

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:**

Request that the Board authorize public hearings for Board Order WT-31-10, proposed rules affecting chapter NR 106, Wis. Adm. Code, related to the calculation of water quality based effluent limitations for the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program regulating wastewater discharges.

**FOR: October 2015 Board meeting**

**PRESENTER'S NAME AND TITLE:** Adrian Stocks, Permits Section Chief

**SUMMARY:**

The proposed rule revisions relate directly to the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program that regulates wastewater discharges. In a letter dated July 18, 2011, the U.S. Environmental Protection Agency (EPA) identified 75 potential issues with Wisconsin's statutory and regulatory authority for the WPDES permit program.

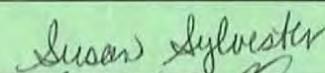
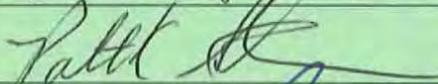
This rule package (referred to as Rule Package #3) seeks to address 4 of the issues identified by EPA relating to: (1) phasing out mixing zones for bioaccumulative chemicals of concern (BCCs) in the Great Lakes System; (2) regulation of pollutant discharges when a pollutant is present in intake water; (3) removal of an exemption for non-contact cooling waters without additives; and (4) modification of the reasonable potential determination for discharges containing mercury. The existing rule relating to mercury reasonable potential determinations, s. NR 106.145(2), Wis. Adm. Code, was invalidated in *MEDC v. WDNR*, Case No. 12-CV-3654, as inconsistent with federal law. The existing exemption in s. NR 106.10 for noncontact cooling water containing certain additives was invalidated in *MEDC v. WDNR*, Case No. 12-CV-0569, as inconsistent with federal law. The proposed rule changes address the inconsistencies cited by EPA and by the circuit court orders and will ensure state regulations are consistent with federal regulations.

The statement of scope for this rule, WT-31-10, was approved by the Secretary on May 10, 2010, and published in Register 662 on February 28, 2011. From April 21, 2014 to May 21, 2014, the department solicited comments for development of the economic impact analysis. Two comments were received. Portions of the proposed changes are expected to have no economic impact because EPA overpromulgated ss. NR 106.06 and 106.10, Wis. Adm. Code, in 2000 and EPA disapproved certain aspects of s. NR 106.145(1)(b), Wis. Adm. Code, in 2009. The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some facilities may require upgrades or modifications to the facility to meet effluent limitations. However, the department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted have already had permits reissued in compliance with the federal law.

**RECOMMENDATION:** That the Board authorize public hearings for Board Order WT-31-10.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- |   |   |
|---|---|
| <input type="checkbox"/> (choose one)   | <input checked="" type="checkbox"/> Attachments to background memo    |
| <input checked="" type="checkbox"/> Fiscal estimate and economic impact analysis (EIA) form | <input type="checkbox"/> Environmental assessment or impact statement |
| <input checked="" type="checkbox"/> Response summary  | <input checked="" type="checkbox"/> Board order/rule                  |

Approved by	Signature	Date
Susan Sylvester, Bureau Director		9-21-15
Patrick Stevens, Environmental Management Division		9/24/15
Cathy Stepp, Secretary		9/29/15

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

**CORRESPONDENCE/MEMORANDUM**

DATE: September 15, 2015

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary

SUBJECT: Background memo on Board Order WT-31-10, relating to authorization of public hearings.

**Why is the rule being proposed?**

The purpose of the proposed rule changes is to be consistent with federal requirements for calculating and implementing water quality based effluent limitations (WQBELs) for point source discharges. In 2000, the U.S. Environmental Protection Agency (EPA) identified several areas where existing ch. NR 106, Wis. Adm. Code, is inconsistent with the federal Great Lakes Water Quality Initiative. In 2009, EPA disapproved of another portion of ch. NR 106, Wis. Adm. Code, as inconsistent with federal requirements. On July 18, 2011, the department received a letter from the EPA identifying 75 issues and potential inconsistencies with Wisconsin's authority to administer its approved Wisconsin Pollutant Discharge Elimination System (WPDES) permit program. EPA directed the department to either make rule changes to address these inconsistencies or address these issues through other avenues. Modifications to ch. NR 106 are necessary to address several issues identified in the EPA letter (issues 8, 10, 17, and 71). These modifications also address circuit court rulings, issued in 2012 and in 2014, in which several portions of ch. NR 106 were declared invalid as inconsistent with federal law.

**Summary of rule.**

This rule package (referred to as Rule Package #3) seeks to address 4 of the 75 EPA issues. These issues relate to the phase out of mixing zone allowances for dischargers of bioaccumulative chemicals of concern (BCC) in the Great Lakes system, regulation of pollutant discharge when a pollutant is present in intake water, removal of an exemption from water quality based effluent limitations for noncontact cooling water additives, and reasonable potential determinations for mercury, among others.

The proposed rule revisions: (1) modify the procedure used statewide for determining mixing zones for BCCs to comply with the procedures in the Great Lakes Initiative; (2) change the procedures for determination of intake credits included in WPDES permits with procedures specific to dischargers within the Great Lakes Basin and outside the Great Lakes Basin; (3) remove the categorical exemption from imposing water quality based effluent limitations for uncontaminated storm water runoff and noncontact cooling waters without additives; and (4) modify the acceptable procedure used for determining when mercury limitations are required in WPDES permits. The proposed rule includes other modifications required to implement these procedural changes such as adding the definition of "same waterbody" and "Great Lakes system".

The noncontact cooling water exemption section being amended was invalidated in Case No. 12-CV-0569, Midwest Environmental Defense Center Inc. v. DNR. The current s. NR 106.10, Wis. Adm. Code, includes a note referencing this case. The mercury reasonable potential section being amended was invalidated in Case No. 12-CV-3654, Midwest Environmental Defense Center v. DNR. The current s. NR 106.145, Wis. Adm. Code, includes a note referencing this case. These proposed revisions would make the rules consistent with the court decisions as well as federal regulations.

### **How does this affect existing policy?**

The proposed revisions are designed to better align the WPDES permitting program with federal regulations and guidelines promulgated pursuant to the Clean Water Act and the federal Great Lakes Initiative. Removing the exemption from water quality based effluent limitations on noncontact cooling water additives is not a change in existing policy. The department stopped applying the exemption when the courts invalidated the rule, EPA objected to WPDES permits that followed the exemption and EPA over promulgated the exemption in the November 6, 2000 federal register (40 CFR 132.6). Also, the department has been complying with the mixing zone phase out requirements in the federal Great Lakes Initiative.

### **Has the Board dealt with these issues before?**

Yes. At the January 25, 2012, Board meeting an informational update was given on the department's response to EPA's letter of July 18, 2011, which identified 75 potential inconsistencies in Wisconsin's legal authority to administer the WPDES permit program. The department responded to EPA with a proposal to address the inconsistencies in a letter October 14, 2011. And a meeting was held with EPA December 15, 2011, in which EPA requested a more detailed schedule to reconcile the inconsistencies.

At the March 12, 2010, Board meeting the Board was requested to approve the scope statement for WT-31-10. Other rule packages to address the 75 issues are at different stages in the rule making process.

### **Who will be impacted by the proposed rule? How?**

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit will likely be impacted by this rule. A small number of permittees may receive new or more restrictive water quality based effluent limitations derived from the changes to the intake credit procedures and noncontact cooling water reasonable potential assessments.

Although these limitations may be more restrictive for some permittees, DNR does not believe that many permittees will incur additional costs associated with this proposed rule package. DNR is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law. The rule revisions are estimated to have a level 3 economic impact.

### **Information on environmental analysis, if needed?**

Pursuant to s. NR 150.20(2)(a)23., Wis. Adm. Code, permanent rules are equivalent analysis actions. An environmental analysis and public disclosure is conducted as part of the permanent rulemaking process.

### **Small Business Analysis.**

The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have impacts from changes required to meet WPDES permit limits. As mentioned above, however, the exemption was already invalidated by the courts and EPA formally objected to the exemption.

**Response to Comments on Economic Impact Analysis (EIA)  
Rule Package WT-31-10**

**WMC, Wisconsin Manufacturers & Commerce**

**Eric Bott, WMC**

Wisconsin Manufacturers & Commerce (WMC) is a business trade organization with more than 3,800 members statewide in the manufacturing, agricultural, energy, commercial, mining, and service sectors. Roughly one-quarter of private sector employees in Wisconsin are employed by WMC member companies. WMC members have a substantial general interest in seeing that the process for rule making set forth in Chapter 227 is properly adhered to by state agencies and a significant specific interest in the economic analysis for this proposed rule particularly as it relates to non-contact cooling water (NCCW).

After reviewing the draft rule and preliminary economic impact analysis released by DNR on April 17<sup>th</sup>, 2014, WMS Notes three primary concerns:

WMC Concern 1: Changes contained in the draft rule pertaining to regulation of NCCW are likely to result in considerable new costs on a wide range of businesses in Wisconsin, and these changes are impossible to quantify without significant additional study.

**Response:**

As mentioned in the Fiscal Estimate and Economic Impact Analysis for this rule package, the proposed changes are likely to result in new limits for some facilities and may require upgrade or additional treatment to meet final effluent limits. The Department does not believe that the existing policy regarding water quality based effluent limits for noncontact cooling water dischargers will change as a result of the proposed changes for the following reasons. As of 2000, EPA determined that the federal rule would apply in Wisconsin to dischargers in the Great Lakes Basin until the State adopted updated administrative rules. In addition, in 2012 the part of NR 106.10 that excludes consideration of “the addition of compounds at a rate and quantity necessary to provide a safe drinking water supply or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply” was declared invalid by a Dane County Circuit Court judge in Case No. 12-CV-0569, Midwest Environmental Defense Center Inc. v. DNR, as inconsistent with federal law. Therefore, when reissuing WPDES permits, the Department has not applied the exemption from water quality based effluent limitations in s. NR 106.10 for some additives to noncontact cooling water discharges.

Many of the noncontact cooling water facilities identified as potentially impacted by this rule have already had permits reissued in compliance with the proposed rule. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying. Statewide there are approximately 451 Noncontact Cooling Water General permittees that may receive new or more restrictive limits when the statewide Noncontact General Permit is reissued. There are approximately 177 permittees with specific permits already containing total residual chlorine limits. There are an additional 17 permittees with specific permits that currently only have monitoring of total residual chlorine. Of these permittees, less than half are likely to get new or more restrictive limits in the next permit reissuance.

There are a number of ways facilities may choose to meet new or more restrictive total residual chlorine limits. Facilities will be granted a compliance schedule, as appropriate, to evaluate options to meet new limits. In a September 2000 Wastewater Technology Fact Sheet (EPA 832-F-00-0022), EPA states that cost estimates for dechlorination would be misleading due to the wide range of possible treatment options. If the facility must dechlorinate costs will include feasibility analysis, design and install costs, and

ongoing operations costs. The equipment and installation costs may range from \$15,000 to \$40,000 and annual chemical costs of \$3-4,000 depending on chlorination level and flow of the facility. Costs for existing facilities may be higher if there is not adequate space to accommodate dechlorination equipment.

The Department has made efforts in the past – and intends to continue to do so in the future – to evaluate water quality based effluent limits on a case by case basis. The proposed order includes the provisions to allow for assessment of reasonable potential, including options to not include limits if the permittee demonstrates that the substance of concern dissipates prior to discharge. For those facilities that have not had permits reissued, the Department will continue to evaluate compliance schedules to allow facilities appropriate amounts of time to upgrade facilities.

WMC Concern 2: The draft rule differs in a meaningful and measurable way from the original statement of scope in apparent violation of ch. 227.

**Response:**

This is not a comment regarding the economic impacts of the rule revisions. Nevertheless, the Department's position is that the rule revisions do fit within the scope statement. The scope statement for rule package WT-31-10 stated that the objective of the proposed rule was to revise ch. NR 106 so it is consistent with federal regulations. The scope statement specifically mentioned the removal of the exemption for substances commonly added by suppliers of drinking water systems and present in noncontact cooling water, but it also specifically referenced that rule revisions would address EPA's disapproval of ss. NR 106.06(6) and 106.10(1) that were identified in the November 6, 2000 Federal Register. The proposed changes to ss. NR 106.06(6) and 106.10(1) address EPA's concerns as expressed in the federal register and comments in the disapproval. The proposed changes are within the scope statement because they revise ch. NR 106 provisions to be consistent with federal regulations.

WMC Concern 3: The Department's preliminary economic impact analysis falls short of complying with its statutory obligations set out in ch. 227 [fails to completely meet the minimum analysis required and fails to even mention Iowa].

**Response:**

The Department appreciates the time and effort spent to verify the requirements of ch. 227. Requirements under the Clean Water Act apply in all adjacent states, including Iowa. Requirements under the Great Lakes Initiative apply to all states that border the Great Lakes. The Department's analysis of the specific provisions adopted by other states was limited in nature due to the directives from EPA and court cases that Wisconsin must address the issues in this rule package. In response to WMC's comment, the Department completed an additional extensive review of the Federal regulations and court cases, as appropriate, to document the changes necessary to meet the minimum requirements.

**Kohler Co**

Jason Nall – Kohler

The economic impact comments specifically address the proposed rule change proposed for the removal of the non-contact cooling water (NCCW) exemption from Wisconsin Administrative Code NR106.10(1)

containing chlorine and other chemical additives present levels consistent with those in public water supplies.

Calculations for estimating the economic impacts of the promulgation of proposed rule changes in non-contact cooling water exemption are based on the following assumptions:

- 1) As the proposed rule is currently written, it is unclear how a demonstration would be made to the Department that the chlorine residual in incoming water from a public water supply is sufficiently dissipated prior to the point of discharge when the anticipated limits imposed on a discharge point would be below the method of detection limits of currently available testing methods as approved in Table B of NR 219.04 for the Department's approved analytical technologies. The reasonable potential procedures in NR106.05 may address this at this time, but it is unknown whether the Department will still require dechlorination, since the chlorine is present at detectable concentrations in the incoming source water. Thus, for the purposes of this economic impact assessment, it is assumed that dechlorination will be required.
- 2) The existing footprints of the manufacturing facilities on the Kohler Company campus in Kohler, Wisconsin are large with a number of generation points for NCCW sources. In compliance with current applicable NR106 rules, NCCW is discharged to the storm sewer. For the purposes of this cost estimate, it is assumed that the NCCW would be collected and dechlorinated at central locations in each building generating NCCW.

Kohler comments in response to the Department inquiries:

- Would your business be affected in a material economic way by the implementing of these rule revisions? Kohler reply: Yes
- Any implementation or compliance costs that are reasonably expected to be incurred. Kohler reply: Implementation costs are anticipated to be significant and estimated at \$264,000 for construction of infrastructure with engineering and project management fees. The annual cost for chemical addition for dechlorination is estimated to be \$1,890/year.
- The implementation costs of \$264,000 are significant, as noted in the response to question 1 from the Department. Kohler reply: Economic impacts of specific alternatives to the proposed rule.

**Response:**

As mentioned in the Fiscal Estimate and Economic Impact Analysis for this rule package, the proposed changes are likely to result in new limits for some facilities and may require upgrade or additional treatment to meet final effluent limits as commented. Statewide there are approximately 451 Noncontact Cooling Water General Permit permittees that may receive new or more restrictive limits when the statewide Noncontact Cooling Water General Permit is reissued. There are approximately 177 permittees with specific permits containing total residual chlorine limits. There are an additional 17 permittees with specific permits that currently only monitor for total residual chlorine. Of these permittees, less than half are likely to get new or more restrictive limits in the next permit reissuance.

The Department notes that as of 2000, EPA determined that the federal rule would apply in Wisconsin to dischargers in the Great Lakes Basin until the State adopted updated administrative rules. In addition, in 2012 the part of NR 106.10 that excludes consideration of "the addition of compounds at a rate and quantity necessary to provide a safe drinking water supply or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply" was declared invalid by a Dane County Circuit Court judge in Case No. 12-CV-0569, Midwest Environmental Defense Center Inc. v. DNR, as inconsistent with federal law. Finally, EPA had objected to WPDES permits that applied the noncontact cooling water exemption provision in s. NR 106.10(1). Therefore, the Department has not been applying the exemption in s. NR 106.10(1) to reissued WPDES permits. The department believes

the proposed rules are no more restrictive than the federal rules which the department is currently applying.

The Department has made efforts in the past, and intends to continue to do so in the future, to evaluate water quality based effluent limits on a case by case basis. The proposed order includes the provisions to allow for assessment of reasonable potential procedures in ss. NR 106.05 and NR 106.06 Wis. Adm. Code, including options to not include limits if the permittee demonstrates that the substance of concern dissipates prior to discharge.

For those facilities that have not had permits reissued, the Department will continue to evaluate compliance schedules to allow facilities to upgrade facilities. Kohler Co's most recent permit reissuance includes total residual chlorine limits as required under federal code and the circuit court case. The permit includes a provision to make chlorine limits not applicable if chlorine is not added to the wastewater. The Department will apply applicable administrative codes to determine when a permittee has demonstrated reasonable potential to exceed water quality based effluent limits.

## **Notice of Hearing**

The Department of Natural Resources announces that it will hold a public hearing on a permanent rule to revise ch. NR 106, Wis. Adm. Code, relating to the Wisconsin Pollutant Discharge Elimination System (WPDES) wastewater permit program regarding bioaccumulative chemicals of concern mixing zones, pollutants in intake waters, non-contact cooling water exemption, and mercury reasonable potential determination and other aspects of the WPDES permitting program, at the time and place shown below.

### **Hearing Information**

Date: December 7, 2015

Time: 8 – 10:30 AM

Location: Wisconsin Department of Natural Resources Room G09 101 South Webster Street  
Madison, WI 53703

### **Accessibility**

1. Hearing impaired persons may request an interpreter for this hearing. Please make reservations for a hearing interpreter at least 10 days before the date of the scheduled hearing, by writing to e-mail
2. Alternatively, you may contact the Department of Natural Resources TDD at (608) 267-6897. The hearing facility is accessible to disabled users.
3. Pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of information material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call with specific information on your request at least 10 days before the date of the scheduled hearing.
4. Handicap access is available at the hearing location.

### **Appearances at the Hearing and Submittal of Written Comments**

Comments on the proposed rule must be received on or before December 18, 2015. Written comments may be submitted by U.S. mail, fax, E-mail, or through the internet and will have the same weight and effect as oral statements presented at the public hearing. Written comments and any questions on the proposed rules should be submitted to:

Jennifer Jerich  
Department of Natural Resources  
N7725 Highway 28  
Horicon, WI 53032-9782

Or email me at: [Jennifer.Jerich@wisconsin.gov](mailto:Jennifer.Jerich@wisconsin.gov)

The rules may be reviewed and comments made at:

<https://health.wisconsin.gov/admrules/public/Rmo?nRmold=13185>

**Initial Regulatory Flexibility Analysis:**

**Agency Small Business Regulatory Coordinator:**

Linda Haddix (608) 266-1959

[Linda.Haddix@wisconsin.gov](mailto:Linda.Haddix@wisconsin.gov)

Dated at Madison, Wisconsin \_\_\_\_\_

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_

Cathy Stepp, Secretary

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

will likely be impacted by this rule. It is possible a small number of permittees may receive new or more restrictive water quality based effluent limitations derived from the changes to the intake credit procedures and noncontact cooling water reasonable potential assessments. However, many permittees have already received WPDES permits based upon federal requirements, which DNR has been required to apply since EPA overpromulgated portions of NR 106 in 2000 and declared other portions of NR 106 invalid in 2009.

The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying. Department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law. There are approximately 451 general permittees that may be impacted upon reissuance of the statewide Noncontact Cooling Water General Permit. There are 177 total permittees with specific permits with chlorine limits and approximately 25% of these permittees are industrial permit holders. There are an additional 17 permittees with specific permits with total residual chlorine monitoring. The department believes that less than half of these permittees will receive new or increased limits in the next reissued permit.

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### 13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

On July 18, 2011, the Department received a letter from EPA identifying seventy five issues or potential inconsistencies with Wisconsin's authority to administer its National Pollutant Discharge Elimination System (NPDES) approved permit program. These proposed rule revisions address some of EPA's issues regarding Chapter NR 106. Implementing the proposed rule revisions will ensure that the State's regulations are consistent with and in compliance with federal regulations.

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### 14. Long Range Implications of Implementing the Rule

Implementing the Administrative Rule revisions as proposed will align Wisconsin's WPDES regulations with federal regulations.

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### 15. Compare With Approaches Being Used by Federal Government

In a November 6, 2000 Federal Register Notice, EPA objected to provisions in ss. NR 106.06(2), 106.06(6) and 106.06(10) as inconsistent with the federal Water Quality Guidance for the Great Lakes System required by section 118(c) of the Clean Water Act, 33 U.S.C. 1268(c). See Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission from the State of Wisconsin, and Final Rule, 60 Fed. Reg. 66502 to 66511 (November 6, 2000). Section 118(c) requires all Great Lakes states, including Wisconsin, to adopt procedures consistent with the federal guidance. In a February 17, 2009 letter, EPA objected to the department's mercury reasonable potential rule as inconsistent with federal requirements.

Implementing the Administrative Rule revisions as proposed will align Wisconsin's WPDES regulations with federal regulations. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying.

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### 16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

All of the other EPA Region 5 states and/or adjacent states (Illinois, Indiana, Iowa, Michigan, Minnesota and Ohio) are subject to EPA regulations implementing the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Program. All other states bordering the Great Lakes system (Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Pennsylvania), are subject to the GLI. See 40 CFR Part 132 (setting forth requirements that Great Lakes States must adopt). The proposed rules will align Wisconsin's WPDES regulations with federal regulations.

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<h3>17. Contact Name</h3> <p>Jennifer Jerich, Wastewater Specialist</p>	<h3>18. Contact Phone Number</h3> <p>(920) 387-7886</p>
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This document can be made available in alternate formats to individuals with disabilities upon request.

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

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1. Type of Estimate and Analysis

Original    Updated    Corrected

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2. Administrative Rule Chapter, Title and Number

NR 106.06 (2), 106.06 (6), 106.10 and 106.145

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3. Subject

WT - 31-10

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4. Fund Sources Affected

GPR    FED    PRO    PRS    SEG    SEG-S

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5. Chapter 20, Stats. Appropriations Affected

None.

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6. Fiscal Effect of Implementing the Rule

No Fiscal Effect       Increase Existing Revenues       Increase Costs  
 Indeterminate       Decrease Existing Revenues       Could Absorb Within Agency's Budget  
 Decrease Cost

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7. The Rule Will Impact the Following (Check All That Apply)

State's Economy       Specific Businesses/Sectors  
 Local Government Units       Public Utility Rate Payers  
 Small Businesses (if checked, complete Attachment A)

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8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes       No

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9. Policy Problem Addressed by the Rule

The purpose of these rule additions and amendments is to make sections of NR 106, which deal with the procedures for calculating water quality based effluent limitations for point source discharges in the Wisconsin Pollutant Discharge Elimination System (WPDES) Permit program, consistent with federal regulations. In 2000, US EPA declared portions of NR 106 invalid and overpromulgated sections of NR 106, requiring the department to apply federal law. In 2009, EPA objected to the mercury reasonable potential section of NR 106 as inconsistent with federal requirements. In a letter dated July 18, 2011, U.S. Environmental Protection Agency (EPA) identified 75 potential issues with Wisconsin's statutory and regulatory authority for the WPDES permit program. EPA directed the department to either make rule changes to address these inconsistencies or obtain a statement from the Attorney General's Office verifying that the existing rules are consistent with federal regulations. The department believes adoption of these rule changes (referred to as Rule Package 3) will address EPA's concerns identified in 2000 and 2009 in four of the 75 issues.

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10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit will likely be impacted by this rule. The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. The potentially impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have economic impacts from changes required to meet WPDES permit limits. The potentially impacted industries also include power plants and industries, especially those that discharge to Lake Michigan.

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11. Identify the local governmental units that participated in the development of this EIA.

None

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12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

Businesses and municipalities that are authorized to discharge effluent to a surface water of the State in a WPDES permit

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

### ATTACHMENT A

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1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have economic impacts from changes required to meet WPDES permit limits. The potentially impacted industries also include power plants and industries, especially those that discharge to Lake Michigan. Impacts to these facilities by this rule are influenced by over promulgation and/or circuit court decisions that require the department to currently use these procedures in determining water quality eased effluent limits. The department believes the proposed rules are no more restrictive than the federal rules which the department is currently applying.

In response to comments received, the department analyzed the number of facilities that may be received new total residual chlorine limits. Statewide there are approximately 451 Noncontact Cooling Water General permittees that may receive new or increased more restrictive limits when the statewide Noncontact General Permit is reissued. There are approximately 177 permittees with specific permits already containing total residual chlorine limits. There are an additional 17 permittees with specific permits that currently only have monitoring of total residual chlorine. Of these permittees, less than half are likely to get new or increased more restrictive limits in the next permit reissuance. Costs for these facilities may vary widely. In recently reissued permits with new total residual chlorine limits, permittees have chosen a wide range of methods to meet new limits. If a facility must dechlorinate, costs will include feasibility analysis, design and install costs, and ongoing operations costs. The equipment and installation cost may range from \$15,000-40,000 and annual chemical costs of \$3,000-4,000 depending on chlorination level and flow of the facility. These costs are likely to be greatest for facilities that do not have the building space to accommodate dechlorination equipment. A permittee may request a variance from water quality standards if the permittee can show that the standard, as applied to the permittee, will cause substantial and widespread adverse social and economic impacts in the area where the permittee is located.

The Department received concerns that the changes to s. NR 106.10, Wis. Adm. Code will not require new or more restrictive total phosphorus limits. Phosphorus regulations in ch. NR217, see especially in s. NR 217.10(2), Wis. Adm. Code, governs phosphorus in discharge. The substances required to be monitored at the time of permit application and the reasonable potential procedures are unchanged under the proposed order.

The rule package may impact permittees discharging to the great lakes system where the intake water is above background concentration. Facilities that discharge to the Great Lakes have been identified as potentially impacted by these changes, especially power plants. Water Quality Based Effluent (WQBEL) limits for expired permits or permits due for permit reissuance are being written following the procedures in federal code. These WQBEL memos include language of options for meeting new limits including the provisions under paragraph D of procedure 5 in appendix F to 40 CFR part 132, "Consideration of Intake Pollutants in Determining Reasonable Potential." The proposed rule will be consistent with the department's current practice in setting limits. Additionally, a permittee may request a variance from water quality standards.

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2. Summary of the data sources used to measure the Rule's impact on Small Businesses

DNR's System for Wastewater Applications, Monitoring and Permits (SWAMP) was used to compile existing WPDES permit holders with non-contact cooling water discharge outfalls. These data were used to determine which facilities may have impact from this rule. Many of the provisions of the proposed rule revision are already implemented by the department when setting water quality based limits as required by EPA under Federal law. As mentioned above, many

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## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

of the facilities impacted by these changes have already had permits reissued in compliance with the federal law except for noncontact cooling water general permit holders. These permittees are more likely to be small businesses and may be impacted when this general permit is reissued.

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3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
  - Less Stringent Schedules or Deadlines for Compliance or Reporting
  - Consolidation or Simplification of Reporting Requirements
  - Establishment of performance standards in lieu of Design or Operational Standards
  - Exemption of Small Businesses from some or all requirements
  - Other, describe:
- 

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

This rule does not specify monitoring frequency or compliance schedule timelines to allow for case by case assessment to ensure adequate environmental protection and reasonable reporting requirements. Consideration was made for difference within and outside the Great Lakes Basin that include additional considerations outside the Great Lakes Basin as allowed under federal code. The department believes the proposed rules are no more restrictive than the federal code which the department is currently applying.

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5. Describe the Rule's Enforcement Provisions

Enforcement provisions are not included in the subsections of the rule effected by the proposed order. These provisions are located in other portions of administrative rule not proposed for revision in this proposed rule order.

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6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes     No
-

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD**  
**REPEALING, RENUMBERING AND AMENDING, AMENDING, REPEALING AND**  
**RECREATING AND CREATING RULES**

The statement of scope for this rule, WT-31-10 was published in Register No. 662 on February 28, 2011.

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 106.145 (2) (b) 2.; to **consolidate, renumber and amend** NR 106.145 (2) (b) (intro.) and 1., to **amend** NR 106.145 (1) (b), and (2) (title); to **repeal and recreate** NR 106.06 (2) (a), (b), (6) and 106.10; and to **create** NR 106.03 (4m), (11m), and 106.06 (2) (br); relating to calculating water quality based effluent limitations for point source discharges to surface waters.

WT-31-10

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**Analysis Prepared by the Department of Natural Resources**

- 1. Statutes interpreted:** ss. 283.01, 283.11(2), 283.13(5), 283.31, Stats .
  
- 2. Statutory authority:** ss. 227.11(2)(a), 283.11(2), 283.13(5) and 283.31(3), (4), Stats.
  
- 3. Explanation of agency authority:** Chapter 283, Stats., grants authority to the department to establish, administer and maintain a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit Program consistent with the requirements of the federal water pollution control act of 1972, commonly known as the Clean Water Act, and amendments to the act. Section 283.11 requires that rules promulgated by the department as they relate to point source discharges must comply with the Clean Water Act and regulations adopted under that act. Section 283.13(5), Stats., authorizes the department to establish more stringent water quality based effluent limitations (WQBELs) and to require compliance with such

limitations if these limitations are necessary to comply with any state or federal law, rule or regulation. Section 283.31(3), and (4), Stats., provides authority to issue permits that require compliance with effluent limitations and standards for point source discharges to surface waters and any more stringent limitations needed to comply with state or federal water quality standards or any applicable federal law or regulation. The department also has general authority to promulgate rules under s. 227.11 (2) (a), Stats., that interpret the specific statutory authority granted in ch. 283, Stats.

#### **4. Related statute or rule:**

These rule changes relate directly to the WPDES Permit program and the regulation of wastewater discharges. Chapter NR 106, Wis. Adm. Code, contains the procedures used by the Bureau of Water Quality to calculate water quality based effluent limitations for WPDES permits issued to point source discharges to surface waters under ch. 283, Stats. Related statutes and rules include: s. 281.15, Stats., which authorizes the department to promulgate water quality standards for waters of the state. Water quality standards for surface waters are set in chs. NR 102 to 105, Wis. Adm. Code.

#### **5. Plain language analysis:**

The primary purpose of these proposed rule changes to ch. NR 106, Wis. Adm. Code, is to be consistent with federal requirements for calculating and implementing water quality based effluent limitations for point source discharges to surface waters included in WPDES Permits.

In a letter dated July 18, 2011, U.S. Environmental Protection Agency (EPA) identified 75 potential issues or deficiencies in Wisconsin's statutory and regulatory authority for the WPDES Permit Program. EPA directed the department to either make rule changes to address these inconsistencies or deficiencies or obtain a statement from the Attorney General's Office verifying that the existing rules are consistent with federal regulations. The proposed rules address four of the 75 issues identified in EPA's July 18, 2011, letter.

In addition to making some minor clarifications and cross-referencing corrections to the Administrative Code for uniformity, these proposed rule changes will:

- Revise s. NR 106.06(2) to phase out (with some exceptions) mixing zone allowances for discharges of bioaccumulative chemicals of concern (BCCs) in the Great Lakes system. While Wisconsin is already adhering to the requirements of the federal Great Lakes Water Quality Initiative (GLI), the proposed rules formally adopt the GLI requirements. When Wisconsin last made changes to NR 106, a footnote in the rule indicated that such changes would be promulgated.
- Modify s. NR 106.06(6) provisions that regulate pollutant discharges when a pollutant is present in the intake water used as the water supply for industrial and municipal dischargers. The proposed rules adopt the federal requirements for establishing effluent limitations.

- Remove the exemption from regulation in s. NR 106.10(1) and (2) for noncontact cooling water (NCCW) containing chlorine or other chemical additives present at levels consistent with those in public water supplies, as required by a Dane County Circuit Court Stipulation and Order in Case No. 12-CV-0569, *Midwest Environmental Defense Center v. WDNR, et. al.* (March 2, 2012) and federal regulations.
- Remove the special definition of “representative data” for purposes of determining reasonable potential to exceed effluent limitations for mercury in s. NR 106.145(1) and (2), as required by a Dane County Circuit Court Order in Case No. 12-CV-3654, *Midwest Environmental Defense Center v. WDNR*, (July 1, 1014) and federal regulations.

**6. Summary and comparison with existing and proposed federal regulations:**

The table below sets forth the sections of ch. NR 106 that the department is proposing to revise, the issue number in EPA’s July 18, 2011, letter that identifies the need for the proposed revision, and the issue and corresponding federal regulation that the department has considered in proposing these rules:

Wis. Adm. Code Section	EPA Issue Number	Issue	Federal Code Section
106.06(2)	71	BCC Mixing Zone Phase-outs	40 C.F.R. Part 132, Appendix F, Procedure 3, paragraph C (Mixing Zones for Bioaccumulative Chemicals of Concern (BCCs))
106.06(6) 106.03(11m)	10	Pollutants in Intake Water	40 C.F.R. 132.6, Appendix F, Procedure 5, paragraphs D and E (Consideration of Intake Pollutants)
106.10(1) & (2)	17	Non-contact Cooling Water Exemption	40 C.F.R. 122.44(d)(1)(i) (Requiring WQBELs for all pollutants which cause or have the reasonable potential to cause or contribute to an excursion above any state water quality standard)
106.145(1) & (2)	8	Mercury Reasonable Potential Determination	40 C.F.R. Part 132, Appendix F, Procedure 5 (Reasonable potential determination procedures)

In 1995, EPA issued Final Water Quality Guidance for the Great Lakes System. The federal Guidance conforms with key treaty provisions agreed to by the United States and Canada in the Great Lakes Water Quality Agreement, a binational agreement establishing common water quality objectives for the Great Lakes. Section 118(c) of the Clean Water Act, 33 U.S.C. 1268(c), requires all Great Lakes states, including Wisconsin, to adopt procedures consistent with the federal Water Quality Guidance for the Great Lakes System. If a Great Lakes state fails to adopt the federal guidance, EPA must promulgate the federal standard for the state.

In 2000, EPA overpromulgated sections of ss. NR 106.06 and 106.10 at 40 C.F.R. 132.6. In Issue 10 of EPA's letter, EPA directed Wisconsin to amend state rules to cure the disapproval of the provisions of s. NR 106.06 regarding consideration of intake pollutants in determining reasonable potential. In Issue 17, EPA directed Wisconsin to revise s. NR 106.10 so it conforms to 40 C.F.R. 122.44(d) regarding reasonable potential determinations.

In a February 17, 2009 letter, EPA objected to Wisconsin's existing mercury reasonable potential rule in s. NR 106.145 as inconsistent with federal requirements. In Issue 8 of EPA's letter, EPA directed Wisconsin to amend the rule to cure EPA's 2009 disapproval.

Section NR 106.06(2) currently contains a note expressing the State's intent to develop a rule to phase out mixing zones for existing dischargers of bioaccumulative chemicals of concern (BCCs) to comply with the federal Great Lakes Water Quality Initiative (GLI). In Issue 71 of EPA's letter, EPA directed Wisconsin to establish a rule to phase out mixing zones for BCCs for discharges within the Great Lakes basin.

The department believes adoption of the proposed rules will address EPA's concerns. The department will have to seek EPA approval for the proposed rules.

#### **7. Comparison of similar rules in adjacent states:**

All of the other EPA Region 5 states or adjacent states (Illinois, Indiana, Iowa, Michigan, Minnesota and Ohio) are subject to EPA regulations implementing the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Program. All other states bordering the Great Lakes system (Illinois, Indiana, Michigan, Minnesota, New York, Ohio and Pennsylvania), are subject to the GLI. See 40 CFR Part 132 (setting forth requirements that Great Lakes States must adopt). The proposed rules will align Wisconsin's WPDES regulations with federal regulations.

#### **8. Summary of factual data and analytical methodologies:**

A discussion of EPA's reasons for issuing the federal Water Quality Guidance for the Great Lakes System and the data underlying EPA's analysis are included in "Final Water Quality Guidance for the Great Lakes System: Supplementary Information Document" (SID) (EPA 1995). See also 60 Fed. Reg. 15366

to 15385 (1995) (concerning the history of the Great Lakes Water Quality Initiative and EPA's adoption of Final Water Quality Guidance for the Great Lakes System).

**9. Analysis and supporting documentation used to determine effect on small business or in preparation of an economic impact analysis:**

A notice soliciting comments regarding potential economic impacts of these proposed rule changes was sent to all industrial and municipal facilities currently regulated by a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit.

DNR's System for Wastewater Applications, Monitoring and Permits (SWAMP) was used to compile existing WPDES permit holders with non-contact cooling water discharge outfalls. These data were used to determine which facilities may have impact from this rule. Many of the provisions of the proposed rule revision are already implemented by the Department when setting water quality based limits as required by EPA under Federal law.

The proposed revisions to s. NR 106.06 contain provisions relating to discharges within the Great Lakes system and outside the Great Lakes system. The department solicited information on economic impacts if the department were to adopt the proposed rules and, as an alternative, if the department were to follow proposed s. NR 106.06(6)(c)(1) statewide. The proposed rule contains different standards for determining permit limits for certain discharges outside the Great Lakes system, to allow permittees outside the Great Lakes system greater flexibility than is required by federal law for dischargers within the Great Lakes system. This rule does not specify monitoring frequency or compliance schedule timelines to allow for case by case assessment to ensure adequate environmental protection and reasonable reporting requirements.

**10. Effect on small business:**

The potential impacted facilities include facilities with non-contact cooling water outfalls or certain substances present in their intake water. Some of these facilities do not currently have treatment processes and may require upgrades or modifications to the facility to meet effluent limitations. Small businesses without treatment processes would be more likely to have economic impacts from changes required to meet WPDES permit limits. However, the department is currently required to use the procedures in the federal law when developing water quality based effluent limits and, as a result, many of the facilities impacted by these changes have already had permits reissued in compliance with the federal law.

**11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03 (2m), Stats., for rules proposed by the Department of Veterans Affairs:**

Not Applicable.

**12. Agency contact:**

Jennifer Jerich  
Wisconsin Department of Natural Resources  
Bureau of Water Quality  
N7725 Highway 28  
Horicon, Wi 53032-9782  
Phone: (920) 387-7886  
Fax: (920) 387-7888  
jennifer.jerich@wisconsin.gov

**13. Place where comments are to be submitted and deadline for submission:**

Written comments may be submitted at the public hearing, by regular mail, fax, or email to:

Jennifer Jerich  
Wisconsin Department of Natural Resources  
Bureau of Water Quality  
N7725 Highway 28  
Horicon, Wi 53032-9782  
Phone: (920) 387-7886  
Fax: (920) 387-7888

jennifer.jerich@wisconsin.gov

Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

A hearing and comments submission deadline is currently planned for December 2015.

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SECTION 1. NR 106.03 (4m) and (11m) are created to read:

**NR 106.03 (4m)** "Great Lakes system" includes all the surface waters within the drainage basin of the Great Lakes.

**(11m)** "Same waterbody" means two hydrologically connected points with similar water quality characteristics in which a pollutant can travel between in a reasonable period of time without

significantly changing chemically or physically. Hydrological connections can include surface and groundwater connections.

SECTION 2. NR 106.06 (2) (a) and (b) are repealed and recreated to read:

**NR 106.06 (2)** Limitations for bioaccumulative chemicals of concern (BCCs). (a) For purposes of this subsection, the following definitions apply:

1. "New discharge" means any point source that first received WPDES permit coverage from the department after November 6, 2000. It does not include a discharge from a publicly owned treatment works if the discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

2. "Existing discharge" means any point source that currently has a WPDES permit and that has continually had WPDES permit coverage since November 6, 2000 or earlier. It also includes a discharge from a publicly owned treatment works that becomes permitted after November 6, 2000 if the discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

3. "Expanded discharge" means any increase in concentration, level or loading of a BCC, which would exceed a limitation specified in a current WPDES permit, or which, according to the procedures in s. NR 106.05, would result in the establishment of a new limitation in a reissued or modified WPDES permit. It does not include an expanded discharge from a publicly owned treatment works if the expanded discharge from the treatment works is caused by a project that is correcting or preventing a public health problem.

(b) Notwithstanding any other provisions in chs. NR 102 and 106, there shall be no mixing zones for effluent limitations for new discharges of BCCs or for the expanded portions of existing discharges of BCCs into waters of the Great Lakes system. Effluent limitations for new discharges of BCCs and for expanded portions of existing discharges shall equal the most stringent applicable water quality criterion or secondary value for the BCC. Effluent limitations for an expansion of an existing discharge of BCCs shall be determined by means of a mass balance where the limitation for the existing portion of a permitted discharge that meets the provisions of par. (br) 1. or 2. shall be determined using the requirements of sub. (4) and the limitation for any expanded portion of the discharge may not exceed the most stringent criterion or value for that BCC.

**Note:** An example of a project that is preventing or correcting a public health problem is a situation where a community with failing septic systems connects to a POTW, as defined in s. 106.59, to avert a potential public health threat from the failing systems.

SECTION 3. NR 106.06 (2) (br) is created to read:

**NR 106.06 (2) (br)** Effluent limitations for existing discharges of BCCs into waters of the Great Lakes system, may not include a mixing zone or exceed the most stringent applicable water quality criteria or secondary values for BCCs, except as provided under subd. 1. or 2.

1. *Water conservation.* A mixing zone may be granted and an effluent limitation may exceed the most stringent water quality criterion or secondary value for a discharged BCC if the permittee demonstrates in the permit application that failure to grant a mixing zone for the BCC would preclude water conservation measures that would lead to an overall load reduction of the BCC, even though a higher concentration of the BCC occurs in the effluent.

2. *Technical and economic considerations.* A mixing zone may be granted and an effluent limitation may exceed the most stringent water quality criterion or secondary value for the discharged BCC, provided the permittee demonstrates and the department concurs that all the following conditions are met:

a. For the BCC discharged, the permittee is in compliance with and will continue to comply with the WPDES permit requirements and this chapter.

b. The permittee has reduced and will continue to reduce loadings of the BCC for which a mixing zone is requested to the maximum extent possible, such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC discharged would result in unreasonable economic effects on the discharger or the affected community because the controls or measures are not feasible or cost-effective.

3. *Approval Requirements.* If the department approves a mixing zone for a BCC under this paragraph, the following requirements shall be met:

a. The approved mixing zone is no larger than necessary to account for the technical constraints and economic effects identified under subd. 2.

b. All water quality criteria or secondary values for the BCC shall be met at the edge of an approved mixing zone or be consistent with the applicable U.S. environmental protection agency (EPA) approved total maximum daily load (TMDL).

c. The permit shall contain a numeric effluent limitation for the BCC, determined using the requirements of sub. (4) and the limit shall not be less stringent than the limit that was effective on November 6, 2000.

d. The WPDES permit may, as appropriate, require the discharger to implement an ambient water quality monitoring plan to ensure compliance with water quality criteria and consistency with any applicable TMDL, including the evaluation of alternative means for reducing the BCC from other sources in the watershed.

e. Any mixing zone for a BCC approved by the department pursuant to this paragraph shall be limited to one permit term unless the permittee applies for a mixing zone approval at the next reissuance and the department approves the mixing zone in the subsequent permit applications in accordance with the requirements of this paragraph.

f. The corresponding permit fact sheet for an approved mixing zone shall specify the mixing provisions used in calculating the permit limits and shall identify each BCC for which a mixing zone is approved.

SECTION 4. NR 106.06 (6) is repealed and recreated to read:

**NR 106.06 (6) Effluent Limitations Based Upon Elevated Background Concentrations.**

Whenever the representative background concentration for a toxic or organoleptic substance in the receiving water is determined to be greater than any applicable water quality criterion or secondary value for that substance the calculation of an effluent limitation and the determination of the need for the limitation in a permit shall be performed subject to all of the following:

(a) If the department has developed an EPA approved TMDL for the toxic or organoleptic substance in the receiving water, an effluent limitation for that substance shall be consistent with the TMDL.

(b) If no EPA approved TMDL has been developed and if the intake source of the wastewater is all from the same waterbody as the receiving water of the discharge, the department may determine that the discharge does not have a reasonable potential to cause or contribute to an excursion above the applicable water quality criterion or secondary value for the substance, and may determine that a numeric limitation is not necessary, provided the permittee has demonstrated that all of the following conditions are met:

1. The permittee withdraws 100 percent of the intake water containing the substance from the same waterbody into which the discharge is made.
2. The permittee does not contribute any additional mass of the identified intake substance to its wastewater.
3. The permittee does not alter the identified intake substance chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the substance were left in-stream.
4. The permittee does not contribute to a statically significant increase the identified intake substance concentration, as determined by the department, at the edge of the mixing zone or at the point of discharge if a mixing zone is not allowed, as compared to the concentration of the substance in the intake water, unless the increased concentration does not cause or contribute to an excursion of water quality standard for that substance.
5. The timing and location of the discharge would not cause adverse water quality impacts to occur that would not occur if the identified intake substance were left in the receiving waterbody.

(c) 1. If no TMDL has been developed and the conditions in par. (b) are not met, an effluent limitation shall be included in the permit if the department determines that the discharge has a reasonable potential to cause or contribute to an excursion above the applicable water quality criterion or secondary value for the substance. The limitation shall be included in the permit in accordance with the any of the following that applies:

1. For discharges within the Great Lakes system, the effluent limitation for that substance shall be equal to the most stringent applicable water quality criterion or secondary value.
2. For discharges outside of the Great Lakes system:
  - a. When all of the intake source of the wastewater is from the same waterbody as the receiving water of the discharge, the effluent limitation for that substance shall equal the representative background concentration of that substance in the receiving water.
  - b. When all of the intake source of the wastewater is from a waterbody that is different than the receiving water of the discharge, the effluent limitation for that substance shall be equal to the lowest applicable water quality criterion or secondary value.
  - c. When the intake source of the wastewater is in part from the same waterbody as the receiving water and in part from a different waterbody, the effluent limitation may be derived using subd. 2.a and b.

to reflect the flow-weighted average of each source of the wastewater, provided that adequate monitoring to determine compliance can be established and is included in the permit.

(d) The determination of representative background concentrations for toxic or organoleptic substances in this subsection shall be statistically ( $P \leq 0.01$ ) or otherwise appropriately determined as the reasonably expected maximum background concentration for that substance.

(e) For purposes of this subsection, an intake pollutant in the source water is considered to be from the same waterbody as the receiving water of the discharge if the permittee successfully demonstrates all of the following to the department:

1. That the pollutant would have reached the outfall point in the receiving water within a reasonable period had it not been withdrawn by the permittee,
2. That the background concentration of the pollutant in the receiving water is at a similar concentration level to that in the intake water,
3. That other water quality characteristics, including temperature, pH and hardness are similar in the intake water and the receiving water.

**Note:** The term “same waterbody” may include a hydrologic connection between groundwater and surface water. See definition in s. NR 106.03 (11m).

SECTION 5. NR 106.10 is repealed and recreated to read:

**NR 106.10 Noncontact cooling water additives.** The department shall establish water quality based effluent limitations for toxic and organoleptic substances in noncontact cooling water discharges as follows:

(1) For toxic and organoleptic substances commonly added by suppliers of drinking water systems and present in the noncontact cooling water, a water quality based effluent limitation calculated under s. NR 106.06 that is based on the applicable water quality criterion or secondary value shall be included in the permit unless the permittee demonstrates at least one of the following:

(a) The concentration of the substance in the intake water is dissipated within the system that supplies the intake water to the permittee and is consistently less than the water quality based effluent limitation.

(b) An effluent limitation is not necessary as determined using the reasonable potential procedures in s. NR 106.05.

(c) Prior to reaching the receiving water, the substance dissipates or is removed to a level that is below the water quality based effluent limitation.

(2) For other toxic and organoleptic substances intentionally added to noncontact cooling water by the permittee, the department shall follow the procedures specified in s. NR 106.05 and s. NR 106.06 to calculate a water quality based effluent limitation and determine whether the limitation is necessary in the permit. If there is no water quality criterion for an additive and there are potential water quality impacts from the additive, the department shall establish a secondary value for the additive in accordance with ch. NR 105 and calculate a limitation based on that value. All of the following requirements apply to the use and discharge of additives:

(a) A permittee shall obtain written approval from the department prior to use of the additive.

(b) A permittee shall provide the department with dosage information and safety data sheets and toxicological data, as requested by the department to meet minimum data requirements specified in s. NR 105.05(4) and 105.06(6), Wis. Adm. Code, for each additive for which approval is sought.

(c) Prior to increasing the usage of an additive in amounts greater than authorized by the department, a permittee shall get written approval from the department for the increased usage.

(d) After reissuance, if a permittee wants to use a new additive not previously approved by the department, the permittee shall get written approval from the department prior to use of the additive.

(e) A permittee may only use additives in accordance with the conditions of the department approval and any applicable permit terms. If the department does not approve use of the additive, the additive may not be discharged.

SECTION 6. NR 106.145 (1) (b) is amended to read:

**NR 106.145 (1) (b)** Representative data on the relatively low concentrations of mercury in wastewater are rare and methods for collecting that data have only recently been developed. difficult to obtain due to specialized sample collection methods required and the precision and sensitivity of laboratory analyses.

SECTION 7. NR 106.145 (2) (title) is amended to read:

**NR 106.145 (2) DETERMINING THE NECESSITY OF FOR MERCURY EFFLUENT LIMITATIONS.**

SECTION 8. NR 106.145 (2) (b) (intro.) and 1. are consolidated, renumbered and amended to read:

(2) (b) For the determination under par. (a), the department shall use representative data that comply with all of the following:

~~1. Data shall meet the sampling and analysis requirements of subs. (9) and (10).~~

SECTION 9. NR. 106.145 (2) (b) 2. is repealed.

**14. Effective Date:** This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

**15. Board Adoption:** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on \_\_\_\_\_.

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Cathy Stepp, Secretary

(SEAL)