

**Summary of Comments and Department of Natural Resources Responses**  
**Natural Resources Board Order DG-03-22**  
**Ch. NR 851 – Management of Great Lakes Diversions**

**DECEMBER 14, 2023**

This document presents a summary of public comments received on proposed rules creating ch. NR 851, Wis. Adm. Code, for the management of diversions of Great Lakes water, including diversions to straddling communities, diversions for communities in a straddling county, and intrabasin transfers (water transferred from one Great Lakes basin to another). The proposed rule includes the process by which the Wisconsin Department of Natural Resources (department) accepts applications, conducts its review, and meets related criteria required by the Great Lakes Compact and statute.

**OVERVIEW**

The purpose of proposed rule ch. NR 851, Wis. Adm. Code, is to clarify existing requirements in the Great Lakes Compact and state statute for applicants applying for diversions from the Great Lakes basin, the department's review process of diversions applications and opportunities for public participation.

The department held the following public input opportunities:

- June 3, 2022 – A public hearing (on-line) on the proposed rule's scope was held jointly with proposed ch. NR 854, Wis. Adm. Code, Water Supply Service Area Planning Rule. One member of the public attended the hearing. The department received zero comments at the hearing.
- December 7, 2022 – An informational meeting to share ideas on the rule, gather input, and answer questions on proposed rule. Thirty-five members of the public attended this meeting.
- July 10-24, 2023 – A public comment opportunity on draft rule's Economic Impact Analysis (EIA). The department received seven comments on the draft EIA.
- October 5, 2023 – The public hearing (on-line) on proposed permanent rule ch. NR 851. Twenty people attended.
- September 5 – October 12, 2023 – The public comment period on proposed rule ch. NR 851. The department received two oral comments at the October 5 public hearing (summarized below) and six comment letters from groups or individuals.

In addition to the formal comment periods associated with the economic impact analysis and the draft board order, the department conducted the following outreach to gather input for proposed rule ch. NR 851, Wis. Adm. Code:

- Interviewed entities that had followed the statute and Great Lakes Compact process for applying for a Great Lakes diversion and took their ideas into consideration while drafting the EIA and draft rule language (ex. City of Racine, Village of Somers, City of Waukesha).
- Notified the Compact Council and Regional Body of the proposed rule making process and provided updates of rule progress at their bi-annual meetings.
- Informed all persons that have a pre-existing diversion approval of the rule-making process (via email and/or letter) and gave each information on where to find rule updates (DNR website, Compact GovDelivery listserv) and highlighted the department would meet with them if they were interested.
- Hosted a meeting specific with tribes and bands to review the Great Lakes Compact and inform the tribes of the rule-making process and how they could be involved.

- Sent updates via our Great Lakes Compact listserv (~7200 people) any time there was an update in the department rulemaking process, opportunity for public information, or comment periods related to the proposed rule.

### **ECONOMIC IMPACT ANALYSIS**

A public comment period on the draft economic impact analysis (EIA) occurred from July 10-24, 2023. The department received six comment letters from individuals or organizations on the EIA during this period. The department made minor adjustments to the economic impact analysis based on comments received.

### **LEGISLATIVE COUNCIL RULES CLEARINGHOUSE**

The Legislative Council Rules Clearinghouse submitted comments on statutory authority; form, style and placement; adequacy of references; and clarity, grammar, punctuation and use of plain language. The department addressed all recommendations by the Legislative Council Rules Clearinghouse to the proposed rule, except for the one below:

Section 2 t. Comment: in the proposed title to subch. IV of ch. NR 851, it appears the plural word “diversions” should be revised to the singular “diversion.”

Response: Since all other chapters are in the plural form, for example “Straddling Community Diversions,” we chose to keep this subchapter title plural.

### **PUBLIC COMMENTS ON DRAFT RULE**

The department accepted public comments on the draft rule from September 5 to October 12, 2023 and held a public hearing on October 5, 2023. Twenty members of the public attended the public hearing. Two persons provided oral comments at the hearing. Out of those who registered and attended the hearing, one person was in opposition, two people were in support, and the remainder were listening in for informational purposes. The department received a total of seven written comments on the proposed permanent rule ch. NR 851. The following is a summary of comments received and the department’s response. The number in parentheses that follows a comment, indicates the number of similar comments received.

1. Comment: The definition of “proposal” in s. NR 851.11 (11) should include an intrabasin transfer.  
Response: The department clarified the definition of “diversion” in s. NR 851.11 (4) to explicitly include intrabasin transfers.
2. Comment: The definition of public water supply system should be revised to refer to the facilities not the water (2).  
Response: The department edited the definition of public water supply system in s. NR 851.11 (12).
3. Comment: We request that “joint local water authorities” be added to the list of applicable entities.  
Response: The department added this to the definition in s. NR 851.11 (12) (b).

4. Comment: We ask that the reference to a 20-year planning period be removed since the planning period may be less than 20 years.  
Response: The department edited this requirement in s. NR 851.11 (21) (a) to be consistent with proposed rule ch. NR 854.
5. Comment: The reference in s. NR 851.13 (1)-(3) should be changed to “public water supply system”/responsibility of the diversion approval holder should be clearer in this section of the rule. (2)  
Response: The department edited s. NR 851.13 to address this comment.
6. Comment: The references to “violations of this chapter” in s. NR 851.15 (1) is very broad.  
Response: The enforcement authority in s. 281.346 (14), Stats., applies to all rules promulgated under the statute.
7. Comment: Modify language to be more specific in defining other entities in s. NR 851.21 (2) (b).  
Response: The department edited this section to specify other entities as those either supplying or returning water.
8. Comment: Unclear what volume is being requested in s. NR 851.21 (2) (f) and (g), s. NR 851.31 (2) (f) and (g), and s. NR 851.31 (2) (f) and (g) of the diversion rule.  
Response: The department clarified averages and peak year volumes in all relevant subsections.
9. The department should not allow Great Lakes Diversions of any kind.  
Response: The Great Lakes Compact bans diversions, with limited exceptions. Comment noted.
10. Comment: The department’s rule-making process is not effective/a guidance document may be more appropriate in this case (2).  
Response: The department is proposing ch. NR 851 to provide clarity and make the process for applying for a Great Lakes diversion more consistent, transparent, and efficient.
11. Comment: The addition of a mandatory contact with the department prior to submitting an application has the potential to delay the proceeding (2).  
Response: The initial contact with the department is already current practice and may be as simple as a phone call to department staff.
12. Comment: In s. NR 851.41 (2) (L), the diversion rule should acknowledge the provisions of Wis. Stat. s. 281.348 (3) (cr) that allow the approved service area to satisfy the water service area requirements.  
Response: Communities that apply for a diversion are required to submit a water supply plan under s. 281.348 (3) (a) 3., Stats. Section 281.348 (3) (cr), Stats., requires that if the Great Lakes Council approves a diversion area, that diversion area shall be the delineated area used in the water supply service area plan. It requires that the diversion area and the water supply service area are consistent. It does not exempt a diversion approval that has council approval from the requirements of s. 281.348, Stats., which requires the creation and maintenance of a water supply service area plan.

13. Comment: The rule language that allows the department to request additional information, documentation and materials is too robust.  
Response: The department intends to request any information needed in order to satisfy Great Lakes Compact and statute requirements for diversions or intrabasin transfers.
14. Comment: The department should include the statutory language: “The department may not use a lack of hydrological connection to the waters of the Great Lakes basin as a reason to disapprove a proposal.”  
Response: The department chose not to reiterate statute in the rule language.
15. Comment: The proposed rule does not reflect statute language in multiple sections related to return flow and combining water from inside and outside of the Great Lakes basin (3).  
Response: The department edited the language in several sections to mirror the statute.
16. Comment: Conditional approvals should not be allowed/Additional requirements for conditions are not allowed under statute (2).  
Response: The department edited the language to clarify that additional conditions are as applicable to the application. The department uses the term “may” to allow for department approvals to include conditions required by the Compact Council and Regional Body approval requirements, Great Lakes Compact requirements and state statutes.
17. Comment: Termination of a diversion approval should not result in the termination of baseline withdrawal amounts (2).  
Response: The department edited the document to remove this language.
18. Comment: Why does s. NR 851.60 only apply to public water supply systems with a pre-existing diversion?  
Response: Some pre-existing diversions belong to persons who are not public water supply systems (for example, a landowner with a well for agricultural irrigation that is used across the basin boundary). These pre-existing diversions were authorized because they were in existence at the time the Great Lakes Compact went into effect. However, they would not be eligible for a new or increased diversion under the Great Lakes Compact if they were to apply now because they are not a public water supply system. Persons that hold pre-existing diversion approvals that are not for public water supply purposes cannot request changes to their approval conditions, other than to transfer ownership under s. NR 851.60 (2).
19. Comment: Request that the department notification of equipment changes be deleted from s. NR 851.60 (3).  
Response: The department deleted this section.
20. Comment: Section NR 851.61 (1) (a) refers to water use sectors served. Since new diversions may only be approved for public water supply purposes, no further description is needed.  
Response: The department eliminated the clause “including water use sectors served.”
21. Comment: The department should amend the definition of “reasonable water supply alternative” in s. NR 851.11 (13) to ensure meaningful consideration of all alternatives to a diversion of Great Lakes water to a community within a straddling county.

Response: The department changed the definition of “reasonable water supply alternative” in the rule to be consistent with s. 281.346 (1) (ps), Stats.

22. Comment: Applicants should be required to identify alternatives that were not considered in their diversion application but considered as part of their water supply service area plan.

Response: The department requires communities to consider alternatives as part of their water supply service area plan, which are submitted to the department for approval and included in the diversion review process. Adding alternatives to the diversion application would be a duplicative step for diversion applicants.

23. Comment: The proposed rule should require an application for a diversion to a community within a straddling county to better demonstrate the need for a diversion (i.e. the department should require that the public water supply system develop a plan that seeks to avoid a diversion).

Response: The Great Lakes Compact bans diversions, with limited exceptions. If a community meets the exceptions and all requirements in the Great Lakes Compact and state statute, the department has the authority to issue a diversion approval.

24. Comment: The department should interpret and implement the “public water supply purposes” statutory requirement to foreclose diversions intended largely for non-residential purposes. We recommend that the department amend the draft rule to clarify that applications to use diverted water largely for non-residential purposes will be denied.

Response: The rule mirrors the statutory definition of “public water supply” under s. 281.346 (1) (pm), Stats., which states that the public water supply must “serve a group of largely residential customers and that may also serve industrial, commercial, and other institutional customers.”

25. Comment: The proposed rule should address the link between environmental review under ch. NR 150 and diversion reviews requiring regional body approval.

Response: The department’s Wisconsin Environmental Policy Act (WEPA) process is fully developed in ch. NR 150. The department will review each diversion application to determine what process under ch. NR 150 will be required to satisfy WEPA. If the department determines that an environmental impact statement is required to comply with WEPA, the department will make every effort to integrate the WEPA process into the diversion approval process in a manner that provides efficiency and robust public participation. In this situation, the department will likely conduct the environmental impact statement process simultaneously with any technical review and review by the Regional Body and Compact Council, if required.

26. Comment: Section NR 851.14 should be written to give the department the authority to impose fees for environmental reviews as part of diversion approval.

Response: Wisconsin state statute does not authorize the department to charge additional fees as part of a diversion approval for an environmental review.

27. Comment: Section NR 851.76 should be amended to ensure compliance with Wisconsin’s Public Records law (Wis. Stat. Ch. 19).

Response: The department edited s. NR 851.76 to address this comment.

28. Comment: Public participation procedures should be altered to provide all impacted individuals an opportunity to participate.

Response: Section NR 851.75 (3) (b) uses the word “may” to allow for the flexibility to hold in-person hearing(s), online hearing(s), or a combination of the two.

29. Comment: Downstream impacts (such as the addition of emerging contaminants like PFAS) to communities that receive treated wastewater should be considered in ss. NR 851.22 and 851.42.

Response: The department is required to work within the statutory limits for authorized dischargers under s. 281.31, Stats. If a discharger is permitted under the Clean Water Act and s. 281.31, Stats., the diversion rule cannot require more stringent limits to dischargers.

30. Comment: Cumulative impacts of diversions, including impacts to future generations, should be a consideration in the review process.

Response: The department conducts a cumulative impacts review as part of any application that is required to meet the exception standard.

31. Comment: The diversion rule should require an analysis of the disproportionate impacts to low-income households.

Response: The department does not review financial impact to various rate-payer classes. The Public Service Commission incorporates this type of review into its Rate Cases or Construction Authorization.