

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
NOTICE OF FINAL DETERMINATION TO REISSUE
WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM (WPDES) PERMIT No. WI-
0063835-02-0

Permittee: Vessels 79 feet in length or more and with a ballast water capacity of 2113 gallons or more.

Facility Where Discharge Occurs: Vessels operating in Wisconsin waters.

Receiving Water and Location: Lake Michigan, Lake Superior and other waters these vessels may transit in Wisconsin.

Brief Facility Description and Summary of Proposed Changes: The previous permit included vessels 150 feet in length. The proposed permit includes vessels 79 feet or more, following the U.S. Environmental Protection Agency (EPA) and Minnesota requirements. All vessels, now including Great Lake Vessels, will be required to meet ballast water numeric discharge limits.

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The Department has decided that the above specified WPDES permit should be reissued.

Date Permit Signed/Issued: April 1, 2015

Date of Effectiveness: April 1, 2015

Date of Expiration: March 31, 2020

Following the public notice period, the Department has made a final determination to reissue the WPDES permit for the above-named permittee for this existing discharge. The permit application information from the WPDES permit file, comments received on the proposed permit and applicable Wis. Adm. Codes were used as a basis for this final determination. The Department has the authority to issue, modify, suspend, or revoke WPDES permits and to establish effluent limitations and permit conditions under ch. 283, Stats. Following is a summary of significant comments and any significant changes which have been made in the terms and conditions set forth in the draft permit:

1. The Department does not have legal authority to include the technology-based effluent limits in the permit.

Response: The Department has authority to include the numeric technology-based effluent limits in the General Permit that reflect the Department's best professional judgment.

The commenter acknowledges that § 283.35 (1m), Wis. Stats., authorizes the Department to include effluent limitations in the Ballast Water General Permit, but suggests that the effluent limits must first be promulgated as a rule. The commenter relies on the definition of "rule" under § 227.01(13), Wis. Stats., the case of *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980) and § 283.11(1) and (2), Wis. Stats., for the proposition that rulemaking requirements apply before effluent limitations may be included in a WPDES Permit.

As the commenter notes, the legislature has expressly authorized the Department to issue a general permit containing effluent limitations for ballast water. *See* § 283.35(1m), Wis. Stats. The commenter suggests that the *WEPCO* case should be read together with § 283.11(1) and (2), Wis. Stats., to require the Department to first promulgate the effluent limitations as an administrative rule before including them in the General Permit. The Department does not agree with this analysis.

The commenter cites § 283.11(1), Stats., which provides that “[t]he department shall promulgate by rule effluent limitations, . . . for any category or class of point sources established by the U.S. environmental protection agency and *for which that agency has promulgated any effluent limitations* . . . for any pollutant” (emphasis added). The commenter also cites § 283.11(2), Stats. (commonly referred to as the “uniformity clause”), which provides that “all rules promulgated by the department under this chapter as they relate to . . . effluent limitations . . . shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387, and regulations adopted under that act.”

The Clean Water Act, 33 U.S.C. § 1314(b), authorizes EPA to adopt effluent limitation guidelines. As soon as possible after the promulgation of any federal regulations establishing effluent guidelines, § NR 220.14, Wis. Adm. Code, requires the Department, to adopt appropriate guidelines in Wisconsin administrative regulations. Wisconsin has adopted EPA effluent limitation guidelines in chs. NR 221 through 299, Wis. Adm. Code. The key factor in this case is that EPA has not adopted any effluent limits for vessels or for the organisms contained in the General Permit. Since EPA has not promulgated effluent limitations for the organisms, there is no applicable federal effluent limitation the state must adopt in its own regulations.

In adopting requirements for ballast water discharges under the federal Vessel General Permit, EPA used its best professional judgment, as authorized under 40 C.F.R. § 125.3(c)(2). State law contains similar authorization for the Department to use its best professional judgment in setting permit limitations. Under subch. III of ch. NR 220, Wis. Adm. Code, the Department has the authority to “specify effluent limitations applicable in permits for discharges from point sources . . . [w]hich belong to classes or categories of point sources for which effluent limitations have not been adopted in chs. NR 221 to 299” (§ NR 220.21(1), Wis. Adm. Code). In the case of Permits for discharges identified in § NR 220.21(1), Wis. Adm. Code, the “effluent limitations shall be those which the department determines are achievable by the application of the best practicable control technology currently available, or, where appropriate, the best available control technology economically achievable” (§ NR 220.21(2), Wis. Adm. Code). Thus, since ballast water discharged from Lakers is not regulated under chapters NR 221 to 299, Wis. Adm. Code, the Department may use its best professional judgment to impose the technology based limits it determines are achievable.

The commenter also suggests that if the Department had followed the rule-making process, Wisconsin courts would hold that the Department does not have authority to impose technology-based effluent limitations that are more stringent than those imposed by federal law, and cites the *WEPCO* case to support the argument. However, a case decided after *WEPCO* clarifies that § 283.11(2), Wis. Stats., “applies only where the federal program regulates the activity in question, for example where the EPA has imposed specific discharge limits for defined categories of industrial discharges . . .” (*Maple Leaf Farms, Inc. v. State DNR*, 247 Wis. 2d 96, 107, ¶16, 633 N.W.2d 720, 726, 2001 WI App 170). As explained above, EPA has not promulgated federal effluent limitation guidelines for discharges of organisms from vessels. In the absence of effluent limitation guidelines, the holding in *WEPCO* does not apply.

Finally, the court in *Maple Leaf Farms* made a point that is very much applicable to the Department’s use of best professional judgment to set limits in the General Permit. The court stated:

Maple Leaf appears to argue that all permit language must be formally promulgated by rule. Carrying this logic further would result in a situation where permit writers could include in permits only restatements of the precise language contained in the administrative code. This would make the issuance of permits an untimely, cumbersome and inflexible exercise that would not benefit permit holders at all. It makes sense that the legislature would allow the DNR flexibility in drafting conditions in permits. This allows the DNR to work individually with

permit holders to fashion permits that more closely balance the specific needs of the permit holder with public environmental concerns.

Id. at ¶31.

In this case, the General Permit is fashioned to allow flexibility for Lakers. It provides that Lakers are required to meet the numeric technology-based effluent limits at the following date, and with the following exception:

First scheduled dry-docking after March 30, 2018, unless the permittee can demonstrate that the USCG has not type approved any freshwater BWTS that are commercially available and compatible for the permittee's vessel as of that date.

If the Department were required to promulgate the limit as a rule before including it in the General Permit, this would result in an "untimely, cumbersome and inflexible exercise" that would not benefit the Lakers. The effluent limit in the General Permit, which is authorized under § 283.35(1m), Wis. Stats., provides for a reasonable limit, based on the Department's best professional judgment, as allowed pursuant to § NR 220.21(2), Wis. Adm. Code, and gives flexibility to the permittees to meet the limit.

2. Imposing the technology based effluent limitations on Lakers would be unreasonable.

The Department acknowledges that Lakers do not bring new Aquatic Invasive Species into the Great Lakes, but Lakers certainly spread existing AIS, as well as pathogens, harmful microbes, or both, throughout the Great Lakes System. As Administrative Law Judge Jeffrey Boldt found in the recent case involving the first Ballast Water General Permit (*In the Matter of the Modification to Ballast Water General Permit No. WI-00638535-01-1 to Discharge Under the Wisconsin Pollutant Discharge Elimination System, Issued April 1, 2011; Case No. IH-11-62, et al.*, November 29, 2012):

Lakers -vessels that operate exclusively within the Great Lakes -are significantly larger than oceangoing vessels and carry up to ten times the ballast water. *DNR's Responses to RFAs* at 7 (Nos. 35, 36); *Environmental Assessment* at 4. They play a significant role in spreading AIS after they have been introduced by taking up and discharging billions of gallons of ballast water every year. *DNR's Responses to RFAs* at 7 (Nos. 35, 36), 8 (No. 40); *Environmental Assessment* at 4; See Rup. M.P., *et al.*, *Domestic Ballast Operations on the Great Lakes: Potential Importance of Lakers as a Vector for Introduction and Spread of Nonindigenous Species*, *Can. J. Fish. Aquat. Sci.* 67(2): 256,263 (2010) (Ex. 73). Lakers are likely "the most important ballast mediated pathway of secondary spread within the Great Lakes." *Id.*

Ruling on Motions for Summary Judgment, at page 13.

The Department believes treatment from both Salties and Lakers is needed to adequately protect Wisconsin Waters. Ballast water technology and the feasibility of onboard treatment are rapidly evolving and the Department believes that technology will be available by the implementation date of the first dry docking of vessels after March 30, 2018. If it is not, section 4.1.3 of the permit covers this issue, by providing an exemption if "the permittee can demonstrate that the USCG has not type approved any freshwater BWTS that are commercially available and compatible for the permittee's vessel as of that date".

3. Questions on the definition change for "Great Lakes Vessel".

The Department changed the definition for "Great Lakes Vessel" in the draft permit to follow the EPA's definition. Due to comments on this, the Department changed the definition in the final permit to the following: "*Great Lakes Vessel*" means a bulk carrier vessel that operates exclusively in the Great

Lakes, their connecting channels, including all other bodies of water within the drainage basin of such lakes and connecting channels, and within the U.S. and Canadian Exclusive Economic Zones (EEZ).

4. Letter of Support from Minnesota Pollution Control Agency

The Department acknowledges this letter.