

Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item

SUBJECT:

Request that the Board approve the Statement of Scope for Board Order DG-03-22 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse, for proposed rules creating chapter 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

FOR: June 2022 Board meeting

PRESENTER'S NAME AND TITLE: Adam Freihoefer, Water Use Section Chief

SUMMARY:

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.

A preliminary public hearing on this scope statement was held on June 3, 2022. A recording of the hearing is available at: https://widnr.widen.net/view/video/acvgnhqhjh/NR854_Public-Hearing_6_3_2022.mp4.

If the scope statement for DG-03-22 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 rule until the scope statement is approved. Once the 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 rule to the legislature for approval expires on October 4, 2024.

RECOMMENDATION: That the Board approve the Statement of Scope for Board Order DG-03-22 and conditionally approve the public hearing notice 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 Steven B. Elmore, Gail E. Good, and Preston D. Cole.

by Sarah Barry

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

Handwritten initials 'KLE' in a box.

Program attorney - LS/8

Department rule officer - LS/8

This page intentionally left blank.

CORRESPONDENCE/MEMORANDUM

DATE: June 6, 2022

TO: All Members of the Natural Resources Board

FROM: Preston D. Cole, Secretary

SUBJECT: Background memo on preliminary public hearing and public comments received on the scope statement for Board Order DG-03-22, proposed rules creating 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

On April 11, 2022, the co-chair of the Joint Committee for the Review of Administrative Rules (JCRAR) requested that the department hold a preliminary public hearing and comment period on the scope statement for Board Order DG-03-22, pursuant to s. 227.136(1), Wis. Stats. The statement of scope contemplates rulemaking to create chapter NR 851, Wis. Adm. Code, 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.

Public Hearing

The department held an online preliminary public hearing on the statement of scope on June 3, 2022 at 10 a.m. One member of the public attended the hearing. The department received zero comments at the hearing.

Written Public Comment

The public comment period ended on June 3, 2022. The department received zero written comments on the proposed statement of scope.

A recording of the preliminary hearing is available at:

https://widnr.widen.net/view/video/acvgnhqjh/NR854_Public-Hearing_6_3_2022.mp4

Drafter: Nicole Clayton

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.

Contact Person: Nicole Clayton, (608) 206-2510

DocuSigned by:

A7D70DC3770642F...
For Preston D. Cole, Secretary

3/8/2022 | 12:44 PM CST

Date Submitted



Tony Evers

Office of the Governor | State of Wisconsin

March 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):

- A statement of scope by the Department of Justice, submitted March 10, 2022, relating to tracking of sexual assault kits in sexual assault cases (Wis. Admin. Code ch. JUS 21); and
- A statement of scope by the Department of Natural Resources, submitted March 21, 2022, 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 (Wis. Admin. Code ch. NR 851); and
- A statement of scope by the Department of Natural Resources, submitted March 15, 2022, relating to creation of ch. NR 854 for statewide water supply service area planning for municipalities serving populations greater than 10,000 people (Wis. Admin. Code ch. NR 854).

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'.

Tony Evers
Governor

cc: Ryan Nilsestuen, chief legal counsel (ryan.nilsestuen1@wisconsin.gov)
Katie Domina, deputy policy director (katherine.domina1@wisconsin.gov)
DOA State Budget Office (SBOAdminRules@spmail.wi.gov)
Jody Schmelzer, DOJ (schmelzerjj@doj.state.wi.us)
Emma Esch, DNR (emma.esch@wisconsin.gov)