

Report to  
Legislative Council Rules Clearinghouse  
NR 851, Wis. Adm. Code  
Natural Resources Board Order No. DG-03-22

Wisconsin Statutory Authority

Section 281.19(1), Wis. Stats., authorizes the department to adopt rules applicable throughout the state for the construction, installation, and use and operation of practicable and available systems, methods and means for preventing and abating pollution of the waters of the state.

The department has explicit authority to promulgate rules establishing department procedures for managing Great Lakes diversions and intrabasin transfers under the following statutes:

- Section 281.343(3)(c)2., Wis. Stats., authorizes the state, through the department, to adopt and enforce rules and regulations to implement and enforce the Great Lakes – St. Lawrence River Basin Water Resource Compact (Compact) and the state’s management programs contemplated by the Compact.
- Section 281.343(4d), Wis. Stats., authorizes the state, through the department, to regulate new or increased diversions and require applications and documentation for new or increased diversions.
- Section 281.346(3)(b)10. and (e)2., Wis. Stats., authorizes the department to promulgate rules to establish reporting requirements and reporting frequencies for any person who begins a diversion.
- Section 281.346(4)(b)4., Wis. Stats., authorizes the department to require by rule additional information from an applicant for a new or increased diversion.
- Section 281.346(4)(d)1., Wis. Stats., authorizes the department to establish requirements by rule for new and increased intrabasin transfers.
- Section 281.346(4)(g), Wis. Stats., requires the department to promulgate rules for certain new or increased diversions that require a demonstration of efficient use and conservation of existing water supplies.
- Section 281.346(9)(b) to (d), Wis. Stats., requires the department to promulgate rules creating a procedure for providing to interested members of the public notices of each complete application the department receives for a diversion or intrabasin transfer; the authorizing statute includes specific minimum requirements for the public notice to be included in the rule, including the form and content of a public notice and procedures for the conduct of public hearings.

Federal Authority

Wisconsin is party to the Great Lakes – St. Lawrence River Basin Water Resource Compact, which is ratified by the eight Great Lakes states and incorporated into each of the states’ laws. The Compact was ratified and signed into federal law on December 8, 2008.

Comparison of Adjacent States

In comparison to adjacent states, Illinois’ rules are the most similar to what Wisconsin is proposing for the diversion rule. Michigan and Minnesota have state statutes that mirror the Compact requirements but no corresponding rules. Iowa is not a party to the Compact, and diversions out of Iowa are reviewed under their rules for withdrawals.

**Illinois:** Illinois’ program regulates diversions within the restrictions of the most recent U.S Supreme Court decree entered in *Wisconsin v. Illinois*, 278 U.S. 367 (1929). The decree limits Illinois’ diversion of Lake

Michigan water to 3,200 cubic feet per second. Illinois' administrative rules identify the following: requirements for the contents of an application, criteria for determining water needs, emergency conditions, process for transferring water use rights, required conservation practices, other permit conditions, the duration of permits and renewals, reporting requirements, the process for modifying a permit, Illinois' review and decision process, and penalties. Illinois' Part [3730 Administrative Rules](#) address the application and review of diversion proposals (Lake Michigan allocations) under the Compact and Agreement in Illinois.

**Michigan:** Michigan has no administrative rule related to the review of Great Lakes diversions or intrabasin transfers.

**Minnesota:** Minnesota has no administrative rule related to the review of Great Lakes diversions or intrabasin transfers. Minnesota's statute does contain additional requirements for all diversions greater than 5 million gallons per day. The statute states that Minnesota must notify and solicit comments from the office of the governors and premiers of the Great Lakes states and provinces, the water management agencies, and the international joint commission. The Minnesota state legislature must approve the diversion. The commissioner must consider any comments received, hold a meeting to resolve any objections and send notification of any final decision to the offices originally notified. (State Statutes Implementation: M.S. 103G.265, subd. 4)

**Iowa:** Iowa is not party to the Compact. Diversions of water outside of Iowa are reviewed under the same process as withdrawal applications. Iowa's administrative rules identify the fees for application, the information required in the application, the review process for applications, the public notice requirements, the decision requirements, and the appeals process for a decision. Iowa's rules also specify the criteria for authorizing a diversion, the duration of permits, monitoring and reporting requirements, modifications, designated protected flow streams, water conservation requirements, and priority allocation restrictions. The authority and process for when and how Iowa reviews water diversion applications is outlined in Code at: <https://www.legis.iowa.gov/docs/code/455B.265.pdf>. The details on how the code is implemented are included in the following chapters: <https://www.legis.iowa.gov/docs/iac/chapter/03-08-2023.567.50.pdf> and <https://www.legis.iowa.gov/docs/iac/chapter/03-08-2023.567.52.pdf>.

#### Court Decisions Directly Relevant

None.

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

The Wisconsin Legislature ratified the Compact in 2007 Wisconsin Act 227. Section 281.343, Wis. Stats., is the ratification and text of the Compact, and s. 281.346, Wis. Stats., is Wisconsin's program for managing and regulating new or increased water withdrawals, diversions and consumptive uses consistent with the provisions of the Compact. The proposed rule establishes department procedures for managing Great Lakes diversions and intrabasin transfers.

Diversions are defined as a transfer of water from the Great Lakes basin into a watershed outside the Great Lakes basin, or from the watershed of one of the Great Lakes into that of another, by any means of transfer, including a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, tanker ship, tanker truck, or rail tanker, with few exceptions (s. 281.346(1)(h), Wis. Stats.). Intrabasin transfer means the transfer of water from the watershed of one of the Great Lakes into the watershed of another of the Great Lakes (s. 281.346(1)(jm), Wis. Stats.).

The Compact is a legally binding interstate agreement that became effective on December 8, 2008. The

Compact and the adopted rules and guidance detail how the states party to the Compact – Wisconsin, Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Pennsylvania – will work together to manage and protect the Great Lakes - St. Lawrence River Basin (Basin). The Compact Council’s adopted rules and guidance provide a framework for each state to create programs and enact rules and regulations within their own jurisdictions to protect the Basin. The proposed rule has built in flexibility for Wisconsin to comply with the Compact, Compact rules and guidance documents.

The Compact bans diversions of Great Lakes water with limited exceptions. These exceptions allow a “straddling community” or “community in a straddling county” to apply to divert water (i.e., to move water out of the Great Lakes basin). If certain requirements are met, water may be transferred in some cases from one Great Lakes basin to another through an intrabasin transfer. Currently, the department works with applicants for diversions and intrabasin transfers from the Great Lakes basin on a case-by-case basis, within the statutory authority and parameters in s. 281.346(4), Wis. Stats.

This rule specifies:

- Diversion and intrabasin transfer application requirements.
- Department application review processes.
- Department determinations related to approvals, conditional approvals, and denials of diversion applications.
- Public notice and participation.
- Reporting requirements.

This rule also provides flexibility for Wisconsin to comply with Compact rules and guidance.

Agency Procedures for Promulgation

The department will hold a hearing online on October 5, 2023 at 10 AM CST. The hearing will be followed by board adoption, expected in December 2023, followed by a request for the governor’s approval and legislative review.

Description of any Forms (attach copies if available)

We do not anticipate any forms related to this rule at this time.

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