

Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item

SUBJECT:

Request that the Board approve the Statement of Scope for Emergency Board Order WA-17-21(E) and Board Order WA-18-21 and conditionally approve the public hearing notice for WA-18-21 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse, for proposed rules affecting chapters NR 500 and 520 related to disposal of material dredged from the Great Lakes

FOR: April 2022 Board meeting

PRESENTER'S NAME AND TITLE: Kate Strom Hiorns, Recycling and Solid Waste Section Chief

SUMMARY:

2021 Wisconsin Act 93 (Act 93), effective July 1, 2022, establishes requirements and exemptions relating to materials dredged from Great Lakes and directs the department to promulgate emergency rules no later than January 1, 2023. The emergency rule must pertain to dredged sediment sample analysis, the number of samples to be collected, and other items determined to be necessary by the department.

Rulemaking will expand on criteria listed in Act 93 to allow a municipality or county to dispose of dredged material from Lake Michigan or Lake Superior in an unlicensed land disposal facility. In other words, the disposal site is exempt from requirements for a licensed landfill or other regulated facility. An exempt disposal site can be used for up to 10 years or for an amount not to exceed 35,000 cubic yards of dredged material in total, whichever occurs first. For this exemption to apply, the department must determine that the disposal will not injure public rights or interests and will not cause environmental pollution, among other findings.

The goal of this rulemaking is to create an upfront, transparent process and list of requirements when municipalities and counties utilize this exemption for dredged material disposal.

If the scope statement for Board Orders WA-17-21(E) and WA-18-21 is approved, the department may begin drafting the rule language. As required by statute, the department may not begin work on the content of the proposed rules until the scope statement is approved. Once the permanent rule is drafted, the department will seek public comment on the economic impact of the rule and on the proposed rule language. The 30-month time frame for submission of a final permanent rule to the legislature for approval expires on September 7, 2024.

RECOMMENDATION: That the Board approve the statement of scope for Emergency Board Order WA-17-21(E) and Board Order WA-18-21 and conditionally approve the public hearing notice for Board Order WA-18-21 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse.

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

- Statement of Scope
Governor's Approval of Statement of Scope
Public Comments Summary
Background Memo
(insert document name)
(insert document name)

Table with 3 columns: Approved by, Signature, Date. Rows include George B. Wolbert, Gail E. Good, and Preston D. Cole, Secretary.

by Sarah Barry

cc: Board Liaison - AD/8
Department Tribal Liaison - AD/8

DS
WR

Program attorney - LS/8

Department rule officer - LS/8

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STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WA-17-21(E) and WA-18-21

Relating to: Revisions to chs. NR 500 and 520 related to disposal of material dredged from the Great Lakes

Rule Type: Permanent and Emergency

1. Finding/nature of emergency:

2021 Wisconsin Act 93 (Act 93), effective July 1, 2022, establishes requirements and exemptions relating to materials dredged from Great Lakes and directs the department to promulgate emergency rules no later than January 1, 2023. The Act states that the department “shall use the procedure under s. 227.24 to promulgate rules under s. 289.43 (8) (d) 1. no later than the first day of the 7th month beginning after the effective date of this subsection. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this subsection remain in effect until the first day of the 36th month beginning after the effective date of the emergency rules or the date on which permanent rules take effect, whichever is earlier. ... Notwithstanding s. 227.24 (1) (a) and (3), the department of natural resources is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.”

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

2021 Wisconsin Act 93 provided a new exemption from certain state solid waste facility licensing requirements for the disposal of dredged material conducted by municipalities in Lake Michigan or Lake Superior. Emergency and permanent rulemaking is required under Act 93. The emergency rule must pertain to sediment sample analysis, the number of samples to be collected, and other items determined to be necessary by the department.

The department anticipates that this rule will impact chs. NR 500 and 520, Wis. Adm. Code, but this may change in the rule development process.

Under Act 93, dredged material need not be disposed of in a solid waste facility that has obtained an operator’s license and approved plan of operation if the department determines that all of the following requirements are satisfied, based on information submitted in an application:

- The material is dredged by a municipality or county, or a contractor of a municipality or county.
- The material is dredged from Lake Michigan, Lake Superior, or bays or harbors of those lakes.

- The dredging and disposal will have a demonstrable economic public benefit, defined to mean an economic benefit to the community or region that is measurable, such as increased access to natural resources, local spending by the proposed project, employment, or community investment.
- The cumulative adverse environmental impact of the dredging is insignificant and will not injure public rights or interests, cause environmental pollution, or result in material injury to the rights of any riparian owner.
- The disposal facility is in compliance with performance standards established by the department by rule.
- The disposal facility will accept dredged material for a period not to exceed 10 years or in an amount not to exceed 35,000 cubic yards in total, whichever occurs first. However, the exemption is voided if there is a material adverse change in the contamination in the dredged material that would be disposed of at the facility, or if there is a material change in the intended use of the dredged material.
- The disposal facility is not located within 100 feet of any wetland or critical habitat area or within a floodplain, unless the project is for beach nourishment above the ordinary high water mark on a public beach that has already been noticeably disturbed by human activities, such as the construction of a parking lot, public swimming area, or other improvement, and that has no unique ecological value.
- The disposal facility is not located less than 100 feet from any water supply well.
- The disposal facility will confine the disposal area to as limited a geographic area as is practicable.
- The disposal facility and application are in compliance with any other conditions established by the department by rule.

Act 93 requires a municipality, county, or contractor to submit an application containing certain information to the department at least 60 days prior to beginning the disposal authorized by Act 93 and specifies that the department may not review the application until the department determines it is complete. An application may address the disposal of dredged material from a single dredging location at multiple disposal sites. The application is considered approved if the department does not provide a written objection to the application within 30 days of a complete application submittal.

The emergency and permanent rules would:

- Identify sediment sampling and analysis requirements prior to disposal, using as a guide the existing ch. NR 347, Wis. Adm. Code, “SEDIMENT SAMPLING AND ANALYSIS, MONITORING PROTOCOL AND DISPOSAL CRITERIA FOR DREDGING PROJECTS.”
- Clarify disposal, operational requirements, and sediment sample requirements intended to prevent potential long term negative environmental effects or potential impacts to fish and wildlife habitat, water and groundwater quality, public health, private riparian rights and public recreation.
- Define waste boundaries and locational criteria that would apply when determining distance from wetlands, floodplains, water supply wells, separation to groundwater, or other locational and performance standards.
- Identify disposal facility performance standards, such as those listed in s. NR 504.04 (4), Wis. Adm. Code.
- Define the maximum 10-year exemption period for the dredge disposal facility and associated tracking and notification procedures.

- Define procedures, such as a deed or other legal document, for documenting the establishment of a dredge disposal facility.
- Define requirements for tracking dredge disposal amounts at a facility in order to prevent disposing of more than 35,000 cubic yards at that site, including procedures for how and when the disposal volume of the dredged materials is determined.
- Define requirements for covering and re-seeding the disposal facility after dredge disposal activity.
- Define requirements or reference other codes regarding storm water run-off pollution prevention control requirements at the disposal facility.
- Define procedures for determining and notifying the department when there is a material adverse change in the contamination of the dredged material that would be disposed of at the facility, or if there is a material change in the intended use of the dredged material.
- Identify the information required to make an application complete.
- Identify or describe the response options the department may provide after receipt of a complete application.
- Describe recordkeeping and reporting requirements for the disposal facility.
- Describe documentation and review by the department when a project is for beach nourishment above the ordinary high water mark on a public beach that has already been noticeably disturbed by human activities.

Additional rule changes may be pursued which are reasonably related to those discussed here.

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:

Dredging projects primarily consist of three steps: 1) remove sediment from a waterbody using either mechanical or hydraulic methods; 2) process the dredged material, including dewatering and transportation from the removal site to a location for use or disposal; 3) place and potentially dewater the dredged material. Permits or regulatory approvals from the department may be required at each of these three steps. In order to conduct a successful dredging project, while minimizing the impact of dredging on the environment, the quality and quantity of sediment to be removed needs to be assessed to ensure that all dredging activities meet permit or regulatory requirements. 2021 Wisconsin Act 93 and this rulemaking only address step 3, the placement or disposal of dredged material. There are no changes to existing reviews or approvals needed when removing or processing dredged material.

Wisconsin law contains licensing requirements and other regulations governing solid waste disposal. In general, any “solid waste” must be disposed of in a facility that has obtained a solid waste facility license and an approved plan of operation, among other requirements. However, the statutes and administrative codes provide exemptions from the general licensing and regulatory requirements for disposal of specified categories of waste, such as dredged material.

Dredged material, or sediment, meets the definition of a solid waste when it is removed from a water body. Existing administrative rules provide an exemption for the disposal of dredged material from the Great Lakes. [s. NR 500.08 (3), Wis. Adm. Code.] Under this exemption, a disposal facility/location is exempt from licensing and plan review requirements if the total disposed is less than 3,000 cubic yards of dredged material and complies with the performance standards specified in s. NR 504.04 (4), Wis. Adm. Code. This rule will likely incorporate

similar performance standards, which are intended to prevent the disposal activity from the following:

- Significant adverse impact on wetlands.
- Take of an endangered or threatened species.
- Detrimental effect on any surface water.
- Detrimental effect on groundwater quality or causing or exacerbating an attainment or exceedance of any preventive action limit or enforcement standard at a point of standards application as defined in ch. NR 140, Wis. Adm. Code.
- Migration and concentration of explosive gases.
- Emission of any hazardous air contaminant.

Dredge disposal from the Great Lakes that exceeds the 3,000 cubic yard limit is often handled using a “low hazard waste exemption” authorized under s. 289.43 (8) (b), Wis. Stats., and s. NR 500.08 (4), Wis. Adm. Code. This review incorporates similar elements to those required under Act 93 and policies likely to be proposed in rulemaking.

New policies proposed to be included in the rule are listed in Section 2 above. Because this rulemaking is required under 2021 Wisconsin Act 93, there are limited policy alternatives. Act 93 requires the emergency rule to pertain to sediment sample analysis, the number of samples to be collected, and other items determined to be necessary by the department. The emergency and permanent rules are intended to incorporate all requirements for the dredge disposal process, making steps transparent for municipalities that need to dispose of dredged material.

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

The department is authorized to promulgate rules under s. 289.43 (8) (d) 1., Wis. Stats.:

The department may not regulate under s. 289.30 or 289.31 any facility for the disposal of material dredged by a municipality or county or a contractor for a municipality or county from Lake Michigan, Lake Superior, or bays or harbors adjacent to Lake Michigan or Lake Superior, if, among other criteria, the department determines that the facility is in compliance with performance standards established by the department by rule and that the application and proposed facility are in compliance with any other conditions established by the department by rule.

Statutory authority to promulgate rules is also granted under s. 289.05, Wis. Stats., to establish minimum standards for the location, design, construction, sanitation, operation, monitoring and maintenance of solid waste facilities.

Under s. 289.06, Wis. Stats., the department is granted authority to promulgate rules implementing and consistent with ch. 289, Wis. Stats., Solid Waste Facilities, and s. 292.31, Wis. Stats., addressing environmental repair.

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 750 hours of staff time will be required to complete the proposed rules.

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

Municipalities or counties located on Lake Michigan, Lake Superior, or bays or harbors of those lakes and their use of engineering consultants and contractors.

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:

In general, disposal of solid waste in Wisconsin must be as protective as federal land disposal requirements in the Resource Conservation and Recovery Act, contained in title 40 of the Code of Federal Regulations. There currently is no federal regulation that specifically oversees exemptions for upland disposal of dredged material.

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


The rules are not expected to have an impact on small businesses.

The rules would likely have a minimal, positive economic impact for municipalities and counties each year. The emergency and permanent rules are intended to incorporate all requirements for the dredge disposal process, making steps transparent for municipalities that need to dispose of dredged material. This transparency should reduce costs for municipalities, counties, or their contractors to spend time preparing and submitting documents for department review.

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

The department anticipates holding a public hearing on the emergency and permanent rules in March 2023. The hearing city will be Madison with an option to join virtually.

Contact Person: Kate Strom Hiorns, Solid Waste Section Chief, Bureau of Waste & Materials Management; PO Box 7921, Madison, WI 53707-7921; Phone: 608-294-8663
kathrynm.stromhiorns@wisconsin.gov

DocuSigned by:

A7D70DC3770643F
For Preston D. Cole, Secretary

2/11/2022 | 10:59 AM CST

Date Submitted

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Tony Evers

Office of the Governor | State of Wisconsin

February 24, 2022

By Electronic Mail Only

Dear Secretaries and Agency Heads:

On this day, I approved the following statements of scope pursuant to Wis. Stat. § 227.135(2):

- Both an emergency and permanent statement of scope by the Department of Natural Resources, submitted February 11, 2022, relating to revisions to chs. NR 500 and 520 related to disposal of material dredged from the Great Lakes (Wis. Admin. Code chs. NR 500 and 520); and
- A statement of scope by the Department of Transportation, submitted February 14, 2022, relating to inclusive language in administrative rules (Wis. Admin. Code chs. Trans 1-515); and
- A statement of scope by the Department of Transportation, submitted February 11, 2022, relating to licensing of driver schools and instructors (Wis. Admin. Code ch. Trans 105).

On this day, I approved the following proposed administrative rules pursuant to Wis. Stat. § 227.185:

- A proposed emergency rule by the Department of Military Affairs, submitted February 21, 2022, relating to eligibility criteria for disaster fund grants and renumber section WEM 7.03(1)(c)-(f) to (b)-(e) (Wis. Admin. Code ch. WEM 7); and
- A proposed rule by the Department of Public Instruction, submitted February 18, 2022, relating to grade ranges for school administrators and speech-language pathologists (Wis. Admin. Code ch. PI 34); and
- A proposed rule by the Controlled Substances Board, submitted February 22, 2022, relating to scheduling Oliceridine (Wis. Admin. Code ch. CSB 2); and
- A proposed rule by the Department of Revenue, submitted February 18, 2022, relating to excise tax (Wis. Admin. Code chs. Tax 7 and 8); and
- A proposed rule by the Department of Workforce Development, submitted February 23, 2022, relating to the order of selection for vocational rehabilitation services, the protection, use, and release of personal information, and the appeal procedures for vocational rehabilitation services (Wis. Admin. Code chs. DWD 65, 68 and 75); and

- A proposed rule by the Department of Natural Resources, submitted February 23, 2022, relating to well construction and pump installation and affecting small business (Wis. Admin. Code ch. NR 812).

Please direct any questions about this letter to my deputy policy director, Katie Domina.

Sincerely,

A handwritten signature in black ink that reads "Tony Evers". The signature is written in a cursive, flowing style.

Tony Evers
Governor

cc: Ryan Nilsestuen, chief legal counsel (ryan.nilsestuen1@wisconsin.gov)
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