

Report From Agency

REPORT TO LEGISLATURE

NR 102, Wis. Adm. Code

Board Order No. WY-23-13
Clearinghouse Rule No. 19-094

Basis and Purpose of the Proposed Rule

The federal Clean Water Act requires states to develop and update water quality criteria protective of waterbodies' designated uses, and requires states to conduct waterbody assessments based on these criteria every two years. U.S. EPA has been working with states over the last two decades to develop robust biological metrics for use in these assessments, and supports states in implementing these procedures as part of their assessment protocols.

Like most states, Wisconsin uses biological metrics to assess the health of waterbodies' aquatic life communities, such as fish, insect, and plant communities. This rule establishes general expectations for waterbodies' biological health and provides transparency on the types of assessments done and how they fit under the Clean Water Act. This rule also establishes criteria for algae (chlorophyll *a*) that are needed to protect recreation, and dissolved oxygen criteria to protect lakes with coldwater fish for which existing criteria were not appropriate.

Another portion of this rule contains detailed procedures for evaluating whether waterbodies attain the phosphorus criteria that were promulgated in 2010. It incorporates an approach that assesses a waterbody's algal and plant responses to phosphorus levels ("phosphorus response indicators") before making an impairment determination.

Summary of Public Comments

See attached "Public Comments and DNR Responses on: NR 102: Waterbody assessments, biocriteria, & phosphorus response indicators (Natural Resources Board Order No. WY-23-13)"

Modifications Made

See the following item numbers in the "Public Comments and DNR Responses" document referenced above describing revisions made to the rule or Technical Support Document in response to comments:

- 5a-d: Language was revised for oxythermal criteria for two-story fishery lakes.
- 8: The chlorophyll *a* criterion for Aquatic Life Use protection for two-story fishery lakes was revised from 10 ug/L to 8 ug/L based on comments from U.S. EPA.
- 9a (last response bullet): A note was added referencing U.S. EPA's cyanotoxin recommendations.
- 10c: Language was removed in the biocriteria section referencing "ecologically and culturally important species" and "feasibility to restore" a population, as these terms were difficult to define.
- 13d-f, 14a, 14c-e: Corrections/clarifications were made to language regarding phosphorus assessment protocols, and a section on using additional metrics for phosphorus assessments was removed.
- 8, 9b, 12, 13c, 14b: Additional detail was added to the Technical Support Document for clarity in several areas, including: chlorophyll *a* criteria for deep lakes and two-story fisheries, number of waterbodies that would be assessed as attaining or not attaining the proposed biocriteria and phosphorus response indicators, phosphorus assessment tools, and plant assessment tools.

Appearances at the Public Hearing

There were three attendees; none indicated support or opposition:

- Evan Miller, representing Senator Cowles, District 2
- Toni Herkert, representing Senator Cowles, District 2

- Waltraud Brinkmann

Changes to Rule Analysis and Fiscal Estimate

Additional detail was added to the rule analysis and fiscal estimate for clarity based on comments received, but no substantive changes were made. Specifically, information about how the proposed rule would affect which waterbodies are listed as impaired was added.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments related to form, style and placement; clarity, grammar, punctuation, and use of plain language. Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse.

Final Regulatory Flexibility Analysis

The department expects this rule package to have minimal economic impacts, and the rule is not expected to incur additional costs for small businesses. The rule primarily pertains to biological assessments of surface waters.

Response to Small Business Regulatory Review Board Report

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