex. For these reasons, a higher-level evaluation on an infrequent basis, such as at the time of permit application submittal, is more appropriate for the purpose of determining whether the facility exceeds the 25 percent threshold for applicability of NR 111. Determining the percent of water withdrawn that is used for cooling on a daily basis would be onerous and would provide little value, given that the decision as to whether or not NR 111 applies is not made on a daily basis. Therefore, this requirement should be removed or flexibility should be written into the provision to allow the Department to waive the requirement on a site-specific basis. (The same comment also applies to NR 111.22 (3).)

Response
The department agrees that there should be some flexibility in the monitoring frequency for "percent used exclusively for cooling" especially for facilities that have little variability in this value. Language in the rule was adjusted to allow for more flexibility. However, the department believes that there is value in reporting the intake flow rate on a daily basis. No changes were made to the requirement for daily flow rate monitoring.

5. NR 111.22 (2) requires continuous monitoring of the head loss across the screens. This is more frequent than what is required by the federal rule, which states, "…you must monitor head loss or velocity during initial facility startup and thereafter at the frequency specified in your NPDES Permit, but no less than once per quarter." The wording should be revised to be consistent with the federal rule.

Response
The department has revised this language to provide flexibility for unusual cases in which continuous monitoring is infeasible or overly burdensome, but it is the department's intent to require continuous monitoring where feasible.

6. NR 111.22 (3) for new facilities mirrors NR 111.14 (3) for existing facilities, and the same comment as above applies regarding the daily requirement to monitor the percent of the water withdrawn that is used for cooling.

   Response
   See response to comment 4.

7. NR 111.22 (4) requires the permittee to conduct weekly inspections of the intake structure but does not include the relief that applies to the corresponding requirement in Subchapter II and the federal rule for existing facilities. We suggest adding the same language that is included in NR 111.14 (4), which states, "The department may establish alternative procedures if this requirement is not feasible, such as in the cases of offshore intakes, velocity caps, intakes inside dams, or monitoring during periods of inclement weather."

   Response
   This language mirrors the requirements in the federal regulations. The alternate procedures is available for existing facilities in 40 CFR 125.96(e). However, the new facilities rules lacks the same flexibility and the department does not have the authority to make regulations that are less stringent than the federal regulations. No changes were made to the rule based on this comment.

8. NR 111.32 (3) states "The permittee shall monitor entrainable organisms outside the zone of influence of the intake structure." This wording does not match that of the federal rule at 40 CFR § 125.96 (d)(3), which requires the permittee to "…monitor entrainable organisms at a proximity to the intake that is representative of the entrainable organisms in the absence of the intake structure." The wording should be revised to match the federal rule.

   Response
   The department has made this change.

9. NR 111.32 (3) states that the permittee shall monitor the AIF for each intake at the same time as collection of the samples of entrainable organisms. While the use of the term AIF matches the federal rule, it is not a correct application of that term. AIF is a long-term (three or five years) average of the intake flow rate, whereas a shorter time period (such as daily) is more appropriate for measuring the flow rate at the time of sample collection. We recommend that the Department revise the wording to replace "AIF" with "intake flow rate."

   Response
   The requirement to monitor AIF comes from the federal rule at 40 CFR 125.96(d)(3), which has the following language, "In addition, you must monitor the AIF for each intake. The AIF must be measured at the same time as the samples of entrainable organisms are collected.". Given that AIF is technically defined as a long-term average, the department understands this provision to mean that the actual average intake flow spanning each entrainment sampling event should be reported. As a result, the department has changed the language from "AIF" to "actual flow withdrawn".

10. NR 111.41(5)(b)(2)(a) - Impingement mortality monitoring frequency. For facilities that rely in part on a credit for reductions in impingement mortality already obtained at the facility, this condition states that a permittee must "Collect data no less frequently than monthly. The Department may establish more frequent data collection or require a period of data collection longer than 2 years." For facilities that claim impingement mortality reductions due to decreased flow from reductions in operation, such as taking seasonal outages, collecting monitoring data on a monthly basis may not be practical. We suggest that this language be modified to state "Collect data no less frequently than monthly. The Department may establish alternate data collection frequencies or duration on a case by case basis."

    Response
    This language parallels the federal rule. No changes were made to the rule as a result of this comment.

11. NR 111.41 (8) Entrainment Characterization Study includes requirements above and beyond those of the federal rule. In particular, the specification of the data collection period and frequency is overly prescriptive and does not account for site-specific circumstances that might warrant a different data collection period and frequency. This level of detail is typically left to the permittee and its consultant(s) to negotiate with the Department. Therefore, the following sentence should be removed from the proposed rule: "The data collection period and frequency shall be no less than biweekly during the periods of primary reproduction and larval recruitment, and peak abundance, as identified by the department."

    Response
    The federal rule allows the director to determine the collection period and frequency. The department will be requiring facilities to collect data no less than biweekly during the period of primary reproduction and larval recruitment and peak abundance. No changes were made to the rule as a result of this comment.

12. NR 111.41 (9) Comprehensive Technical Feasibility and Cost Evaluation Study goes above and beyond the federal rule by including variable speed pumps as a technology that must be evaluated as part of the study. 40 CFR § 122.21 (r)(10) does not require variable speed pumps to be evaluated, and EPA does not consider these to be BTA for several reasons, including the fact that they have limited application. In fact, our own experience with installing variable frequency drives (VFDs) on the circulating water pumps at Valley Power Plant in Milwaukee has demonstrated that incorporating VFDs into a cooling water system is complex and flow reduction is limited by condenser backpressure and other operational concerns. Instead of mandating the evaluation of variable speed pumps, the Department should remove the requirement from the rule language and leave it as an optional technology to consider as site-specific circumstances warrant.

    Response
    The department understands that there may be limitations to the feasibility of VFDs. For this reason, it is important that the permittee provides such information to the department as the department makes the determination, as the department does intend to consider VFDs as a candidate entrainment BTA. No changes were made to this rule as a result of this comment.

13. NR 111.41 (13) Alternatives Analysis for Candidate Entrainment BTA is a new requirement that is not included in the federal rule and that the Department has said is optional. However, the proposed NR 111 language does not explicitly indicate that this requirement is optional. NR 111.40 (2)(b) states that for existing facilities with one or more cooling water intake structures that withdraw between 2 and 125 MGD AIF, the permittee shall submit the application information required under s. NR 111.41 (1), (2), and (13). And NR111.41 (13) in turn states that the permittee "…shall submit information on analysis of available entrainment reduction technologies and strategies if the applicant has such information at the time of the permit application…" The proposed language could lead permit drafters to require permittees to gather the listed information in advance so that it will be available for submittal with the permit application. This would negate the cost savings that EPA intended to be available for facilities with an AIF < 125 MGD. Executing an entrainment characterization study and compiling the other information that facilities with larger withdrawals are required to submit with their permit applications can take years and cost several hundred thousand dollars. Since facilities with lower AIF should theoretically have less potential to impact the source water body via their water withdrawals, the level of effort and expense associated with the application requirements should be correspondingly lower. Therefore, the Department should revise the proposed NR 111 language to make the Alternatives Analysis for Candidate Entrainment BTA requirement explicitly optional.

    Response
    A note was added to this section to clarify that this section does not require the applicant to collect any new information or create any new documents. However, if the facility has done a study or analysis it will need to share it with the department.

14. NR 111.01 Purpose – Include "and existing" facilities in the first sentence so that it reads, "The purpose of this chapter is to establish requirements that apply to cooling water intake structures…at new and existing facilities."

    Response
    This change was made to the rule.

15. NR 111.02 Applicability – Add the following phrase to the end of the sentence at (2)(b): "…to withdraw water from surface waters of the state." Also, reword (2)(c) to read, "The facility uses or proposes to use at least one cooling water structure and uses or proposes to use at least 25% of the total water…"

    Response
    The withdrawal of water from surface waters of the stats is already included in the definition of cooling water intake structures. The first change was not made to the rule. The department has made changes to the rule to clarify that it also applies to proposed intake structures.

16. NR 111.03 (7) Definition of Cooling Water Intake Structure – The Department needs to add the word "surface" before the term "waters of the state." This definition applies to "…the total physical structure and any associated constructed waterways used to withdraw cooling water…" and it "…extends from the point at which water is withdrawn from waters of the state up to, and including, the intake pumps." In the context of this definition, this can only mean surface waters of the state.

    Response
    The department agrees that it should be clear that this rule applies to cooling water intake structures that withdraw water from surface water bodies. "Surface" was added before "waters of the state" in this subsection.

17. NR 111.16(2) Supplemental Technologies and Monitoring – NR 111.16 pertains to the protection of threatened and endangered species, not fragile species. Therefore, the first two sentences of this subsection are out of place. The 40 CFR § 125.98(d) Supplemental Technologies and Monitoring requirements should either be combined with NR 111.12(2) Additional Measures for Other Species subsection or a new subsection under NR 111.12 should be created. NR 111.12 establishes the impingement mortality BTA standards and the supplemental technologies and monitoring requirement best fits in this section of the NR 111 rule. The final sentence of NR 111.16(2) only pertains to threatened and endangered species and that requirement should be moved up to subsection (1).

    Response
    NR 111.16 has been renamed to make it more inclusive of other protections that are within it.

18. NR 111.40 Application materials – NR 111.40 (1)(a) lists some of the application requirements for new facilities and refers to information required under s. NR 111.41 (3)(a) to (h). However, NR 111.41 (3) only contains items (a) to (c). Moreover, the requirement does not match the federal rule requirements, since some of the aspects of the source water baseline biological characterization data in the federal rule are not required for new facilities (i.e., 40 CFR § 122.21 (r)(4) (ix) – (xii)). The Department should review the application materials requirements again and ensure that NR 111 matches the federal rule.

    Response
    There was a typo in the rule. The language should have said (a) to (c) i. This change was made to the rule.

19. NR 111.40 Application materials – Item (2)(c) specifies the application requirements for existing facilities with cooling water intake structure(s) that withdraw > 125 MGD AIF. It does this by referring to the requirements specified in (2)(b) for facilities that withdraw between 2 and 125 MGD and adding the requirements that apply only to facilities withdrawing > 125 MGD. However, this method of citing the requirements results in the inclusion of the Alternatives Analysis for Candidate Entrainment BTA at NR

111.41 (13), which does not apply to facilities withdrawing > 125 MGD. Therefore, we recommend removing the reference to paragraph (b) and instead explicitly listing the application requirements that are necessary for those facilities.

Response
The department has made this change to ensure clarity in application material requirements.

20. NR 111.41 Application Materials – To avoid confusion, we recommend making item "(1)" reserved and starting the numbering at "(2)" so that the numbering of the requirements matches that of the federal rule (e.g., "(r)(9)" would then be the Entrainment Characterization Study in both the state and federal rules).

Response
The department is not able to reserve numbers in regulations as it does not match our state rule formatting. No changes were made to the rule as a result of this comment.

21. First, any and all compliance requirements that would entail or involve process changes or engineered alterations to the existing design must commence after the Rule is enacted and not before. It is inequitable to require the Permittee to undergo a potential re-design and installation of a new intake/discharge system before the Rule is final and legally binding. Given the expense associated with such an effort, fairness requires that all actions necessary to achieve compliance with the new Rule be triggered after the Rule is enacted, and not before.

Response
The department is adopting federal regulations which became effective in 2001 and 2014. These regulations are already enacted and enforceable and the department is required to issue permits that are consistent with the federal regulations. No change was made to the proposed rule in regard to this comment.

22. In addition, once the Rule is enacted, compliance cannot be immediate. Immediate compliance is both unfair and impractical. Instead, compliance must occur over some measured time periods, with increments of at least six months for each milestone. For example, the Permittee assumes that the Wisconsin Department of Natural Resources will want to review and approve in advance any engineered process design changes. Permittee submits that the Department will want at least six months from the date of submission of plans, specifications and drawings to review, comment upon and/or approve of such submissions given the likely complicated technical nature of such submissions. Additionally, it is expected that the permit process would set forth a mutually agreed upon timeline for compliance based upon Permittee's required timeline for design and construction of an alternate system.

Response
The rule already allows for a schedule to be put into permits to allow the facility to come into compliance as soon as practicable in NR 111.11 (3). Permit schedules are made in consultation with the facility. No change was made to the proposed rule in regard to this comment.

23. 125.96(c) appears to be missing from NR 111. The requirements are in the new units at existing facilities subchapter but not in the existing facilities subchapter.

Response
It was not the intent to remove this section of federal code. It has been added to NR 111.14.

24. The rule is not consistent with state endangered species law. Where the federal endangered species laws are cited, the state law should also be cited. It should also be noted in the rule that incidental take law applies to all species, not just fish and shellfish.

Response

State endangered species law was added to the rule in several locations. A note was also added to the front of the rule specifying that all state endangered species law must be followed.

25. The protection of critical habitat only applies to federally endangered species and this should be made clear in the rule.

    Response
    This change was made to the rule in several locations.

26. Alewife, white perch, and rainbow smelt should only be listed as nuisance species in inland waters since they are important forage fish in Lake Michigan.

    Response
    This change was made to the rule in the nuisance species list.

Modifications Made
Modifications were made as noted in numbers 2 - 6, 8, 9, 13 – 19, and 23 – 26 above as a result of comments received.

Appearances at the Public Hearing
Brian O'Neil, representing Environmental Consulting and Technology (ECT), Inc. attended the hearing. Mr. O'Neil indicated that his position on the rule was "as interest may appear".

Changes to Rule Analysis and Fiscal Estimate
No changes were made to this analysis or the fiscal estimate as a result of public comments and testimony since no comments were made on the Rule Analysis and Fiscal Estimates. The changes that were made to the rule as a result of public comments did not require a new rule analysis and fiscal estimate.

Response to Legislative Council Rules Clearinghouse Report
Comments received from the Wisconsin Legislative Council Rules Clearinghouse were related to: statutory authority; form, style, placement in administrative code; clarity, grammar, punctuation and use of plain language; potential conflicts with, and comparability to, related federal regulations. The department made all requested changes except as follows:

Comment 1.a. – The department should more directly explain the relationship between the proposed rule and s. 227.139, Stats., which places a general limit on an agency's authority to promulgate certain high-cost rules. In its fiscal estimate and economic impact analysis to the proposed rule, the department indicates the rule has no direct economic impact because "the rule itself will not impose any additional economic or fiscal impact besides what the federal government requirements imposed". The department estimates the cost of the federal rules, which it asserts would be imposed in the absence of department rulemaking, to be approximately $13 million per year.

Comment 1.b. – Section 227.139, Stats., as enacted under 2017 Wisconsin Act 57, prohibits an agency from proceeding with a rulemaking for which the economic impact analysis describes an impact of $10 million over a two-year period. Instead, under s. 227.139, Stats., an agency must stop work on the rule until legislation is enacted to specifically authorize the agency to resume the rulemaking.

Comment 1.c. – This statutory limitation does not apply to the proposed rule, because the rule is based on a scope statement approved by the Governor in 2015, while 2017 Wisconsin Act 57 first applies to rules promulgated based on scope statements approved after the effective date of the Act. Nonetheless, through its fiscal estimate and economic analysis, the department appears to imply that s. 2227.139, Stats., would not

apply because a similar impact would be imposed under the federal rules in the absence of state rulemaking. With respect to a proposed rule relating to water pollution, such as this particular rule, the basis for the department's conclusion regarding its statutory authority is unclear.

Comment 1.d. – Several provisions of s. 227.139, Stats., and the legislative history of 2017 Wisconsin Act 57 suggest the limitation of rulemaking authority would apply, but for the initial applicability of the Act. In particular, s. 227.139 (4) (a) 1. To 3., Stats., specifically provides an exemption for certain rules promulgated by the department, if those rules are no more stringent than required under the federal Clean Air Act. However, s. 227.139, Stats., provides no similar exemption for rules promulgated by the department that are intended to conform to other federal regulations, such as the federal Clean Water Act. Additionally, during the Legislatures' consideration of 2017 Senate Bill 15, which was enacted as Act 57, the Assembly rejected an amendment to the bill that would have provided a broad exemption from the limitation of s. 227.139, Stats., for "a proposed rule that is required in order to comply with a federal law or an order from the federal government". [Assembly Amendment 4 to 2017 Senate Bill 15, laid on the table, Ayes, 62; Noes, 33 (June 14, 2018).]

Response to Comments 1.a.-d.
As noted in the Clearinghouse Report, Wis. Stat. s. 227.139 does not apply to the proposed rule. In addition, s. 227.139 applies to proposed rules where an economic impact analysis indicates that $10,000,000 or more in implementation and compliance costs are reasonably expected to be incurred or passed along to businesses, local governmental units, and individuals over any 2-year period as a result of the proposed rule. Permittees are required to comply with the federal rules the proposed rule implements, and thus bear the implementation and compliance costs, whether or not the proposed rule is finalized. There are no additional requirements contained in the proposed rule beyond those in the federal rules. Accordingly, implementation and compliance costs to the permittees do not arise as a result of the proposed rule.

Comment 2.a. – Throughout the proposed rule, the department should review the use of the terms "applicant", "permittee", and "owner or operator" for consistency. For example, the first sentence of s. NR 111.41 (13) uses both "owner or operator" and "applicant". Are these different parties or the same party? In addition, in s. NR 111.25, although sub. (2) (intro.) refers to "materials submitted by the applicant", sub. (2) (a) refers to the "permit application from the permittee". Are the "applicant" and the "permittee" different parties or the same party?

Response
The proposed rule language is consistent with the language used in the federal rule with the exception that the proposed rule does not use "you" or "your" when the federal language uses "you" and "your". "You" was changed to "owner or operator" unless another term such as "applicant" or "permittee" was used earlier in that paragraph or section and would be more consistent with the federal regulations.

Comment 2.j. – In s. NR 111.41 (19) (c) 1. A., the department should consider changing "fish and shellfish and all life stages" to " all life stages of fish and shellfish" because the latter is a defined term but the former is not. The department should consider a similar change to "impinged life stages of fish and shellfish" in subd. 2. b.

Response
This language is consistent with federal rule and not all life stages of fish and shellfish will be able to be impinged since most eggs and larvae would be entrained rather than impinged. No changes were made to the rule as a result of this comment.

Comment 5.d. – In s. NR 111.03 (18), how will the department's decision to deem a species as a "fragile species" be manifested?

Response
A facility may submit data quantifying fish impingement survival rates across multiple facilities or intake configurations. DNR would review the data and make a determination as to whether the species should be classified as "fragile."

Comment 5.e.(1). – In s. NR 111.03 (34) how will the department's decision to add the list of nuisance species be manifested?

Response
The department may classify a species as a nuisance species in one of three ways. This may be done by modifying NR 111.03 (34), modifying NR 40, or on a facility specific basis as determined by department fisheries biologist. Any facility specific determination would include the opportunity for public input during the permit reissuance process.

Comment 5.e.(2). – In s. NR 11.03 (34) will there be any unintended consequences for the operation of the chapter by listing two species (alewife and rainbow smelt) as "nuisance species" in sub. (34) when they are also listed as "fragile species" in sub. (18)?

Response
The department does not believe that there will be any unintended consequence. Alewife and rainbow smelt are considered a nuisance species in inland Wisconsin waters as it is a non-native fish (albeit an important prey base in the Great Lakes), and it is one of the species specifically listed as a fragile species in the federal rule.

Comment 5.f. – In s. NR 111.03 (35) (b), the reference to "large aquatic organisms" might be ambiguous. The applicable federal regulation provides some frame of reference for the word "large" by listing "marine mammals, sea turtles, and other large aquatic organisms". [40 C.F.R. s. 125.92 (v).] Are there any analogous examples that could be provided in par. (b) to give connotation to the word "large"?

Response
The department is paralleling language from the federal rule in this paragraph but removed the examples as these marine species are not present in Wisconsin. No changes were made to the rule as a result of this comment, as the department does not want to risk altering the meaning of the term "large aquatic organism."

Comment 5.q.(1) – In s. NR 111.41 (3) (intro.) the meaning of the first sentence is not clear. It states that certain information "is required" in order to perform certain characterizations. But it is not clear whether this sentence actually imposes a requirement on any party.

Response
This language is from the federal rule, and the department does not believe that it will be able to make changes without changing the meaning from the federal rule. No changes were made to the rule as a result of this comment.

Comment 5.q.(2) – In s. NR 111.41 (3) (intro.) in the third sentence, it is not clear to what "This supporting information" refers.

Response
This language is from the federal rule, and the department does not believe that it will be able to make changes without changing the meaning from the federal rule. No changes were made to the rule as a result of this comment.

Comment 5.q.(3) – In s. NR 111.41 (3) (intro.) The meaning of the fourth sentence is not clear. It states that the owner or operator "may supplement the data". Does this mean that the owner or operator may supplement source water baseline biological characterization data that had previously been submitted? Or does this mean that the owner or operator may supplement a permit renewal application? In either case, is there a deadline for submission of the supplemental data?

Response

This language is from the federal rule, and the department does not believe that it will be able to make changes without changing the meaning from the federal rule. No changes were made to the rule as a result of this comment. The department interprets this language to mean that facilities must submit any available, existing information required under s. NR 111.41 (3) (a), and facilities may collect new information to supplement this available/existing information. See s. NR 111.41 (3) (b) for more detail on supplementary information.

Comment 5.r. – In s. NR 111.41 (3) (a) 2., how will it be decided which species are "most important" to commercial and recreational fisheries?

Response
This language is consistent with federal regulations. The applicant will propose what species are most important to commercial and recreational fisheries using their best professional judgment, and then department permit drafters, in consultation with department fisheries biologists, will review this application material and determine if they agree with this decision. In practice, such discussions will likely occur prior to submittal as consultants prepare the application materials. There will be opportunities for public comment on this determination during the permit reissuance process.

Comment 5.s. – In s. NR 111.41 (7) (a) 4. And (c) 4., will an owner or operator understand what is meant by "major upgrades"? Paragraph (a) 4. Includes examples of major upgrades, but par. (c) 4. Does not. Does this suggest a different interpretation between the two subdivision?

Response
Paragraph (a) applies to facilities which use cooling water for power production. These facilities are generally relatively similar in structure and operation, and this uniformity will provide more certainty in determining what constitute a "major upgrade.", Also, as mentioned, paragraph (a) 4. provides examples to provide context. Paragraph (c) is for facilities that use cooling water for purposes other than power production. There is a lot more diversity in types of facilities and what would constitute a "major upgrade" for these facilities, so providing examples is more difficult in this context.

Comment 5.t. – In s. NR 111.41 (9) (c) (intro.), the department should review the eighth sentence. It states: "Social costs shall also be discounted using social discount rates of 3 percent and 7 percent". Will an applicant know what this means?

Response
The department expects that the applicant will know what this means; the preamble to the federal rule also provides additional discussion on social costs and discount rates.

Comment 6.b. – Although s. NR 111.11 (1) (b) closely tracks the syntax of the applicable federal regulation, the department could consider whether it has the latitude to revise this paragraph in response to a changed circumstance. For instance, could it be revised to account for the fact that although July 14, 2018 was a prospective date when the applicable federal regulation was promulgated, that date is now in the past? In the year 2019, there are not any "currently effective" permits that expire "prior to or on July 14, 2018" and thus par. (b) as written is a nullity.

Response
There are several permits that while expired prior to July 14, 2018 are still currently effective as they have been administratively continued. This section might seem to be invalid due to the fact of these dates being in the past; however, it still is valid and needed.

Comment 6.d. – In ss. NR 111.21 (4) (b) and 111.31 (c) (a), the rule establishes departmental discretion in the event that certain compliance would result in "costs wholly out of proportion of the costs U.S. environmental protection agency considered in establishing the requirement at issue". Although this same formulation appears in the applicable federal regulation, does the department have a method of determining what costs the federal agency considered?

Response

The U.S. environmental protection agency has published several documents that detailed the costs that were considered in the development of these regulations. These documents are available on online. The Technical Development Document and preamble to the federal regulations are especially relevant to this.

Final Regulatory Flexibility Analysis

The rule will primarily impact power plants and paper mills in Wisconsin and is not expected to affect small businesses. It is expected that no or very few small businesses with an intake structure have intakes with design intake flows that are greater than the minimum threshold and therefore would be subject to the federal rule.

Response to Small Business Regulatory Review Board Report

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