

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: DG-03-22

Relating to: Creation of ch. NR 851 for the management of diversions (transfers of water from the Great Lakes basin to outside of the Great Lakes basin) and intrabasin transfers including the application and review process and other related criteria.

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rule will be proposed as a permanent rule.

2. Detailed description of the objective of the proposed rule:

The objective is to create a new rule to establish 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.).

This rule would specify requirements regarding: diversion and intrabasin transfer application requirements, including exception standard requirements; department determinations related to approval, conditional approval, and denial of diversion applications; public notice and participation; and reporting requirements. Additional rule language may be considered to effectuate the purpose of the rule described herein.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The Great Lakes - St. Lawrence River Water Resources Compact (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 will work together to manage and protect the Great Lakes - St. Lawrence River Basin (Basin). They also provide a framework for each state to create programs and enact rules and regulations within their own jurisdictions to protect the Basin.

The Wisconsin Legislature ratified the Compact in 2007 Wisconsin Act 227. Sections 281.343 and 281.346, Wis. Stats., detail the Compact and Wisconsin's program, respectively, for managing and regulating new or increased water withdrawals, diversions and consumptive uses consistent with the provisions of the Compact.

The Great Lakes 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 would specify requirements regarding: diversion and intrabasin transfer application requirements that are outlined in s. 281.346(4), Wis. Stats., including the exception standard under s. 281.346(4)(f), Wis. Stats.; department determinations related to approval, conditional approval, or denial of diversion and intrabasin transfer applications; public notice and participation requirements (s. 281.346(9)(b) to (d), Wis. Stats.); and fees (s. 281.346(12)(d), Wis. Stats.).

Chapters NR 852 (Water Conservation and Water Use Efficiency) and 856 (Water Use Registration and Reporting), Wis. Adm. Code., already refer to requirements for diversions and would be amended, if needed, to be consistent with this rule.

Interbasin transfers that existed prior to the Compact's effective date and that have approvals issued under s. 281.344, Wis. Stats., would also be regulated under this rule.

An alternative to this rule is to not proceed with rule promulgation and rely solely on the existing statutory language.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Wisconsin is a party to the Great Lakes – St. Lawrence River Water Resources Compact and is required to, "within its jurisdiction, manage and regulate new or increased withdrawals, consumptive uses, and diversions, including exceptions, in accordance with this compact." (s. 281.343(4d)(a), Wis. Stats.). To accomplish this, Wisconsin has authority to "adopt and enforce rules and regulations to implement and enforce this compact and programs adopted by such party to carry out the management programs contemplated by this compact." (s. 281.343(3)(c)2., Wis. Stats.).

The department is explicitly authorized to promulgate rules establishing department procedures for managing Great Lakes diversions and intrabasin transfers:

—Sections 281.346(3)(b)10. and (e)2. authorize the department 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. authorizes the department to establish requirements by rule for new and increased intrabasin transfers.

—Section 281.346(4)(g) 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) 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.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The department estimates that approximately 800 hours of staff time will be required to complete the proposed rule.

6. List with description of all entities that may be affected by the proposed rule:

The proposed rule may affect the following entities:

- 1) Communities or operators of public water supply systems that straddle the Great Lakes subcontinental divide.
- 2) Communities within straddling counties.
- 3) Southeast Wisconsin Regional Planning Commission.
- 4) Applicants seeking an intrabasin transfer.
- 5) Entities that have an existing interbasin transfer approval or diversion approval.

Currently there are 17 entities that have an existing diversion approval or interbasin transfer approval. In the future, any applicant for a diversion of Great Lakes water to a straddling community or community in a straddling county, or an intrabasin transfer would be affected by this rule. The proposed set of rules may also interest citizens and groups concerned with the Great Lakes basin and implementation of the Great Lakes Compact.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

There are no comparable federal regulations pertaining to the management of diversions and intrabasin transfers regulated under the Great Lakes – St. Lawrence River Basin Water Resource Compact. There are specific procedures that are laid out in the Compact Rules of Practice and Procedure that will need to be considered while writing this rule.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):

The proposed rule will affect communities applying for a diversion of water out of the Great Lakes basin, or an intrabasin transfer. Since the Compact and implementing legislation was passed in December 2008, the department has received and approved a limited number of applications for diversions (e.g. Cities of New Berlin, Waukesha, and Racine) and intrabasin transfers (e.g. Enbridge hydrostatic testing). The department anticipates a similar limited number of applications in future years. Costs related to diversions and intrabasin transfers are mostly

related to hiring consultants to meet statutory requirements. The department anticipates the economic impact of implementing this rule to be moderate, as requirements for this administrative rule would be no more stringent than the requirements established by statute. The rule is not anticipated to have a significant economic impact on small businesses.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding a public hearing in September, 2023. The hearing will be held in Madison, Wisconsin with an option to join virtually. This will provide convenient access to the hearing for interested parties around the state.

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