



COMMENTS: FISH PASSAGE POLICY MANUAL CODE

I. INTRODUCTION

The Wisconsin Paper Council (WPC) appreciates the opportunity to comment on the proposed Manual Code relating to Fish Passage at Dams. The papermaking industry is a key economic driver for Wisconsin, employing over 35,000 highly skilled men and women whose efforts continue to make us the number one papermaking state in the United States. The Wisconsin Paper Council is the premier trade association which advocates for our entire industry – an industry which is focused on sustainability and strong environmental stewardship. Many of our members own and operate hydroelectric dams, providing a carbon-free source of energy for our energy-intensive operations. WPC looks forward to working with the Wisconsin Department of Natural Resources (the Department) on this important issue.

II. GENERAL COMMENTS

Our members' employees live and work in some of the most pristine environmental areas of Wisconsin, and we value the protection of those resources. We advocate for regulatory certainty, transparency, and stakeholder involvement at every step. We also advocate for balancing reasonable regulation with the economic impact on both the families that work in our industry and the communities they support.

WPC generally supports the Department providing a detailed and understandable process for research, evaluation, and permitting decisions so our members can understand the actions taken by the Department. However, with respect to this proposed guidance, WPC believes it may be premature, should provide more transparency and opportunity for stakeholder input in the decision-making process, and leaves the department vulnerable to legal challenges.

III. PROCEDURE (SECTION IV)

a. Section A

The introduction to Section A notes that "any department staff may receive a contact related to a fish passage project" which is the initial starting point for any fish passage evaluation. It is unclear from whom this contact may come. Is a request from a member of the public enough to require an analysis of a fish passage, or must it be a dam owner, permit holder, or licensee? Can another state or federal agency request a review? If the request can come from someone other than the permit holder, the Department may find itself evaluating several requests. WPC would recommend better defining who may initiate a project evaluation by limiting it to permit holders or licensees.

Regardless of who makes the first contact, the evaluation from start to finish must not place any requirements on the dam owner or permit holder that are not otherwise found in statute or rule. For example, the Department may not require the permit holder to undertake additional studies or incur additional costs due to the process laid out in this guidance.

The current procedure proposed includes 1) initial project contact, 2) preliminary screening, 3) simple or complex project determination, and 4) complex project determination.

Comments on Fish Passage Policy Manual Code

With respect to the specific procedure, there is no defined needs evaluation and it is not clearly described at what point the Department may abandon the process based on lack of need. Currently, the preliminary screening is a robust pre-study that requires Department staff to evaluate advantages, disadvantages, stakeholders, legal consideration, and known controversial issues. WPC believes a screening should be done before that somewhat extensive screening to evaluate need. In many situations, it is possible the Department can determine, with little effort, that there is no need for a fish passage project evaluation before evaluating the remainder of the Preliminary Screening list. For example, as explained in the strategic analysis, many fish species native to Wisconsin may not need to migrate. That certain species traverses or travel waterways does not necessarily mean that species migrates, and the list of migrating species that are specifically doing so to spawn is limited. (*See Fish Passage at Dams Strategic Analysis*, Wisconsin DNR, February 5, 2019, page 44). While there are certainly many factors to consider in a full evaluation, a high-level screen of the species present and their need to migrate could save significant state resources by preventing in-depth studies of projects where need for a fish passage simply does not exist. WPC would recommend that Section A include a step between the Initial Project Contact and the Preliminary Screening that would be a basic Needs Assessment Screen of a fish passage. The Needs Assessment Screen would also include identifying the stakeholders. In the alternative, a basic needs assessment must at least be included in the preliminary screening, with stakeholder input before moving on to step three.

Regarding the Preliminary Screening, WPC requests that the Department include stakeholders in the screening process. If the prior step is a Needs Assessment Screen, and includes identifying the stakeholders, then the preliminary screening to determine the advantages and disadvantages and advise Department leadership should include input at least from the permit-holder, but preferably from all stakeholders. The Department purposes gathering substantial information during the Preliminary Screening, but all of it seems to come from internal resources or the Federal Energy Regulatory Commission (FERC). Specifically, if the Department is interacting with a federal agency regarding a permit, at least the permit-holder should be part of that information gathering and have input on the recommendation being made to Department leadership.

Regarding step three, Project Determination, WPC requests that the Department add an option for Department leadership to determine the ongoing evaluation is unnecessary. Currently, the guidance explains that the Secretary's Director will determine whether the project is simple or complex, but he/she should also have the option to determine, based on the preliminary screening that includes permit-holder/stakeholder input, that continued analysis of the project is unnecessary.

Regarding the Complex Project Evaluation, WPC agrees that public input is important. If the process is not changed to allow public input prior to step 4, WPC requests that the language be changed to require the Secretary's Director or project manager to use a public scoping process. Currently, it is at the discretion of the Department to do so absent a legal requirement. WPC recommends mandating that the process always be public and transparent.

b. Section B

WPC appreciates the breadth of resources the Department is willing to dedicate to evaluating complex projects. WPC requests adding a *Key Program Evaluation Factor* to evaluate economic impact. While economic costs and benefits are proposed as part of the environmental analysis, WPC believes it is important to address the points raised in the strategic analysis as well as additional items, and that the economic impact should be thoroughly evaluated. The Strategic Analysis provides a starting point for the economic considerations, but WPC recommends the Department consider the costs and benefits fully. For example, when considering the economic benefits of construction as recommended in the strategic

analysis, the Department should also consider the economic cost to the employees of the permit-holder. Relatedly, as noted in public comment to the strategic analysis, when considering the economic benefits of property value and recreation, the Department should also consider potential costs of a fish passage in those same categories. Because these types of projects are significant capital investments, the Department must fully evaluate the costs and benefits, and the risk that a state-licensed dam owner may choose to simply discontinue use of and remove a dam if the cost exceeds the benefit, and an evaluation of the economic impact of that option should also be included for the decision-making process.

For these reasons, WPC recommends making Economic Impact its own *Key Program Evaluation Factor*.

c. Section C

WPC understands the need for the Department to reach an internal consensus. However, by shielding stakeholders and the public from that decision-making process, the public loses the benefit of hearing alternatives from DNR staff. Ideally, the decision-making process would be more transparent, with stakeholders able to hear, understand, and opine on the different ideas being proposed to Department leadership. As in any government deliberation, it is valuable for the public to have full transparency and ensure the Department remains accountable to the public. By involving the public only after a final agency position is reached, the citizens of Wisconsin lose the value of transparency in their regulatory process and will not have full access to the deliberative process. WPC recommends the decision-making process be more transparent, and that stakeholders and the public be allowed to observe and participate.

In addition, because of the significant resources that must be invested to study site-specific projects, and the multiple federal and states agencies that are often involved, WPC would advocate for legislative involvement at some point in the process described in the proposed guidance.

IV. BACKGROUND (SECTION V)

As noted, WPC generally supports the Department providing a detailed and understandable process for research, evaluation, and permitting decisions. However, WPC believes this guidance document is premature and should not be finalized until the underlying rules and requirements have been developed.

As explained in Section V, the Department does not have authority to require a fish passage until rules are promulgated to specify the public's right in navigable waters with dams. In addition, a cost-sharing program must exist for dam owners required to construct fish passages. It is imprudent to finalize guidance on the process for evaluating whether a fish passage will be required when the agency does not yet have authority to require one. It is even more imprudent for the agency to implement the process, expending significant resources on complex evaluation processes, when the agency does not have authority to implement or enforce its decision. Moreover, stakeholders cannot provide meaningful input on a proposed methodology for evaluating these projects without understanding the rights of the involved parties or the magnitude of cost the process may force an entity to incur. This guidance document, and further evaluations of non-voluntary fish passages, should be put on hold until the necessary rules are promulgated, and a cost-sharing program is established.

Additionally, the current requirement that a FERC licensee obtain a Water Quality Certificate (WQC) does not, on its own, provide additional authority to the Department. While a FERC licensee is required to obtain a WQC from the state, that process does not give the Department any authority not otherwise explicitly allowed in statute or in a properly promulgated rule. In other words, the Department cannot withhold a WQC if a permit holder does not agree to install a fish passage or follow any other condition not explicitly authorized in Wisconsin law.

Comments on Fish Passage Policy Manual Code

In fact, the Department may be vulnerable to legal challenges based on the current WQC process. WPC urges the Department to undertake a full legal analysis of the rules and permits associated with the WQC process.

The Executive Summary of the Strategic Analysis published last year notes that “under Wisconsin’s Public Trust Doctrine, the Wisconsin Department of Natural Resource (department) is responsible for protecting public rights in the commercial and recreational use of navigable waters.” (pg. 5). That statement should be clarified to explain that the legislature holds the waters of the state in trust and can delegate to DNR any portion of that responsibility it deems appropriate, but that the constitution does not provide any responsibility or authority directly to the Department.

Relatedly, § 401 of the Clean Water Act (CWA) requires state certification of water quality before a federal license or permit can be issued. This provides the state with inherent power to deny the WQC and therefore the permit, and to add conditions if the state so chooses. However, that requirement and those powers belong to the state legislature and not specifically on the agency. In fact, the state could waive its ability to issue WQCs completely if the legislature saw fit to do so.

The current WQR rule seems to have no statutory authority and may arguably be an unenforceable rule. The WQR rule (NR 299) list Wis. Stats. § 227.11(2) (agency rule-making authority in general), § 281.11 (statement of policy and purpose – water and sewage), § 218.12(1) (General department powers and duties – water and sewage) and § 283.001 (statement of policy and purpose – pollution discharge elimination) as sources of Department authority. However, the very statute cited first as authority for rulemaking also explains that neither a provision containing a statement of purpose or intent nor a provision explaining general duties can be relied upon as rulemaking authority. (Wis. Stats. § 227.11(2)(a)1-2). Absent an explicit grant of authority from the legislature to develop rules to grant WQC’s, the agency arguably does not have legal authority to do so.

NR 299.01(2) also cites the CWA for authority, stating that it is the policy of the Department to review all activities requiring a federal license or permit, pursuant to 33 USC 1251, et. seq. However, as noted above, the CWA speaks to the authority and obligations of states, and the requirements of the federal government to work with the states and state agencies. The state agency is a creature of the legislature and has only the powers granted to it by the legislative body. Therefore, the CWA does not, and cannot, provide any independent authority to the Department outside of what is given to the agency by the Wisconsin legislature.

In other words, the state of Wisconsin may have an obligation under the CWA, but the Department derives no direct authority from that or any other federal law. It is up to the legislature to decide who issues a WQC and how. Absent explicit authority from the Wisconsin legislature to issue WQCs, the agency may be acting beyond its legal authority.

In addition, any previous condition placed on the grant of a WQC without explicit authority of the Department to do so may not be enforceable. The agency should review existing permits and licenses and notify permit holders if licensees if there are conditions in permits that the agency no longer has authority to enforce.

It would be prudent for the agency to re-promulgate WQC rules based on changes to regulatory authority.

V. CONCLUSION

The process proposed by the Department is unnecessarily complex and costly. If a permit holder or licensee is subject to any additional costs or requirements based on this process, this proposal must be promulgated as a rule and not guidance. In addition, the process laid out presumes a need for installation of a fish passage. However, the first step should be to determine need for a fish passage by evaluating the specifics of the dam site. WPC also requests more transparency and stakeholder input throughout this process, and encourages the Department to perform a legal analysis of the underlying rules and existing permits to determine agency authority.