



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 4 1974

Memorandum of Agreement

WISC

THE ADMINISTRATOR

Dear Governor Lucey:

Your request dated November 7, 1973, for approval to conduct a State Permit Program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Federal Water Pollution Control Act of 1972 (the "Act") is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency under subsection (a) of Section 402 of the Act as to all discharges in the State of Wisconsin other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with Section 402 of the Act, all guidelines promulgated pursuant to Section 304(h)(2) of the Act, and the Memorandum of Agreement between the Regional Administrator of EPA's Region V and the Administrator of the Division of Environmental Protection, Wisconsin Department of Natural Resources, which I have also approved today (copy enclosed).

In addition, this approval is based upon Mr. Frangos' December 27 letter to Mr. McDonald in which he states that interim effluent limitations will be adopted by the DNR as emergency rules by February 1, 1974 for the categories of sources listed in Wisconsin regulation NR 220. I understand that these rules as well as your procedural rules have been adopted and are presently in effect.

I strongly support Wisconsin's goal, as set forth in paragraph 4 of the November 29, 1973 letter to Region V, of issuing NPDES permits to all dischargers in the State of Wisconsin by December 31, 1974. We note with concern that some States which have assumed the NPDES program have not taken their permit issuance commitments seriously, thereby compromising their chances of meeting the December 31 deadline. Because all facilities discharging without an NPDES permit after that date will be in violation of the Act and possibly subject to severe penalty provisions, we vigorously urge the State of Wisconsin to honor this important commitment. In order to facilitate EPA's review of the State's progress in processing permits, we are

asking our Regional Office to request from Mr. Frangos a weekly report identifying by name the permits drafted, sent to public notice, and issued by the Division of Environmental Protection.

The Memorandum of Agreement has established an important relationship between the parties for enforcement of permit violations as well as for permit issuance. It gives Wisconsin the first opportunity to take enforcement action for violations of all federally-issued permits except those issued to agencies and instrumentalities of the federal government and for Indian activities on Indian lands. Of course, if the State does not take appropriate enforcement action for violations of either State- or federally-issued NPDES permits the Agreement does not intend to and will not foreclose direct enforcement action in any case where EPA determines that federal enforcement proceedings are warranted.

We note with pleasure that Wisconsin becomes one of the first eight States to receive authority to administer the NPDES program. The Wisconsin DNR has already set a good example by drafting permits during the federal administration of the NPDES program. This achievement is accredited to the energy shown by Mr. Frangos and his staff at the DNR in their efforts to make it possible.

Speaking on behalf of the Environmental Protection Agency and its staff, let me assure you that we will do everything possible to aid you in your commitment to eliminate the blight of water pollution.

Sincerely yours,

[Handwritten signature]

Russell E. Train

Honorable Patrick J. Lucey
Governor of Wisconsin
Madison, Wisconsin 53702

Enclosure

cc: Mr. Thomas G. Frangos, Administrator
Division of Environmental Protection
Wisconsin Department of Natural Resources

bcc: AX (2)

Richard Johnson, AGW

Albert C. Printz, AGW

Valdas V. Adamkus, Deputy RA, Region V

James McDonald, Director, Enforcement Div., Region V

OGC Chron
Reading

Written by Henry Balikov, Region V, 1/2/74

Rewritten by Henry Balikov and Bob Emmett, AGW, 1/4/74

Rewritten by Henry Balikov and Bob Emmett, AGW, 1/28/74

MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

AND

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION V

INTRODUCTION

The Environmental Protection Agency (EPA) Guidelines for state program elements necessary for participation in the National Pollutant Discharge Elimination System (NPDES), 40 CFR 124, prepared pursuant to the authority contained in Section 304(h)(2) of the Federal Water Pollution Control Act Amendment of 1972 (referred herein as the Federal Act) were published in the Federal Register on December 22, 1972. Various sections of the Guidelines permit the chief administrative officer of a state water pollution control agency and the Regional Administrator of EPA to reach agreement on the manner in which the 40 CFR 124 Guidelines are to be implemented.

To satisfy the requirements of the Guidelines, the following procedures are hereby agreed to by the Administrator of the Division of Environmental Protection, State of Wisconsin Department of Natural Resources (referred to herein as the Administrator), and the Regional Administrator.

The sections and subsections of 40 CFR 124 related to these agreements are: 124.22, 124.23, 124.35(b), 124.35(c), 124.41(c), 124.44(d), 124.46, 124.47, 124.61(b), 124.62(c), 124.71(c), 124.72(b), 124.73(b)(2), and 124.80(d). The terms used in this Memorandum of Agreement have the same meaning as those used and defined in 40 CFR 124.1

I. RECEIPT AND USE FEDERAL DATA

- A. The two purposes of this part of the agreement are: (1) to provide for the transfer of data bearing on NPDES permit determinations from the EPA to the Wisconsin Department of Natural Resources and (2) to insure that any significant deficiencies in the transferred NPDES application will be corrected prior to issuance of an NPDES permit.
- B. Commencing immediately after the effective date of this agreement the Regional Administrator will transmit to the Administrator a list of all NPDES permit applications received by EPA. This list will include the name of each discharger, SIC Code, application number and indicate those applications which EPA has determined are administratively complete.

- C. After receipt of the list, the Administrator will indicate the order to be used by EPA to transmit the application files to him. The application file will include the NPDES permit application and any other pertinent data collected by EPA. The application files will be transmitted to the Administrator according to the order indicated. EPA will retain two copies of each file transmitted to the Administrator and route one copy to the Permit Branch and the second to the Regional Data Management Section, Surveillance and Analysis Section.
- D. For an application identified by EPA as not administratively complete, EPA will obtain the necessary information from the discharger and complete the application prior to its transmittal to the Administrator. The Administrator will obtain effluent data and any other additional information for those applications identified by EPA as administratively complete which he deems necessary to update or process the application.
- E. For each application for which additional information was obtained by the Administrator, two (2) copies of each completed application or completing amendments and a cover letter indicating that the application has been determined to be complete will be transmitted by the Administrator to the Regional Administrator, Attention: Permit Branch. One copy will be routed by the Regional Administrator to the Regional Data Management Section, Surveillance and Analysis Division, for processing into the National Data Bank and the other copy will be placed in the NPDES Permit Branch file.

II. TRANSMISSION OF NPDES APPLICATION FORMS TO REGIONAL ADMINISTRATOR

- A. After final approval of Wisconsin's NPDES permit program, the Administrator will assume initial responsibility for determining that applications submitted to the Department after that date are complete. When the Administrator determines that the NPDES forms received from the applicant are complete, two (2) copies of the forms with a cover letter indicating that the forms are complete will be transmitted to the Regional Administrator, Attention: Permit Branch. If EPA concurs with the Administrator, one (1) copy will be routed to the Regional Data Management Section, Surveillance and Analysis Division, through the Compliance Section, Enforcement Division for processing into the National Data Bank and the other copy will be placed in the Regional NPDES Permit Branch file. If the Regional Administrator does not concur that the application is complete, he shall within 20 days notify the Administrator by letter in which respects the application is deficient. No NPDES permit will be issued by the Administrator until the deficiencies are corrected.
- B. After receipt of an NPDES short form application from the Administrator, the Regional Administrator may identify the discharge as one for which an NPDES standard form shall be submitted. The Regional Administrator shall notify the Administrator of any such determination made with respect to any such discharge. After receipt of this determination the Administrator shall require the applicant to submit an NPDES standard application form or any other information requested by the Regional Administrator.

- C. When requested by the Regional Administrator, the Administrator will transmit copies of notices received by him from publicly owned treatment works pursuant to 40 CFR 124.45(d) and (e) and Section 147.14, Wisconsin Statutes, within 20 days of receipt of the request.
- D. The Regional Administrator may waive his right to receive copies of NPDES application forms with respect to classes, types and sizes within any category of point sources and with respect to minor discharges or discharges to particular navigable waters or parts thereof. Such written waiver must be issued by the Regional Administrator before the Administrator can discontinue transmitting copies of NPDES forms to EPA.

III. PUBLIC ACCESS TO INFORMATION

- A. The Administrator will protect any information (other than effluent data) contained in such NPDES form, or other records, reports or plans as confidential upon a showing by any person that such information, if made public, would divulge methods or processes entitled to protection as trade secrets of that person. If, however, the information being considered for confidential treatment is contained in an NPDES form, the Administrator will forward such information to the Regional Administrator for his concurrence in any determination of confidentiality. If the Regional Administrator does not agree that some or all of the information being considered for confidential treatment merits such protection, he will request advice from the Office of the General Counsel, stating the reasons for his disagreement with the determination of the Administrator. The Regional Administrator will simultaneously provide a copy of the request to the Administrator and to the person claiming trade secrecy. The General Counsel will determine whether the information in question would, if revealed, divulge methods or processes entitled to protection as trade secrets. In making such determinations, he will consider any additional information submitted to the Office of the General Counsel within 30 days of receipt of the request from the Regional Administrator. If the General Counsel determines that the information being considered does not contain trade secrets, he will so advise the Regional Administrator and will notify the person claiming trade secrecy of such determination by certified mail. No sooner than 30 days following the mailing of such notice, the Regional Administrator will communicate to the Administrator his decision not to concur in the withholding of such information and the Regional Administrator will then make available to the public, upon request, that information determined not to constitute trade secrets, unless an appeal is made to EPA by the person claiming trade secrecy. Following an appeal, the determination made by EPA will be conclusive unless reviewed in an appropriate district court of the United States.
- B. Any information accorded confidential status, whether or not contained in an NPDES form, will be disclosed by the Administrator, upon written request, to the Regional Administrator, or his authorized representative, who will maintain the disclosed information as confidential.

IV. TRANSMISSION TO REGIONAL ADMINISTRATOR OF PROPOSED NPDES PERMIT

- A. At the time a public notice required by 40 CFR 124.32 and Section 147.09, Wisconsin Statutes, is issued, the Administrator will transmit one copy of the NPDES public notice, the fact sheet (if one is required) and proposed NPDES permit to the Regional Administrator, Attention: NPDES Permit Branch. The information transmitted with the proposed permit will include any and all terms, conditions, requirements or documents which are part of the proposed NPDES permit or which affect the State's authorization of the discharge of pollutants.
- B. The Regional Administrator will be provided 45 days from the time he receives the proposed NPDES permit from the Administrator within which to object to, as provided for in Section 402(d)(2) of the Federal Act, comment upon or make a recommendation with respect to the proposed NPDES permit. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days. The Regional Administrator shall notify the Administrator within the time periods set forth above if EPA objects to or concurs with the issuance by the Administrator of the NPDES permit as proposed.
- C. If a proposed NPDES permit issued with a public notice is modified as a result of comments received by the Department during the thirty-day comment period or as a result of a public hearing, the Administrator will transmit a revised copy of the proposed NPDES permit to the Regional Administrator, Attention: NPDES Permit Branch, and shall specify the reasons for the modifications.

The Regional Administrator shall be provided 45 days from the time he receives the proposed NPDES permit, as revised, within which to object, comment upon or make recommendations with respect to any such revisions. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days. The Regional Administrator shall notify the Administrator within the time periods set forth above if EPA either objects to or concurs with the issuance by the Administrator of the NPDES permit as revised.

- D. Upon receipt of any written comments on any proposed NPDES permit from any State whose waters may be affected by the issuance of such a permit, the Administrator shall consider such written recommendations and may modify the proposed NPDES permit accordingly. If the Administrator fails to accept, in whole or in part, the written recommendations of such a State, he shall immediately notify the Regional Administrator of his reasons for so doing. The Regional Administrator, notwithstanding the provisions of Paragraph B above, shall be provided 45 days from the time he receives such notification from the Administrator within which to object to, comment upon or make recommendations with respect to the issuance of the proposed NPDES permit. Upon request of the Regional Administrator, the Administrator will provide the Regional Administrator additional time for review, provided that the total review period shall not exceed 90 days.

E. No later than 120 days from the date of EPA approval of Wisconsin's NPDES permit program, the Regional Administrator, pursuant to Section 402(e) of the Federal Act, shall consider whether to waive his right to receive, review, object to or comment upon proposed NPDES permits for all industrial discharges into navigable waters with daily discharges of less than 100,000 gallons per day and all discharges from publicly owned treatment works of less than 500,000 gallons per day and for all discharges, irrespective of size, for such categories and classes of point sources as the Regional Administrator shall specify at that time.

The Regional Administrator shall promptly notify the Administrator of his decision. If the Regional Administrator does not respond to the Administrator within this 120-day period, his right to receive, review, object to or comment upon proposed permits of less than the above levels shall be considered waived.

V. TRANSMISSION TO REGIONAL ADMINISTRATOR OF ISSUED NPDES PERMITS

The Administrator will transmit to the Regional Administrator two (2) copies of every issued NPDES permit, Attention: NPDES Permit Branch, together with any and all terms, conditions and requirements of the NPDES permit. The Administrator will transmit the above information, together with a copy of the Administrator's letter to the applicant forwarding the NPDES permit, at the same time the NPDES permit issued by the Department is transmitted to the applicant.

VI. COMPLIANCE REPORTS

On the last day of the months of February, May, August and November the Administrator will transmit to the Regional Administrator, Attention: Compliance Section, Enforcement Division, a list of all instances, as of 30 days prior to the date of such report, of failure or refusal of an NPDES permittee to comply with an interim or final requirement of a schedule of compliance or to notify the Department of compliance or noncompliance with each interim or final requirement. The list will be available to the public for inspection and copying and will contain at least the following information with respect to each instance of noncompliance.

1. The name and address of each noncomplying NPDES permittee;
2. A short description of each instance of noncompliance (e.g., failure to submit preliminary plans, two-week delay in commencement of construction of treatment facilities, etc.);
3. A short description of any action or proposed action by the permittee or the Administrator to comply or enforce compliance with an interim or final requirement; and
4. Any details which tend to explain or mitigate an instance of noncompliance with an interim or final requirement (e.g., construction delayed due to materials shortage, etc.).

VII. MONITORING

- A. Any discharge authorized by an NPDES permit which (1) is not a minor discharge, (2) the Regional Administrator requests, in writing, to be monitored, or (3) contains toxic pollutants for which an effluent standard has been established pursuant to Section 307(a) of the Federal Act, will require monitoring by the permittee for at least the following:
- (i) Flow (in gallons per day); and
 - (ii) All of the following pollutants:
 - a. Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) which are subject to reduction or elimination under the terms and conditions of the permit;
 - b. Pollutants which the Department finds, on the basis of information available to it, could have significant impact on the quality of navigable waters;
 - c. Pollutants specified by the Administrator of EPA, in regulations issued pursuant to the Federal Act, as subject to monitoring; and
 - d. Any pollutants in addition to the above which the Regional Administrator requests, in writing, to be monitored.
- B. The Regional Administrator may make the request specified in A (2) and (3) above at any time before an NPDES permit is issued.
- C. The Administrator will ensure that the Regional Administrator receives two (2) copies of all NPDES reporting forms submitted to the Department. If the Regional Administrator determines that the NPDES reporting forms are complete, he shall route one copy to the Permit Branch and the second to the Regional Data Management Section, Surveillance and Analysis Division, for processing into the National Data Bank. If the Regional Administrator determines that the NPDES reporting forms submitted to the Department are not complete or are otherwise deficient, he shall specify to the Administrator in which respects the forms are deficient. Upon receipt of the specification of deficiencies, the Administrator shall require the permittee to supply such additional information as the Regional Administrator specifies.
- D. The Administrator will evaluate data submitted by NPDES permittees in NPDES reporting forms and other forms supplying monitoring data for possible enforcement or remedial action.

On the last day of the months of February, May, August and November the Administrator will transmit to the Regional Administrator, Attention: Compliance Section, Enforcement Division, a list of all instances, as of 30 days prior to the date of such report, of each failure or refusal of an NPDES permittee to comply with an interim or final effluent limitation. The list will be available to the public for inspection and copying and will contain at least the following information with respect to each instance of noncompliance.

1. The name and address of each noncomplying NPDES permittee;
2. A short description of each instance of noncompliance;
3. A short description of any action or proposed action by the permittee or the Administrator to comply or enforce compliance with an interim or final effluent limitation; and
4. Any details which tend to explain or mitigate an instance of noncompliance with an interim or final effluent limitation.

VIII. MONITORING RESULTS

During the term of a permit, upon request of the Regional Administrator, the Administrator shall notify and require the permittee to extend the normal three-year retention of monitoring records required under 40 CFR 124.62(c).

IX. RECEIPT AND FOLLOW-UP OF NOTIFICATIONS AND REQUESTS

If the Administrator determines that a condition of a permit to a publicly owned treatment works relating to a new introduction or changes in the volume or character of pollutants introduced into such treatment works is violated, he shall notify the Regional Administrator in writing and consider taking action to restrict or prohibit the introduction of pollutants into treatment works.

X. MODIFICATION, SUSPENSION AND REVOCATION OF NPDES PERMITS

- A. If an NPDES permit is modified, suspended or revoked by the Administrator for good cause, a copy of the proposed modification, suspension or revocation shall be transmitted to the Regional Administrator, Attention: NPDES Permit Branch. The Regional Administrator will be provided 45 days from the time he receives the proposed modification, suspension or revocation from the Administrator within which to object, as provided for in Section 402(d)(2) of the Federal Act, comment upon or make a recommendation with respect to the proposed modification, suspension or revocation.

Upon request of the Regional Administrator, the Administrator shall provide the Regional Administrator additional time for review, provided that the total review period does not exceed 90 days.

- B. If the Administrator, upon request of the permittee, decides to revise or modify a schedule of compliance for good cause, he shall notify the Regional Administrator in writing. The Regional Administrator shall notify the administrator in writing of his acceptance or rejection of such request within 20 days of receipt of the notice.

XI. EMERGENCY NOTICE

The Administrator or his authorized representative will notify the Regional Administrator by telephone as soon as he is notified of any actual or immediate threat to the health or welfare of persons resulting from the discharge of pollutants. The Administrator or his authorized representative will utilize the telephone numbers identified in the current Regional Oil and Hazardous Materials Contingency Plan to notify the Regional Administrator. Telephone contact may be made with either the EPA District Offices or the Regional Offices, as the Administrator determines appropriate.

XII. CONTROL OF DISPOSAL OF POLLUTANTS INTO WELLS

The Regional Administrator shall transmit to the Administrator any policies, technical information, or requirements specified by the Administrator of EPA in regulations issued pursuant to the Act or in directives issued to Environmental Protection Agency Regional Offices.

XIII. OTHER ITEMS

- A. Attached hereto is a list of major dischargers which shall be given priority in processing and a schedule for such processing. This schedule is premised on the availability of guidance material from EPA for dischargers identified. Also attached is a six-month schedule covering all permits to be processed in the six-month period. This is the first part of the schedule aimed at completing all all permits to be issued in the State of Wisconsin by December 31, 1974. The schedule will be expanded by the Department on a quarterly basis thereafter to identify the remainder of the workload until all permits are issued. A copy of each quarterly schedule will be forwarded by the Administrator to the Regional Administrator for review.
- B. After the effective date of this agreement, the Administrator and the Regional Administrator shall pursue additional discussions as to appropriate responsibilities with respect to the input of application and monitoring data into the National Data Bank.
- C. This Memorandum of Agreement may be modified by the Administrator and the Regional Administrator following the public hearing to evaluate the State Program submitted pursuant to Section 402(b) of the Federal Act on the basis of issues raised at the hearing. The hearing record will be left open for a period of five days following the hearing to permit any person to submit additional written statements or to present views or evidence tending to rebut testimony presented at the public hearing. Any revisions of agreements following public hearing will be finalized, reduced to writing and signed by the Administrator and the Regional Administrator prior to forwarding of this Memorandum of Agreement and the recommendations of the Regional Administrator to the Administrator of EPA for review and approval. The Administrator and Regional Administrator will make any such revised agreements available to the public for inspection and copying.

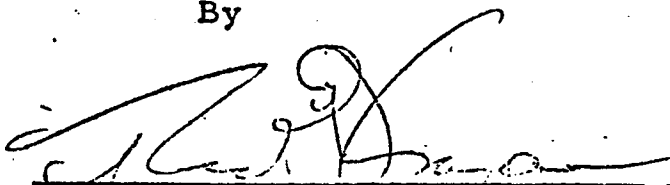
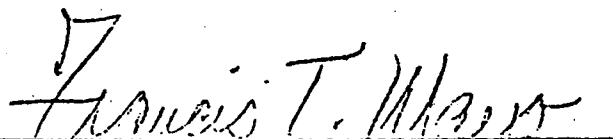
- D. All agreements between the Wisconsin Department of Natural Resources and the Regional Administrator are subject to review by the Administrator of EPA. If the Administrator of EPA determines that any provisions of such agreement do not conform to the requirements of Section 402(b) of the Federal Act or to the requirements of Section 304(h)(2) Guidelines, he will notify the Administrator and Regional Administrator of any revisions or modifications which must be made in the written agreements.
- E. This Memorandum of Agreement will take effect after it has been executed by the Administrator and the Regional Administrator and concurred in by the Administrator of EPA.
- F. This Memorandum of Agreement shall remain in effect until such time as it is modified or suspended.
- G. After the date of approval of Wisconsin's Pollutant Discharge Elimination System Permit Program, the Department shall be primarily responsible for the administration and enforcement of all federally issued NPDES permits issued prior to that date, except those NPDES permits issued to agencies and instrumentalities of the federal government and for Indian activities on Indian lands as provided by 40 CFR 125.2(a)(2).

State of Wisconsin
 Department of Natural Resources

U.S. Environmental Protection Agency
 Region V

By

By

Thomas G. Frangos, Administrator
 Division of Environmental Protection

Francis T. Mayo
 Regional Administrator

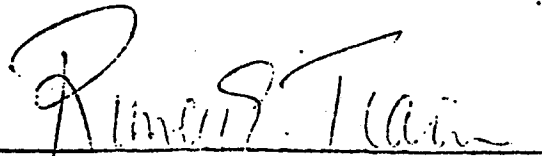
12/19/73

Date

12/17/73

Date

APPROVED:



Administrator
 Environmental Protection Agency

2/4/74

Date

Jan Kuryly - Leg 1

MODIFICATION TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT BETWEEN THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V

The Memorandum of Agreement approved February 4, 1974, by the Administrator of the United States Environmental Protection Agency between the Wisconsin Department of Natural Resources (hereinafter, the "State") and the United States Environmental Protection Agency (hereinafter "USEPA") Region V is hereby modified as follows:

The State will administer the NPDES permit program with respect to Federal facilities and has shown that it has the authority to enter and inspect Federal facilities. The State is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Wisconsin, including permits applicable to Federal facilities but excluding permits to Indian tribes or tribal organizations discharging from point sources located on Indian lands or reservations in Wisconsin.

All references in the Memorandum of Agreement which have the effect of retaining responsibility to USEPA Region V over Federal facilities have no force or effect after the effective date of this Modification. Nothing in this Modification shall be construed to limit the authority of USEPA to take action pursuant to Sections 308, 309, 311, 402, 504, or other Sections of the Act.

This Modification will become effective upon approval of the Administrator.

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION V

By *Anthony S. Earl*
Anthony S. Earl, Secretary

By *John McGuire*
John McGuire, Administrator

Date: 22 June 1979

Date: SEP 28 1979

Approved:

Jeff J. Miller
Acting Assistant Administrator for Enforcement
United States Environmental Protection Agency

Date: 12/3/79



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

27 NOV 1979

OFFICE OF ENFORCEMENT

Honorable Lee S. Dreyfus
Governor of Wisconsin
State Capitol
Madison, Wisconsin 53702

Dear Governor:

On February 4, 1974, Wisconsin received authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders. The Environmental Protection Agency's (EPA) approval letter indicated that we would retain authority to issue permits for Federal facilities within the State. The reservation of authority over Federal facilities was necessary because the Federal Water Pollution Control Act (FWPCA) precluded State regulation of these facilities.

The 1977 amendments to the FWPCA specifically authorize the States to administer the NPDES permit program for Federal facilities. Therefore, I hereby approve the State of Wisconsin's request to assume this responsibility, and have, accordingly, approved a modification to the Memorandum of Agreement between the Wisconsin Department of Natural Resources and the U.S. EPA, Region V (copy attached). This approval overrides any contrary language in EPA's February 4, 1974, letter approving the State NPDES program.

We look forward to the administration of the NPDES permit program for Federal facilities by the State of Wisconsin. Region V will be working with the Wisconsin Department of Natural Resources to facilitate the timely transfer of this responsibility.

Sincerely yours,

Jeffrey G. Miller
Acting Assistant Administrator
for Enforcement

Attachments

CC GARDEBRING
BRYSON
GRIMES
MUNO
LEDER
CATES

PRATT
DZIKOWSKI
SPYROPOULOS
NEWMAN
LIN

ORIGINAL IN
PERMIT BRANCH
FILE

12-7-79
am

cc: Mr. Anthony S. Earl
Secretary
Wisconsin Department of
Natural Resources

Mr. John McGuire
Regional Administrator
Region V, EPA

MODIFICATION TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT BETWEEN THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V

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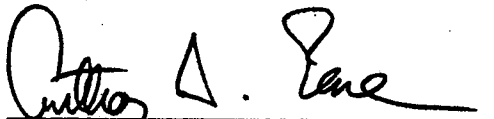
The State will administer the NPDES permit program with respect to Federal facilities and has shown that it has the authority to enter and inspect Federal facilities. The State is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Wisconsin, including permits applicable to Federal facilities but excluding permits to Indian tribes or tribal organizations discharging from point sources located on Indian lands or reservations in Wisconsin.

All references in the Memorandum of Agreement which have the effect of retaining responsibility to USEPA Region V over Federal facilities have no force or effect after the effective date of this Modification. Nothing in this Modification shall be construed to limit the authority of USEPA to take action pursuant to Sections 308, 309, 311, 402, 504, or other Sections of the Act.

This Modification will become effective upon approval of the Administrator.

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES

By


Anthony S. Earl, Secretary

Date: 22 June 1979


Approved:


Acting Assistant Administrator for Enforcement
United States Environmental Protection Agency

Date: 12/3/79

U.S. ENVIRONMENTAL PROTECTION
AGENCY, REGION V

By


John McGuire, Administrator

Date: SEP 28 1979



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Anthony S. Earl
Secretary

BOX 7921
MADISON, WISCONSIN 53707

June 21, 1979

IN REPLY REFER TO: 8300

RECEIVED

JUN 27 1979

EPA REGION 5
OFFICE OF REGIONAL
ADMINISTRATOR

Mr. John McGuire
Regional Administrator
United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. McGuire:

In a letter dated April 3, 1978, Mr. George R. Alexander, Jr., then Regional Administrator of Region V, proposed to transfer to this Department the responsibility for the administration of the National Pollutant Discharge Elimination System (NPDES) permit program for Federal facilities located in Wisconsin upon a showing that the Department possessed adequate authority to administer the NPDES permit program for such facilities. Mr. Alexander's letter also stipulated that the existing Memorandum of Agreement between our agencies be modified to reflect this additional delegation of responsibilities.

Since the Department of Natural Resources is the central pollution control agency of the State of Wisconsin and presently has authority under State law to regulate discharges from Federal facilities, I can see no good purpose to be served by maintaining separate Federal and State permit programs for these facilities. Consequently, I am requesting that the United States Environmental Protection Agency delegate to this Department the responsibility for the administration of the NPDES permit program as it applies to Federal facilities located in Wisconsin.

However, based on our review of your proposed modification of the existing Memorandum of Agreement, a question has arisen concerning the scope of the proposed delegation of NPDES responsibilities contemplated by EPA at this time. Although the letter of April 3, 1978 addresses State assumption of NPDES permit issuance and enforcement responsibilities as they relate to Federal facilities in Wisconsin, the proposed modification of the Memorandum of Agreement requires the State of Wisconsin to be responsible for "the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Wisconsin, including permits applicable to Federal facilities" (Emphasis supplied). If this broad undertaking requires the Department to regulate discharges from point sources operated by Indian tribes or Indian tribal organizations on Indian lands and reservations, the Department is unprepared to accept this responsibility. An opinion of the Attorney General of Wisconsin dated July 31, 1978 concluded that under current Wisconsin law the

Department does not have this authority. Consequently, we have revised the proposed modification of the Memorandum of Agreement to make the delegation of NPDES administrative responsibilities consistent with the July 31, 1978 opinion of the Attorney General.

In furtherance of our request, I am submitting the following documents:

1. A copy of the statement of the Attorney General of Wisconsin dated August 15, 1973 certifying that the State of Wisconsin, acting through its Department of Natural Resources, possesses all the authority required by Section 402(b) of the Federal Clean Water Act, as amended, 33 U.S.C. 1251 et seq., and 40 CFR Part 124 for administration of the NPDES permit program within the jurisdiction of this State;
2. A copy of an opinion of the Attorney General of Wisconsin dated February 21, 1979 expressing the opinion that Federal facilities and any officer, agent, or employe thereof responsible for the discharge of pollutants into waters of the State are subject to the requirements of ch. 147, Wis. Stats.;
3. Three signed copies of our proposed modification of the existing Memorandum of Agreement;
4. A copy of an opinion of the Attorney General of Wisconsin dated July 31, 1978 concluding that the Department is without authority to regulate discharges from point sources operated by Indian tribes and tribal organizations on Indian lands and reservations in Wisconsin; and
5. Mailing labels for our statewide permit program public notice list.

If members of your staff have any questions concerning these materials, please have them contact Mr. Carl Blabaum, Director of the Bureau of Water Quality, at (608) 266-3910.

Sincerely,



Anthony S. Earl
Secretary

cc: Andrew Damon - 14
Thomas Kroehn - 14
Carl Blabaum - 11

ATTORNEY GENERAL'S STATEMENT

from exempting vessels unless the federal legislation were amended. Accordingly, state law is in compliance with requirements of FWPCA.

b. Disposal into wells.

State law provides authority to issue permits to control the disposal of pollutants into wells. [Federal Authority: FWPCA § 402 (b) (1) (D); 40 C.F.R. § 124.80.]

State Statutory and Regulatory Authority:
Chapter 162, sec. 144.025 (2) (d) (1.); N.R. 112.12

Remarks of the Attorney General: Pre-FWPCA state law regulates the construction and use of wells for the purpose of protecting pure drinking water for human consumption. Ch. 162 requires a permit to be issued to commercial well drillers or pump installers. Those drilling on their own property need no permit but must comply with departmental rules and regulations.

N.R. 112.12 prohibits the use of any well for disposal of sewage or other drainage. The term "sewage" is defined broadly in 144.01 (2), Wis. Stats., to include ". . . the water carried wastes created in and to be conducted away from residences, industrial establishments and public buildings as defined in s. 101.01 (2), with such surface or ground water as may be present.

In addition, sec. 144.025 (2) (d) (1.) authorizes the department of natural resources to issue special orders to control pollution of the waters of the state, which by definition (144.01 (1)) includes ground water, public or private. These orders are enforceable by the attorney general (144.536).

Since Wisconsin prohibits the discharge of pollutants into wells there is no need for the state to adopt procedures to comply with the requirement of 40 C.F.R. 124.80.

2. Authority to Apply Federal Standards and Requirements.

a. Effluent standards and limitations and water quality standards.

State law provides authority to apply in terms and conditions of issued permits applicable Federal effluent standards and limitations and water quality standards promulgated or effective under the FWPCA, including:

ATTORNEY GENERAL'S STATEMENT

- (1) Effluent limitations pursuant to Section 301;

State Statutory Authority: Sections 147.02 (3) 147.04 (1), 144.07 (1), 144.07 (4) and 147.021; chapter 227.

Remarks of the Attorney General: Wisconsin law grants authority to the department of natural resources to condition the issuance of permits upon compliance with effluent limitations.

State law [Art. VII, sec. 21, WIS. CONST.; Clark v. Janesville (1859), 10 Wis. 135, 183; 59 OAG 31 (1970); 50 OAG 107 (1961); 10 OAG 648 (1921)] requires that the State must first adopt its own effluent standards. These will be at least as stringent as the Federal standards according to sections 147.04 (4) and 147.021.

Rule-making procedures are set out for the department in chapter 227.

- (2) Water quality related effluent limitations pursuant to section 302;

State Statutory Authority: Sections 147.05 and 147.02 (3) (c), (3) (d) 1. and 2. and (3) (e) and 147.021. Cf. 147.04 (4) under (1) above.

Remarks of the Attorney General: State law is in compliance with the FWPCA requirements.

- (3) National standards of performance pursuant to section 306;

State Statutory Authority: Sections 147.06 and 147.02 (3) (b), 147.02 (3) (d) 2. and 147.021.

Remarks of the Attorney General: State law is in compliance with requirements of the FWPCA.

ATTORNEY GENERAL'S STATEMENT

- (4) Toxic and pretreatment effluent standards pursuant to section 307; and

State Statutory Authority: Sections 147.07 and 147.02 (3) (c), 147.02 (3) (d) 2. and (3) (e) and 147.021.

Remarks of the Attorney General: State law is in compliance with requirements of the FWPCA.

- (5) Ocean discharge criteria pursuant to section 403.

State Statutory Authority: None. This requirement appears to be inapplicable to the State of Wisconsin.

b. Effluent limitations requirements of sections 301 and 307.

In the absence of formally promulgated effluent standards and limitations under sections 301(b) and 307 of the FWPCA, State law provides authority to apply in terms and conditions of issued permits effluent limitations to achieve the purposes of these sections of the FWPCA. Such limitations may be based upon an assessment of technology and processes as required under the FWPCA with respect to individual point sources, and include authority to apply:

- (1) To existing point sources, other than publicly-owned treatment works, effluent limitations based on application of the best practicable control technology currently available or the best available technology economically achievable;
- (2) To publicly owned treatment works, effluent limitations based upon the application of secondary treatment or the best practicable waste treatment technology; and
- (3) To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly owned treatment works. [Federal Authority: FWPCA §§ 301, 304 (d), 307, 402(a) (1), 402(b)(1)(A); 40 C.F.R. § 124.42(a)(6).]

ATTORNEY GENERAL'S STATEMENT

- (3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate, biological monitoring methods);
 - (4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as may be prescribed); and
 - (5) Provide such other information as may reasonably be provided.
- b. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:
- (1) Have a right of entry to, upon, or through any premises of a permittee or of an industrial user of a publicly-owned treatment works in which premises an effluent source is located or in which any records are required to be maintained;
 - (2) At reasonable times have access to and copy any records required to be maintained;
 - (3) Inspect any monitoring equipment or method which is required; and
 - (4) Have access to and sample any discharge of pollutants to State waters or to publicly owned treatment works resulting from the activities or operations of the permittee or industrial user.
[Federal Authority: FWPCA §§ 304(h)(2)(A) and (B), 308(a), 402(b)(2), and 402(b)(9); 40 C.F.R. §§ 124.45(c), 124.61-63, and 124.73(d).]

State Statutory Authority: Section 147.08

Remarks of the Attorney General: The authorities listed above in 5(a) are not applied through permit conditions but rather through statutory requirements applied to all owners or operators of points sources, enforceable with penalties by the department of justice through section 147.29.

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The authorities listed above in 5(b) are permit conditions imposed pursuant to section 147.02(4) (c) and (f) 2., as well as statutory requirements under 147.08(2) (a), enforceable through section 147.29. See also section 147.02(3) (d) 2.

6. Authority to Require Notice of Introductions of Pollutants into Publicly Owned Treatment Works.

State law provides authority to require in permits issued to publicly owned treatment works conditions requiring the permittee to give notice to the State permitting agency of:

- a. New introductions into such works of pollutants from any source which would be a new source as defined in section 306 of the FWPCA if such source were discharging pollutants directly to State waters;
- b. New introductions of pollutants into such works from a source which would be a point source subject to section 301 if it were discharging such pollutants directly to State waters; or
- c. A substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit.
[Federal Authority: FWPCA § 402(b)(8); 40 C.F.R. 124.45(d).]

State Statutory Authority: Sections 147.02(4) (f), 147.025(4), 147.14. Cf. 147.29.

Remarks of the Attorney General: The requirements of 402(b)(8) are met in Wisconsin law. Section 147.025(4), Wis. Stats., requires industrial users to submit a report to owners of publicly owned treatment works upon permit application. The owner transmits these reports to the department as part of his permit application. Thereafter, industrial users are required by 144.54 and 147.14(2) to notify the department and the treatment works owner of 1) pollutants introduced by new sources, and 2) pollutants not being introduced at the time of the permit application. The treatment works owner is then required to comply with sections 147.14(3) and 147.14(1) which provide for reports concerning new discharges and the quality and quantity of effluents introduced into the treatment

ATTORNEY GENERAL'S STATEMENT

works. Enforcement powers against violations of these reporting requirements are granted by 147.14(4) in conjunction with 147.29.

The permittee has the ability to obtain the necessary information to comply with its reporting duties, since the industrial users are required to submit discharge reports at various times. These are: 1) upon permit application, 2) upon introduction of pollutants from new sources, and 3) upon introduction of different types or volumes of pollutants than first reported.

7. Authority to Insure Compliance by Industrial Users with Sections 204(b), 307, and 308.

State law provides authority to insure that any industrial user of a publicly owned treatment works will comply with FWPCA requirements concerning:

- a. User charges and recovery of construction costs pursuant to section 204(b);
- b. Toxic pollutant effluent standards and pretreatment standards pursuant to section 307; and
- c. Inspection, monitoring and entry pursuant to section 308.
[Federal Authority: FWPCA § 402(b)(9); 40 C.F.R. § 124.45(e).]

State Statutory Authority: Sections 147.02(4)(f), 147.07(1) and (2) 147.08, 147.15. Cf. sec. 147.07, 147.04(2)(a) and (b) 2., 147.04(4), 147.08, 127.29, and 147.021.

Remarks of the Attorney General: Section 147.02(4)(f) provides authority to condition permits to require compliance with 147.07(2), 147.08 and 147.15, which parallel FWPCA requirements concerning a., b., and c., above.

8. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings.

State law provides authority to comply with requirements of the FWPCA and EPA Guidelines for "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System," 40 C.F.R. Part 124 (hereinafter "the Guidelines") to:

ATTORNEY GENERAL'S STATEMENT

- a. Notify the public, affected States and appropriate governmental agencies of proposed actions concerning the issuance of permits;

Federal Authority:

Function 8(a): FWPCA §§ 402(b)(3) (public notice), 402(b)(5) (notice to affected States), 402(b)(6) (notice to Army Corps of Engineers); 40 C.F.R. §§ 124.31 (tentative permit determinations), 124.32 (public notice), 124.33 (fact sheets) and 124.34 (notice to government agencies).

State Statutory Authority: Sections 147.09, 147.10, 147.11, 147.03(2)(c)-(f) and (2m), 147.03(3)(d); 147.05(1) and (2); 147.20, and see also 147.12.

Remarks of the Attorney General: State law is in compliance with requirements of the FWPCA.

- b. Transmit such documents and data to and from the U.S. Environmental Protection Agency and to other appropriate governmental agencies as may be necessary; and

Federal Authority:

Function 8(b): FWPCA §§ 402(b)(4) (notices and permit applications to EPA), 402(b)(6) (notices and fact sheets to Army Corps of Engineers); 40 C.F.R. §§ 124.22 (receipt and use of Federal data), 124.23 (transmission of data to EPA), 124.34 (notice to other government agencies), 124.46 (transmission of proposed permits to EPA), 124.47 (transmission of issued permits to EPA).

State Statutory Authority: Sections 147.11 and 147.12. See also 147.08 (2)(c).

Remarks of the Attorney General: Wisconsin law is in compliance with the requirements of the FWPCA.

- c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits.

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Federal Authority:

Function 8(c): FWPCA § 402(b)(3) (opportunity for public hearing); 40 C.F.R. §§ 124.36 (public hearings), 124.37 (notice of public hearings).

State Statutory Authority: Sections 147.13, 147.09, 147.03(2)(c)-(f) and (2m); 147.03(3)(d); 147.05(1) and (2); and 147.20, see also 147.021.

Remarks of the Attorney General: Wisconsin law complies with the requirements of the FWPCA. There is a provision for establishment of procedural requirements by departmental rule which would proceed under chapter 227.

9. Authority to Provide Public Access to Information.

State law provides authority to make information available to the public, consistent with the requirements of the FWPCA and the Guidelines, including the following:

- a. Except insofar as trade secrets would be disclosed, the following information is available to the public for inspection and copying:
 - (1) Any NPDES permit, permit application, or form;
 - (2) Any public comments, testimony or other documentation concerning a permit application; and
 - (3) Any information obtained pursuant to any monitoring, recording, reporting or sampling requirements or as a result of sampling or other investigatory activities of the State.
- b. The State may hold confidential any information (except effluent data) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.
[Federal Authority: FWPCA §§ 304(h)(2)(B), 308(b), 402(b)(2) and 402(j); 40 C.F.R. § 124.35.]

ATTORNEY GENERAL'S STATEMENT

State Statutory Authority: Section 147.08(2)(c) and section 147.12(1)(a), (2) and (3). See also 147.021.

Remarks of the Attorney General: State law is in compliance with FWPCA requirements. Wisconsin law makes available to the public all records and other information which do not constitute a trade secret. Trade secrets are protected from the public with the exception of effluent data. All information is available to the EPA, including effluent data. Furthermore all such data, despite its confidentiality, may be used in publishing general analyses which do not identify specific owners.

10. Authority to Terminate or Modify Permits.

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

- a. Violation of any condition of the permit (including but not limited to, conditions concerning monitoring, entry, and inspection);
- b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or
- c. Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
[Federal Authority: FWPCA § 402(b)(1)(C); 40 C.F.R. §§ 124.45(b) and 124.72.]

State Statutory Authority: Section 147.03, and 147.02(4)(e), 147.04(2)(c), see also 147.021 and 147.20.

Remarks of the Attorney General: State law is in compliance with FWPCA requirements. The applicable statutes contains an additional circumstance on which permits may be modified with respect to permit application files after July 1, 1977, i.e., a demonstration by the owner or operator that the modification will represent the maximum use of technology within the economic capacity of the owner or operator and will result in reasonable further progress toward elimination of discharge of pollutants.

ATTORNEY GENERAL'S STATEMENT

11. Authority to Abate Violations of Permits or the Permit Program.

State law provides authority to:

a. Abate violations of:

- (1) Requirements to obtain permits;
- (2) Terms and conditions of issued permits;
- (3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly owned treatment works); and
- (4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling.

b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:

- (1) Injunctive relief, without the necessity of a prior revocation of the permit;
- (2) Civil penalties;
- (3) Criminal fines for willful and negligent violations; and
- (4) Criminal fines against persons who knowingly make any false statement, representation or certification in any form, notice, report, or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting, or monitoring requirement;

c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under section 309 of the FWPCA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained. [Federal Authority: FWPCA §§ 402(b)(7), 309, 304(a)(2)(C), 402(h), 504; 40 C.F.R. § 124.73.]

ATTORNEY GENERAL'S STATEMENT

State Statutory Authority: Sections 147.21, 147.29 and 147.23. See also sections 144.025(2)(c), (d) and (f), 144.536, and 144.537. Cf. 165.07.

Remarks of the Attorney General: Wisconsin law provides that the Department of Justice shall seek civil or criminal penalties upon referral of the DNR of any person who violates "this chapter, any rule promulgated thereunder or a term or condition of any permit issued under this chapter."

Maximum civil penalty is \$10,000 for each day of violation. Maximum criminal fine is \$25,000 for each day of violation, or imprisonment for a maximum of six months, or both (for chapter, rule or permit violations); and for subsequent convictions a maximum of \$50,000 per day of violation or 1 year or both; and \$10,000, or imprisonment for a maximum of six months, or both (for false statements, etc.)

In determining the amount of criminal fine for chapter, rule or permit violations, the statute provides that "the court shall assess an amount which represents an actual and substantial economic deterrent."

In addition to the above penalties, the court may assess a portion of the total costs of the investigation, including monitoring, which led to the establishment of the violation.

Additional ways and means of enforcement:

Chapter 144 authorizes the DNR to issue orders to prevent and abate water pollution. These orders are enforceable by the attorney general, and the circuit court has jurisdiction to enforce these orders by injunctive and other relief. Under State v. Dairyland Power Cooperative (1971), 52 Wis. 2d 45, 190 N.W. 2d 169, these procedures need not be exhausted before the State can seek relief, since administrative agencies in Wisconsin do not have exclusive original jurisdiction in their respective areas.

There is no requirement that permits under chapter 147 or orders under 144 must be revoked before obtaining an injunction, or for that matter other relief and before issuing other enforcement action.

Emergency procedures are authorized by section 144.025(2)(d)(2.) and 144.536 to protect the public health. In addition temporary restraining orders may be obtained on an ex parte basis pursuant to sec. 268.025 to restrain discharges which are an imminent and substantial endangerment to the public health. The authority is comparable to that granted the administrators of the United States Environmental Protection Agency pursuant to sec. 504 of the FWPCA Amendments. 33 U.S.C. 1251, et seq.

The State may request the assistance of the district attorney of any county in which a violation of chapter 147 occurred and that district attorney shall provide assistance.

In addition, the department may sue to recover the expense incurred in remedying water pollution and the costs of replacing fish or other wildlife destroyed.

12. State Board Membership

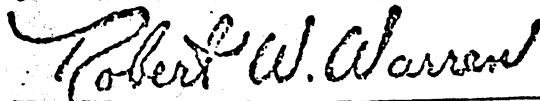
No State board or body which has or shares authority to approve permit applications or portions thereof, either in the first instance or on appeal, includes [or will include, at the time of approval of the State permit program], as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit. No State law requires representation on the State board or body which has or shares authority to issue permits which would violate the conflict of interest provision contained in section 304(h)(2) of the FWPCA.

[Federal Authority: FWPCA § 304 (h) (2) (D); 40 C.F.R. § 124.94.]

State Statutory Authority: Section 15.34 and 147.021.

Remarks of the Attorney General: State law is in compliance with FWPCA requirements.

Dated this 15th day of August, 1973.



ROBERT W. WARREN, Attorney General
State of Wisconsin

WPDES PERMIT

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

Domtar A.W. Corporation

is permitted, under the authority of Chapter 283, Wisconsin Statutes, to discharge from the following facilities:

Wastewater Reclamation Center NW ¼ of Section 2, Town of Saratoga

Nekoosa Mill Market Street and Point Basse Avenue, Nekoosa Wisconsin

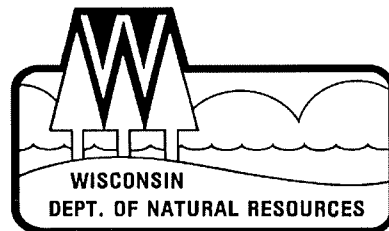
Port Edwards Mill 100 Wisconsin River Drive, Port Edwards, Wisconsin

to the Wisconsin River, groundwaters in Wood County and land application sites in Adams, Juneau, Portage, Waushara and Wood Counties in accordance with the effluent limitations, monitoring requirements and other conditions set forth in this permit.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit, according to Chapter NR 200, Wis. Adm. Code, at least 180 days prior to the expiration date given below.

State of Wisconsin Department of Natural Resources
For the Secretary

By Regul. Larson Sr
Al Shea
Director, Bureau of Watershed Management
7/28/2003
Date Permit Signed/Issued for Modification



PERMIT TERM: EFFECTIVE DATE: February 1, 2002
EFFECTIVE DATE OF MODIFICATION: August 1, 2003

EXPIRATION DATE: January 31, 2007

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1 In-Plant Requirements

1.1 Sampling Points

Sampling Point Designation	
Sampling Point Number	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
101	At in-plant Sampling Point 101 (NK BLEACH PLANT D1), overflow from the first stage chlorine dioxide washer seal box (D1) in the Nekoosa Mill's pulp bleach plant shall be sampled prior to combining with overflow from either the enhanced caustic washer seal box (EOP) or the second stage chlorine dioxide washer seal box (D2).
102	At in-plant Sampling Point 102 (NK BLEACH PLANT EOP), overflow from the EOP stage in the Nekoosa Mill's pulp bleach plant shall be sampled prior to combining with overflow from either the D1 or D2 stages.
103	At in-plant Sampling Point 103 (NK BLEACH PLANT D2), overflow from the D2 stage in the Nekoosa Mill's pulp bleach plant shall be sampled prior to combining with overflow from either the D1 or EOP stages.
104	At in-plant Sampling Point 104 (NK D1, EOP and D2 COMBINED), overflow from the Nekoosa Mill's D1, EOP and D2 bleach stages shall be sampled after mixing, but prior to combining with other waste streams from the Nekoosa Mill's chlorine dioxide plant and tall oil plant.
106	At in-plant Sampling Point 106 (NK MAIN COLLECTION TANK), process wastewaters from the Nekoosa Mill shall be sampled after mixing at the Mill's main collection tank, but prior to discharge to the Wastewater Reclamation Center.
107	At in-plant Sampling Point 107 (PE MAIN COLLECTION TANK), process wastewaters from the Port Edwards Mill shall be sampled after mixing at the Mill's main collection tank, but prior to discharge to the Wastewater Reclamation Center.

1.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

1.2.1 Sampling Points 101, 102 and 103

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Weekly	Estimated	
Chloroform		mg/L	Weekly	Grab Comp	See 1.2.1.1 and 1.2.2.5.

1.2.1.1 Sample Type for Chloroform

A separate grab-composite sample for chloroform is required at Sampling Points 101 (NK BLEACH PLANT D1), 102 (NK BLEACH PLANT EOP), and 103 (NK BLEACH PLANT D2). The three grab-composite samples shall be collected during the same 24-hour period and analyzed separately.

For each bleach stage, a sample type of grab composite means a composite sample made up of at least three equal-volume grab samples. The permittee shall collect the grab samples at approximately equal time intervals over a 24-hour period with at least one grab sample being collected during each 8-hour shift. While grab samples may be composited prior to being analyzed for chloroform, they must be composited at the laboratory where the analysis is performed.

1.2.2 Sampling Point 104 - NK D1, EOP and D2 COMBINED

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Total Daily	
Dioxin, 2,3,7,8-TCDD	Daily Max	<10 pg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
Furan, 2,3,7,8-TCDF	Daily Max	31.9 pg/L	Monthly	24-Hr Comp	See 1.2.2.1 and 1.2.2.3.
Chloroform	Daily Max	6.70 lbs/day	Weekly	Calculated	See 1.2.2.4 and 1.2.2.5.
Chloroform	Monthly Avg	4.01 lbs/day	Weekly	Calculated	See 1.2.2.4 and 1.2.2.5.
Trichlorosyringol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
3,4,5-Trichlorocatechol	Daily Max	<5.0 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
3,4,6-Trichlorocatechol	Daily Max	<5.0 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
3,4,5-Trichloroguaiacol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
3,4,6-Trichloroguaiacol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
4,5,6-Trichloroguaiacol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
2,4,5-Trichlorophenol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
2,4,6-Trichlorophenol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
Tetrachlorocatechol	Daily Max	<5.0 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
Tetrachloroguaiacol	Daily Max	<5.0 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
2,3,4,6-Tetrachlorophenol	Daily Max	<2.5 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.
Pentachlorophenol	Daily Max	<5.0 µg/L	Monthly	24-Hr Comp	See 1.2.2.1, 1.2.2.2 and 1.2.2.3.

1.2.2.1 Analytical Test Methods

The permittee shall use Method 1613 for TCDD and TCDF and Method 1653 for the chlorinated phenolic compounds listed in the table above. Alternate methods may be used if they are approved by EPA for use with wastewater effluents and provide a minimum level equal to or less than the effluent limit of the parameter being tested.

1.2.2.2 Determination of Compliance

Detectable effluent concentrations equal to or greater than the effluent limit and non-detectable effluent concentrations at limits of detection greater than the effluent limit do not comply with an effluent limit that is expressed as an inequality. For example, monitoring results of 10 pg/L, 11 pg/L and <11 pg/L do not comply with the 2,3,7,8-TCDD daily maximum effluent limit of <10 pg/L.

1.2.2.3 Sample Type for Dioxin, Furan and the Chlorinated Phenolics

The sample type of 24-hour composite for dioxin, furan and the chlorinated phenolics may be either time-proportional or flow-proportional.

1.2.2.4 Sample Type for Chloroform

A calculated sample type for chloroform means the sum of test results for Sampling Points 101 (NK BLEACH PLANT D1), 102 (NK BLEACH PLANT EOP) and 103 (NK BLEACH PLANT D2) when the results are expressed in units of pounds per day.

1.2.2.5 Chloroform Monitoring

The permittee is not required to monitor for chloroform if it complies with the following:

- The permittee maintains a record of the maximum value for each of the following process and operating conditions for the fiber line that was recorded during the collection of each of the samples used to make the compliance demonstration required under 40 CFR 430.02 (f)(2)(i):
 - pH of the first chlorine dioxide bleaching stage;
 - chlorine (Cl_2) content of the chlorine dioxide (ClO_2) used on the bleach line;
 - kappa factor of the first chlorine dioxide bleaching stage; and
 - total bleach line chlorine dioxide application rate.
- The permittee certifies each month that:

The chlorine-containing compound used for bleaching is unchanged from that used during the compliance demonstration, and the pH of the first chlorine dioxide bleaching stage, the chlorine (Cl_2) content of the chlorine dioxide (ClO_2) used on the bleach line, the kappa factor of the first chlorine dioxide bleaching stage, and the total bleach line chlorine dioxide application rate during the reporting period did not exceed the maximum value recorded for each such condition during the collection of samples used to make the compliance demonstration.

- The permittee shall sign, as specified in Standard Requirement 6.1.1, and attach the above certification clause to the monthly discharge monitoring report.

Should the permittee change process and operating conditions on the fiber line so that one or more exceeds the maximum value recorded during the compliance demonstration required under 40 CFR 430.02 (f)(2)(i), the permittee must comply with 40 CFR 430.02 (f)(3) if the permittee wishes to continue the exemption from chloroform monitoring.

As used above, the "compliance demonstration" represents the period from January 1, 2001 through March 31, 2003 when pH, chlorine content and total chlorine dioxide application data were collected and the period from February 21, 2001 through March 31, 2003 when chloroform data were collected. "Kappa factor," "total bleach line chlorine dioxide application rate," and "chlorine-containing compounds" have the meanings specified in 40 CFR 430.02 (f)(7).

1.3 Best Management Practices for Spent Pulping Liquor, Soap and Turpentine Management, Spill Prevention and Control

The permittee shall implement Best Management Practices (BMPs) for the Nekoosa and Port Edwards pulp mills as specified in 40 CFR 430.03 for direct discharging mills. Best Management Practices for spent liquor, soap and turpentine management, spill prevention and control include, but are not limited to, the following.

1.3.1 Requirement to Implement Best Management Practices

The permittee shall implement the following BMPs:

- The permittee shall return spilled or diverted spent pulping liquors, soap and turpentine to the process to the maximum extent practicable as determined by the mill, recover such materials outside the process, or discharge spilled or diverted material at a rate that does not disrupt the receiving wastewater treatment system.
- The permittee shall establish a program to identify and repair leaking equipment items. This program shall include:
 - Regular visual inspections (e.g., once per day) of process areas with equipment items in spent pulping liquor, soap and turpentine service;
 - Immediate repairs of leaking equipment items, when possible. Leaking equipment items that cannot be repaired during normal operations shall be identified, temporary means for mitigating the leaks shall be provided, and the leaking equipment items repaired during the next maintenance outage;
 - Identification of conditions under which production will be curtailed or halted to repair leaking equipment items or to prevent pulping liquor, soap and turpentine leaks and spills; and
 - A means for tracking repairs over time to identify those equipment items where upgrade or replacement may be warranted based on frequency and severity of leaks, spills or failures.
- The permittee shall operate continuous, automatic monitoring systems that are necessary to detect and control leaks, spills and intentional diversions of spent pulping liquor, soap and turpentine. These monitoring systems should be integrated with the mill process control system.
- The permittee shall establish a program of initial and refresher training of operators, maintenance personnel and other technical and supervisory personnel who have responsibility for operating, maintaining or supervising the operation and maintenance of equipment items in spent pulping liquor, soap and turpentine service. The refresher training shall be conducted at least annually and the training program shall be documented.
- The permittee shall prepare a brief report that evaluates each spill and any intentional diversion of spent pulping liquor, soap and turpentine that is not contained at the immediate process area. The report shall describe the equipment items involved, the circumstances leading to the incident, the effectiveness of the corrective actions taken to contain and recover the spill or intentional diversion, and plans to develop changes to equipment and operating and maintenance practices as necessary to prevent recurrence. Discussion of the reports shall be included as part of the annual refresher training.
- The permittee shall establish a program to review any planned modifications to the pulping and chemical recovery facilities and any construction activities in the pulping and chemical recovery areas before these activities commence. The purpose of such review is to prevent leaks and spills of spent pulping liquor, soap and turpentine during the planned modifications, and to ensure that construction and supervisory personnel are aware of possible liquor diversions and of the requirement to prevent leaks and spills of spent pulping liquors during construction.
- The permittee shall install and maintain secondary containment (i.e., containment constructed of materials impervious to pulping liquors) for spent pulping liquor bulk storage tanks equivalent to the volume of the largest tank plus sufficient freeboard for precipitation. An annual tank integrity testing program, if coupled with other

containment or diversion structures, may be substituted for secondary containment for spent pulping liquor bulk storage tanks.

- The permittee shall conduct wastewater monitoring to detect leaks and spills, to track the effectiveness of the BMPs, and to detect trends in spent pulping liquor losses. Such monitoring shall be performed in accordance with 1.3.7.
- The permittee shall install and maintain secondary containment for turpentine bulk storage tanks.
- The permittee shall install and maintain curbing, diking or other means of isolating soap and turpentine processing and loading areas from the wastewater treatment facilities.

1.3.2 Requirement to Develop a BMP Plan

The permittee shall prepare and implement a BMP plan that is based on a detailed engineering review, as described below, and that specifies the procedures and practices required to meet the requirements of 1.3.1, the construction necessary to meet those requirements including a schedule for such construction, the monitoring program, including the statistically derived action levels, that will be used to meet the requirements of 1.3.6, and the period of time that the action levels may be exceeded without triggering the responses specified in 1.3.7.

The permittee shall conduct a detailed engineering review of the pulping and chemical recovery operations, including but not limited to process equipment, storage tanks, pipelines and pumping systems, loading and unloading facilities, and other appurtenant pulping and chemical recovery equipment items in spent pulping liquor, soap and turpentine service, for the purpose of:

- Determining the magnitude and routing of potential leaks, spills and intentional diversions of spent pulping liquors, soap and turpentine during process startups and shutdowns, maintenance, production grade changes, storm or other weather events, power failures, and normal operations.
- Determining whether existing spent pulping liquor containment facilities are of adequate capacity for collection and storage of anticipated intentional liquor diversions with sufficient contingency for collection and containment of spills.
- Considering the need for continuous automatic monitoring systems to detect and control leaks and spills of spent pulping liquor, soap and turpentine; the need for process wastewater diversion facilities to protect end-of-pipe wastewater treatment facilities from adverse effects of spills and diversion of spent pulping liquors, soap and turpentine; the potential for contamination of storm water from the immediate process areas; and the extent to which segregation and/or collection and treatment of contaminated storm water from immediate process areas are appropriate.

1.3.3 Amendment of the BMP Plan

The permittee shall amend its BMP plan whenever there is a change in mill design, construction, operation or maintenance that materially affects the potential for leaks or spills of spent pulping liquor, soap or turpentine from the immediate process areas.

The permittee shall complete a review and evaluation of the BMP plan five years after the first BMP plan is prepared and, except as provided above, once every five years thereafter. As a result of this review and evaluation, the permittee shall amend the BMP plan within three months of the review if the permittee determines that any new or modified management practices and engineering controls are necessary to reduce significantly the likelihood of spent pulping liquor, soap and turpentine leaks, spills or intentional diversions from the immediate process areas. The amended BMP plan shall include a schedule for implementation of such practices and controls.

1.3.4 Review and Certification of the BMP Plan

The BMP plan, and any amendments thereto, shall be reviewed by the senior technical manager at the mill and approved and signed by the mill manager. Any person signing the BMP plan or its amendments shall certify to the Department that the BMP plan or its amendments have been prepared in accordance with good engineering practices and in accordance with 40 CFR 430.03.

1.3.5 Record Keeping Requirements

The permittee shall maintain on the mill premises a complete copy of the current BMP plan and the records specified below and shall make such BMP plan and records available to the Department and the Regional Administrator or his or her designee for review upon request.

The permittee shall maintain the following records for three years from the date they are created:

- Records tracking the repairs performed in accordance with the repair program described in 1.3.1;
- Records of initial and refresher training conducted in accordance with 1.3.1;
- Reports of uncontained spills and intentional diversions of spent pulping liquor, soap and turpentine prepared in accordance 1.3.1; and
- Records of monitoring required by 1.3.1. and 1.3.7.

1.3.6 Establishment of Action Levels

The permittee shall conduct a monitoring program, as described below, for the purpose of defining action levels, also described below, that will trigger requirements to initiate investigations on BMP effectiveness and to take corrective action.

The permittee shall employ the following procedures in order to develop the action levels:

- The permittee shall collect 24-hour composite samples and analyze the samples for a measure of organic content (e.g., chemical oxygen demand (COD) or total organic carbon (TOC)), or a measure related to spent pulping liquor losses measured continuously and averaged over 24 hours (e.g., specific conductivity or color).
- Monitoring shall be conducted at **Sampling Point 106**, Nekoosa Mill main collection tank, and **Sampling Point 107**, Port Edwards Mill main collection tank.
- **By the effective date of this permit**, the permittee shall complete an initial monitoring program of at least six months duration using the procedures specified above and shall establish initial action levels based on the results of that program. An action level is a statistically determined pollutant loading determined by a statistical analysis of at least six months of daily measurements. The action levels shall consist of a lower action level, which if exceeded will trigger the investigation requirements described in 1.3.7, and an upper action level, which if exceeded will trigger the corrective action requirements described in 1.3.7.
- **By the effective date of this permit**, the permittee shall complete a second monitoring program of at least six months duration using the procedures specified above and shall establish revised action levels based on the results of that program. The initial action levels shall remain in effect until replaced by revised action levels.

Action levels developed as specified above shall be revised using at least six months of monitoring data after any change in mill design, construction, operation or maintenance that materially affects the potential for leaks or spills of spent pulping liquor, soap or turpentine from the immediate process areas.

1.3.7 Monitoring, Corrective Action and Reporting Requirements

The permittee shall conduct daily monitoring at **Sampling Points 106 and 107** in accordance with the procedures described in 1.3.6 for the purpose of detecting leaks and spills, tracking the effectiveness of the BMPs, and detecting trends in spent pulping liquor losses.

Whenever monitoring results exceed the lower action level for the period of time specified in the BMP plan, the permittee shall conduct an investigation to determine the cause of such exceedance. Whenever monitoring results exceed the upper action level for the period of time specified in the BMP plan, the permittee shall complete corrective action to bring the mass loading below the lower action level as soon as practicable.

Although exceedances of the action levels will not constitute violations of this permit, failure to take the actions required above as soon as practicable will be a permit violation.

By the 15th of February each year beginning in 2003, the permittee shall report to the Department the results of the daily monitoring conducted as required above for the previous calendar year. Such reports shall include a summary of the monitoring results, the number and dates of exceedances of the applicable action levels, and brief descriptions of any corrective actions taken to respond to such exceedances.

1.3.8 Compliance Deadlines

The permittee shall meet the deadlines set forth below:

- By **the effective date of this permit**, prepare a BMP plan and certify to the Department that the BMP plan has been prepared in accordance with 40 CFR 430.03.
- By **the effective date of this permit**, implement all BMPs specified in 1.3.1 that do not require the construction of containment or diversion structures or the installation of monitoring and alarm systems.
- By **the effective date of this permit**, establish initial action levels required by 1.3.6.
- By **the effective date of this permit**, commence operation of any new or upgraded continuous, automatic monitoring systems necessary under 1.3.1 (other than those associated with construction of containment or diversion structures).
- By **the effective date of this permit**, complete construction and commence operation of any spent pulping liquor collection, containment, diversion or other facilities, including any associated continuous monitoring systems, necessary to fully implement BMPs specified in 1.3.1.
- By **the effective date of this permit**, establish revised action levels required by 1.3.6.

2 Surface Water Requirements

2.1 Sampling Points

The discharges shall be limited to the waste types designated for the listed sampling points.

Sampling Point Designation	
Sampling Point Number	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
001	At Sampling Point 001 (NK CLO2 LIFT STATION OVERFLOW), the Nekoosa Mill's chlorine dioxide plant lift station emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 001.
003	At Sampling Point 003 (PE PM #8 CLEAR SEWER OVERFLOW), the Port Edwards Mill's No. 8 Paper Machine clear sewer emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 003.
007	At Sampling Point 007 (PE BLEACH PLANT OVERFLOW), the Port Edwards Mill's bleach plant emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 007.
008	At Sampling Point 008 (NK COLLECTION TANK OVERFLOW), the Nekoosa Mill's main collection tank emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 008.
009	At Sampling Point 009 (PE COLLECTION TANK OVERFLOW), the Port Edwards Mill's main collection tank emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 009.
002	At Sampling Point 002, final effluent from the Wastewater Reclamation Center shall be sampled prior to discharge to the Wisconsin River via Outfall 002.
013	Sampling Point 013 represents the combined loadings from Outfalls 001 (Nekoosa CLO2 lift station overflow), 002 (Wastewater Reclamation Center effluent), 003 (Port Edwards No. 8 Paper Machine clear sewer overflow), 007 (Port Edwards bleach plant overflow), 008 (Nekoosa collection tank overflow) and 009 (Port Edwards collection tank overflow).
006	At Sampling Point 006, noncontact cooling waters (No. 6 Turbine condenser, chlorine dioxide plant chiller and other sources) shall be sampled after mixing, but prior to discharge to the Wisconsin River via Outfall 006.
011	At Sampling Point 011, overflow from the intake water standpipe shall be sampled prior to discharge to the Wisconsin River via Outfall 011.

2.2 Monitoring Requirements and Effluent Limitations

The permittee shall comply with the following monitoring requirements and limitations.

2.2.1 Sampling Points 001 , 003, 007, 008 and 009

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Estimated	See 2.2.1.1 and 2.2.1.2.
BOD ₅ , Total		lbs/day	Daily	Grab Comp	See 2.2.1.2 and 2.2.1.3.
Suspended Solids, Total		lbs/day	Daily	Grab Comp	See 2.2.1.2 and 2.2.1.3.
pH Field	Daily Max	9.0 su	Daily	Grab	See 2.2.1.2.
pH Field	Daily Min	5.0 su	Daily	Grab	See 2.2.1.2.

2.2.1.1 Scheduled and Unscheduled Bypassing

The discharge shall comply with Standard Requirements 6.2.2 and 6.2.3 of this permit.

2.2.1.2 Daily Sample Frequency

The discharge shall be sampled daily when discharge occurs.

2.2.1.3 Grab Composite Sample Type

Grab composite sampling means a composite of individual grab samples of equal volume that are collected over the duration of the discharge at approximately equal intervals of time not to exceed one hour.

2.2.2 Sampling Point 002 - WRC EFFLUENT

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Continuous	
BOD ₅ , Total		lbs/day	5/Week	24-Hr Flow Prop Comp	November through April (see 2.2.2.1).
BOD ₅ , Total		lbs/day	Daily	24-Hr Flow Prop Comp	May through October (see 2.2.2.1).
Suspended Solids, Total		lbs/day	5/Week	24-Hr Flow Prop Comp	See 2.2.2.2.
pH (Minimum)	Daily Min	4.0 su	Daily	Continuous	See 2.2.2.3.
pH (Maximum)	Daily Max	11 su	Daily	Continuous	See 2.2.2.3.
pH Total Exceedance Time Minutes	Monthly Total	446 minutes	Daily	Continuous	See 2.2.2.3.
pH Exceedances Greater Than 60 Minutes	Daily Max	0 Number	Daily	Continuous	See 2.2.2.3.

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Temperature Average		deg F	Daily	Continuous	
Phosphorus, Total		mg/L	Monthly	24-Hr Flow Prop Comp	
Chlorine, Total Residual		µg/L	Monthly	Grab	
AOX		lbs/day	Daily	24-Hr Flow Prop Comp	See 2.2.2.4.
3,4-Benzofluoranthene		µg/L	Quarterly	24-Hr Flow Prop Comp	Quarterly from July 1, 2002 to June 30, 2003. Also see 2.2.2.4.
Benzo(a)anthracene		µg/L	Quarterly	24-Hr Flow Prop Comp	Quarterly from July 1, 2002 to June 30, 2003. Also see 2.2.2.4.
Benzo(a)pyrene		µg/L	Quarterly	24-Hr Flow Prop Comp	Quarterly from July 1, 2002 to June 30, 2003. Also see 2.2.2.4.
Dibenzo(a,h)-anthracene		µg/L	Quarterly	24-Hr Flow Prop Comp	Quarterly from July 1, 2002 to June 30, 2003. Also see 2.2.2.4.
Dioxin, 2,3,7,8-TCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, 1,2,3,7,8-PeCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, 1,2,3,4,7,8-HxCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, 1,2,3,6,7,8-HxCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, 1,2,3,7,8,9-HxCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, 1,2,3,4,6,7,8-HpCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Dioxin, OCDD		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 2,3,7,8-TCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 1,2,3,7,8-PeCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 2,3,4,7,8-PeCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 1,2,3,4,7,8-HxCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 1,2,3,6,7,8-HxCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 1,2,3,7,8,9-HxCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 2,3,4,6,7,8-HxCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Furan, 1,2,3,4,6,7,8-HpCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, 1,2,3,4,7,8,9-HpCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Furan, OCDF		pg/L	Annual	Composite	See 2.2.2.4 and 2.2.2.5.
Aluminum, Total Recoverable		mg/L	Monthly	24-Hr Flow Prop Comp	Monthly During 2005.
Mercury, Total Recoverable		ng/L	Quarterly	Grab	Quarterly from July 1, 2002 to June 30, 2003. Also see 2.2.2.4.
Acute WET		TU _a	See 2.2.2.6.	24-Hr Flow Prop Comp	See 2.2.2.6.
Chronic WET		rTU _c	See 2.2.2.6.	24-Hr Flow Prop Comp	See 2.2.2.6.

2.2.2.1 BOD₅ Sample Frequency

During the months of May through October each year, BOD₅ monitoring is required daily. During the months of November through April each year, BOD₅ monitoring is required five times per week with the following exception. BOD₅ monitoring at Sampling Point 002 during the months of November through April is required on each day that discharge occurs from Outfall 001 (Nekoosa Mill's chlorine dioxide plant lift station emergency overflow), Outfall 003 (Port Edwards Mill's No. 8 Paper Machine clear sewer emergency overflow), Outfall 007 (Port Edwards Mill's bleach plant emergency overflow), Outfall 008 (Nekoosa Mill's main collection tank emergency overflow) or Outfall 009 (Port Edwards Mill's main collection tank emergency overflow).

If the permittee exceeds technology-based effluent limits for BOD₅, fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the BOD₅ monitoring frequency during the months of November through April.

2.2.2.2 Total Suspended Solids Sample Frequency

If the permittee exceeds technology-based effluent limits for total suspended solids (TSS), fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the TSS monitoring frequency.

2.2.2.3 Continuous pH Monitoring

The permittee shall maintain the pH of this discharge within the range of 5.0 to 9.0 except excursions are permitted subject to the following conditions:

- The total time during which the pH is outside the range of 5.0 to 9.0 shall not exceed 446 minutes during any calendar month;
- No individual pH excursion outside the range of 5.0 to 9.0 shall exceed 60 minutes in duration;
- No individual pH excursion shall be outside the range of 4.0 to 11.0; and
- On a daily basis, the permittee shall report the total time that the pH is outside the range of 5.0 to 9.0 and the number of pH excursions outside the range of 5.0 to 9.0 that exceed 60 minutes in duration.

2.2.2.4 Required Test Methods

When testing for polynuclear aromatic hydrocarbons (PAHs), adsorbable organic halides (AOX), dioxin and furan congeners, and mercury, the permittee shall use EPA Method SW-846 8310 (HPLC), Method 1650, Method 1613 and Method 1631, respectively, or any other methods that are approved by EPA and provide a minimum level (ML) of 20 µg/L for AOX, 10 pg/L for 2,3,7,8-TCDD and 0.5 ng/L for mercury.

2.2.2.5 Composite Sample Type for Dioxin and Furan Congeners

When monitoring for dioxin and furan congeners, flow proportional composite samples shall be obtained over a period of time of one to five consecutive days and shall be made up using continuous flow proportional samples or the greater of:

- Twelve nearly equally spaced, flow proportioned grab samples; or
- The total number of grab samples that would be obtained if a minimum of six nearly equally spaced, flow proportional samples are taken on each day of sampling.

2.2.2.6 Whole Effluent Toxicity (WET) Testing

Primary Control Water: Wisconsin River.

Instream Waste Concentration: 6.6%

WET Testing Frequency: Tests are required during the following quarters:

- **Acute:** April through June of 2002, January through March of 2003 and October through December of 2004, July through September of 2005 and April through June of 2006.
- **Chronic:** January through March of 2003, October through December of 2004 and April through June 2006.

Determination of Positive Results: An acute toxicity test shall be considered positive if the Toxic Unit – Acute (TU_a) is >1 for either species. A chronic toxicity test shall be considered positive if the Relative Toxic Unit - Chronic (rTU_c) is >1 for either species.

Reporting: The permittee shall report results of each test on the Discharge Monitoring Report form in units of TU_a and rTU_c and on the "Whole Effluent Toxicity Test Report Form" (page 40 of the "*State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, Edition 1*"). A copy of the "Whole Effluent Toxicity Test Report Form" shall be sent to the Biomonitoring Coordinator, WT/2, Bureau of Watershed Management, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921, within 45 days of test completion.

Additional Testing Requirements: Within 90 days of a test which showed positive results, the permittee shall submit the results of at least 2 retests to the Biomonitoring Coordinator on "Whole Effluent Toxicity Test Report Forms". The retests shall be completed in accordance with the same requirements specified for the original test (see the Standard Requirements section herein).

2.2.3 Sampling Point 013 - 1, 2, 3, 7, 8 and 9 COMBINED

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
BOD ₅ , Total	Daily Max	30,377 lbs/day	5/Week	Calculated	November through April (see 2.2.3.2).
BOD ₅ , Total	Monthly Avg	15,778 lbs/day	5/Week	Calculated	November through April (see 2.2.3.2).
BOD ₅ , Total	Daily Max	30,377 lbs/day	Daily	Calculated	May through October (see 2.2.3.2). Also see 2.2.3.5.
BOD ₅ , Total	Monthly Avg	15,778 lbs/day	Daily	Calculated	May through October (see 2.2.3.2). Also see 2.2.3.5.
Suspended Solids, Total	Daily Max	54,427 lbs/day	5/Week	Calculated	See 2.2.3.3.
Suspended Solids, Total	Monthly Avg	29,262 lbs/day	5/Week	Calculated	See 2.2.3.3.
Phosphorus, Total	Rolling 12 Month Avg	1.5 mg/L	Monthly	Calculated	
AOX	Daily Max	921 lbs/day	Daily	Calculated	
AOX	Monthly Avg	603 lbs/day	Daily	Calculated	
Dioxin, 2,3,7,8-TCDD	Monthly Avg	1.2 µg/day	Annual	Calculated	
Dioxin, 2,3,7,8-TCDD TE	Monthly Avg	11 µg/day	Annual	Calculated	See 2.2.3.4.
WLA Previous Day River Flow		cfs	Daily	Continuous	May through October (see 2.2.3.5).
WLA Previous Day River Temp		deg F	Daily	Continuous	May through October (see 2.2.3.5).
WLA Value		lbs/day	Daily	Calculated	May through October (see 2.2.3.5).
WLA Adjusted Value		lbs/day	Daily	Calculated	May through October (see 2.2.3.5).
WLA BOD ₅ Discharged	Daily Max - Variable	0 Exceedances	Daily	Calculated	
WLA 5 Day Sum Of WLA Values		lbs/day	Daily	Calculated	May through October (see 2.2.3.5).
WLA 5 Day Sum Of BOD ₅ Discharged	Daily Max - Variable	0 Exceedances	Daily	Calculated	

2.2.3.1 Applicability

Effluent limitations specified in the above table are applicable to the combined loadings from Outfalls 001, 002, 003, 007, 008 and 009 as monitored at Sampling Points 001, 002, 003, 007, 008 and 009. The table's monitoring requirements refer to the calculation of combined loads. Sampling requirements for BOD₅, TSS, phosphorus, 2,3,7,8-TCDD, and the dioxin and furan congeners that are necessary to calculate total dioxin equivalents are specified elsewhere in this permit.

2.2.3.2 BOD₅ Sample Frequency

During the months of May through October each year, BOD₅ monitoring is required daily. During the months of November through April each year, BOD₅ monitoring is required five times per week with the following exception. BOD₅ monitoring at Sampling Point 002 (Wastewater Reclamation Center effluent) during the months of November through April is required on each day that discharge occurs: from Outfall 001 (Nekoosa Mill's chlorine dioxide plant lift station emergency overflow), Outfall 003 (Port Edwards Mill's No. 8 Paper Machine clear sewer emergency overflow), Outfall 007 (Port Edwards Mill's bleach plant emergency overflow), Outfall 008 (Nekoosa Mill's main collection tank emergency overflow) or Outfall 009 (Port Edwards Mill's main collection tank emergency overflow).

If the permittee exceeds technology-based effluent limits for BOD₅, fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the BOD₅ monitoring frequency during the months of November through April.

2.2.3.3 Total Suspended Solids Sample Frequency

If the permittee exceeds technology-based effluent limits for total suspended solids (TSS), fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the TSS monitoring frequency.

2.2.3.4 Total Dioxin Equivalents (TCDD TE)

The monthly average effluent limit of 11 µg/day for 2,3,7,8-TCDD TE is effective January 1, 2005.

The permittee shall demonstrate compliance with the monthly average effluent limit for 2,3,7,8-TCDD TE by using the 2,3,7,8-TCDD toxicity equivalence concentration and the effluent flow rate. The permittee shall use the following equation to calculating the 2,3,7,8-TCDD toxicity equivalence concentration:

$$(TEC)_{tcdd} = \sum(C)_x (TEF)_x (BEF)_x$$

where:

(TEC)_{tcdd} = 2,3,7,8-TCDD toxicity equivalence concentration in the effluent;

(C)_x = concentration of congener "x" in the effluent;

(TEF)_x = toxicity equivalency factor for congener "x"; and

(BEF)_x = bioaccumulation equivalency factor for congener "x."

When a congener is not detected, a zero may be used in the above equation for the concentration of the congener.

The following table provides the toxicity and bioaccumulation equivalency factors:

Toxicity and Bioaccumulation Equivalency Factors		
Congener	TEF	BEF
2,3,7,8-TCDD	1.0	1.0
1,2,3,7,8-PeCDD	0.5	0.9
1,2,3,4,7,8-HxCDD	0.1	0.3
1,2,3,6,7,8-HxCDD	0.1	0.1
1,2,3,7,8,9-HxCDD	0.1	0.1
1,2,3,4,6,7,8-HpCDD	0.01	0.05
OCDD	0.001	0.01
2,3,7,8-TCDF	0.1	0.8

1,2,3,7,8-PeCDF	0.05	0.2
2,3,4,7,8-PeCDF	0.5	1.6
1,2,3,4,7,8-HxCDF	0.1	0.08
1,2,3,6,7,8-HxCDF	0.1	0.2
1,2,3,7,8,9-HxCDF	0.1	0.6
2,3,4,6,7,8-HxCDF	0.1	0.7
1,2,3,4,6,7,8-HpCDF	0.01	0.01
1,2,3,4,7,8,9-HpCDF	0.01	0.4
OCDF	0.001	0.02

2.2.3.5 Waste Load Allocation Requirements

Each year during the months of May through October the total daily discharge of BOD₅ from Outfalls 001, 002, 003, 007, 008 and 009 is limited to the more restrictive of 30,377 lbs/day or the following wasteload allocated water quality related effluent limitations.

Definitions:

- Flow in the following waste load allocation tables shall be defined as the daily average flow value derived from continuous river flow monitoring data for the Wisconsin River collected at the Biron Dam. If such flow data is unavailable for any day, the daily average flow value shall be derived from continuous river flow monitoring data for the Wisconsin River collected at the Centralia Dam. Daily average flow values reported by the Wisconsin Valley Improvement Company for the Biron Dam and Centralia Dam locations are acceptable.
- Temperature in the following waste load allocation tables shall be defined as the daily average temperature value derived from continuous river temperature monitoring data for the Wisconsin River collected at the Wisconsin Rapids Dam. If such temperature data is unavailable for any day, the daily average temperature value shall be derived from continuous river temperature monitoring data for the Wisconsin River collected at the Biron Dam. Daily average temperature values reported by the Wisconsin Valley Improvement Company for the Wisconsin Rapids Dam and Biron Dam locations are acceptable.
- Point source allocation values (pounds per day BOD₅) in the following waste load allocation tables represent water quality related effluent limitations. The flow and temperature conditions used to determine a point source allocation value for a given day shall be the representative measurements of the flow and temperature of the previous day.

Determination of Effluent Limitations: For the purposes of determining compliance with the wasteload allocated water quality related effluent limitations, the following conditions shall be met:

- The sum of the actual daily discharges of BOD₅ for any 5-consecutive-day period shall not exceed the sum of the daily point source allocation values for the same 5-consecutive-day period.
- For any one-day period, the actual discharge of BOD₅ shall not exceed 120.5% of the point source allocation value for that day.

Monitoring Requirements: Flow and temperature monitoring of the Wisconsin River and flow and BOD₅ monitoring at Sampling Point 002 (Wastewater Reclamation Center effluent) shall be performed on the same schedule. For example, Wisconsin Valley Improvement Company provides flow and temperature data for the 24-hour period beginning at 7:00 a.m. each day. If the permittee uses Wisconsin Valley Improvement Company's river flow and temperature data, the permittee must begin collecting 24-hour composite samples for BOD₅ at 7:00 a.m. each day and must total effluent flow over the 24-hour period beginning and ending at 7:00 a.m. This requirement does not preclude

the definition of point source allocation value, which requires the previous day's river temperature and flow to be used to derive the day's point source allocation value.

Reporting Requirements: During the months of May through October inclusive, the permittee shall report the following:

- Daily river flow (cfs);
- Daily river temperature (°F);
- Daily point source allocation value (lbs BOD₅ per day);
- Daily adjusted point source allocation values (percent adjustment factor multiplied by the point source allocation value) (lbs BOD₅ per day)
- Actual daily discharge value of BOD₅ (lbs BOD₅ per day);
- Number of times that the actual daily discharge value of BOD₅ exceeds the daily adjusted point source waste load allocation value;
- Sum of the actual daily discharge values of BOD₅ (lbs BOD₅) for each 5-consecutive-day period (present day's discharge plus the four previous day's discharge);
- Sum of the daily point source waste load allocation values (lbs BOD₅) for each 5-consecutive-day period (present day's discharge plus the four previous day's discharge); and
- Number of times that the sum of actual daily discharge values of BOD₅ exceeds the sum of daily point source waste load allocation values.

Point Source Allocation Values: Point source allocation values are provided in the following tables:

Point Source Waste Load Allocated Values for May and June in Pounds per Day of BOD₅

Temperature (previous day average in °F)	Flow at Biron Dam (previous day average in cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥82	6882	8213	10594	14765	20173	26242	27164	52819	60746	60746
78 TO 81	6882	8558	11176	15810	22076	28938	29703	59820	60746	60746
74 TO 77	6882	8898	11802	17028	24127	32034	32912	60746	60746	60746
70 TO 73	6882	9504	12709	18482	26695	36220	37231	60746	60746	60746
66 TO 69	7113	11146	14908	21760	31739	43359	44423	60746	60746	60746
62 TO 65	8691	13601	18216	26912	39543	54407	55846	60746	60746	60746
58 TO 61	11062	17338	23387	34746	51735	60746	60746	60746	60746	60746
54 TO 57	14784	23358	31882	47031	60746	60746	60746	60746	60746	60746
50 TO 53	20799	33479	46208	60746	60746	60746	60746	60746	60746	60746
46 TO 49	31137	50537	60746	60746	60746	60746	60746	60746	60746	60746
42 TO 45	49935	60746	60746	60746	60746	60746	60746	60746	60746	60746
≤41	60746	60746	60746	60746	60746	60746	60746	60746	60746	60746

Point Source Waste Load Allocated Values for July and August in Pounds per Day of BOD₅

Temperature (previous day average in °F)	Previous Day Average Flow at Biron Dam (cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥ 82	6882	6882	6882	8622	12354	16821	17353	36974	51094	58671
78 TO 81	6882	6882	6882	10086	14789	20360	21036	45547	60746	60746
74 TO 77	6882	6882	7848	11787	17575	24363	25009	55866	60746	60746
70 TO 73	6882	6882	8972	13725	20681	28894	29801	60746	60746	60746
66 TO 69	6882	8242	11388	17294	26035	36353	37374	60746	60746	60746
62 TO 65	6882	10796	14849	22564	33957	47564	48979	60746	60746	60746
≤61	8928	14582	20074	30624	46154	60746	60746	60746	60746	60746

Point Source Waste Load Allocated Values for September and October in Pounds per Day of BOD₅

Temperature (previous day average in °F)	Flow at Biron Dam (previous day average in cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥82	6882	6882	6882	6882	7404	10776	11205	25680	36097	41643
78 TO 81	6882	6882	6882	6882	9347	13601	14075	33030	46893	54362
74 TO 77	6882	6882	6882	7074	11634	17023	17585	42654	58873	60746
70 TO 73	6882	6882	6882	8947	14572	21243	21834	53041	60746	60746
66 TO 69	6882	6882	7370	12280	19527	28145	29047	60746	60746	60746
62 TO 65	6882	7044	10466	17003	26740	38291	39286	60746	60746	60746
58 TO 61	6882	10293	15016	24117	37655	53795	55393	60746	60746	60746
54 TO 57	8587	15401	22234	35382	55146	60746	60746	60746	60746	60746
50 TO 53	13532	23885	34381	54683	60746	60746	60746	60746	60746	60746
46 TO 49	21958	38463	55176	60746	60746	60746	60746	60746	60746	60746
42 TO 45	37364	60746	60746	60746	60746	60746	60746	60746	60746	60746
≤41	60746	60746	60746	60746	60746	60746	60746	60746	60746	60746

2.2.4 Sampling Point 006 - NK CLEAR SEWER NCCW

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Continuous	
Temperature Maximum		deg F	Daily	Continuous	
Temperature Average	Daily Max	120 deg F	Daily	Continuous	See 2.2.2.1.
Chlorine, Total Residual		µg/L	Quarterly	Grab	

2.2.4.1 Daily Maximum Temperature Limit

The daily maximum temperature limit is applicable to the daily average temperature of the effluent rather than the instantaneous maximum temperature for the day.

2.2.5 Sampling Point 011 - NEPCO LAKE STANDPIPE OVERFLOW

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Quarterly	Estimated	
Chlorine, Total Residual		µg/L	Quarterly	Grab	See 2.2.5.1.

2.2.5.1 Total Residual Chlorine Sample Location

When sampling for total residual chlorine, the permittee may collect a sample of standpipe water at the Nekoosa Mill rather than collect a sample of standpipe overflow.

3 Land Treatment Requirements

3.1 Sampling Point

The discharge shall be limited to the waste type designated for the listed sampling point.

Sampling Point Designation	
Sampling Point Number	Sampling Point Location, Waste Description/Sample Contents and Treatment Description (as applicable)
005	At Sampling Point 005, supernatant from the Nepco Lake alum sludge settling basin, which is located in SW 1/4, SW 1/4, Section 31, T22N, R6E, Town of Grand Rapids, Wood County, shall be sampled prior to seeping to groundwaters via Outfall 005.

3.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

3.2.1 Sampling Point 005 - NEPCO LAKE ALUM SLUDGE BASIN

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Manganese Dissolved		mg/L	Quarterly	Grab	
COD, Filtered		mg/L	Once	Grab	Once During 2005.
pH Field		su	Once	Grab	Once During 2005.
Aluminum Dissolved		mg/L	Once	Grab	Once During 2005.
Copper Dissolved		µg/L	Once	Grab	Once During 2005.
Lead Dissolved		µg/L	Once	Grab	Once During 2005.
Zinc Dissolved		µg/L	Once	Grab	Once During 2005.

4 Land Application Requirements

4.1 Sampling Point

The discharge shall be limited to land application of the waste type designated for the listed sampling point on Department approved sites.

Sampling Point Designation	
Sampling Point Number	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
010	At Sampling Point 010, sludge from the Wastewater Reclamation Center shall be sampled prior to land application via Outfall 010.

4.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

4.2.1 Sampling Point 010 - WRC SLUDGE

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Solids, Total		Percent	Quarterly	Grab	
Nitrogen, Total Kjeldahl		Percent	Quarterly	Grab	Dry Wt.
Nitrogen, Ammonia (NH ₃ -N) Total		Percent	Quarterly	Grab	Dry Wt.
pH Field		su	Quarterly	Grab	
Phosphorus, Total		Percent	Quarterly	Grab	Dry Wt.
Potassium, Total Recoverable		Percent	Quarterly	Grab	Dry Wt.
Boron Dry Wt		mg/kg	Once	Grab	Once During 2005.
Calcium Dry Wt		mg/kg	Once	Grab	Once During 2005.
Chloride		Percent	Once	Grab	Dry Wt. Once During 2005.
Sulfate, Total		mg/kg	Once	Grab	Dry Wt. Once During 2005.
Aluminum Dry Wt		mg/kg	Once	Grab	Once During 2005.
Magnesium Dry Wt		mg/kg	Once	Grab	Once During 2005.
Molybdenum Dry Wt		mg/kg	Once	Grab	Once During 2005.
Cadmium Dry Wt		mg/kg	Quarterly	Grab	
Copper Dry Wt		mg/kg	1/ 6 Months	Grab	
Lead Dry Wt		mg/kg	1/ 6 Months	Grab	
Nickel Dry Wt		mg/kg	1/ 6 Months	Grab	
Zinc Dry Wt		mg/kg	1/ 6 Months	Grab	
Dioxin, 2,3,7,8-TCDD		ng/kg	1/ 6 Months	Grab Comp	Dry Wt. See 4.2.1.1.

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Furan, 2,3,7,8-TCDF		ng/kg	1/ 6 Months	Grab Comp	Dry Wt. See 4.2.1.1.
Dioxins & Furans		ng/kg	Once	Grab Comp	Dry Wt. Once During 2002. Also see 4.2.1.1.
Priority Pollutant Scan		mg/kg or μ g/kg	Once	Grab	Dry Wt. Once During 2005. Also se 4.2.1.2.

4.2.1.1 Sample Type for Dioxin, Furan and Congeners

The permittee may use a composite of daily sludge samples that are obtained over a period of one to five days when monitoring for 2,3,7,8-TCDD; 1,2,3,7,8-PeCDD; 1,2,3,4,7,8-HxCDD; 1,2,3,6,7,8-HxCDD; 1,2,3,7,8,9-HxCDD; 1,2,3,4,6,7,8-HpCDD; OCDD; 2,3,7,8-TCDF; 1,2,3,7,8-PeCDF; 2,3,4,7,8-PeCDF; 1,2,3,4,7,8-HxCDF; 1,2,3,6,7,8-HxCDF; 1,2,3,7,8,9-HxCDF; 2,3,4,6,7,8-HxCDF; 1,2,3,4,6,7,8-HpCDF; 1,2,3,4,7,8,9-HpCDF and/or OCDF.

4.2.1.2 Priority Pollutants

For the purposes of the priority pollutant scan monitoring requirement, priority pollutants are those pollutants that are specified in s. NR 215.03 (1) through (6), but excluding asbestos, cadmium, copper, lead, nickel, zinc and 2,3,7,8-TCDD.

4.3 Sludge Application Rate Limitations

The permittee shall comply with the following sludge application rate limitations.

4.3.1 Nitrogen Requirements

The total pounds of nitrogen applied per acre per year shall be limited to the nitrogen needs of the cover crop minus any other nitrogen added to the land application site, including fertilizer or manure. Nitrogen applied can be calculated on the basis of plant available nitrogen, as long as the release of nitrogen from the organic material is credited to future years. The application of total Kjeldahl nitrogen (TKN) shall not exceed 200 pounds per acre per year on agricultural landspreading sites or 100 pounds per acre per year on silvicultural landspreading sites unless the permittee demonstrates via the management plan that more can be applied and obtains written concurrence from the Department.

4.3.2 Total Dioxin Equivalents Limitations

- Total dioxin equivalents shall not exceed 1.2 ppt in the soil profile after application and incorporation of Wastewater Reclamation Center sludge on agricultural sites. The soil profile shall include the sludge plus underlying litter and soil to a depth of 15 centimeters below the litter-soil interface. Total dioxin equivalents for agricultural sites shall be calculated as follows:

$$\text{TDE} = 2,3,7,8\text{-TCDD (ppt)} + 0.1 \times 2,3,7,8\text{-TCDF (ppt)}$$

- Total dioxin equivalents shall not exceed 0.53 milligrams per acre after application of Wastewater Reclamation Center sludge on silvicultural sites. Total dioxin equivalents for silvicultural sties shall be calculated as follows:

$$\text{TDE} = 2,3,7,8\text{-TCDD (ppt)} + 0.0013 \times 2,3,7,8\text{-TCDF (ppt)}$$

- Sludge may be applied on sites where livestock will graze only if the resulting soil concentration does not exceed 0.5 ppt total dioxin equivalents.

- Sludge with a total dioxin equivalents greater than 10 ppt shall not be applied within the range of Prairie Chickens (*Tympanuchus cupido*), or any other threatened or endangered wildlife species, unless soil incorporation occurs within 21 days of application.
- Sludge shall not be applied within 1200 feet of a public water supply when the sludge contains detectable concentrations of either 2,3,7,8-TCDD or 2,3,7,8-TCDF.

4.4 Soil Monitoring Requirements

The permittee shall comply with the following monitoring requirements for land application sites.

4.4.1 Dioxin and Furan Testing Prior to Sludge Application

- Agricultural application sites that will exceed a calculated total dioxin equivalents of 0.8 ppt in the soil profile after application of Wastewater Reclamation Center sludge shall be tested for 2,3,7,8-TCDD and 2,3,7,8-TCDF prior to the application of sludge.
- Silvicultural application sites that will exceed a calculated total dioxin equivalents of 0.35 milligrams per acre in the soil profile after application of Wastewater Reclamation Center sludge shall be tested for 2,3,7,8-TCDD and 2,3,7,8-TCDF prior to the application of sludge. The soil profile shall include the sludge plus underlying litter and soil to a depth of 2.54 cm below the litter-soil interface.

4.4.2 Background Testing for Dioxin and Furan Congeners

Once during 2002, the permittee shall collect a composite sample of soil from a land application site upon which no Wastewater Reclamation Center sludge has been applied. The permittee shall test the composite soil sample for 2,3,7,8-TCDD; 1,2,3,7,8-PeCDD; 1,2,3,4,7,8-HxCDD; 1,2,3,6,7,8-HxCDD; 1,2,3,7,8,9-HxCDD; 1,2,3,4,6,7,8-HpCDD; OCDD; 2,3,7,8-TCDF; 1,2,3,7,8-PeCDF; 2,3,4,7,8-PeCDF; 1,2,3,4,7,8-HxCDF; 1,2,3,6,7,8-HxCDF; 1,2,3,7,8,9-HxCDF; 2,3,4,6,7,8-HxCDF; 1,2,3,4,6,7,8-HpCDF; 1,2,3,4,7,8,9-HpCDF and OCDF. The permittee shall report the test results to the Department by **March 31, 2003**.

4.5 Land Application Activity Reporting Requirements

The permittee shall comply with the following reporting requirements.

4.5.1 Total Dioxin Equivalents Loadings Reporting

By **February 15th of each year**, the permittee shall report the cumulative loadings of total dioxin equivalents for each land application site that received Wastewater Reclamation Center sludge during the previous year.

4.5.2 Daily Log

Land application activity shall be documented on log sheets. Originals of the log sheets shall be kept by the permittee as described under "Records Retention" in the Standard Requirements section, and if requested, made available to the Department. At minimum, the log sheets shall include the following:

Parameters	Units	Sample Frequency	Sample Type
DNR Site Number(s)	Number	Daily	Log
Acres Applied	Acres	Daily	Log
Application Rate	Tons/Acre/Day	Daily	Calculated

4.5.3 Annual Reporting (Form 3400-55)

The annual totals for the land application loadings of sludge to field spreading sites shall be submitted on the Land Application Report Form 3400-55 by January 31, following each year sludge is land applied. The permittee shall provide the following information on land application activities for the previous calendar year.

Parameters	Units	Reporting Frequency	Sample Type
DNR Site Number(s)	Number	Annual	-
Facility Site No./Field No.	Number	Annual	-
Landowner	-	Annual	-
Acres Land Applied	Acres	Annual	Total Annual
Total Amount Per Site	Tons (DWB)	Annual	Total Annual
Total Kjeldahl Nitrogen per Site	Pounds/Acre/Year	Annual	Calculated
Amount of Nitrogen from Other Sources	Pounds/Acre/Year	Annual	Total Annual
Crop Code and Year	Code	Annual	-
Nitrogen Recommendation	Pounds/Acre/Year	Annual	Total Annual

5 Schedules of Compliance

5.1 BMP Implementation and Reporting Compliance Schedule

BMP reporting and compliance dates from 1.3.7 Monitoring, Corrective Action and Reporting Requirements and 1.3.8 Compliance Dates for the management, spill prevention and control of spent pulping liquor, soap and turpentine are repeated below.

Required Action	Date Due
First Annual BMP Report: Submit the first annual report on daily BMP monitoring.	02/15/2003
Second Annual BMP Report: Submit the second annual report on daily BMP monitoring.	02/15/2004
Third Annual BMP Report: Submit the third annual report on daily BMP monitoring.	02/15/2005
Fourth Annual BMP Report: Submit the fourth annual report on daily BMP monitoring.	02/15/2006

5.2 Compliance with the Effluent Limitation for 2,3,7,8-TCDD Toxicity Equivalence

The permittee shall comply with the monthly average effluent limitation of 11 micrograms of 2,3,7,8-TCDD per day at Sampling Point 013 in accordance with the following schedule.

Required Action	Date Due
Action Plan: Submit an action plan for complying with the effluent limitation. If construction is required, include plans and specifications with the submittal.	12/31/2002
Initiate Actions: Initiate actions identified in the plan.	12/31/2003
Complete Actions: Complete actions necessary to achieve compliance with the effluent limitations.	12/31/2004

5.3 Total Dioxin Equivalents Loadings Reporting

By February 15th of each year, the permittee shall report the cumulative loading of total dioxin equivalents for each site that has received Wastewater Renewal Center sludge during the previous calendar year. This is consistent with footnote 4.5.1 Total Dioxin Equivalents Loadings Reporting.

Required Action	Date Due
First Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents for each land application site that has received Wastewater Reclamation Center sludge during 2002.	02/15/2003
Second Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents for each land application site that has received Wastewater Reclamation Center sludge during 2003.	02/15/2004
Third Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents for each land application site that has received Wastewater Reclamation Center sludge during 2004.	02/15/2005
Fourth Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents for each land application site that has received Wastewater Reclamation Center sludge during 2005.	02/15/2006

5.4 Soil Monitoring Requirements for Dioxins and Furans

Compliance dates from footnote 4.4.2 Background Testing for Dioxin and Furan Congeners are repeated below.

Required Action	Date Due
Soil Testing: Once during 2002, the permittee shall collect a composite sample of soil from a land application site upon which no Wastewater Reclamation Center sludge has been applied. The permittee shall test the composite soil sample for 2,3,7,8-TCDD; 1,2,3,7,8-PeCDD; 1,2,3,4,7,8-HxCDD; 1,2,3,6,7,8-HxCDD; 1,2,3,7,8,9-HxCDD; 1,2,3,4,6,7,8-HpCDD; OCDD; 2,3,7,8-TCDF; 1,2,3,7,8-PeCDF; 2,3,4,7,8-PeCDF; 1,2,3,4,7,8-HxCDF; 1,2,3,6,7,8-HxCDF; 1,2,3,7,8,9-HxCDF; 2,3,4,6,7,8-HxCDF; 1,2,3,4,6,7,8-HpCDF; 1,2,3,4,7,8,9-HpCDF and OCDF. The permittee shall report the test results to the Department by March 31, 2003.	03/31/2003

5.5 Mercury Pollutant Minimization Program

The permittee shall undertake a pollutant minimization program for mercury as described below.

Required Action	Date Due
Preliminary Study: Undertake a mill-specific, preliminary study to identify sources of mercury. The Department's draft "Wisconsin Mercury Sourcebook" and the National Council for Air and Stream Improvement's "Source Reduction to Reduce Mercury in Final Effluent" may be used as guidance.	01/31/2004
Submit a Plan of Action: Submit a plan of action to eliminate or reduce, when technically and economically feasible, those sources of mercury that are identified in the preliminary study.	01/31/2005

5.6 Report on Chlorine Use for Water Treatment

By February 15th of each year, the permittee shall report the annual average and peak month chlorine addition rates used to treat the noncontact cooling waters (pounds of chlorine per million gallons of treated water) that are discharge via Outfalls 006 and 011 during the previous calendar year.

Required Action	Date Due
First Annual Chlorine Report: Submit the first annual chlorine usage report.	02/15/2003
Second Annual Chlorine Report: Submit the second annual chlorine usage report.	02/15/2004
Third Annual Chlorine Report: Submit the third annual chlorine usage report.	02/15/2005
Fourth Annual Chlorine Report: Submit the fourth annual chlorine usage report.	02/15/2006

6 Standard Requirements

NR 205, Wisconsin Administrative Code (Conditions for Industrial Dischargers): The conditions in ss. NR 205.07(1) and NR 205.07(3), Wis. Adm. Code, are included by reference in this permit. The permittee shall comply with all of these requirements. Some of these requirements are outlined in the Standard Requirements section of this permit. Requirements not specifically outlined in the Standard Requirement section of this permit can be found in ss. NR 205.07(1) and NR 205.07(3).

6.1 Reporting and Monitoring Requirements

6.1.1 Monitoring Results

Monitoring results obtained during the previous month shall be summarized and reported on a Department Wastewater Discharge Monitoring Report Form. This report form is to be returned to the Department no later than the date indicated on the form. The original and one copy of the Wastewater Discharge Monitoring Report Form shall be submitted to your DNR regional office. A copy of the Wastewater Discharge Monitoring Report Form shall be retained by the permittee.

If the permittee monitors any pollutant more frequently than required by this permit, the results of such monitoring shall be included on the Wastewater Discharge Monitoring Report Form.

The permittee shall comply with all limits for each parameter regardless of monitoring frequency. For example, monthly, weekly, and/or daily limits shall be met even with monthly monitoring. The permittee may monitor more frequently than required for any parameter.

Monitoring reports shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

6.1.2 Water Quality Sampling and Testing Procedures

Sampling and laboratory testing procedures shall be performed in accordance with Chapters NR 218 and NR 219, Wis. Adm. Code and shall be performed by a laboratory certified or registered in accordance with the requirements of ch. NR 149, Wis. Adm. Code. Groundwater sample collection and analysis shall be performed in accordance with ch. NR 140, Wis. Adm. Code. The analytical methodologies used shall enable the laboratory to quantitate all substances for which monitoring is required at levels below the effluent limitation. If the required level cannot be met by any of the methods available in NR 219, Wis. Adm. Code, then the method with the lowest limit of detection shall be selected. Additional test procedures may be specified in this permit.

6.1.3 Recording of Results

The permittee shall maintain records which provide the following information for each effluent measurement or sample taken:

- the date, exact place, method and time of sampling or measurements;
- the individual who performed the sampling or measurements;
- the date the analysis was performed;
- the individual who performed the analysis;
- the analytical techniques or methods used; and
- the results of the analysis.

6.1.4 Reporting of Monitoring Results

The permittee shall use the following conventions when reporting effluent monitoring results:

- Pollutant concentrations less than the limit of detection shall be reported as < (less than) the value of the limit of detection. For example, if a substance is not detected at a detection limit of 0.1 mg/L, report the pollutant concentration as < 0.1 mg/L.
- Pollutant concentrations equal to or greater than the limit of detection, but less than the limit of quantitation, shall be reported and the limit of quantitation shall be specified.
- For the purposes of calculating an average or a mass discharge value, the permittee may substitute a 0 (zero) for any pollutant concentration that is less than the limit of detection. However, if the effluent limitation is less than the limit of detection, the department may substitute a value other than zero for results less than the limit of detection, after considering the number of monitoring results that are greater than the limit of detection and if warranted when applying appropriate statistical techniques.

6.1.5 Records Retention

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 3 years from the date of the sample, measurement, report or application, except for sludge management forms and records, which shall be kept for a period of at least 5 years.

6.1.6 Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or correct information to the Department.

6.2 System Operating Requirements

6.2.1 Noncompliance Notification

- The permittee shall report the following types of noncompliance by a telephone call to the Department's regional office within 24 hours after becoming aware of the noncompliance;
 - any noncompliance which may endanger health or the environment;
 - any violation of an effluent limitation resulting from an unanticipated bypass;
 - any violation of an effluent limitation resulting from an upset; and
 - any violation of a maximum discharge limitation for any of the pollutants listed by the Department in the permit.
- A written report describing the noncompliance shall also be submitted to the Department's regional office within 5 days after the permittee becomes aware of the noncompliance. On a case-by-case basis, the Department may waive the requirement for submittal of a written report within 5 days and instruct the permittee to submit the written report with the next regularly scheduled monitoring report. In either case, the written report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times; the steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance; and if the noncompliance has not been corrected, the length of time it is expected to continue.
- The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

6.2.2 Unscheduled Bypassing

Any unscheduled bypass or overflow of wastewater at the treatment works or from the collection system is prohibited, and the Department may take enforcement action against a permittee for such occurrences under s. 283.89, Wis. Stats., unless:

- The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
- The permittee notified the Department as required in this Section.

Whenever there is an unscheduled bypass or overflow occurrence at the treatment works or from the collection system, the permittee shall notify the Department within 24 hours of initiation of the bypass or overflow occurrence by telephoning the wastewater staff in the regional office as soon as reasonably possible (FAX, email or voice mail, if staff are unavailable).

In addition, the permittee shall within 5 days of conclusion of the bypass or overflow occurrence report the following information to the Department in writing:

- Reason the bypass or overflow occurred, or explanation of other contributing circumstances that resulted in the overflow event. If the overflow or bypass is associated with wet weather, provide data on the amount and duration of the rainfall or snow melt for each separate event.
- Date the bypass or overflow occurred.
- Location where the bypass or overflow occurred.
- Duration of the bypass or overflow and estimated wastewater volume discharged.
- Steps taken or the proposed corrective action planned to prevent similar future occurrences.
- Any other information the permittee believes is relevant.

6.2.3 Scheduled Bypassing

Any construction or normal maintenance which results in a bypass of wastewater from a treatment system is prohibited unless authorized by the Department in writing. If the Department determines that there is significant public interest in the proposed action, the Department may schedule a public hearing or notice a proposal to approve the bypass. Each request shall specify the following minimum information:

- proposed date of bypass;
- estimated duration of the bypass;
- estimated volume of the bypass;
- alternatives to bypassing; and
- measures to mitigate environmental harm caused by the bypass.

6.2.4 Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control which are installed or used by the permittee to achieve compliance with the conditions of this permit. The wastewater treatment facility shall be under the direct supervision of a state certified operator as required in s. NR 108.06(2), Wis.

Adm. Code. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training as required in ch. NR 114, Wis. Adm. Code, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

6.2.5 Spill Reporting

The permittee shall notify the Department in accordance with ch. NR 706 (formerly NR 158), Wis. Adm. Code, in the event that a spill or accidental release of any material or substance results in the discharge of pollutants to the waters of the state at a rate or concentration greater than the effluent limitations established in this permit, or the spill or accidental release of the material is unregulated in this permit, unless the spill or release of pollutants has been reported to the Department in accordance with s. NR 205.07 (1)(s), Wis. Adm. Code.

6.2.6 Planned Changes

In accordance with ss. 283.31(4)(b) and 283.59, Stats., the permittee shall report to the Department any facility expansion, production increase or process modifications which will result in new, different or increased discharges of pollutants. The report shall either be a new permit application, or if the new discharge will not violate the effluent limitations of this permit, a written notice of the new, different or increased discharge. The notice shall contain a description of the new activities, an estimate of the new, different or increased discharge of pollutants and a description of the effect of the new or increased discharge on existing waste treatment facilities. Following receipt of this report, the Department may modify this permit to specify and limit any pollutants not previously regulated in the permit.

6.2.7 Duty to Halt or Reduce Activity

Upon failure or impairment of treatment facility operation, the permittee shall, to the extent necessary to maintain compliance with its permit, curtail production or wastewater discharges or both until the treatment facility operations are restored or an alternative method of treatment is provided.

6.3 Surface Water Requirements

6.3.1 Permittee-Determined Limit of Quantitation Incorporated into this Permit

For pollutants with water quality-based effluent limits below the Limit of Quantification (LOQ) in this permit, the LOQ calculated by the permittee and reported on the Discharge Monitoring Reports (DMRs) is incorporated by reference into this permit. The LOQ shall be reported on the DMRs, shall be the lowest quantifiable level practicable, and shall be no greater than the minimum level (ML) specified in or approved under 40 CFR Part 136 for the pollutant at the time this permit was issued, unless this permit specifies a higher LOQ.

6.3.2 Appropriate Formulas for Effluent Calculations

The permittee shall use the following formulas for calculating effluent results to determine compliance with average limits and mass limits:

- Weekly/Monthly average concentration = the sum of all daily results for that week/month, divided by the number of results during that time period.
- Weekly Average Mass Discharge (lbs/day)
 - Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34
 - Average the daily mass values for the week.

- Monthly Average Mass Discharge (lbs/day)
 - Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34
 - Average the daily mass values for the month.

6.3.3 Visible Foam or Floating Solids

There shall be no discharge of floating solids or visible foam in other than trace amounts.

6.3.4 Compliance with Phosphorus Limitation

Compliance with the concentration limitation for phosphorus shall be determined as a rolling twelve-month average and shall be calculated as follows:

$$\frac{\text{Total lbs of P discharged (most recent 12 months)}}{\text{Total flow in MGD (most recent 12 months)} \times 8.34} = \text{Average concentration of P in mg/L}$$

The quantity for the individual months is calculated by using the average of all the concentration values for phosphorus in mg/L and the total flow for the month in MGD.

This calculation shall be performed each monthly reporting period after substituting data from the most recent month for the oldest month. A calculated value in excess of the concentration limitation will be considered equivalent to a violation of a monthly average.

6.3.5 Additives

In the event that the permittee wishes to commence use of a water treatment additive, or increase the usage of the additives greater than indicated in the permit application, the permittee must get a written approval from the Department prior to initiating such changes. This written approval shall provide authority to utilize the additives at the specific rates until the permit can be either reissued or modified in accordance with s. 283.53, Stats. Restrictions on the use of the additives may be included in the authorization letter.

6.3.6 Whole Effluent Toxicity (WET) Monitoring Requirements

In order to determine the potential impact of the discharge on aquatic organisms, static-renewal toxicity tests shall be performed on the effluent in accordance with the procedures specified in the *"State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, Edition 1"* (PUBL-WW-033-096, as required by NR 219.04, Table A, parameters 9 & 10, footnote 8, Wis. Adm. Code). Receiving water samples shall not be collected from any point in contact with the permittee's mixing zone and every attempt shall be made to avoid contact with any other discharge's mixing zone.

6.3.7 Whole Effluent Toxicity (WET) Reporting Requirements

The permittee shall report test results on the Discharge Monitoring Report form, and also complete the "Whole Effluent Toxicity Test Report Form". A copy of the Whole Effluent Toxicity Test Report Form shall be sent to the Biomonitoring Coordinator within 45 days of test completion.

6.3.8 Whole Effluent Toxicity (WET) Identification

In the event of serious or repeated toxicity, the permittee may obtain approval from the Department to postpone retests in order to investigate the source(s) of toxicity. In order to postpone these tests, the permittee must provide the following information to the Department in writing, within 30 days of the end of the test which showed a positive result:

- a description of the investigation to be used to identify potential sources of toxicity. Treatment efficiency, housekeeping practices, and chemicals used in operation of the facility should be included in the investigation.
- who will conduct a toxicity identification evaluation (TIE), if required.

Once the above investigation has been completed, the permittee must conduct the postponed test(s) to demonstrate that toxicity has been reduced/eliminated.

6.4 Land Application Requirements

6.4.1 General Sludge Management Information

The General Sludge Management Information Form 3400-48 shall be submitted with your WPDES permit application. This form shall also be updated and submitted prior to any significant sludge management changes.

6.4.2 Land Application Characteristic Report

The analytical results from testing sludge that is land applied shall be reported annually on the Characteristic Form 3400-49. The report shall be submitted by January 31 following each year of analysis.

The permittee shall use the following convention when reporting sludge monitoring results: Pollutant concentrations less than the limit of detection shall be reported as < (less than) the value of the limit of detection. For example, if a substance is not detected at a detection limit of 1.0 mg/kg, report the pollutant concentration as < 1.0 mg/kg .

6.4.3 Other Methods of Disposal or Distribution Report

The permittee shall submit Report Form 3400-52 by January 31, following each year sludge is hauled to another facility, landfilled, incinerated, or stored in a manure pit.

6.4.4 Land Application Site Approval

The permittee is authorized to landspread permitted sludge on sites approved in writing by the Department in accordance with ss. NR 214.17(2) and 214.18(2), Wis. Adm. Code. Any site use restrictions or granting of case-by-case exceptions shall be identified in the approval letter. If the permittee wishes to have approval for additional sites, application shall be made using Land Application Site Evaluation Form 3400-53. Complete information shall be submitted about each site, including location maps and soil maps, any soil analyses results and other information showing that the site complies with all application requirements and permit conditions. Spreading on a site may commence upon receipt of Department approval. If an existing spreading site is found by the Department to be environmentally unacceptable, a written notice will be issued to withdraw approval of that site.

6.4.5 Operating Requirements/Management Plan

All land application sites used for treatment of sludge shall be operated in accordance with a Department approved management plan. The management plan shall be consistent with the requirements of this permit, ss. NR 214.17 (3) and (6), and NR 214.18 (3) and (6), Wis. Adm. Code. If operational changes are needed, the land application management plan shall be amended by submitting a written request to the Department for approval. A land application management plan shall be submitted for approval at least 60 days prior to land application.

6.4.6 Soil Incorporation

Sludge shall be plowed, disced, injected or otherwise incorporated into the soil as specified in the approved management plan.

6.4.7 Field Stockpiles

The permittee is encouraged to landspread the sludge as it is transported to the fields; but if it becomes necessary to stockpile solids in the fields, the stockpiles shall be spread within 72 hours or as specified in the approved management plan.

6.4.8 Additional Requirements from ch. NR 214, Wis. Adm. Code

The requirements of s. NR 214.18 (4)(b) and (d) through (h) for sludge application systems are included by reference in this permit. The permittee shall comply with these requirements.

7 Summary of Reports Due

FOR INFORMATIONAL PURPOSES ONLY

Description	Date	Page
Compliance with the Effluent Limitation for 2,3,7,8-TCDD Toxicity Equivalence -Action Plan	December 31, 2002	24
BMP Implementation and Reporting Compliance Schedule -First Annual BMP Report	February 15, 2003	24
Total Dioxin Equivalents Loadings Reporting -First Annual TDE Loadings Report	February 15, 2003	24
Report on Chlorine Use for Water Treatment -First Annual Chlorine Report	February 15, 2003	25
Soil Monitoring Requirements for Dioxins and Furans -Soil Testing	March 31, 2003	25
Compliance with the Effluent Limitation for 2,3,7,8-TCDD Toxicity Equivalence -Initiate Actions	December 31, 2003	24
Mercury Pollutant Minimization Program -Preliminary Study	January 31, 2004	25
BMP Implementation and Reporting Compliance Schedule -Second Annual BMP Report	February 15, 2004	24
Total Dioxin Equivalents Loadings Reporting -Second Annual TDE Loadings Report	February 15, 2004	24
Report on Chlorine Use for Water Treatment -Second Annual Chlorine Report	February 15, 2004	25
Compliance with the Effluent Limitation for 2,3,7,8-TCDD Toxicity Equivalence -Complete Actions	December 31, 2004	24
Mercury Pollutant Minimization Program -Submit a Plan of Action	January 31, 2005	25
BMP Implementation and Reporting Compliance Schedule -Third Annual BMP Report	February 15, 2005	24
Total Dioxin Equivalents Loadings Reporting -Third Annual TDE Loadings Report	February 15, 2005	24
Report on Chlorine Use for Water Treatment -Third Annual Chlorine Report	February 15, 2005	25
BMP Implementation and Reporting Compliance Schedule -Fourth Annual BMP Report	February 15, 2006	24
Total Dioxin Equivalents Loadings Reporting -Fourth Annual TDE Loadings Report	February 15, 2006	24
Report on Chlorine Use for Water Treatment -Fourth Annual Chlorine Report	February 15, 2006	25
General Sludge Management Information Form 3400-48	prior to any significant sludge management changes	31

Characteristic Form 3400-49	January 31 following each year of analysis	31
Report Form 3400-52	by January 31, following each year sludge is hauled to another facility, landfilled, incinerated, or stored in a manure pit	31
Wastewater Discharge Monitoring Report Form	no later than the date indicated on the form	26
Whole Effluent Toxicity Test Report Form	within 45 days of test completion	30

All submittals required by this permit shall be submitted to the Central Office, 101 South Webster Street, P.O. Box 7921, Madison, WI 53707-7921, except as follows. Report forms shall be submitted to the address printed on the report form when provided by the Department. Any construction plans and specifications for industrial wastewater systems should also be submitted to the above address.



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
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May 30, 2007

Jo Lynn Traub, Director
Water Division
Mail Code W-15J
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604-3590

Subject: EPA Review of Wisconsin's Mercury Rule

Dear ~~Ms. Traub~~ *Jo Lynn Traub*:

In recent correspondence from your office, you requested the Wisconsin Department of Natural Resources (WDNR) to submit certain provisions of its mercury regulations to EPA for review. WDNR hereby submits § NR 106.145, Wisconsin Administrative Code (the Mercury Rule), for EPA approval. In addition, I wish to point out in this letter certain factors that WDNR would like EPA to consider as it reviews the information.

WDNR is aware of EPA concerns as to whether parts of the Mercury Rule are as protective as the requirements of the Great Lakes Water Quality Initiative (GLI) contained in 40 CFR, § 132 (GLI). WDNR believes that the existing rule for mercury meets the necessary federal requirements. We would like to address EPA's concerns as follows:

DEFINITION OF NEW DISCHARGER

Federal regulations at 40 CFR Part 132, Appendix F, Procedure 2, prohibit variances for "...any building, structure, facility or installation from which there is or may be a discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997.

We have reviewed all permits issued during the period March 23, 1997 (GLI definition of new) and November 1, 2002 (§ NR 106.145 definition of new). Based on the application of § NR 106.145 to dischargers in the Great Lakes basin, the definition of "new" in § NR 106.145 is essentially the same as the GLI definition of "new". WDNR issued 5 permits for new discharges to surface waters that are in the Great Lakes basin during the period from March 23, 1997 to November 1, 2002. Three of those entities were very small municipal dischargers for which we have no information that the discharge would cause or have the reasonable potential to cause or contribute to an exceedance of the water quality standard. The other two discharges, from clean-

up of volatile organic contaminated groundwater, are not expected to contain mercury. We have a single mercury result from monitoring a grab sample at one of those facilities with a test result of "not detected" at a limit of detection of 0.085 nanograms per liter (ng/L), which is well below the water quality criterion of 1.3 ng/L. Therefore, even though there is a difference in the specified dates, there has not been and will not be any practical difference between the federal and state definition of new discharger when applied to discharges from Wisconsin facilities to the Great Lakes Basin.

WDNR agrees that it will not issue a variance from water quality standards for mercury or include alternative effluent limitations under § NR 106.145 for any building, structure, facility or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997. Based on § 283.31(3)(d) 2., Wis. Stats., WDNR has the authority to deny variances or alternative effluent limitations to those buildings, structures, facilities and installations; and will not issue variances or alternative effluent limitations for mercury to those facilities. We have attached an amendment to the October 26, 2000 addendum to the NPDES Memorandum of Agreement that formalizes this commitment.

ALTERNATIVE MERCURY EFFLUENT LIMITATIONS

The Mercury Rule contains a finding that complying with the water quality-based effluent limitations needed to attain the water quality criteria for mercury contained in §§ NR 105.07 and 08, Wis. Adm. Code, would result in substantial and widespread economic and social impact in Wisconsin. This finding serves as the technical basis for granting individual variances from water quality standards to permittees that choose to seek mercury permit conditions under the procedures in § NR 106.145, Wis. Adm. Code. In addition, § NR 106.145 includes a procedural mechanism for imposing in permits alternative mercury effluent limitations that represent variances to water quality standards specified in chapters NR 102 to NR 105, Wis. Adm. Code. The technical basis for the finding in § NR 106.145 of substantial and widespread social and economic impact is contained in the report prepared by Ohio EPA, Forster Wheeler, and DRI/McGraw-Hill, "Assessing the Economic Impacts of the Proposed Ohio EPA Rules on the Ohio Economy," (1997), as applied collectively to Wisconsin permittees. Including the finding of substantial and widespread social and economic impacts in § NR 106.145 relieves an individual facility seeking a mercury variance of having to replicate the information contained in the 1997 study on a facility-specific basis. However, each facility must still apply for an individual variance. A facility that applies for and meets the requirements specified in § NR 106.145 will be granted an individual variance. Each individual variance granted under the Rule will be submitted to U.S. EPA for review and approval.

REASONABLE POTENTIAL PROCEDURE

§ NR 106.145 defines the data set that must be available before WDNR will determine reasonable potential for mercury. Among other things, the data must consist of at least 12 results that meet specified data quality requirements and are collected over a minimum time period of 24 months. Essentially, this rule defines what constitutes “representative data” specifically for the pollutant mercury. If the requisite data are not available, the rule directs WDNR to reissue the permit without effluent limitations, but with requirements to monitor and with source reduction requirements that become effective after representative data are available and if those data show reasonable potential.

WDNR believes that § NR 106.145 meets the requirements of federal regulations for two basic reasons.

- 40 CFR 122.44 (d) (1) (i) indicates that permit limitations must control all pollutants which the Director determines may be discharged at a level which will cause, have the reasonable potential to cause or contribute to an excursion above a water quality standard. Information available to WDNR indicates that wastewater effluent levels of mercury contributed to the environment are insignificant compared with other sources, particularly atmospheric deposition. Because wastewater mercury discharges are insignificant, such dischargers are unlikely to cause an excursion above a water quality standard. Furthermore, even though discharges may contribute to an excursion above a water quality standard, the science indicates such contributions are comparatively insignificant, as well. Nevertheless, we recognize that within the larger context of mercury control, permit limits and pollutant minimization programs are an appropriate control strategy when implemented through procedures adopted in our rules.
- 40 CFR § 132, Appendix F, Procedure 5 (GLI Procedure 5) provides procedures for determining reasonable potential, that are predicated on the amount of representative data. If one presumes that a single data point is “representative” of a permittee’s effluent, then GLI Procedure 5 allows the determination with as little as a single sample result, as does Wisconsin’s generic procedure at § NR 106.05 (6). However, WDNR believes that mercury regulation warrants the special procedures provided at § NR 106.145. § NR 106.145 provides a definition representative data that is more scientifically defensible.

Wisconsin’s mercury procedures provide a mechanism for granting alternative limitations in the form of pollutant minimization program (PMP) activities and eventually, once WDNR can appropriately calculate them, numeric effluent limits. The delay in setting numeric effluent limits is justified because of the extremely small quantities of mercury contained in effluents. It is not scientifically defensible to set numeric effluent limits at levels that are either too high or that are too low. A limit that is set too high becomes meaningless. A limit that is set too low might require a permittee to invest in removal technologies that cause social and economic hardship for insignificant environmental benefit.

1996 Wisconsin Mercury Strategy

§ NR 106.145, Wis. Adm. Code, is a natural outgrowth of the 1996 Wisconsin Strategy for Regulating Mercury in Wastewater. The Strategy concluded that mercury source control is the only effective means of controlling releases of mercury from wastewater to all environmental media. Rather than focusing on the extremely small inputs to surface waters from direct discharges of effluent, the Strategy recognizes the global nature of mercury pollution by emphasizing clean-up of all releases from wastewater sources, including the wastewater sludge that is most commonly disposed by incineration or recycled on farm land as biosolids.

At the time the Strategy was developed, analytical test methods approved for mercury were not sufficiently sensitive to determine if water quality standards were being exceeded by wastewater discharges (EPA method 1631 was promulgated in 1999). Consequently, several years before the adoption of NR 106.145, WDNR used a variety of permit conditions and voluntary source reduction incentives to successfully reduce mercury in discharges from wastewater systems (both effluent and sludge) and also from sources to other media (direct air emissions and solid waste). Wisconsin's Community Mercury Reduction Program, made possible in part by EPA grants, was responsible for collecting and eliminating from circulation close to 13,000 pounds of mercury over a period of 8 years. Eliminating mercury releases to all environmental media is important because of the global nature of mercury pollution and its environmental effects.

Reasonable Potential and Variances

Procedures in the GLI, including those for reasonable potential, are significantly patterned after Wisconsin's procedures in ch. NR, 106. The generic ch. NR 106 procedure for reasonable potential is to first calculate a water quality based effluent limitation (WQBEL) from information on water quality criteria, dilution and other known factors. The next step is to do an analysis of whether the concentration of a pollutant contained in a permitted discharge might be reasonably expected to exceed the calculated WQBEL and use that analysis to decide if the limitation (calculated based on the known factors) should be placed in the permit. For mercury, since available information suggests that most effluent receiving waters in Wisconsin already exceed the strictest water quality criterion, the limitation is not calculated but automatically set at the strictest water quality criterion of 1.3 ng/L.

Following this procedure, in Wisconsin, after a permit with a WQBEL is reissued, the affected permittee may request a variance. A variance request, which often takes at least a year to process, affords time for the permittee to collect sufficient data that WDNR can use to either determine that the permittee can indeed meet the WQBEL (WDNR denies the variance) or to set an interim limit (if DNR approves the variance) at the existing effluent quality level. That interim limit puts a cap on existing discharge levels while the permittee investigates and implements potential actions for meeting the WQBEL.

Prior to the approval of the low-level mercury analysis method (EPA Method 1631), there was really no way to reliably assess compliance. Much of the mercury data using the older, less sensitive method (virtually all data for effluent levels) was not useable. Further, since it was apparent that there was no technically feasible method for treating mercury in effluent discharges to water quality criteria levels, the more voluntary approach of the 1996 Mercury Strategy allowed us to make progress on the problem. The Strategy made sense, particularly considering

that treatment already in place was concentrating the mercury into the sludge phase, thereby only transferring the problem. Limited information suggested that most biological treatment systems removed perhaps 95% to 99% of the mercury in the wastewater.

Following the approval of Method 1631, it was evident that existing effluent concentrations of mercury in effluents would exceed the traditionally calculated WQBELs and, given the technical infeasibility of achieving the limits, there would likely be legitimate reasons to make frequent use of variances as a permitting mechanism. WDNR designed a variance procedure that would be incorporated into the permit reissuance process instead of using the very work-intensive variance process following permit reissuance. Neither the State's nor EPA's permit application is conducive to collecting the amount of data necessary to determine existing effluent quality with enough accuracy to set variance levels on an individual basis. WDNR and other Great Lakes states were faced with designing and implementing a variance procedure that was fair but manageable, recognizing that imposing numeric effluent limitations would achieve very little real environmental gain.

WDNR chose to set variance levels at existing effluent quality on an individual basis in future permits after collecting the mercury data as a condition in the currently issued permit. The resulting delay in setting numeric mercury limits is justified, considering that effluent discharges of mercury are miniscule relative to releases from other sources and considering WDNR's continuing PMP program.

Permit Application Not Conducive to Collecting Representative Mercury Data

Data collection is one of the first steps in setting up a regulatory mechanism that meets the intent of the Clean Water Act. The promulgation in 1999 of Method 1631 meant that EPA and States were now compelled to put a program in place to formally permit mercury releases. Because of sampling, analytical and effluent quality variability and extremely low mercury concentrations, accurately determining existing effluent quality cannot be easily accomplished. Therefore, rather than backlogging permits to await confirmation of accurate effluent quality, WDNR, in promulgating the Mercury Rule, established a process to incorporate into permits specific requirements that permittees must follow to generate useful data.

Determining levels of mercury in effluents and natural waters poses special challenges that demand special solutions. For example:

- Mercury is ubiquitous in the environment, which can easily result in sample contamination.
 - Special quality control is needed for Method 1631, including collection of field blanks. WDNR did not know how difficult it would be for wastewater treatment plant personnel to collect uncontaminated samples.
 - Facility personnel assigned to collect samples need special training. Experience is necessary to correct problems initially encountered in sample collection.
 - Use of grab samples is appropriate since available information indicates that collection of uncontaminated composite samples requires exceptional procedures. Because grab samples must be used for mercury, a relatively large number of individual samples are needed to accurately characterize the potential variability

of effluent and ambient water quality, particularly at low concentrations. A single grab sample cannot be considered to be representative.

- Initially, labs needed to gain experience using EPA Method 1631. States, laboratories and permittees needed time to work through a number of analytical issues.
 - Labs need expensive, special equipment to perform Method 1631.
 - States needed to feel confident that labs could adequately perform the analyses. WDNR developed a special lab certification for low-level mercury analyses.
 - It was not known how many labs would be available to perform all the work. The WDNR process spread the sampling investigations over a longer time, which would work to prevent laboratory sample backlogs.
- It was difficult to know how many data points would be needed to characterize effluent levels because WDNR's technical experts did not know how much variability to expect. This seemed particularly relevant because of the need to use grab samples.
- It was not known whether there might be seasonal components to mercury levels.

Because of these uncertainties, WDNR created a rule to require at least 12 data samples collected over a time period of at least 24 months. It made good sense to design the program to place the requirements for data collection in permits where it is much easier to specify and monitor quality control steps. Again, the delay in implementing numeric effluent limitations is reasonable, considering the concerns with data quality and the relatively insignificant levels of mercury in effluents.

Scientific Defensibility of Using "Regular" Procedures

In GLI Procedure 5, the regulations state, "If **representative**, facility-specific effluent monitoring data samples are available for a pollutant discharged from a point source to the waters of the Great Lakes System, the permitting authority shall apply the following *{reasonable potential}* procedures:" *{emphasis and clarification provided}*. However, federal regulations do not define what constitutes "representative" effluent data for mercury or any other substance. In the past, WDNR has imposed effluent limitations based on as little as a single data point. This procedure has resulted in numerous situations of permit challenges, unnecessary variance applications and the need to rework permits. In attempting to avoid those situations, which seemed particularly likely because of the data quality issues associated with mercury, WDNR provided a definition of representative data specifically for mercury in § NR 106.145 that is scientifically defensible and more holistic.

In addition, the GLI specifically provides for advances in scientific understanding by providing the flexibility created at 40 CFR § 132.4 (h) (2). This provision states, in part, the following: "For any pollutant...for which the State or Tribe demonstrates that a methodology or procedure in this part is not scientifically defensible, the Great Lakes States or Tribes shall:...(2) Apply an alternative implementation procedure that is consistent with all applicable Federal, State or Tribal laws." *(emphasis added)*.

It appears that EPA understands, and understood when it promulgated GLI, that it may be appropriate to use different approaches to regulate mercury. A passage on p. 15371 of the March 23, 1995 Federal Register says, "Although EPA believes that there is sufficient flexibility in the Guidance to handle the unique problems posed by mercury...EPA is committed to developing a

mercury permitting strategy to provide a holistic, comprehensive approach for dealing with this pollutant. EPA will publish this strategy no later than two years following publication of this Guidance.” Since this strategy has not been published, each state in the Great Lakes Basin was left to develop its own approach. A number of states’ approaches are described in a Government Accountability Office (GAO) report on the GLI in July 2005 (see particularly page 28, but issues related to mercury appear throughout). It is clear that EPA and the GAO report recognize the unique problems posed by mercury.

Wisconsin Mercury Rule

The end result of Wisconsin’s Mercury Rule is that it is as protective as and, additionally, more comprehensive than the federal requirements in the GLI. Although the Clean Water Act’s emphasis is on effluent discharges, WDNR, in its rule-making effort, desired to affect more meaningful environmental benefit by emphasizing reductions in sludge mercury and was able to work with its partners to develop a common-sense approach to the problem. The requirements of § NR 106.145 are the result. For example, Wisconsin’s Mercury Rule requires permittees to institute PMPs that, while clearly benefiting sludge levels, may have only marginal benefits on effluent quality. GLI only requires a PMP when a WQBEL is below the quantitation level of the test method, which is obviously not the case for mercury and Method 1631. WDNR believes its approach satisfies not only GLI Requirements but also the desire to achieve meaningful reductions in the overall release of mercury.

Wisconsin’s mercury rule establishes a rational approach that begins with a time period for generation of reliable, representative data needed to assess effluent quality and variability, determines appropriate effluent limitations and then, most importantly, establishes PMP requirements, where necessary, in permits. Considering that virtually 100% of mercury pollution is from atmospheric sources, there is no justification for moving quickly to impose expensive regulatory controls on direct surface water dischargers. Furthermore, decisions not supported by good data are more likely to be challenged with lengthy adjudications. On the other hand, the PMP work that started with the 1996 Strategy continues.

WDNR’s Mercury Rule requires the largest facilities that, by virtue of wastewater volume, generate and discharge the most significant quantities of mercury, to implement monitoring and mercury reduction steps at a faster pace. Further, the Department expects that the impacts of source reduction activities by the largest, most capable systems may result in more widely applied actions that will achieve reductions elsewhere at smaller facilities. For example, if a number of larger municipalities successfully argue for a Federal or State law that requires dentists to install dental amalgam separators, the result would be reductions at all municipal facilities. Even if this does not occur, regulatory controls will require implementation of the last mercury PMPs for major facilities by 2012. Compare this schedule to the significantly longer time frames for mandated reductions at air pollution sources.

Twelve of Wisconsin’s largest major municipal dischargers located in the Great Lakes Basin, representing about 85% of the total municipal wastewater discharges in that area, are currently doing PMP work as a result of Wisconsin’s 1996 Mercury Strategy and the more recent Mercury Rule. Of the remaining twenty major facilities in the Basin, all but five facilities, representing

less than 2% of the flow, will perform monitoring and PMP work during their current permit terms. Statewide, numbers are similar.

Context for the Statement of Insignificance of Effluent Mercury Levels

- Approximate concentrations of mercury in various media in Wisconsin
 - Water quality criterion (ng/L) 1.3
 - Surface waters (ng/L, various data) 1 - ~ 30 (rivers); 0.3 - 3 (lakes)
 - Precipitation (ng/L) ~ 10
 - Municipal effluents (ng/L, 2005 data) 1 - 30 (average ~ 2.5)
 - Municipal influents (ng/L, 2005 data) 30 - 300 (average ~ 120)
 - Municipal sludges (mg/Kg, 1999 data) < 1 - 20 (median ~ 1.7)

- Estimated quantities of mercury cycling in the Wisconsin environment (Kg/year)
 - Estimated emissions to air in Wisconsin (1995 data) 3000
 - Re-emission of mercury previously-deposited on land Unknown
 - Wet deposition to surface (including land) of the State 2000
 - Dry deposition (recent estimates are that dry ~ wet) 2000
 - Mercury in precipitation that reaches surface waters 400
 - Mercury in dry deposition that reaches surface waters Unknown
 - Mercury in influent to all municipal treatment plants (to sludge) 70
 - Mercury in effluent from all WI municipal treatment plants 1.5

This data supports WDNR's contention that effluent levels of mercury from effluents are not significant compared with levels from other sources.

Conclusions

WDNR believes that wastewater discharges of mercury (with potentially a few exceptions) are insignificant and therefore, are unlikely to cause or contribute to exceedances of water quality standards.

WDNR further believes that releases of mercury to the environment should be controlled in the most efficient manner possible. There is no scientific rationale for setting numeric effluent limitations in WPDES permitted facilities based on insufficient data when those limits will do little or nothing to reduce mercury levels in the environment. The scheduled activities in the Wisconsin Mercury Rule become effective in comparable or earlier time frames than those for the much more significant reductions mandated by federal and state regulations on coal-fired power generation facilities. To focus first on setting effluent limits in WPDES permits implies that this action, by itself, will result in a discernable environmental improvement. This implication is counter to the scientific evidence. A more scientifically defensible and rational approach is to work as partners with permittees to concentrate on controlling mercury sources that discharge into wastewater systems, thereby not only benefiting effluent quality, **but also** reducing levels in the sludge that, although still relatively small, are significant.

The procedures in the GLI for determining reasonable potential from facility-specific effluent monitoring data are predicated on the use of "representative data". Considering the situation presented in the preceding paragraphs, WDNR believes its Mercury Rule appropriately defines

what representative data is for regulating mercury, at least for the first round of permits following implementation of the rule.

Aside from the representative data issue, the GLI recognizes the uniqueness of mercury as a pollutant and provides flexibility to deal with unique substances. WDNR believes that the scientific defensibility exclusion at 40 CFR § 132.4 (h) (2) was intended for the type of situation presented by mercury.

WDNR is committed to science-driven policy-making. With that in mind, please consider the factors presented and approve § NR 106.145, Wis. Adm. Code under authorities cited in your September 21, 2006 letter.

I am sending a copy of the entire chapter NR 106 as it currently exists (a subchapter for ammonia has since been added) for context and for your use in cross-referencing. For your information, the November 2002 rule-making also included a change to § NR 219.04, Table B (item 35f), that promulgated EPA Method 1631 as an approved analytical method and the addition of § NR 211.41, pertaining to requirements for action by publicly owned treatment works to reduce mercury discharges from all sources. Also enclosed is an amendment to the October 26, 2000 addendum to the NPDES MOA between U. S. EPA Region V and WDNR. WDNR is working on an Attorney General certification statement that we will send to you when we have it.

Please contact Duane Schuettpelz at (608) 266-0156 if you have questions or comments about this or other provisions of Wisconsin's wastewater permit program.

Sincerely,



Todd L. Ambs, Administrator
Division of Water

cc: Russ Rasmussen – WT/2
Bruce Baker – AD/4
Duane Schuettpelz – WT/2
Robert Masnado – WT/2
Tom Mugaan – WT/2
Robin Nyffeler – LC/5

Attachments:

- Wisconsin Strategy for Regulating Mercury in Wastewater (May 1996)
- Chapter NR 106, Wisconsin Administrative Code
- Amendment to the Addendum to the NPDES MOA

AMENDMENT TO THE OCTOBER 26, 2000 ADDENDUM TO THE NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT
BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION
V AND THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES CONCERNING
MERCURY & WISCONSIN'S GREAT LAKES RULES AND PROCEDURES

Whereas, pursuant to Appendix F, Procedure 2, Part I of 40 CFR 132, the Department of Natural Resources (hereinafter "Department") must submit all proposed water quality standard variances for point source discharges to the Great Lakes System to the Environmental Protection Agency (hereinafter "EPA") for review and approval, and

Whereas, pursuant to Appendix F, Procedure 2, Part A of 40 CFR 132, EPA will not approve a variance from a water quality standard for any building, structure, facility or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997, and will accordingly object to any WPDES permit that includes such a variance,

The Department agrees that it will not approve a variance to the mercury water quality standard or include alternative effluent limitations under § NR 106.145, Wisconsin Administrative Code, for any building, structure, facility or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997.

FOR THE DEPARTMENT OF NATURAL RESOURCES

Scott Hassett 5/30/07
Scott Hassett Date
Secretary

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Mary A. Gade Date
Region V. Administrator

Chapter NR 106

PROCEDURES FOR CALCULATING WATER QUALITY BASED EFFLUENT LIMITATIONS FOR TOXIC AND ORGANOLEPTIC SUBSTANCES DISCHARGED TO SURFACE WATERS

Subchapter I — Applicability		NR 106.34	Compliance with antidegradation.
NR 106.01	Purpose.	NR 106.36	Alternative whole effluent toxicity monitoring for certain discharges of ammonia.
NR 106.02	Applicability.	NR 106.37	Schedules of compliance.
NR 106.03	Definitions.	NR 106.38	Variations for stabilization pond and lagoon systems.
Subchapter II — General Procedures for Effluent Limitations		Subchapter VII — Effluent Limitations for Chloride Discharges	
NR 106.04	General.	NR 106.80	Purpose.
NR 106.05	Determination of the necessity for water quality based effluent limitations for toxic and organoleptic substances.	NR 106.81	Applicability.
NR 106.06	Calculation of water quality based effluent limitations for toxic and organoleptic substances.	NR 106.82	Definitions.
NR 106.07	Application of and compliance with water quality based effluent limitations in permits.	NR 106.83	Regulation of chloride discharges.
NR 106.08	Determination of the necessity for whole effluent toxicity testing requirements and limitations.	NR 106.84	Compliance with Wisconsin water quality antidegradation rules when reissuing a permit.
NR 106.09	Whole effluent toxicity data evaluation and limitations.	NR 106.85	Determination of the necessity for water quality-based effluent limitations.
NR 106.10	Exclusions.	NR 106.86	Monitoring.
NR 106.11	Multiple discharges.	NR 106.87	Establishment of effluent limitations.
NR 106.115	Additivity of dioxins and furans.	NR 106.88	Application of and compliance with chloride effluent limitations in a permit.
NR 106.117	Schedules for compliance.	NR 106.89	Alternative whole effluent toxicity monitoring and limitations for dischargers of chloride.
NR 106.13	Leachate in publicly owned treatment works.	NR 106.90	Source reduction.
NR 106.14	Analytical methods and laboratory requirements.	NR 106.91	Publicly owned treatment works which accept wastewater from public water systems treating water to meet primary safe drinking water act standards.
Subchapter III — Effluent Limitations for Mercury Discharges		NR 106.92	Authority of a publicly owned treatment works to regulate chloride discharges.
NR 106.145	Mercury regulation.	NR 106.93	New discharges.
NR 106.15	Limitations for mercury.	NR 106.94	Relocation of an existing discharge.
Subchapter IV — Effluent Limitations for Ammonia Discharges		NR 106.95	Multiple discharges.
NR 106.30	Applicability.	NR 106.96	Analytical methods and laboratory requirements.
NR 106.31	Definitions.		
NR 106.32	Calculation of water quality-based effluent limitations for ammonia.		
NR 106.33	Determination of the necessity for water quality based effluent limits for ammonia.		

Note: Corrections made under s. 13.93 (2m) (b) 7., Stats., Register, August, 1997, No. 500.

Subchapter I — Applicability

NR 106.01 Purpose. One purpose of this chapter is to specify how the department will calculate water quality based effluent limitations under s. 283.13 (5), Stats., for toxic and organoleptic substances and whole effluent toxicity. The other purpose of this chapter is to specify how the department will decide if and how these limitations will be included in Wisconsin pollution discharge elimination system (WPDES) permits. Water quality based effluent limitations for toxic and organoleptic substances are needed to assure attainment and maintenance of surface water quality standards as established in accordance with s. 281.15 (1), Stats., and as set forth in chs. NR 102 to 105.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; correction made under s. 13.93 (2m) (b) 7., Stats., Register October 2002 No. 562.

NR 106.02 Applicability. The provisions of this chapter are applicable to point sources which discharge wastewater containing toxic or organoleptic substances to surface waters of the state.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89.

NR 106.03 Definitions. The following definitions are applicable to terms used in this chapter.

(1) "Bioaccumulative chemical of concern" or "BCC" means any substance that has the potential to cause adverse effects which, upon entering the surface waters, accumulates in aquatic organisms by a human health or wildlife bioaccumulation factor greater than 1000.

(2) "Biologically based design flow" means a receiving water design flow to protect fish and aquatic life for which both the duration of exposure is expressed in days and the allowable frequency of excursion is expressed in years. An example of a biologically based design flow is a 4-day 3-year design flow which corre-

sponds to the lowest 4-day average flow that will limit excursions from any water quality criteria or secondary values to no more than once in 3 years.

(3) "Dynamic models" means computer simulation models which use real or derived time series data to predict a time series of observed or derived receiving water concentrations. Methods include continuous simulation, Monte Carlo simulations, or other similar statistical or deterministic techniques.

(4) "EC₅₀" means the point estimate of the concentration of a toxic substance, wastewater effluent or other aqueous mixture which causes an adverse effect including mortality to 50% of the exposed organisms in a given time period, when compared to an appropriate control.

(5) "IC₂₅" means the point estimate of the concentration of a toxic substance, wastewater effluent or other aqueous mixture that would cause a 25% reduction in a nonlethal biological measurement, such as reproduction or growth, of the exposed test organisms in a given time period.

(6) "IWC" or "instream waste concentration" means the concentration of a toxicant or the parameter toxicity in the receiving water after mixing.

(7) "LC₅₀" means the point estimate of the concentration of a toxic substance, wastewater effluent or other aqueous mixture which is lethal to 50% of the exposed organisms in a given time period, when compared to an appropriate control.

(8) "Limit of detection" or "LOD" means the lowest concentration level that can be determined to be significantly different from a blank for that analytical test method and sample matrix.

(9) "Limit of quantitation" or "LOQ" means the concentration of an analyte at which one can state with a degree of confidence for that analytical test method and sample matrix that an analyte is present at a specific concentration on the sample tested.

(10) "NOEC" means the highest tested concentration of a toxic substance, wastewater effluent or other aqueous mixture at

which no adverse effects are observed on the aquatic test organisms at a specific time of observation. The NOEC is determined using hypothesis testing.

(11) "rTU_c" or "relative toxic unit chronic" means the IWC divided by the IC25.

(12) "Toxicity test" means a test which determines the toxicity of a chemical substance, wastewater effluent or other aqueous mixture using living organisms. A toxicity test measures the degree of response of exposed test organisms to a chemical substance, wastewater effluent or other aqueous mixture.

(13) "TU_a" or "toxic unit acute" means 100 divided by the LC₅₀.

(14) "Whole effluent toxicity" means the aggregate toxic effect of an effluent as measured directly by a toxicity test.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; r. (7), rescum. (1) to (6), (8) and (9) to be (4), (7) to (9), (12) and (14) and am. (2), (4), (7) and (12), cr. (1), (5), (6), r. (10), (11) and (13), Register, August, 1997, No. 500, eff. 9-1-97.

Subchapter II — General Procedures for Effluent Limitations

NR 106.04 General. (1) Water quality based effluent limitations shall be established whenever categorical effluent limits required under s. 283.13, Stats., are less stringent than necessary to achieve applicable water quality standards specified in chs. NR 102 to 105. Water quality based effluent limitations for a point source shall be specified in the WPDES permit for that point source.

(2) In no case may the water quality based effluent limitations be less stringent than applicable categorical effluent limitations.

(3) The department shall establish limitations for toxic and organoleptic substances if any of the conditions specified in s. NR 106.05 are met. Limitations shall be established according to the methods provided in s. NR 106.06 and included in WPDES permits according to the conditions provided in s. NR 106.07. The department shall establish limitations for whole effluent toxicity if any of the conditions specified in s. NR 106.08 are met. Whole effluent limitations shall be established and included in WPDES permits according to the methods provided in ss. NR 106.08 and 106.09.

(4) Water quality based effluent limitations or monitoring requirements for toxic or organoleptic substances or whole effluent toxicity may be removed from a permit, subject to public notice and opportunity for hearing under ch. NR 203, if the limitation is determined to be unnecessary based on the procedures presented in this chapter or based on other information available to the department.

(5) For purposes of this chapter, a cost-effective pollutant minimization program is an activity which has as its goal the reduction of all potential sources of the pollutant for the purpose of maintaining the effluent at or below the water quality based effluent limitation. The pollutant minimization programs specified in ss. NR 106.05 (8), 106.06 (6) (d), 106.07 (6) (f) and 106.145 (7) shall include investigation of treatment technologies and efficiencies, process changes, wastewater reuse or other pollution prevention techniques that are appropriate for that facility, taking account of the permittee's overall treatment strategies, facilities plans and operational circumstances. Past documented pollution prevention or treatment efforts may be used to satisfy all or part of a pollution minimization program requirement. The permittee shall submit to the department an annual status report on the progress of a pollutant minimization program.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (3), cr. (5), Register, August, 1997, No. 500, eff. 9-1-97; CR 02-019: am. (5) Register October 2002 No. 562, eff. 11-1-02.

NR 106.05 Determination of the necessity for water quality based effluent limitations for toxic and organoleptic substances. (1) (a) *General.* The department shall establish water quality based effluent limitations for point source

dischargers whenever the discharges from those point sources contain(s) toxic or organoleptic substances at concentrations or loadings which do not, as determined by any method in this section, meet applicable water quality standards specified in chs. NR 102 to 105.

(b) *Determining necessity for limitations based on secondary values.* The department may establish water quality based effluent limitations for point source discharges based on secondary values calculated according to ch. NR 105. The department shall calculate secondary values and establish limitations for toxic and organoleptic substances in permits based on secondary values when, in the judgment of the department, one or more of the following factors support the necessity for the values, in conjunction with the procedures in subs. (2) to (8).

1. Whole effluent toxicity or other biomonitoring or bioassay test results indicate toxicity to test or other species.

2. The use designation of the receiving water is or may be impaired.

3. There is other information that the industrial category or subcategory of the point source or the industrial or other sources discharging to a publicly owned treatment works discharges the substance.

4. The substance in the wastewater will not be adequately removed or reduced by the type of wastewater treatment provided.

5. The ecological or environmental risk from the substance may be significant when discharged to surface waters.

6. Other relevant factors which may cause an adverse effect on surface waters as specified in s. NR 105.04 (1).

(c) If the department determines that a limitation based on an aquatic life acute or chronic secondary value should be established in a permit according to the provisions in this section, a permittee may request an alternative wet limit in accordance with s. NR 106.07 (7).

Note: A toxic or organoleptic substance includes, but is not limited to, those substances in Table 6 of 40 CFR part 132.

(2) When considering the necessity for water quality based effluent limitations, the department shall consider in-stream bio-survey data and data from ambient toxicity analyses whenever such data are available.

(3) If representative discharge data are available for a toxic or organoleptic substance being discharged from a point source, limitations shall be established in accordance with any one of the following conditions:

(a) The discharge concentration of the substance for any day exceeds the limit of detection and exceeds the limitations based on either the acute toxicity criterion or secondary acute value for the substance as determined in s. NR 106.06 (3) where appropriate.

(b) The arithmetic average discharge concentration of the substance for any 4 consecutive days calculated as described in sub. (7) exceeds the limit of detection and exceeds the limitations based on either the chronic toxicity criterion or secondary chronic value for the substance as determined in s. NR 106.06 (4).

(c) The arithmetic average discharge concentration of the substance for any 30 consecutive days calculated as described in sub. (7) exceeds the limit of detection and exceeds any limitation based on the wildlife, human threshold, or human cancer criteria or secondary values, or taste and odor criteria for the substance as determined in s. NR 106.06 (4).

(4) If at least 11 daily discharge concentrations of the substance are greater than the limit of detection and the requirements of sub. (3) do not result in the need for an effluent limitation, water quality based effluent limitations are necessary for a substance in a point source discharge if the upper 99th percentile of available discharge concentrations as calculated in sub. (5) meets any of the conditions specified in pars. (a) to (c).

(a) The upper 99th percentile of daily discharge concentrations of the substance exceeds the limitation based on either the acute

toxicity criterion or the secondary acute value for the substance as determined in s. NR 106.06 (3).

(b) The upper 99th percentile of 4-day average discharge concentration of the substance exceeds the limitation based on either the chronic toxicity criterion or the secondary chronic value for the substance as determined in s. NR 106.06 (4), or

(c) The upper 99th percentile of 30-day average discharge concentration of the substance exceeds any limitation based on the wildlife, human threshold, or human cancer criteria or secondary value, or taste and odor criteria for the substance as determined in s. NR 106.06 (4).

(5) This subsection shall be used to calculate upper 99th percentile values unless a probability distribution other than log normal is determined to be more appropriate and alternate methods to calculate the upper 99th percentile are available.

(a) When available daily discharge concentrations of the substance are not serially correlated and at least 11 concentrations are greater than the limit of detection, the upper 99th percentile of the daily average, the 4-day average and the 30-day average discharge concentrations may be calculated as follows:

$$P_{99} = \exp(\mu_{dn} + Z_p \sigma_{dn})$$

Where:

- P_{99} = Upper 99th percentile of n-day average discharge concentrations.
- d = Ratio of the number of daily discharge concentrations less than the limit of detection to the total number of discharge concentrations.
- n = Number of discharge concentrations used to calculate an average over a specified monitoring period ($n=1$ for daily concentrations, 4 for 4-day averages and 30 for 30-day averages).
- \exp = Base e (or approximately 2.718) raised to the power shown between the parentheses in the original equation.
- Z_p = Z value corresponding to the upper p^{th} percentile of the standard normal distribution.
- P = $(0.99 - d^n) / (1 - d^n)$.
- μ_{dn} = $\mu_d + [(\sigma_{dn})^2 - (\sigma_d)^2] / 2 + \ln[(1-d)/(1-d^n)]$ = estimated log mean of n-day average discharge concentrations greater than the limit of detection. (Note: $\mu_{dn} = \mu_d$ if $n = 1$).
- $(\sigma_{dn})^2$ = $\ln \{ [1 - d^n] \{ [1 + (s/m)^2] / [n(1-d)] + (n-1)/n \} \}$ = estimated log variance of n-day average discharge concentrations greater than the limit of detection. (Note: $(\sigma_{dn})^2 = (\sigma_d)^2$ if $n = 1$).
- μ_d = $\ln m - 0.5 (\sigma_d)^2$ = estimated log mean of discharge concentrations greater than the limit of detection.
- $(\sigma_d)^2$ = $\ln [1 + (s/m)^2]$ = estimated log from variance of discharge concentrations greater than the limit of detection.
- \ln = Natural logarithm.

m = Mean of discharge concentrations greater than the limit of detection.

s = Standard deviation of discharge concentrations greater than the limit of detection.

(b) When the daily discharge concentrations of any substance are serially correlated, the serially correlated data may be adjusted using appropriate methods such as that presented in Appendix E of "Technical Support Document for Water Quality-based Toxics Control", U.S. environmental protection agency, March 1991 (EPA/505/2-90-001). The equation presented in par. (a) may be used after adjustment of the serially correlated data.

(6) If less than 11 daily discharge concentrations of the substance are greater than the limit of detection, and the requirements in sub. (3) do not result in an effluent limitation, water quality based effluent limitations are necessary for a substance in a point source discharge if the arithmetic average of available discharge concentrations as calculated in sub. (7) exceeds any value determined in par. (a) or (b):

(a) One fifth of the limitation based on the acute toxicity criterion or secondary acute value for the substance, as determined in s. NR 106.06 (3) where appropriate, or

(b) One fifth of any limitation based on chronic toxicity criteria or secondary chronic values or long-term impacts as determined in s. NR 106.06 (4).

(7) The arithmetic average discharge concentration as used in subs. (3) and (6) shall be calculated using all available discharge data treated according to this subsection.

(a) If, in the judgment of the department, the analytical methods used to test for the substance represent acceptable methods, all values reported as less than the limit of detection shall be set equal to zero for calculation of the average concentration.

(b) If, in the judgment of the department, the analytical methods used to test for the substance do not represent the best acceptable methods, all values reported as less than the limit of detection shall be discarded from the data.

(8) When the provisions of this section cannot be invoked because representative discharge data are not available for a substance, water quality based effluent limitations may be established if, in the judgment of the department, water quality standards will be exceeded if the discharge from the point source is not limited. If, in the judgment of the department, the discharge from a point source may exceed the water quality standards, but the collection of representative discharge data is not possible due to the inability of the most sensitive approved method to quantify discharge levels and, in the judgment of the department, the application numeric effluent limitations in a permit is infeasible or impractical, then the permittee may request an alternative to a numerical effluent limitation. The alternative shall consist of a permit requirement to conduct a cost-effective pollutant minimization program as specified in s. NR 106.04 (5). Approved methods are those specified in ch. NR 219 or 40 CFR part 136.

Note: A department guidance document finalized in May 1996, entitled "Wisconsin Strategy for Regulating Mercury in Wastewater", describes how the department evaluates whether an effluent limitation or a pollutant minimization program for mercury is appropriate.

(9) Regardless of the results of the analysis conducted under this section, the department may, whenever determined necessary, require monitoring for any toxic or organoleptic substance.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) to be (1) (a), cr. (1) (b) and (c), am. (3) (a) to (c), (4) (a) to (c), (5) (b), (6) (a) and (b) and (8), Register, August, 1997, No. 500, eff. 9-1-97; CR 03-050; am. (5) (a) Register February 2004 No. 578, eff. 3-1-04.

NR 106.06 Calculation of water quality based effluent limitations for toxic and organoleptic substances.

(1) BASIS FOR LIMITATIONS. (a) The department shall establish

water quality based effluent limitations for point source dischargers whenever such limitations are necessary, as determined by any method in this section, to meet the applicable water quality standards, criteria and secondary values as determined in chs. NR 102 to 105.

(b) 1. Water quality based effluent limitations for toxic and organoleptic substances shall be determined to attain and maintain water quality standards and criteria or secondary values, specified in or determined according to procedures in ch. NR 105, at the point of discharge. Effluent limitations shall be established to protect downstream waters whenever the department has information to make the determinations.

2. For discharges to Green Bay that are north of 44° 32' 30" north latitude, the cold water community criteria shall apply in effluent limit calculations. For discharges to Green Bay that are south of 44° 32' 30" north latitude, effluent limitations shall be established in accordance with subd. 1.

(2) LIMITATIONS FOR BIOACCUMULATIVE CHEMICALS OF CONCERN (BCCs). (a) Notwithstanding any other provisions in chs. NR 102 and 106, beginning on March 23, 1997, effluent limitations for new or expanded discharges of BCCs into waters of the Great Lakes system as defined in s. NR 102.12 may not exceed the most stringent applicable water quality criteria or secondary values for BCCs. Effluent limitations for expanded discharges of BCCs with permit limitations shall be determined by means of a mass balance where the limitation for the existing portion of a permitted discharge shall be determined using the requirements of sub. (4) and the limitation for the expanded portion of the discharge may not exceed the most stringent criteria or value for that BCC.

(b) For the purposes of par. (a), "expanded discharge" means any change in concentration, level or loading of a substance which would exceed a limitation specified in a current WPDES permit, or which, according to the procedures in s. NR 106.05 would result in the establishment of a new limitation in a reissued or modified WPDES permit. "New discharge" means any point source which has not received a WPDES permit from the department prior to September 1, 1997.

Note: The Great Lakes Water Quality Initiative requires that for existing discharges of BCCs in waters of the Great Lakes system, effluent limitations may not exceed the most stringent criteria or secondary value beginning March 23, 2007, with two exceptions: Prior to that date, DNR will develop additional rules to implement this requirement for existing discharges.

(c) Effluent limitations for discharges of BCCs into waters of the Great Lakes system as defined in s. NR 102.12 that are based on human health criteria or secondary values calculated according to procedures in ch. NR 105, shall be also based on the most protective designated use: cold water, public water supply.

(3) LIMITATIONS BASED ON ACUTE TOXICITY. (a) The department shall establish water quality based effluent limitations to ensure that substances are not present in amounts which are acutely harmful to animals, plants or aquatic life in all surface waters including those portions of the mixing zone normally habitable by aquatic life and effluent channels as required by s. NR 102.04 (1).

(b) To assure compliance with par. (a) and except as provided in par. (c), water quality based effluent limitations shall equal the final acute value as determined in s. NR 105.05 or the secondary acute value as determined in s. NR 105.05 (4) for the respective fish and aquatic life subcategory for which the receiving water is classified. Effluent limitations for substances for which criteria may be expressed as dissolved concentrations may be established according to sub. (7):

(c) Except as provided in par. (d), water quality based effluent limitations may exceed the final acute value or the secondary acute value within a zone of initial dilution provided that the acute toxicity criteria or secondary acute values are met within a short distance from the point of discharge. A zone of initial dilution shall only be provided if the discharger demonstrates to the

department that mixing of the effluent with the receiving water in the zone of initial dilution is rapid and all the following conditions are met:

1. The discharge is not at the water surface or at the shoreline.
2. The discharge does not constitute a significant portion of the streamflow or otherwise dominate the receiving water.

3. The discharge velocity is not less than 3 meters per second (10 feet per second) unless an alternative discharge velocity, which similarly minimizes organism exposure time, is determined appropriate for the specific site.

4. The acute toxicity criteria or secondary acute values must be met within 10% of the distance from the edge of the outfall structure to the edge of a mixing zone which may be determined in accordance with s. NR 102.05 (3).

5. The acute toxicity criteria or secondary acute values shall be met within a distance of 50 times the discharge length scale in any direction. The discharge length scale is defined as the square root of the cross-sectional area of any discharge outlet. If a multi-port diffuser is used, this requirement must be met for each port using the appropriate discharge length scale for that port.

6. The acute toxicity criteria or secondary acute values shall be met within a distance of 5 times the local water depth in any horizontal direction from any discharge outlet. The local water depth is defined as the natural water depth (existing prior to the installation of the discharge outlet) prevailing under the mixing zone design conditions for the site.

(d) For toxic substances with water quality criteria related to one or more other water quality parameters, effluent limitations shall be calculated using the effluent value for the water quality parameter. Water quality parameters include, but are not limited to, pH, temperature and hardness.

(4) LIMITATIONS BASED ON CHRONIC TOXICITY OR LONG-TERM IMPACTS. (a) *Water quality criteria and secondary values.* The department shall calculate water quality based effluent limitations to ensure that the chronic toxicity criteria (CTC), the wildlife criteria (WC), the taste and odor criteria (TOC), the human threshold criteria (HTC), and human cancer criteria (HCC) appropriate for the receiving water as specified in chs. NR 102 to 105 and the secondary chronic values determined according to ch. NR 105 will be met after dilution with an appropriate allowable quantity of receiving water flow as specified in this subsection, subs. (5) to (11) and s. NR 106.11. The available dilution shall be determined according to par. (c) unless the conditions specified in s. NR 102.05 (3) or sub. (2) require less dilution or no dilution be allowed. Effluent limitations for substances for which criteria may be expressed as dissolved concentrations may be established according to sub. (7).

(b) *Calculation of limits.* Water quality based effluent limitations to meet the requirements of this subsection shall be calculated using the procedure specified in subd. 1. or 2., except as provided in sub. (2) or (6).

1. For discharges of toxic or organoleptic substances to flowing receiving waters, the water quality based effluent limitation for a substance shall be calculated using the following conservation of mass equation whenever the background concentration is less than the water quality criterion or secondary value:

$$\text{Limitation} = \frac{(\text{WQC}) (Q_s + (1-f)Q_e) - (Q_s - (Q_e)(C_s))}{Q_e}$$

Where:

Limitation = Water quality based effluent limitation (in units of mass per unit of volume).

WQC = The water quality criterion or secondary value concentration (in units of mass per unit volume) as referenced in sub. (1) or par. (a)

- Q_s = Receiving water design flow (in units of volume per unit time) as specified in par. (c)
- Q_c = Effluent flow (in units of volume per unit time) as specified in par. (d)
- f = Fraction of the effluent flow that is withdrawn from the receiving water, and
- C_s = Background concentration of the substance (in units of mass per unit volume) as specified in par. (e).

Note: In applying this equation, all units for the flow and concentration parameters respectively, shall be consistent.

2. For discharges of toxic or organoleptic substances to receiving waters which do not exhibit a unidirectional flow at the point of discharge, such as lakes or impoundments, the department may calculate, in the absence of specific data, water quality based effluent limitations using the following equation whenever the background concentration is less than the water quality criterion or secondary value:

$$\text{Limitation} = 11(\text{WQC}) - 10C_s$$

Where:

- Limitation = Water quality based effluent limitation (in units of mass per unit of volume)
- WQC = The water quality criterion concentration or secondary value (in units of mass per unit volume) as referenced in sub. (1) or par. (a).
- C_s = Background concentration of the substance (in units of mass per unit volume) as specified in par. (e).

On a case-by-case basis other dilutional factors may be used, but in no case may the dilution allowed exceed an area greater than the area where discharge induced mixing occurs. The discharge is also subject to the conditions specified in s. NR 102.05 (3). The discharger may be required to determine the size of the mixing zone using acceptable models or dye studies.

3. The limitation calculated in subd. 1. or 2. may be converted to a maximum load limitation by multiplying the calculated concentration limitation by the rate of effluent flow as determined in par. (d) and appropriate conversion factors.

(c) *Receiving water design flow (Q_s)*. The value of Q_s to be used in calculating the effluent limitation for discharges to flowing waters shall be determined as follows:

1. The department shall make reasonable efforts to determine the area of the zone of passage and the dilution characteristics of discharges.

2. The department may require that the discharger provide information on the discharge mixing and dilution characteristics of discharges.

3. The discharger shall be allowed to demonstrate, through appropriate and reasonable methods that an adequate zone of free passage exists in the cross-section of the receiving water or that dilution is accomplished rapidly such that the extent of the mixing zone is minimized. In complex situations, the department may require that the demonstration under this subdivision include water quality modeling or field dispersion studies.

4. Following the determinations under subds. 1. to 3., the value of Q_s of the receiving water for calculating effluent limitations based upon the chronic toxicity criteria specified in s. NR 105.06 or secondary chronic values shall be determined on a case-by-case basis. In no case may Q_s exceed the larger of the average minimum 7-day flow which occurs once in 10 years (7-day Q_{10}) or, if sufficient information is available to calculate a biologically

based receiving water design flow, the flow which prevents an excursion from the criterion or secondary value using a duration of 4 days and a frequency of less than once every 3 years (4-day, 3-year biological flow).

5. If the requirements of subds. 2. and 3. are not satisfied, the department shall notify the permittee and identify the deficiencies and allow additional time, if necessary, to complete the demonstration. If the demonstration cannot be completed satisfactorily, the value of Q_s of the receiving water for calculating effluent limitations based upon the chronic toxicity criteria specified in s. NR 105.06 or secondary chronic values shall equal 1/4 of the 7-day Q_{10} or 1/4 of the 4-day, 3 year biological flow. In no case may the value of Q_s of the receiving water, for calculating effluent limitations based upon the chronic toxicity criteria or secondary chronic values developed according to ch. NR 105, exceed 1/4 of the 7-day Q_{10} or 1/4 of the 4-day, 3-year biological flow if the department determines that the discharge has a potential to jeopardize the continued existence of any endangered or threatened species listed under ch. NR 27 and conforming to section 7 of the endangered species act, 16 USC 1536.

6. Q_s may be reduced from those values calculated in subds. 3. to 5., where natural receiving water flow is significantly altered by flow regulation.

7. Following the determinations under subds. 1. to 3., the value of Q_s of the receiving water for calculating effluent limitations based upon the wildlife criteria or secondary values developed according to ch. NR 105 shall be determined on a case-by-case basis. In no case may the Q_s exceed the average minimum 90-day flow which occurs once in 10 years (90-day Q_{10}) or if the 90-day Q_{10} flow is not available, the average minimum 30-day flow which occurs once in 5 years (30-day Q_5) or 85% of the average minimum 7-day flow which occurs once in 2 years (7-day Q_2).

8. If the requirements of subds. 2. and 3. are not satisfied, the department shall notify the permittee and identify the deficiencies and allow additional time, if necessary, to complete the demonstration. Except as provided in subd. 12., if the demonstration cannot be completed satisfactorily, the value of Q_s of the receiving water for calculating effluent limitations based upon the wildlife criteria specified in s. NR 105.07 shall equal 1/4 of the 90-day Q_{10} or 1/4 of the 30-day Q_5 or 1/4 of 85% of the 7-day Q_2 . In no case may the value of Q_s of the receiving water, for calculating effluent limitations based upon the wildlife criteria or secondary values developed according to ch. NR 105, exceed 1/4 of the 90-day Q_{10} or 1/4 of the 30-day Q_5 or 1/4 of 85% of the 7-day Q_2 if the department determines that the discharge has a potential to jeopardize the continued existence of any endangered or threatened species listed under ch. NR 27 and conforming to section 7 of the endangered species act, 16 USC 1536.

9. Except as provided in subd. 12., following the determinations under subds. 1. to 3., the value of Q_s of the receiving water for calculating effluent limitations based upon the human cancer criteria, human threshold criteria or secondary values developed according to ch. NR 105 shall be determined on a case-by-case basis. In no case may Q_s exceed the harmonic mean flow.

10. If the requirements of subds. 2. and 3. are not satisfied, the department shall notify the permittee and identify the deficiencies and allow additional time, if necessary, to complete the demonstration. Subject to subd. 12., if the demonstration cannot be completed satisfactorily, the value of Q_s of the receiving water for calculating effluent limitations based upon the human cancer criteria or secondary values or the human threshold criteria or secondary values specified in ch. NR 105 shall equal 1/4 of the harmonic mean flow.

11. Except as provided in subd. 12., the value of Q_s shall equal the mean annual flow of the receiving water for calculating efflu-

ent limitations based upon the taste and odor criteria as specified in ch. NR 102.

12. Q_s may be reduced from those values calculated in subd. 9., 10., and 11., whenever the department determines such discharges may directly affect public drinking water supplies.

(d) *Effluent flows (Q_e)*. 1. For dischargers subject to ch. NR 210 and which discharge for 24 hours per day on a year-round basis, Q_e shall equal the maximum effluent flow, expressed as a daily average, that is anticipated to occur for 12 continuous months during the design life of the treatment facility unless it is demonstrated to the department that such a design flow rate is not representative of projected flows at the facility.

2. For all other dischargers not subject to ch. NR 210, Q_e shall equal either subd. 2. a. or b. for effluent limitations based on aquatic life chronic criteria or chronic secondary values, and shall equal either subd. 2. a. or c. for effluent limitations based on wildlife, human threshold, human cancer or taste and odor criteria or secondary values. Whenever calculating Q_e , the department may consider a projected increase in effluent flow that will occur when production is increased or modified, or another wastewater source, including stormwater, is added to an existing wastewater treatment facility. This subdivision does not waive the requirements of ch. NR 207.

a. The maximum effluent flow, expressed as a daily average, that has occurred for 12 continuous months and represents normal operations; or

b. The maximum effluent flow, expressed as a daily average, that has occurred for 7 continuous days and represents normal operations; or

c. The maximum effluent flow, expressed as a daily average, that has occurred for 30 continuous days and represents normal operations.

3. For seasonal discharges, discharges proportional to stream flow, or other unusual discharge situations, Q_e shall be determined on a case by case basis.

(e) *Background concentrations of toxicant or organoleptic substances (C_b)*. The representative background concentration of a toxic or organoleptic substance shall be used in deriving chemical specific water quality based effluent limitations. Except as provided elsewhere in this paragraph, the representative background concentration shall equal the geometric mean of the acceptable available data for a substance. Background concentrations may not be measured at a location within the direct influence of a point source discharge.

1. The department shall determine representative background concentrations of toxic substances on a case-by-case basis using available data on the receiving water or similar waterbodies in the state, including acceptable and available caged or resident fish tissue data, available or projected pollutant loading data, and best professional judgment.

2. The department may utilize representative seasonal concentrations and may consider other information on background concentrations submitted to the department.

3. When evaluating background concentration data, commonly accepted statistical techniques shall be used to evaluate data sets consisting of values both above and below the level of detection. When all of the acceptable available data in a data set category, such as water column, caged or resident fish tissue, are below the level of detection for a pollutant, then all the data for that pollutant in that data set shall be assumed to be zero.

(5) *VALUES FOR PARAMETERS WHICH AFFECT THE LIMIT*. For toxic substances with water quality criteria related to one or more other water quality parameters, the department may calculate effluent limitations in consideration of those other water quality parameters. Water quality parameters include but are not limited to pH, temperature and hardness. The department shall determine

the value of the water quality parameters on a case-by-case basis as follows:

(a) *Receiving water*. 1. The geometric mean of available data for the receiving water shall be used, except the arithmetic mean for pH shall be used.

2. Representative seasonal values may be used.

3. If information on the water quality parameters is not available, then information on the quality of similar water bodies in the area and best professional judgment may be used.

4. The receiving water value of the water quality parameter shall be used to determine the effluent limitation. The receiving water value may be modified to account for the mixture of the receiving and effluent flows when any of the following conditions occur:

a. When the value of the water quality parameter in the effluent is significantly greater than or less than the value in the receiving water;

b. When the effluent flow is relatively large in comparison to the receiving water flow used in the calculation of the effluent; or

c. When, as a result of demonstrated or measured physical, chemical or biological reactions, the value of the water quality parameter, after mixing of the receiving water and the effluent, is significantly different than the background value of the water quality parameter in the receiving water.

(b) *Effluent*. 1. The geometric mean of available data for the effluent shall be used, except the arithmetic mean for pH shall be used.

2. If information on the water quality parameters is not available, then values representative of similar effluents may be used.

(6) *ALTERNATIVE EFFLUENT LIMITATIONS BASED UPON BACKGROUND CONCENTRATIONS*. (a) Whenever the representative background concentration for a toxic or organoleptic substance in the receiving water is determined to be greater than any applicable water quality standard or criterion or secondary value for that substance and the source of at least 90% of the wastewater is from groundwater or a public drinking water supply, the effluent limitation for that substance without dilution shall be equal to the lowest applicable water quality standard or criterion or secondary value except as provided by par. (b).

(b) The department may establish limitations greater than the applicable water quality standard or criterion or secondary value for the substance as required by par. (a) up to the representative background concentration of the substance in the receiving water, or an alternate limitation or requirement may be determined according to par. (d). The limitation, or alternate limitation or requirement determined according to par. (d), shall only be increased above the standard or criterion if it is demonstrated to the department that the concentration of the substance in the groundwater or public drinking water supply or other source water at the point of intake exceeds the applicable standard or criterion for that substance and that reasonable, practical or otherwise required methods are implemented to minimize the addition of the toxic or organoleptic substance to the wastewater. This subdivision shall not apply where groundwater is withdrawn from a location because of noncompliance with the standards contained in ch. NR 140.

(c) 1. Whenever the representative background concentration for a toxic or organoleptic substance in the receiving water is determined to be greater than any applicable water quality standard or criteria for that substance and the source of more than 10% of the wastewater for any discharger is from the same receiving water, the effluent limitation for that substance shall, except as provided in subd. 2., equal the representative background toxicant concentration of that substance in the receiving water as determined by the department, or an alternate limitation or requirement may be determined according to par. (d).

2. The department may establish an effluent limitation more stringent than the representative background concentration when the existing treatment system has a demonstrated and cost-effective ability to achieve regular and consistent compliance with a limitation more stringent than the representative background concentration.

(d) Where appropriate, for effluent limitations determined under pars. (b) and (c), the department may conduct an analysis for a toxic or organoleptic substance which accounts for all sources of the pollutant impacting a waterbody or stream segment. In the event the discharger's relative contribution to the mass of the toxic or organoleptic substance impacting the waterbody or stream segment is negligible in the best professional judgment of the department, and the concentration of the substance in the discharge exceeds the representative background concentration of the substance, the department shall establish an alternative effluent limitation for the discharger. In determining whether the discharger's relative contribution to the mass of the substance is negligible, consideration shall be given to the type of substance being limited, the uses of the receiving water potentially affected and other relevant factors. The alternative effluent limitation or other requirement shall represent in the judgment of the department, application of the best demonstrated treatment technology reasonably achievable. An alternative effluent limitation or other requirement may include one or more of the following permit conditions:

1. A numerical limitation for the substance;
2. A monitoring requirement for the substance; or
3. A cost-effective pollutant minimization program for the substance as defined in s. NR 106.04 (5).

Note: The analysis which may be conducted to determine the relative contributions of various sources of pollutants discharged to surface waters is functionally equivalent to the type of analysis described in 40 CFR 130.7.

(e) The determination of representative background concentrations for toxic or organoleptic substances in pars. (b) and (c) shall be statistically ($P \leq 0.01$) or otherwise appropriately determined as the reasonably expected maximum background concentration for that substance.

(7) **APPLICABILITY OF WATER QUALITY CRITERIA EXPRESSED AS DISSOLVED CONCENTRATIONS.** Effluent limitations may be established in a permit under this subsection based upon the acute and chronic aquatic life toxicity criteria expressed as dissolved concentrations which are determined using the procedures specified in ss. NR 105.05 (5) and 105.06 (8).

(a) Determine the effluent limitations according to the procedures specified in this chapter using the water quality criteria expressed as total recoverable from tables 1 to 6 in ch. NR 105. Determine the necessity for water quality based effluent limitations according to s. NR 106.05. If the procedures in s. NR 106.05 do not result in the need for effluent limitations based upon the total recoverable criteria, then no limitations shall be established in the permit and there is no further review. If the procedures in s. NR 106.05 do result in the need for effluent limitations based upon the total recoverable criteria, then the limitations shall be established in the permit or the permittee may request that effluent limitations be established based on criteria expressed as dissolved concentrations according to par. (b).

(b) If, following the procedures in par. (a), the permittee requests that effluent limitations be established based on criteria expressed as dissolved concentrations, the department shall determine the effluent limitations according to the procedures specified in this chapter using WQTRAN, the water quality criterion expressed as a dissolved concentration, and shall determine the necessity for water quality based effluent limitations according to s. NR 106.05. If the procedures in s. NR 106.05 do not result in the need for effluent limitations based upon the criteria expressed as dissolved concentrations, WQTRAN, then no limitations shall be established in the permit and the monitoring conditions in par.

(c) 1. shall be included in the permit. If the procedures in s. NR 106.05 do result in the need for effluent limitations based upon the criteria expressed as dissolved concentrations, then the limitation is established in the permit and the requirements in par. (c) apply.

(c) If, following the procedures in par. (b), effluent limitations are established based upon water quality criteria expressed as dissolved concentrations, then the following shall also be included in the permit:

1. Monitoring requirements which may include, but are not limited to, effluent monitoring, monitoring of effluent toxicity, in-stream monitoring for unfiltered and filtered substances which may be limited in the permit, or other monitoring. Testing methods which allow appropriately sensitive detection limits may also be specified.

2. Conditions which require the permittee to document that reasonable steps have been taken to minimize or eliminate the sources of the substances for which effluent limitations expressed as dissolved concentrations have been established in the permit. The documentation may consist of implementation of a formal pre-treatment program, pollution reduction activities, and other documented efforts which are reasonably likely to reduce or eliminate sources of the substance. The documentation shall be submitted as specified in the permit, unless, prior to issuance of the permit, documented source elimination or reduction efforts have occurred. If reasonable steps have not been taken as specified in the permit, the department may establish effluent limitations based upon a water quality criterion expressed as total recoverable concentrations.

(d) The procedures in pars. (a) to (c) may also be used to establish effluent limits based on aquatic life secondary values.

(8) **CUMULATIVE RISK FOR HUMAN CARCINOGENS.** (a) If an effluent for a particular discharger contains more than one substance for which a human cancer criterion (HCC) exists at levels which warrant water quality based effluent limits, the incremental risk of each carcinogen should be assumed to be additive. Except as provided in par. (b), the water quality based limitation for each carcinogen shall be established in a permit to protect against additive or synergistic effects possibly associated with simultaneous multiple chemical human exposure such that the following condition is met:

$$\frac{C_1}{\text{Limit } 1} + \frac{C_2}{\text{Limit } 2} + \dots + \frac{C_n}{\text{Limit } n} \leq 1$$

Where:

$C_{1 \dots n}$ = the monthly average concentration of each separate carcinogen in the effluent (assumed equal to zero if effluent concentration is not detected).

Limit_{1 \dots n} = the effluent limitation concentration based on the human cancer criterion for each respective carcinogen.

Note: This additional condition is equivalent to a total incremental risk of cancer due to multiple chemicals not exceeding 10^{-5} .

(b) If information is provided to the department that the carcinogenic risk is not additive, the limitations for each carcinogen will be determined based on that information.

(9) **SEDIMENT DEPOSITION.** The limitations calculated according to the procedures in this section may be reduced to prevent contamination of sediment with toxic substances or to prevent accumulation of the substance in sediments if determined necessary to protect water quality.

(10) **ENVIRONMENTAL FATE.** The limitations calculated pursuant to this section may be modified to account for degradation of the substance based on information available to the department provided that:

(a) The rate of degradation is documented by field studies supplied by the discharger, and

(b) The field studies demonstrate rapid and significant loss of the substance inside the mixing zone under the full range of critical conditions expected to be encountered; and

(c) The field studies are reviewed and approved by the department.

(11) OTHER METHODS OF CALCULATION. In lieu of sub. (4), scientifically defensible technical approaches such as calibrated and verified mathematical water quality models developed or adapted for a particular stream, simplified modeling approaches as outlined in "WATER QUALITY ASSESSMENT" (EPA-600/6-82-004), or dynamic methods may be utilized in developing water quality based effluent limitations such that applicable water quality standards specified in chs. NR 102 to 105 are maintained.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1) (a), (4) (c) 12., (d) 1., (4) (e) 1., (6) (e), or (1) (b) 2., (2), (3) (d), (4) (c) 7., in 11., (d) 2., (e) 3., (5) (a) 4., (6) (e) 2., (d), (7), renum. (1) (b), (2) (a) to (c), (3) (a) to (c) 6., 9., (d) 1. and 3., (e) 1. to 6., (4) to (8) to be (8) to (11) and am. (3) (b), (c) (intro.), 4. to 6., (4) (a), (b) (intro.) 1., 2., (c) 4. and 5., (6) (a) to (c), (11) (d) 2., (4) (e) 3., (5) (a) 4., (6) (c) 2. and (d) 5. and (7), r. (2) (d), (3) (c) 7. and 8., (d) 2., (e) 7., Register, August, 1997, No. 500, eff. 9-1-97.

NR 106.07 Application of and compliance with water quality based effluent limitations in permits.

(1) The department shall determine on a case-by-case basis the monitoring frequency to be required for each water quality based effluent limitation in a permit.

(2) A chemical specific water quality based effluent limitation that is established according to this chapter shall be expressed in the permit as both a concentration limitation (in units of mg/L or equivalent units) and a mass limitation (in units of kg/day or equivalent units).

(a) For dischargers subject to ch. NR 210, an acute toxicity based concentration limitation that is derived by the procedure in s. NR 106.06 shall be converted to a mass limitation by using the discharger's maximum effluent flow, expressed as a daily average, that is anticipated to occur for 24 continuous hours during the design life of the treatment facility.

(b) For all other dischargers not subject to ch. NR 210, an acute toxicity based concentration limitation that is derived by the procedures in s. NR 106.06 shall be converted to a mass limitation by using the discharger's maximum effluent flow, expressed as a daily average, that has occurred for 24 continuous hours and represents normal operations. When calculating a mass limitation, the department may consider a projected increase in effluent flow that will occur when production is increased or modified, or another wastewater source, including stormwater, is added to an existing wastewater treatment facility. This paragraph does not waive the requirements of ch. NR 207.

(c) An aquatic life chronic, human health or wildlife-based concentration limitation that is determined by the procedures in s. NR 106.06 shall be converted to a mass limitation by using the same effluent flow rate that was used in s. NR 106.06 (4) (d) to calculate the chronic toxicity concentration limitation. Also, see sub. (9) for alternate wet weather limitations.

(d) A chronic toxicity based mass limitation that is determined by the procedures in s. NR 106.11 shall be converted to a concentration limitation by using an effluent flow rate from s. NR 106.06 (4) (d).

Note: The method of allocating the combined allowable load in to s. NR 106.11 does not have to be based on the effluent flow rates specified in s. NR 106.06 (4) (d).

(3) Except as provided in sub. (4), effluent limitations based on acute toxicity criteria or secondary acute values shall be expressed in permits as daily maximum limitations; effluent limitations based on aquatic life chronic toxicity criteria or secondary chronic values shall be expressed in permits as weekly average limitations; and effluent limitations based on wildlife, human threshold or human cancer criteria, or secondary values shall be expressed in permits as monthly average limitations.

(4) If, for a substance, the monitoring frequency determined according to sub. (1) is insufficient to allow calculation of a weekly average, then the water quality based effluent limitation for that substance based on aquatic life chronic toxicity criteria or secondary chronic values may be established in a permit as a daily maximum limitation. If, for a substance, the monitoring frequency determined according to sub. (1) is insufficient to allow calculation of a monthly average, then the water quality based effluent limitation for that substance may be established in a permit as a daily maximum limitation.

(5) If application of sub. (4) results in multiple daily maximum limitations for a substance, the most stringent of the daily maximum limitations for that substance shall be established in the permit as the limitation.

(6) When the water quality based effluent limitation for any substance in a permit is less than the limit of detection or the limit of quantitation, the following conditions shall apply:

(a) The permittee shall perform monitoring required in the permit using an acceptable analytical methodology for that substance in the effluent which produces the lowest limit of detection and limit of quantitation.

(b) The permittee shall determine the limit of detection and limit of quantitation using a method specified by the department.

(c) Compliance with concentration and mass limitations shall be determined as follows:

1. When the water quality based effluent limitation is less than the limit of detection, effluent levels less than the limit of detection are in compliance with the effluent limitation.

2. When the water quality based effluent limitation is less than the limit of detection, effluent levels greater than the limit of detection, but less than the limit of quantitation are in compliance with the effluent limitation except when analytically confirmed and statistically confirmed by a sufficient number of analyses of multiple samples and use of appropriate statistical techniques. The department may require in a permit additional monitoring when effluent levels are between the limit of detection and the limit of quantitation.

3. When the water quality based effluent limitation is greater than the limit of detection, but less than the limit of quantitation effluent levels less than the limit of detection or less than the limit of quantitation are in compliance with the effluent limitation.

(d) When the water quality based effluent limitation is expressed in the permit as a daily maximum or average mass limitation, compliance is determined according to par. (c) after converting the limit of detection and limit of quantitation to mass values using appropriate conversion factors and the actual daily effluent flow, or actual average effluent flow for the averaging period.

(e) Except as provided in this paragraph, when calculating an average or mass discharge level for determining compliance with an effluent limitation according to the provisions of par. (c), a monitoring result less than the limit of detection may be assigned a value of zero. If the effluent limitation is less than the limit of detection, the department may substitute a value other than zero for results less than the limit of detection, after considering the number of monitoring results that are greater than the limit of detection and if warranted when applying appropriate statistical techniques.

(f) Unless the permittee can demonstrate continuous compliance with the limit, the department shall include a condition in the permit requiring the permittee to develop and implement or update and implement a cost-effective pollutant minimization program as specified in s. NR 106.04 (5).

(7) The department may establish a whole effluent toxicity limitation according to s. NR 106.09 as an alternative to a chemical specific water quality-based effluent limitation based on a fish and aquatic life secondary acute or secondary chronic value determined according to ss. NR 105.05 (4) and 105.06 (6). The alterna-

tive whole effluent toxicity limitation shall meet all the following conditions:

(a) The fathead minnow (*Pimephales promelas*) or the cladoceran *Ceriodaphnia dubia* were represented in the toxicological database used to generate the secondary value:

(b) The permittee has requested the alternative whole effluent toxicity limitation; and

(c) Whole effluent toxicity testing required in the permit shall be conducted at a frequency to be determined by the department, but at least once every 3 months during the entire term of the permit.

(8) If the effluent limitation based on a secondary value is established in a permit, the permittee may request that additional time be added to the compliance schedule, according to s. NR 106.117 (2), for the permittee to conduct studies, other than studies for site-specific criteria pursuant to s. NR 105.02 (1), that are needed to propose a revision to the secondary value upon which the effluent limitation is based. During this time, the permittee may provide additional data necessary to either refine the secondary value or calculate a water quality criterion.

(9) In addition to the mass limitation calculated under sub. (2) (c), for a discharger subject to ch. NR 210 and which discharges on a year-around basis, the department shall include in the permit an alternative wet weather mass limitation. For purposes of compliance, this alternative wet weather mass limitation shall apply when the mass discharge level exceeds the mass limitation calculated under sub. (2) (c) and when the permittee demonstrates to the satisfaction of the department that the discharge exceedance is caused by and occurs during a wet weather event. For purposes of this subsection, a wet weather event occurs during and immediately following periods of precipitation or snowmelt, including but not limited to rain, sleet, snow, hail or melting snow, during which water from the precipitation, snowmelt or elevated groundwater enters the sewerage system through infiltration or inflow, or both. In calculating this alternative wet weather mass limitation, the department shall use the concentration limit determined by the procedures in s. NR 106.06, the appropriate conversion factor and the appropriate effluent flow given in either par. (a) or (b).

(a) For effluent limitations based on aquatic life chronic toxicity criteria or secondary chronic values, the maximum effluent flow, expressed as a daily average, that is anticipated to occur for 7 continuous days during the design life of the treatment facility.

(b) For effluent limitations based on wildlife, human threshold or human cancer criteria or secondary values, or taste and odor criteria, the maximum effluent flow, expressed as a daily average, that is anticipated to occur for 30 continuous days during the design life of the treatment facility.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (2) to (5) to be (3) to (6) and am., cr. (2), (6) (d) to (f) and (7) to (9), Register, August, 1997, No. 500, eff. 9-1-97, correction in (7) made under s. 13.93 (2m) (b) 1., Sums., Register, October, 1999, No. 526; correction in (8) made under s. 13.93 (2m) (b) 7., Sums., Register February 2004 No. 578.

NR 106.08 Determination of the necessity for whole effluent toxicity testing requirements and limitations.

(1) GENERAL. The department shall establish whole effluent toxicity testing requirements and limitations whenever necessary to meet applicable water quality standards as specified in chs. NR 102 to 105 as measured by exposure of aquatic organisms to an effluent and specified effluent dilutions. When considering the necessity for whole effluent toxicity testing requirements and limitations, the department shall consider in-stream biosurvey data and data from ambient toxicity analyses, whenever such data are available.

(2) DETERMINATION OF NECESSITY. If representative discharge data are available for an effluent being discharged from a point

source, whole effluent toxicity testing requirements are necessary when:

(a) Existing aquatic life toxicity test data generated according to standard test protocols indicate a potential for an effluent from a point source discharge to adversely impact the receiving water aquatic life community.

(b) A water quality based effluent limitation for a toxic substance is determined necessary in s. NR 106.05.

(3) NO REPRESENTATIVE DATA. If no representative discharge data are available for an effluent being discharged from a point source, whole effluent toxicity testing requirements are necessary if, in the judgment of the department, water quality standards may be exceeded. In such cases, the following factors shall be considered.

(a) Any relevant information which is available that indicates a potential for an effluent to impact the receiving water aquatic life community.

(b) Available dilution in the receiving water.

(c) Discharge category and predicted effluent quality.

(d) Proximity to other point source dischargers.

(4) OTHER CONSIDERATIONS. Regardless of the results of the analysis conducted under this section, the department may, whenever determined necessary, require whole effluent toxicity testing for a point source discharge. The department may use information submitted under s. 166.20 (5) (a) 3. and 4., Stats., together with other information, in determining when whole effluent toxicity testing is necessary.

(5) REASONABLE POTENTIAL TO RECEIVE AN ACUTE OR CHRONIC WHOLE EFFLUENT TOXICITY LIMIT. (a) General. Whole effluent toxicity limits are established in a permit according to s. NR 106.09 whenever representative, facility-specific whole effluent toxicity data demonstrate that the effluent is or may be discharged at a level that will cause, have the potential to cause, or contribute to an excursion of a water quality standard. In evaluating the potential of a water quality standard to be exceeded, a reasonable potential factor (RPF) shall be calculated for a discharger with 5 or more representative toxicity tests according to par. (b). Whole effluent toxicity limits shall be imposed in a WPDES permit whenever the RPF calculated according to par. (b) exceeds 0.3. Whole effluent toxicity limits may be imposed, on a case-by-case basis, whenever facility-specific whole effluent toxicity test data indicate toxicity to aquatic life as determined in s. NR 106.09. Whole effluent toxicity limits may also be imposed in the absence of facility-specific whole effluent toxicity test data, on a case-by-case basis, whenever facility-specific or site-specific data or conditions indicate toxicity to aquatic life that is attributable to the discharger.

(b) Reasonable potential factor. The percentage of failures and the severity of those failures for the most sensitive species shall be used to determine when a whole effluent toxicity limit is established in a permit.

1. When a zone of initial dilution has not been approved by the department, a RPF for acute toxicity shall be calculated as follows for toxicity test data with a calculated LC₅₀:

$$RPF = \text{Geometric Mean } TU_{50} \times \text{Failure Rate}$$

Where: Failure Rate = (Representative Tests Failed/Representative Tests Conducted)

2. When a zone of initial dilution has not been approved by the department, a RPF for acute toxicity shall be calculated as follows for toxicity test data without a calculated LC₅₀:

$$RPF = \text{Geometric Mean } S \times \text{Failure Rate}$$

Where: $S = (50 \div X)^{1/2}$

Where: $X = 50$ if the percent survival in 100% effluent is greater than or equal to 50%.

$X = 5$ if the percent survival in 100% effluent is less than or equal to 5%.

$X =$ the percent survival in 100% effluent when the percent survival is less than 50% and greater than 5%.

Failure Rate = (Representative Tests Failed/Representative Tests Conducted)

3. When a zone of initial dilution has been approved by the department, according to s. NR 106.06 (3) (c), a RPF for acute toxicity shall be calculated as follows:

RPF = Failure Rate

Where: Failure Rate = (Representative Tests Failed/Representative Tests Conducted)

4. The RPF for chronic toxicity shall be calculated as follows:

RPF = Geometric Mean of rTU_c values x Failure Rate

Where: $rTU_c = IWC/IC_{25}$

If an IC_{25} is not available for a given toxicity test, a NOEC value may be used.

Failure Rate = (Representative Tests Failed/Representative Tests Conducted)

(c) *Representative data.* Toxicity test data available to the department shall be considered representative when those data meet the following conditions:

1. Data are representative of normal discharge conditions;
2. Data were produced by a lab certified or registered under ch. NR 149;
3. Data were produced from toxicity test procedures specified in the WPDES permit;
4. Data were produced from toxicity tests that met all applicable quality assurance/quality control requirements specified in the WPDES permit; and
5. Data represent the geometric mean of all whole effluent toxicity test failures for the most sensitive species.

(d) *Use of other data when determining reasonable potential.* Data from toxicity tests not required in a WPDES permit and other empirical data may be considered when making judgments regarding reasonable potential. This may include data from split samples, toxicity testing evaluations, screening tests, single species tests and other information.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1), c. and corr. (2), Register, August, 1997, No. 500, eff. 9-1-97.

NR 106.09 Whole effluent toxicity data evaluation and limitations. (1) **DATA EVALUATION.** Data evaluation procedures are specified in the whole effluent toxicity test methods specified in s. NR 219.04, Table A. In the event of a WET test failure, facility specific requirements shall be established in the WPDES permit which specify required follow-up actions.

(2) **ACUTE WHOLE EFFLUENT TOXICITY.** (a) Except as provided in par. (c), the department shall establish acute whole effluent toxicity limitations to ensure that substances shall not be present in amounts which are acutely harmful to aquatic life in all surface waters including the mixing zone and effluent channel as required by s. NR 102.04 (1).

(b) To assure compliance with par. (a), a whole effluent toxicity test may not result in a statistically valid LC_{50} less than 100% with the following taxa-specific exposure periods:

1. 48 hours for aquatic invertebrate organisms (including *Ceriodaphnia dubia*);

2. 96 hours for aquatic vertebrate organisms (including fathead minnows (*Pimephales promelas*));

3. Any other exposure period deemed appropriate by the department for a specific test organism.

(c) If a zone of initial dilution is determined appropriate in accordance with the provisions of s. NR 106.06 (3) (c), whole effluent acute toxicity limitations determined by this subsection shall be adjusted such that the effluent meets the following condition. The adjustment shall insure that after dilution of the effluent with the receiving water at a concentration equal to 3.3 times the percent dilution value calculated through application of the zone of initial dilution, the test solution of effluent and receiving water shall not produce a statistically valid LC_{50} less than 3.3 times the percent dilution value determined through application of the zone of initial dilution with the exposure periods as provided in par. (b).

(d) If, in the judgment of the department, the statistical interpretation methods used to test for LC_{50} are not appropriate for a specific data set, empirical interpretation methods may be used to determine the significance of an effect.

(e) Compliance with an acute whole effluent toxicity water quality based limitation shall be determined as follows:

1. For dischargers without an approved zone of initial dilution, a TU_n of 1.0 may not be exceeded.

2. For dischargers with an approved zone of initial dilution determined according to s. NR 106.06 (3) (c), a TU_n of X may not be exceeded.

Where: $X = 100 \div (3.3 \times \text{Dilution Factor})$

Dilution Factor = $\frac{\text{The Approved Zone of Initial Dilution}}{\text{Concentration}}$

(3) **CHRONIC WHOLE EFFLUENT TOXICITY.** (a) The department shall establish chronic whole effluent toxicity limitations to ensure that concentrations of substances are not discharged from a point source that alone or in combination with other materials present are toxic to fish or other aquatic life as required by s. NR 102.04 (4) (d).

(b) To assure compliance with par. (a), an effluent, after dilution with an appropriate allowable quantity of receiving water flow equivalent to that provided by receiving water flows specified in s. NR 106.06 (4) (c) or implied in s. NR 106.06 (4) (b) 2., may not cause a significant adverse effect, as determined by subs. 1. and 2., to a test organism population when compared to an appropriate control.

1. Using statistical interpretation methods appropriate to the toxicity test protocol, an adverse effect will be determined to be significant if the statistically derived IC_{25} , from the whole effluent toxicity test, is less than the calculated IWC.

2. If, in the judgment of the department, the statistical interpretation methods used to test for significance are not appropriate for a specific data set, empirical interpretation methods may be used to determine the significance of an effect.

(c) Compliance with a chronic whole effluent toxicity water quality based limitation shall be determined as a calculated rTU_c less than or equal to 1.0.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) (a), (b), (c) (intro.) and 2. and (2) to be (2) (a) to (c) and (3) and am. (2) (b), (c), (3) (a), (b) (intro.) and 1., r. (1) (c) l., cr. (1), Register, August, 1997, No. 500, eff. 9-1-96; CR 03-050: am. (2) (b) (intro.) Register February 2004 No. 578, eff. 3-1-04; CR 04-101: am. (1) Register May 2005 No. 593, eff. 6-1-05.

NR 106.10 Exclusions. (1) **NONCONTACT COOLING WATER.** Except as provided in sub. (2), the department may not impose water quality based effluent limitations for toxic and organoleptic substances for discharges of uncontaminated stormwater runoff not defined as point sources by s. 283.01 (12), Stats., non-contact cooling waters which do not contain additives or combined discharges consisting solely of uncontaminated stormwater runoff and noncontact cooling water without additives. Only the

additives to noncontact cooling waters shall be examined under this subsection for the establishment of water quality based effluent limitations. For purposes of this exclusion, the term "additives" are those compounds intentionally introduced by the discharger, but do not include the addition of compounds at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply. The following may be used to establish water quality based effluent limitations for noncontact cooling waters:

(a) If at least one 48-hour LC₅₀ or EC₅₀ value is available for *Daphnia magna* or *Ceriodaphnia dubia* and at least one 96-hour LC₅₀ or EC₅₀ value is available for either fathead minnow, rainbow trout or bluegill, the geometric mean LC₅₀ or EC₅₀ for each of these species shall be divided by 5 if rainbow trout are represented in the data base or divided by 10 if rainbow trout are not represented in the data base. The limitation for purposes of this section shall be equal to the lowest resultant value. A limitation can be calculated for an additive only if LC₅₀ or EC₅₀ data for at least one of the invertebrate species and at least one of the fish species listed above are available.

(b) Effluent limitations based on chronic toxicity to aquatic life shall be established using the procedures described in this paragraph for additives whenever chronic toxicity criteria are not available from s. NR 105.06. The calculation of limitations shall be in accordance with the requirements of s. NR 106.06 (4) (b). In this calculation, the water quality criterion concentration shall be equal to the final acute value for that additive as provided in s. NR 105.05, or the effluent limitation as determined in par. (a), divided by the geometric mean of all the vertebrate and invertebrate species mean acute-chronic ratios determined in accordance with s. NR 105.06 (5) for that additive. A water quality criterion concentration may be calculated for an additive only if a final acute value, as provided in s. NR 105.05 or an effluent limitation as determined in par. (a), and an acute-chronic ratio for a vertebrate species and an acute-chronic ratio for an invertebrate species are available.

(c) Groundwater which is withdrawn from a location because of noncompliance with the standards contained in ch. NR 140 and which is used as noncontact cooling water shall not be subject to this exclusion.

(d) Regardless of the results of the analysis conducted under this section, the department may, whenever determined necessary, require whole effluent toxicity testing for a point source discharge.

(2) **INTERMITTENT DISCHARGES.** Effluent limitations derived as specified in s. NR 106.06 (3) and (4) for substances which rapidly degrade and which are discharged for less than 24 hours per day shall be calculated as specified in those subsections, unless the discharger demonstrates to the department that, as a result of the duration and frequency of the discharge, adverse effects will not occur when limitations are increased.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1) (a), (b) and (2), cr. (1) (d), August, 1997, No. 500, eff. 9-1-97; CR 03-050; am. (1) (intro.) Register February 2004 No. 578, eff. 3-1-04.

NR 106.11 Multiple discharges. Whenever the department determines that more than one discharge may be affecting the water quality of the same receiving water for one or more substances, the provisions of this chapter shall be used to calculate the combined allowable load from the discharges necessary to meet the water quality criteria for the substances. The resultant combined allowable load shall be divided among the various discharges using an allocation method based on site-specific considerations. Whenever the department makes a determination under this section, the department shall notify all permittees who may be affecting the water quality of the same receiving water of the determination and any limitations developed under this section.

Permittees shall be given the opportunity to comment to the department on any determination made under this section.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. Register, August, 1997, No. 500, eff. 9-1-97.

NR 106.115 Additivity of dioxins and furans. The 2,3,7,8-TCDD toxicity equivalence concentration in effluent shall be used when developing waste load allocations and for purposes of establishing water quality based effluent limits.

(1) For the chlorinated dibenzo-p-dioxins (CDDs) listed in Tables 7, 8 and 9 in ch. NR 105, the potential adverse additive effects of all dioxin (CDD) and chlorinated dibenzofuran (CDF) congeners in effluents shall be accounted for as specified in this section.

(2) The Toxicity Equivalency Factors (TEFs) in Table 1 and Bioaccumulation Equivalency Factors (BEFs) in Table 2 shall be used when calculating a 2,3,7,8-TCDD toxicity equivalence concentration in effluent to be used when implementing both human health noncancer and cancer criteria. The chemical concentration of each CDD and CDF in effluent shall be converted to a 2,3,7,8-TCDD toxicity equivalence concentration in effluent by using the following equation:

$$(TEC)_{TCDD} = \sum (C)_x (TEF)_x (BEF)_x$$

where:

(TEC)_{TCDD} = 2,3,7,8-TCDD toxicity equivalence concentration in effluent

(C)_x = concentration of total chemical x in effluent

(TEF)_x = TCDD toxicity equivalency factor for x from table 1

(BEF)_x = TCDD bioaccumulation equivalency factor for x from table 2

**Table 1
Toxicity Equivalency Factors for CDDs and CDFs**

Congener	TEF
2,3,7,8-TCDD	1.0
1,2,3,7,8-PeCDD	0.5
1,2,3,4,7,8-HxCDD	0.1
1,2,3,6,7,8-HxCDD	0.1
1,2,3,7,8,9-HxCDD	0.1
1,2,3,4,6,7,8-HpCDD	0.01
OCDD	0.001
2,3,7,8-TCDF	0.1
1,2,3,7,8-PeCDF	0.05
2,3,4,7,8-PeCDF	0.5
1,2,3,4,7,8-HxCDF	0.1
1,2,3,6,7,8-HxCDF	0.1
2,3,4,6,7,8-HxCDF	0.1
1,2,3,7,8,9-HxCDF	0.1
1,2,3,4,6,7,8-HpCDF	0.01
1,2,3,4,7,8,9-HpCDF	0.01
OCDF	0.001

**Table 2
Bioaccumulation Equivalency Factors
for CDDs and CDFs**

Congener	BEF
2,3,7,8-TCDD	1.0
1,2,3,7,8-PeCDD	0.9
1,2,3,4,7,8-HxCDD	0.3
1,2,3,6,7,8-HxCDD	0.1
1,2,3,7,8,9-HxCDD	0.1
1,2,3,4,6,7,8-HpCDD	0.05
OCDD	0.01
2,3,7,8-TCDF	0.8
1,2,3,7,8-PeCDF	0.2
2,3,4,7,8-PeCDF	1.6
1,2,3,4,7,8-HxCDF	0.08
1,2,3,6,7,8-HxCDF	0.2
2,3,4,6,7,8-HxCDF	0.7
1,2,3,7,8,9-HxCDF	0.6
1,2,3,4,6,7,8-HpCDF	0.01
1,2,3,4,7,8,9-HpCDF	0.4
OCDF	0.02

History: Cr. Register, August, 1997, No. 500, eff. 9-1-97; CR 03-050; renum. from NR 106.16 Register February 2004 No. 578, eff. 3-1-04.

NR 106.117 Schedules for compliance. (1) Any point source which has not received a WPDES permit from the department prior to March 23, 1997 or which commenced construction after that date may not receive a schedule for compliance to meet an effluent limitation that is established under the provisions of this chapter. The department may allow a brief period, not to exceed 90 days from the beginning of discharge, for the discharger to correct pollution control equipment start-up problems.

(2) A reissued or modified permit may include a schedule for compliance with new or more stringent effluent limitations that are established by this chapter. The schedule for compliance shall meet the following conditions:

- Be as short as reasonably possible;
- May not extend beyond 5 years from the date that the permit is reissued or modified to include the new or more stringent effluent limitation, except as provided in par. (c);
- If the effluent limitation is based on a secondary value, the compliance schedule may allow the permittee additional time to conduct studies, other than those for site-specific criteria developed under s. NR 105.02 (1), that are needed to propose a revision to the secondary value upon which the effluent limitation is based. In no case may the compliance schedule for an effluent limitation that is based on a secondary value extend beyond 7 years from the date that the permit is reissued or modified to include the effluent limitation;
- May not allow more than one year between interim compliance dates;
- May require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation; and
- May extend beyond the expiration date of the permit if an interim permit limit which is effective upon the permit's expiration date is included in the permit.

Note: An interim permit limit is not necessarily a numerical effluent limitation.
History: Cr. Register, August, 1997, No. 500, eff. 9-1-97; CR 03-050; renum. from NR 106.17 Register February 2004 No. 578, eff. 3-1-04.

NR 106.13 Leachate in publicly owned treatment works. Publicly owned treatment works subject to ch. NR 210 may demonstrate to the department that leachate from a licensed solid waste facility materially affects the quality of effluent from that treatment works and affects the capability of the treatment works to meet the effluent limitations established under this chapter. If the department determines that a proper demonstration has been made, the department shall, within its capabilities, provide reasonable assistance to the owner of the treatment works and establish an appropriate schedule of compliance.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89.

NR 106.14 Analytical methods and laboratory requirements. (1) Methods used for analysis of samples shall be those specified in ch. NR 219 unless alternative methods are specified in the WPDES discharge permits. Where more than one approved analytical method for a pollutant exists, the department may specify in the permit which method shall be used.

(2) The permittee shall submit, with all monitoring results, appropriate quality control information, as specified by the department.

(3) The permittee shall report numerical values for all monitoring results greater than the limit of detection, as determined by a method specified by the department, unless analyte-specific instructions in the WPDES permit specify otherwise. The permittee shall appropriately identify all results greater than the limit of detection but less than the limit of quantitation.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. NR 106.14 to be (1), (2) and (3), Register, August, 1997, No. 500, eff. 9-1-97.

Subchapter III — Effluent Limitations for Mercury Discharges

NR 106.145 Mercury regulation. This section provides an alternative means of regulating mercury in WPDES permits through the establishment of alternative mercury effluent limitations and other requirements and is intended as a supplement to the authority and procedures contained in other sections of this chapter. For purposes of this section, an alternative mercury effluent limitation represents a variance to water quality standards specified in chs. NR 102 to 105.

(1) FINDINGS. On November 1, 2002, the department finds all of the following:

- Requiring all dischargers of mercury to remove mercury using wastewater treatment technology to achieve discharge concentrations necessary to meet water quality standards would result in substantial and widespread adverse social and economic impacts.
- Representative data on the relatively low concentrations of mercury in wastewater are rare and methods for collecting that data have only recently been developed.

(c) Appropriate mercury source reduction activities are environmentally preferable to wastewater treatment technology in many cases because wastewater treatment for mercury produces a sludge or other resultant wastewater stream that can be as much or more of an environmental liability than the untreated effluent.

(2) DETERMINING THE NECESSITY OF MERCURY EFFLUENT LIMITATIONS. (a) The department shall determine whether a mercury effluent limitation is necessary using the procedures in s. NR 106.05.

(b) For the determination under par. (a), the department shall use representative data that comply with all of the following:

- Data shall meet the sampling and analysis requirements of subs. (9) and (10).
- Data shall consist of at least 12 monitoring results spaced out over a period of at least 2 years.

(3) DATA GENERATION. (a) In this paragraph, "major municipal discharge" and "minor municipal discharge" have the mean-

ings specified in s. NR 200.02 (7) and (8). If an applicant in any of the categories specified in this subsection does not have sufficient discharge data that meet the criteria of sub. (2) at the time of application for permit reissuance, the reissued permit shall require the permittee to monitor and report mercury at the following frequency and location:

1. Monthly influent and effluent for a major municipal discharge with an average flow rate greater than or equal to 5 million gallons per day.

2. Once every 3 months influent and effluent for a major municipal discharge with an average flow rate greater than or equal to one million gallons per day but less than 5 million gallons per day.

3. Once every 3 months influent and effluent for a minor municipal discharge if there are 2 or more exceedances in the last 5 years of the high quality sludge mercury concentration of 17 mg/kg specified in s. NR 204.07 (5).

4. Monthly effluent for an industrial discharge that the department determines is likely to contribute net discharges of mercury to the environment or if sludge or biosolids mercury concentrations indicate a source of mercury.

5. Once every 3 months effluent for an industrial discharge with an average flow rate, excluding noncontact cooling water as defined in s. NR 205.03 (21), of more than 100,000 gallons per day and the department has no information on mercury concentrations in similar discharges. The department may exempt discharges in this category if the department determines that there is little risk that the effluent will contain mercury.

Note: Any permittee who believes that a significant portion of the mercury in its effluent originates from its intake of surface water is encouraged to provide results of intake monitoring.

6. The department may reduce monitoring frequency from monthly to once every 3 months for discharges described in subs. 1. and 4. after at least 12 representative results have been generated.

(b) The department may require mercury monitoring for other discharges not included in one of the categories specified in par. (a) if the department has a reasonable expectation that the discharge includes significant quantities of mercury.

(c) Permittees shall collect and analyze samples according to the requirements in subs. (9) and (10).

(4) ALTERNATIVE MERCURY EFFLUENT LIMITATION ELIGIBILITY

(a) When the department makes a determination of the necessity for a water quality based effluent limitation for mercury under sub. (2), the department shall determine if an alternative mercury effluent limitation is justified based on information submitted by the permittee in an alternative mercury effluent limitation application.

(b) The department may not establish an alternative mercury effluent limitation for a new discharge to waters in the Great Lakes system, as defined in s. NR 102.12 (1), unless the proposed discharge is necessary to alleviate an imminent and substantial danger to the public health or welfare. For the purposes of this section, a new discharger is any building, structure, facility or installation from which there is or may be a discharge of pollutants, as defined in s. NR 200.02 (4), the construction of which commenced after November 1, 2002. An existing discharger that relocates its outfall after November 1, 2002 may not be considered a new discharger for purposes of this paragraph. Relocation includes the diversion of a discharge from a land treatment system or systems to a surface water.

(c) The term of an alternative mercury effluent limitation may not extend beyond the term of the permit.

(d) An alternative mercury effluent limitation may be renewed using the procedures and requirements in subs. (5) to (8). An alternative mercury effluent limitation may not be renewed if the permittee did not substantially comply with all of the mercury-regulation conditions of the previous permit.

(5) CALCULATION OF AN ALTERNATIVE MERCURY EFFLUENT LIMITATION. (a) An alternative mercury effluent limitation shall equal the upper 99th percentile of representative daily discharge concentrations as calculated under s. NR 106.05 (4) (a), except as provided in par. (c).

(b) The alternative mercury effluent limitation shall be expressed as a daily maximum concentration.

(c) An alternative mercury effluent limitation may not be greater than the alternative mercury effluent limitation contained in the previous permit, unless the permittee demonstrates that the previous alternative mercury effluent limitation was based on monitoring that did not represent actual discharge concentrations.

(6) DEPARTMENT ACTION ON ALTERNATIVE MERCURY EFFLUENT LIMITATION APPLICATIONS. (a) The department shall establish an alternative mercury effluent limitation for a discharger when all of the following have been met:

1. The information provided in the alternative mercury effluent limitation application described in sub. (8) supports establishing the alternative mercury effluent limitation.

2. The permittee and the department agree upon the alternative mercury effluent limitation and the specific permit language requiring implementation of the pollution minimization program described in sub. (7).

(b) If the information provided in the alternative mercury effluent limitation application does not support establishing an alternative mercury effluent limitation or if the department and the permittee cannot agree on the alternative mercury effluent limitation and the specific permit language incorporating the pollution minimization program, the department shall include the water quality based effluent limitation or limitations in the permit. This paragraph does not prohibit the department from seeking and the applicant providing supplemental information after the initial application is submitted.

(c) If the department grants an alternative mercury effluent limitation, the permit shall require monitoring subject to the data quality requirements of subs. (9) and (10), at the following locations:

1. Effluent for both municipal and industrial discharges.

2. Influent and sludge or biosolids for major and minor municipal discharges.

(7) POLLUTANT MINIMIZATION PROGRAMS. (a) If the department grants an alternative mercury effluent limitation under sub. (6), the reissued permit shall require the permittee to implement a pollutant minimization program as defined in s. NR 106.04 (5) and detailed for mercury in this subsection.

(b) If the reissued permit requires monthly data generation under sub. (3) (a) 1. or 4., the permit shall contain a special condition that triggers a pollutant minimization program if the first 24 months of data demonstrate that a limit will be necessary under sub. (2). The permit shall also require that the permittee do all of the following:

1. Submit to the department within 36 months of permit reissuance a pollutant minimization program plan meeting the requirements specified in this subsection.

2. Implement the pollutant minimization program following submittal of the plan.

3. Submit the first annual status report required in par. (g) within 48 months of permit reissuance.

(c) For municipal permittees, a pollutant minimization program shall consist of all of the following elements:

1. Source identification.

2. Activities to help educate the general public, health professionals, school teachers, laboratory personnel or other professionals about ways to reduce use of mercury-containing products, recycle mercury-containing products and prevent spills.

3. A program for collecting mercury from the permittee's sewer system users. This program may be independently operated by the permittee, jointly by the permittee and others or by another governmental unit.

4. Other activities that the department, in consultation with the permittee, deems appropriate for the individual permittee's circumstances.

(d) For industrial permittees, a pollutant minimization program may consist of any of the following elements:

1. Source identification and inventory.
2. Improvement of operational, maintenance or management practices.
3. Substitution of raw materials or chemical additives with low-mercury alternatives.
4. Institution of alternative processes.

(e) In assessing the appropriate elements for a pollutant minimization program, the department may consider any of the following:

1. The type of discharger.
2. The operations that generate the wastewater.
3. The level of mercury in the effluent, influent and biosolids or sludge.
4. The costs of potential source reduction measures.
5. The environmental costs and benefits of the pollutant minimization program elements.
6. The characteristics of the community in which the discharger is located.
7. The opportunities for material substitution.
8. The opportunities available for support from or cooperation with other organizations.
9. The actions the discharger has taken in the past to reduce mercury use or discharges.
10. Any other relevant information.

(f) The pollutant minimization program plan shall include all of the following:

1. Identify specific activities to be undertaken and a relative timeline to implement those activities.
2. State which, if any, activities have already been implemented and how effective they were in reducing potential and actual mercury discharges.
3. Commit the permittee to document how the pollutant minimization program plan was implemented including measures such as the number of contacts of various types made, programs implemented and other activities.
4. Provide for steps to measure the effectiveness of the pollution minimization program elements in reducing potential and actual mercury discharges. Where the permittee regularly monitors influent, effluent, sludge or biosolids for mercury, measures shall include any changes in mercury concentrations over comparable historic data. Where practicable, other measures or estimates of mercury reductions from programs such as mercury recycling, collection or disposal may also be included.

(g) Within 12 months of the beginning of implementation of the pollutant minimization program and annually thereafter, the permittee shall report to the department on the progress of the pollutant minimization program as required in s. NR 106.04 (5). This annual report shall include all of the following:

1. An evaluation of the effectiveness of the program in accordance with the plan.
2. Identification of barriers that have limited program effectiveness and adjustments to the program that will be implemented during the next year to help address these barriers.

(h) Permittees may collaborate with one another or other parties to plan and implement a pollutant minimization program.

Note: Permittees that do not prepare or effectively implement a pollutant minimization program are subject to regulatory requirements for mercury, without alternative mercury effluent limitations to water quality standards. For municipal permittees this may mean development and enforcement of mercury discharge standards for users of the public sewerage system pursuant to s. NR 211.10 (3). For users of the municipal sewerage system this may mean changes in processes, installation of treatment technology, or other means to comply with the municipal mercury discharge standards pursuant to s. NR 211.10 (1). Implementation of the municipal mercury discharge standards may require a program of user discharge permits and wastewater discharge monitoring.

(8) ALTERNATIVE MERCURY EFFLUENT LIMITATION APPLICATIONS. (a) To apply for an alternative mercury effluent limitation under this section, a permittee shall do all of the following:

1. Submit an alternative mercury effluent limitation application at the same time as the application for permit reissuance following data generation.

2. State the basis for concluding that wastewater treatment technology for mercury is impractical.

3. Supply representative effluent monitoring results of sufficient number and analytical sensitivity to quantify with reasonable certainty the concentration and mass of mercury discharged. Representative sample results shall meet all of the following requirements:

- a. Be of sufficient quantity to allow calculation of the upper 99th percentile values pursuant to s. NR 106.05 (5).
- b. Reasonably represent current conditions.
- c. Meet the data quality requirements of subs. (9) and (10).
- d. Represent a time period of at least 2 years.

4. Submit a pollution minimization program plan described in sub. (7) (f).

(b) A permittee applying for renewal of an alternative mercury effluent limitation previously granted shall follow the procedures in par. (a) except for all of the following:

1. The permittee shall submit information indicating whether the permittee substantially complied with mercury regulation conditions of the existing permit.
2. A new pollutant minimization program plan shall re-evaluate the plan required under the previous permit.

(9) SAMPLING REQUIREMENTS (a) Sample types may be grab or 24-hour composite. "Grab sample" and "24-hour composite sample" have the meanings specified in s. NR 218.04.

(b) Sample collection methods shall be consistent with *EPA Method 1669: Sampling Ambient Water for Trace Metals at EPA Water Quality Criteria Levels*, EPA-821-R-96-011.

Note: This method provides flexible procedures for collecting samples under clean conditions. Sample collection personnel may modify this procedure or eliminate steps if the modification does not lead to unacceptable contamination of the samples. This method may be accessed on the department's website at <http://www.dnr.state.wi.us/org/water/wai/www/mercury/1669.pdf>.

(c) Requirements for field blanks are as follows. A field blank means an aliquot of mercury-free reagent water that is placed in a sample container, shipped to the field and treated as a sample in all respects, including contact with the sampling devices and exposure to sampling site conditions, filtration, storage, preservation, and all analytical procedures. The purpose of the field blank is to determine whether the field or sample transporting procedures and environments have contaminated the sample:

1. At least one field blank shall be collected at each site for each day a sample is collected. If more than one sample is collected in a day, at least one field blank for each 10 samples collected on that day shall be collected.

2. If mercury or any potentially interfering substance is found in the field blank at a concentration equal to or greater than 0.5 ng/L, the limit of detection or one-fifth the level in the associated sample, whichever is greater, results for associated samples may not be used for regulatory compliance purposes unless the conditions in subd. 3. are met.

3. If at least 3 field blanks are collected on a day when samples are collected and the average mercury concentration of the field blanks plus 2 standard deviations is less than or equal to one-half

of the level in the associated sample or less than the lowest water quality criterion for mercury found in ch. NR 105, whichever is greater, results may be used.

Note: As of November 1, 2002 the lowest water quality criterion listed in ch. NR 105 is 1.3 ng/L.

4. Once a permittee demonstrates the ability to collect samples from a given site using an established procedure that meets the use-criteria of subd. 2., the permittee may decrease the number of field blanks to no fewer than one field blank for each 4 sampling days.

a. The initial demonstration shall consist of at least 6 consecutive sampling days.

b. If the permittee makes significant changes to the sampling procedure or sampling personnel, the 6-day demonstration shall be repeated.

c. If after reducing the field blank frequency, a field blank fails to meet the use-criteria, the permittee shall take corrective action and return to collecting field blanks on each sampling day until it can meet the use-criteria for at least 3 consecutive sampling days.

d. In no case may the permittee decrease field blanks to fewer than one for each 10 samples.

5. The permittee shall report, but may not subtract, field blank concentrations when reporting sample results.

Note: When using the data, the department may subtract field blanks from sample concentrations on a case-by-case basis.

(10) **LABORATORY ANALYSIS REQUIREMENTS.** (a) In this subsection, "method blank", "matrix spike" and "limit of detection" have the meanings specified in s. NR 149.03.

(b) The analytical method used shall be sensitive enough to quantify mercury concentrations in the sample or mercury concentrations down to the lowest water quality criterion found in ch. NR 105, whichever is greater.

(c) The department may exempt a permittee from the sensitivity requirement in par. (b) if the permittee can demonstrate to the department's satisfaction that the specific effluent matrix does not allow this level of sensitivity using the most sensitive approved method with all reasonable precautions.

(d) The laboratory performing the analyses shall be certified under ch. NR 149 for low-level mercury analyses. Until low-level mercury certification is available, the lab shall be certified under ch. NR 149 for mercury and recognized by the department as having demonstrated its low-level mercury capabilities under the emerging technology provision contained in s. NR 149.12 (2).

(e) Method blanks analyzed concurrently with samples shall be reported with sample results. Method blanks may be subtracted from sample results unless concentrations of mercury in the method blank exceed the laboratory's limit of detection, 0.5 ng/L or 5% of the sample concentration, whichever is greater.

(f) Matrix spikes analyzed concurrently with samples shall have recoveries between 71 and 125%.

(11) **DATA REJECTION.** The department may reject any sample results if data quality requirements specified in subs. (9) and (10) are not met or if results are produced by a laboratory that is not in compliance with certification requirements specified in ch. NR 149.

(12) **APPLICABILITY OF THE VARIANCE PROCESS UNDER S. 283.15, STATS.** If a water quality based effluent limitation is included in a permit under sub. (6) (b), a permittee may apply to the department for a variance from the water quality standard used to derive the limitation following the procedure specified in s. 283.15, Stats. Where a permittee has been granted an alternative mercury effluent limitation under this section, the procedures of s. 283.15, Stats., are not applicable.

History: CR 02-019; cr. Register October 2002 No. 562, eff. 11-1-02.

NR 106.15 Limitations for mercury. Regardless of the effluent limitations determined under this chapter, the discharge

of organic mercury compounds, inorganic mercury compounds, and metallic mercury shall not exceed the requirements in s. 281.17 (7), Stats., and ch. NR 100.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89.

Subchapter IV — Effluent Limitations for Ammonia Discharges

NR 106.30 Applicability. The provisions of this subchapter are applicable to point sources that discharge wastewater containing ammonia to surface waters of the state. This subchapter first applies to permits issued or reissued after March 1, 2004.

Note: Any discharges of ammonia from a concentrated animal feeding operation (CAFO) are regulated under ch. NR 243.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.31 Definitions. In this subchapter:

(1) "Acute criterion" or "ATC" has the meaning in s. NR 105.03 (2)

(2) "Chronic criterion" or "CTC" has the meaning in s. NR 105.03 (15)

(3) "Early life stages" or "ELS" means the life stages of fish that include the pre-hatch embryonic period, post-hatch free embryo or yolk-sac fry, and the larval period, during which the fish feeds. Juvenile fish, which are anatomically similar to adults, are not considered an early life stage. The duration of the early life stage extends from the beginning of spawning through the end of the larval period.

(4) "Early life stages absent" means the early life stages of fish are not present in a water body affected by a permittee's discharge.

(5) "Early life stages present" means the early life stages of fish are present in a water body affected by a permittee's discharge.

(6) "Lagoon system" means a wastewater treatment system where the method of treatment consists of intermediate-depth basins with typical detention times of 30 to 60 days and generally a continuous discharge. Sufficient aeration is provided to help satisfy oxygen demand, but not provide for complete mixing.

(7) "Real-time" means an event that is occurring during a present point in time.

(8) "Stabilization pond" means a wastewater treatment system consisting of large shallow earthen basins that use algae and aerobic, facultative, and anaerobic organisms for wastewater treatment. Stabilization ponds include, but are not limited to, those sized for a minimum of 150 days storage and have discharges in the spring and fall.

(9) "WPDES" or "WPDES permit" means Wisconsin pollutant discharge elimination system permit under ch. 283, Stats.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.32 Calculation of water quality-based effluent limitations for ammonia. (1) **BASIS FOR LIMITATIONS.** (a) The department shall establish water quality based effluent limitations for point source dischargers of ammonia whenever the limitations are necessary, as determined by any method in this section, to meet the applicable water quality standards and criteria in chs. NR 102 to 105.

(b) Water quality based effluent limitations for ammonia shall be determined to attain and maintain water quality standards and criteria specified in or determined according to procedures in ch. NR 105, at the point of discharge. Effluent limitations shall be established to protect downstream waters whenever the department has information to make the determinations.

(2) **LIMITATIONS BASED ON ACUTE TOXICITY.** (a) The department shall establish daily maximum water quality based effluent limitations to ensure that ammonia is not present in amounts that are acutely harmful to aquatic life in all surface waters, including

those portions of the mixing zone normally habitable by aquatic life as required by s. NR 102.04 (1).

(b) To assure compliance with par. (a) and except as provided in par. (c), water quality based effluent limitations for ammonia shall equal the final acute value as determined in s. NR 105.05 for the respective fish and aquatic life subcategory for which the receiving water is classified. The water quality based limitations based on acute toxicity shall be established as follows:

1. Effluent limitations for ammonia for discharges to water bodies classified as cold water communities shall be established using the ammonia criteria for the CW Category 1, shown in ch. NR 105, Table 2C, except as provided in subd. 2.

2. If the permittee can demonstrate to the department through site specific information that the fish present in the receiving water are limited to those included in CW Category 2, CW Category 3 or CW Category 5, as described in ch. NR 105, Table 2C, then effluent limitations shall be established based on the criteria shown in ch. NR 105 Table 2C for the respective CW Category. If the permittee intends to make a site-specific demonstration, the permittee shall notify the department prior to the end of the public comment period for permit reissuance. An additional period of time, not to exceed 6 months, shall be provided in the schedule of compliance under s. NR 106.37 to perform the demonstration. If the department grants approval for an alternative limitation based on CW Category 2, 3 or 5, the department shall propose a modification to the permit that includes the alternative limit.

3. In all cases, effluent limitations for ammonia for discharges directly to Lake Superior, Lake Michigan and Green Bay north of 44° 32' 30" north latitude shall be established using the ammonia criteria for the CW Category 1 shown in ch. NR 105, Table 2C.

(c) Water quality based effluent limitations for ammonia may exceed the final acute value within a zone of initial dilution that meets all of the conditions in s. NR 106.06 (3) (c).

(d) Effluent limitations for ammonia shall be calculated using the pH value of the effluent as determined in sub. (4) (b) and this paragraph. The department may also establish effluent limitations or other requirements for pH according to the following procedure:

1. Whenever the department establishes an effluent limitation based on the acute ammonia criteria in ch. NR 105, the department may also establish a maximum effluent limitation for pH equal to the pH value that was used to calculate the ammonia effluent limitation.

2. The department may allow a permittee to chemically adjust effluent pH to a lower value for the purpose of obtaining a higher ammonia effluent limitation. The adjusted pH shall be used to calculate the ammonia effluent limitation. The pH value of an effluent may not be adjusted to less than 6.0. Whenever the effluent pH is adjusted, the department may require continuous monitoring of the pH of the effluent.

3. The department may establish an alternative pH for calculating the limitation under this section to protect downstream uses whenever the receiving water pH is significantly different from the effluent, or if a zone of initial dilution is applicable based on par. (c).

(3) LIMITATIONS BASED ON CHRONIC TOXICITY OR LONG-TERM IMPACTS. (a) *Water quality criteria.* The department shall calculate water quality based effluent limitations for ammonia to ensure that the chronic toxicity criteria applicable to the receiving water as specified in chs. NR 102 to 105 will be met after taking into account dilution with an appropriate quantity of receiving water flow allowed in this subsection. The available dilution shall be determined according to par. (c) unless the conditions specified in s. NR 102.05 (3) require less dilution or no dilution be allowed. The chronic toxicity criteria to be used in the calculation of ammonia effluent limitations shall apply as follows:

1. The applicable early life stages present ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for all times of the year for all discharges to Class I and Class II trout waters, as identified by the department's Wisconsin Trout Streams publication referenced in s. NR 102.04 (3) (a), and any additional Class I and Class II trout waters identified in ss. NR 102.10 (1) (d) and (e), and 102.11 (1) (b) and (c).

2. The applicable early life stages present ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for all discharges to all waters supporting warm water sport fish and warm water forage fish during the month of April or whenever the receiving water temperature, as determined in s. NR 106.32 (4), is greater than or equal to 14.6 degrees Celsius.

Note: Effluent limitations are determined based on monthly average water temperatures determined from historical records. For many waters supporting warmwater fish species, the monthly average water temperature is 14.6 degrees Celsius or greater during the months of May through September.

3. Except as provided in subd. 4., the applicable early life stage absent ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for all discharges to all waters supporting warm water sport fish and warm water forage fish whenever the receiving water temperature, as determined in s. NR 106.32 (4), is less than 14.6 degrees Celsius, but not including the month of April.

4. The applicable early life stages present ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations applicable for the months of January, February, and March for all discharges to waters where the department determines that early life stages of burbot are present.

Note: Burbot are not present in limited aquatic life streams, limited forage fish streams and small or shallow headwater streams and rivers.

a. Whenever the department determines that early life stage present ammonia criteria are applicable under this subdivision, the permittee may make a demonstration that the early life stages of burbot are not present at the discharge location and will not be affected by the discharge during the months of January and February. If the permittee intends to perform the demonstration, the permittee shall notify the department prior to the end of the public comment period for permit reissuance. The department shall allow an extended compliance schedule in the permit not to exceed one year for the permittee to provide the demonstration.

Note: Permittees that choose to undertake a demonstration under this paragraph should consult with the department during the development of the plan of study.

b. If the permittee can demonstrate to the satisfaction of the department that the early life stages of burbot are not present at the discharge location and will not be affected by the discharge, the early life stage absent ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations that apply to the permittee and the department shall propose a permit modification to incorporate the limitations. If the permittee does not make a sufficient demonstration, the early life present ammonia criteria in s. NR 105 Table 4B shall apply.

5. The applicable early life stages present ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for the months of May through September for all discharges to waters designated in ch. NR 104 as limited forage fish waters. The early life stages absent ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for the months of October through April for all discharges to waters designated in ch. NR 104 as limited forage fish waters.

6. The applicable ammonia criteria in s. NR 105.05 Table 4B shall be used to calculate effluent limitations for all discharges to waters designated in ch. NR 104 as limited aquatic life waters.

(b) *Calculation of limits.* Water quality based effluent limitations to meet the requirements of this subsection shall be calculated using the procedure specified in subd. 1. or 2., except as provided in s. NR 106.06 (6).

1. For discharges of ammonia to flowing receiving waters, the water quality based effluent limitation shall be calculated using the following conservation of mass equation whenever the background concentration is less than the water quality criterion:

$$\text{Limitation} = \frac{(\text{CTC})(Q_r + (1-f)Q_e) - (Q_r - fQ_e)(C_s)}{Q_e}$$

Where:

- Limitation = Water quality based effluent limitation (in units of mass per unit of volume)
- CTC = The chronic toxicity criterion (concentration in units of mass per unit volume) as referenced in par. (a)
- Q_s = Receiving water design flow (in units of volume per unit time) as specified in par. (c)
- Q_e = Effluent flow (in units of volume per unit time) as specified in par. (d)
- f = Fraction of the effluent flow that is withdrawn from the receiving water
- C_s = Background concentration of ammonia (in units of mass per unit volume) as specified in par. (e)

Note: In applying this equation, all units for the flow and concentration parameters respectively shall be consistent.

2. For discharges of ammonia to receiving waters which do not exhibit a unidirectional flow at the point of discharge, such as lakes or impoundments, the department may calculate, in the absence of specific data, water quality based effluent limitations using the following equation whenever the background concentration is less than the water quality criterion:

$$\text{Limitation} = 11 (\text{CTC}) - 10C_s$$

Where:

- Limitation = Water quality based effluent limitation (in units of mass per unit of volume)
- CTC = The chronic toxicity criterion (concentration in units of mass per unit volume) as referenced in par. (a)
- C_s = Background concentration of ammonia (in units of mass per unit volume) as specified in par. (e)

3. On a case-by-case basis other dilutional factors may be used, but in no case may the dilution allowed exceed an area greater than the area where discharge induced mixing occurs. The discharge is also subject to the conditions specified in s. NR 102.05 (3). The permittee may be required to determine the size of the mixing zone using models or dye studies that are determined to be acceptable by the department.

(c) *Receiving water design flow (Q_s)*. Subject to the application of the zone of passage factors in subd. 3. or 4., the value of Q_s to be used in calculating the effluent limitation for discharges to flowing waters shall be determined using one of the approaches in subd. 1. or 2.

1. To calculate limits based on 4-day chronic ammonia criteria, Q_s shall equal the average minimum 7-day flow which occurs once in 10 years (7-day Q_{10}) or, if sufficient information is available to calculate a biologically based receiving water design flow, the flow which prevents an excursion from the criterion using a duration of 4 days and a frequency of less than once every 3 years (4-day, 3-year biological flow). To calculate limits based on 30-day chronic ammonia criteria, Q_s shall equal the average minimum 30-day flow which occurs once in 5 years (30-day Q_5) or

85% of the average minimum 7-day flow which occurs once in 2 years (7-day Q_2).

2. If approved by the department, the value of Q_s of the receiving water for calculating effluent limitations based upon the chronic toxicity criteria specified in s. NR 105.06 may be determined on a case-by-case basis, using historical flow data or real time data. Q_s may be based on real-time streamflow data if the permittee demonstrates that modifications to effluent quality or quantity can be achieved in response to changing stream conditions. Appropriate modifications to effluent quality or quantity may include, but are not limited to, land application, storage, shut-down or reduction in ammonia feed rates.

3. To provide for an adequate zone of passage, the value of Q_s to be used in the equation in par. (b) 1. shall be determined by multiplying the applicable value from subd. 1. or 2. by the following zone of passage factors:

- 0.25 when the receiving water temperature is less than 11 degrees Celsius.
- 0.50 when the receiving water temperature is equal to or greater than 11 degrees Celsius and equal to or less than 16 degrees Celsius.
- 1.00 when the receiving water temperature is greater than 16 degrees Celsius.

4. Based on the zone of passage or rapid dilution demonstration in this subdivision, the department may determine that alternative zone of passage factors to those provided in subd. 3. apply. The permittee may demonstrate, through appropriate and reasonable methods approved by the department, and by using information on the mixing and dilution characteristics of the discharge, that an adequate zone of free passage exists in the cross-section of the receiving water or that dilution is accomplished rapidly such that the extent of the mixing zone is minimized. In complex situations, the department may require that the demonstration under this subdivision include water quality modeling or field dispersion studies.

5. The department may adjust Q_s from the values in subd. 1. where natural receiving water flow is significantly altered by flow regulation.

(d) *Effluent flows (Q_e)*. Effluent flows used in the calculation of ammonia limits shall be determined using the procedures in s. NR 106.06 (4) (d).

(e) *Background concentrations of ammonia (C_s)*. Background ammonia concentrations used in the calculation of ammonia limits shall be determined using the procedures in s. NR 106.06 (4) (e).

(4) **VALUES FOR PARAMETERS WHICH AFFECT THE LIMIT.** Effluent limitations for ammonia shall be based upon the effects of pH and temperature on the toxicity of ammonia. The department shall determine the value of the pH and temperature on a case-by-case basis as follows:

(a) *Receiving water*. 1. The geometric mean of temperature and the arithmetic mean for pH in the receiving water shall be used to establish the chronic toxicity criteria for purposes of determining the effluent limitation for ammonia. Representative seasonal values of pH and temperature may be used. The pH and temperature determined under this subdivision may be modified to account for the mixture of the receiving and effluent flows when either of the following conditions occur:

- Whenever the value of the pH and temperature of the effluent as determined in par. (b) is significantly greater than or less than the value in the receiving water.
- Whenever, as a result of demonstrated or measured physical, chemical or biological reactions, the value of the pH and temperature, after mixing of the receiving water and the effluent, is significantly different than the respective background value of the pH and temperature in the receiving water.

2. If information on the pH and temperature of the receiving water is not available, information on the quality of similar water bodies in the area and best professional judgment of the department may be used.

(b) *Effluent.* 1. The daily maximum effluent pH shall be used to calculate the daily maximum ammonia limit based on acute toxicity criteria and in any calculations under par. (a).

2. If information on the effluent pH is not available, then values representative of similar effluents may be used.

(c) A permittee may conduct an investigation to demonstrate that alternate values for the pH and temperature determined under pars. (a) and (b) should be used. The investigation shall be based on site-specific conditions and shall address all of the following: critical loading conditions; buffering capacity of the stream; whether pH changes persist long enough to allow decay of ammonia to non-toxic levels; the effect of seasonal variations; maintaining the pH at the edge of the chronic mixing zone within the range of 6.0 to 9.0; and separate analyses for chronic mixing zone and an acute zone of initial dilution.

Note: It is suggested that the permittee submit a plan of study to the department prior to undertaking a demonstration under this paragraph.

(d) *Real-time data.* Effluent limitations may be established based on real-time effluent and stream data provided the permittee demonstrates that the real-time data can be collected, and the discharge can be controlled to attain the effluent limitations. Adjustment of effluent pH may be an appropriate modification for compliance with real-time daily maximum limits. Real-time stream data may not be used to calculate ammonia limits if the department determines that the discharge may affect the existence of any endangered or threatened species listed under ch. NR 27.

(5) APPLICATION OF WATER QUALITY BASED AMMONIA LIMITATIONS IN PERMITS AND MONITORING. (a) *Limitations based on acute toxicity criteria.* Effluent limitations for ammonia that are established in permits based on the acute toxicity criteria in ch. NR 105 shall be expressed only as concentrations.

(b) *Limitations based on chronic toxicity criteria.* Effluent limitations for ammonia that are established in permits based on the chronic toxicity criteria in ch. NR 105 shall be expressed as concentrations, except mass limits may also be included in a permit if there is more than one discharger of ammonia at a location or where the discharge is to an exceptional resource water designated under s. NR 102.11 or outstanding resource water designated under s. NR 102.10. If mass limits are determined to be necessary by the department, they shall be calculated using the procedure in s. NR 106.07 (2).

(c) *Maximum and average ammonia limitations.* Effluent limitations based on acute toxicity criteria shall be expressed in permits as daily maximum limitations. Effluent limitations based on 4-day chronic toxicity criteria shall be expressed in permits as weekly average limitations. Effluent limitations based on 30-day chronic toxicity criteria shall be expressed in permits as monthly average limitations.

(d) *Monitoring frequency.* The department shall determine on a case-by-case basis the monitoring frequency for ammonia to be required in a permit.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.33 Determination of the necessity for water quality based effluent limits for ammonia. (1) Except as provided in sub. (2) or (3), the procedures specified in s. NR 106.05 shall be used to determine if water quality based effluent limitations for ammonia are necessary in a permit. When application of the procedures in s. NR 106.05 results in a determination that ammonia effluent limits are not necessary in a permit, the wastewater treatment plant shall continue to be operated in a manner that optimizes the removal of ammonia within the design capabilities of the wastewater treatment plant. The department may require that the permittee monitor ammonia at a frequency

established on a case-by-case basis in its discharge permit for the purpose of determining representative discharge levels.

(2) Whenever ammonia effluent limitations calculated under s. NR 106.32 for a sewage treatment works regulated under ch. NR 210 and treating primarily domestic wastewater are greater than or equal to 20 mg/L for the period of May through October or greater than or equal to 40 mg/L for the period of November through April, ammonia effluent limitations may not be included in the permit for the period or periods.

(3) If a permittee can satisfactorily demonstrate to the department that the ammonia effluent limitations calculated under s. NR 106.32 are greater than the influent total nitrogen loading and the wastewater treatment process will not cause periodic discharge levels greater than the proposed limits, ammonia effluent limitations may not be included in the permit that is up for reissuance. The department may require that the permittee monitor ammonia at a frequency established on a case-by-case basis in its discharge permit for the purpose of determining representative discharge levels.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.34 Compliance with antidegradation.

(1) The determination of effluent limitations for ammonia for all discharges to outstanding resource waters and exceptional resource waters as defined in ss. NR 102.10 and 102.11 shall be subject to the water quality antidegradation provisions ch. NR 207.

(2) Except as provided in sub. (1) and pursuant to s. NR 207.03 (1), if the department determines that a water quality based ammonia effluent limitation in effect in a permit as of March 1, 2004 may be increased in the next reissuance of that permit based solely on the application of the procedures in this subchapter, then the inclusion of the increased ammonia effluent limitation in the reissued permit is not subject to the provisions of ch. NR 207.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.36 Alternative whole effluent toxicity monitoring for certain discharges of ammonia. (1) In addition to water quality based effluent limitations for ammonia, the department may establish whole effluent toxicity testing requirements and limitations pursuant to ss. NR 106.08 and 106.09.

(2) Chronic fathead minnow whole effluent toxicity test samples may be modified to remove ammonia prior to testing when all of the following conditions are met:

(a) The whole effluent toxicity test is being conducted during a period when ammonia effluent limitations based on early life stage absent criteria are in effect.

(b) The permittee has demonstrated compliance with applicable acute and chronic water quality based effluent limitations for ammonia during the testing period.

(c) Total ammonia measured in whole effluent toxicity test effluent samples is less than the applicable chronic water quality based effluent limitation contained in the WPDES permit, but greater than the "ammonia-threshold number", determined as follows:

1. Measure the pH of the whole effluent toxicity test effluent sample after the sample has been warmed to the test temperature.

Note: Effluent samples should not be aerated to remove supersaturation of dissolved oxygen prior to use in the whole effluent toxicity test. The measured pH value shall be rounded to the nearest one-tenth of a unit.

2. Using the pH value of the sample as determined in subd. 1., determine the value of the ammonia multiplier in Table 1 for the pH range corresponding to the effluent pH.

3. Divide 100 by the appropriate in-stream waste concentration, as a percentage, contained in the WPDES permit; then multiply the resulting value by the ammonia multiplier determined in subd. 2. to obtain the ammonia threshold number.

(3) If all of the criteria in sub. (2) have been met, ammonia may be removed from the test sample.

Note: If ammonia is proposed to be removed from the test pursuant to the requirements of this section, the Department recommends that the ammonia be removed in accordance with procedures specified in Chapter 1.10 of the *WDNR Whole Effluent Toxicity (WET) Program Guidance Document*. Copies of this document can be obtained from the DNR Bureau of Watershed Management, Attn. Biomonitoring Coordinator, 101 South Webster Street, Box 7921, Madison, Wisconsin 53707-7921, or at the following website (<http://www.dnr.state.wi.us/org/water/wm/wet/wet/biomon/biomon.htm>)

Table 1

Effluent pH (s.u., after warming)	Ammonia Multiplier (mg/l total ammonia)
6.0 - 6.5	30
6.6 - 7.0	25
7.1 - 7.5	15
7.6 - 8.0	5
8.1 - 9.0	1

(4) Lagoon and stabilization pond systems that have been granted a variance pursuant to s. NR 106.38 may not be required to perform whole effluent toxicity testing during the months of November through May and whole effluent toxicity testing may be specified in a permit only for the period of June through October.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.37 Schedules of compliance. (1) The department shall determine and specify a reasonable compliance schedule in the WPDES permit if the permittee is unable to meet the ammonia effluent limits determined according to this subchapter at the time of permit reissuance. The department shall establish the term of the compliance schedule on a case-by-case basis and shall consider factors such as necessary planning, complexity of wastewater treatment issues, scope of construction, equipment delivery time, and construction seasons in establishing a schedule. In no circumstance may the date of compliance with the limits extend more than 5 years after the date of permit reissuance, unless a variance has been granted pursuant to s. NR 106.38.

Note: Under most circumstances, a reasonable compliance schedule is approximately 3 years in length.

(2) One additional year may be added to the compliance schedule, subject to the 5-year maximum, if either one of the following applies:

(a) The permittee is authorized in the permit to gather stream data in accordance with s. NR 106.32 (4) (c) that will significantly add to the data base used for limit calculations.

(b) The permittee is authorized in the permit to conduct a study to demonstrate that early life stages of burbot are not affected by its discharge in accordance with s. NR 106.32 (3) (a) 4. a.

(3) Six additional months may be added to the compliance schedule, subject to the 5-year maximum, if the permittee is authorized in the permit to make a cold water category demonstration pursuant to s. NR 106.32 (2) (b) 2.

(4) Any point source discharge which was not authorized by a WPDES permit prior to March 1, 2004 may not be provided with a schedule of compliance for achieving ammonia limits, but rather shall meet the limits upon initiation of discharge. A point source discharge previously authorized by a WPDES permit but relocated in the same receiving water body may be allowed a schedule of compliance.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

NR 106.38 Variances for stabilization pond and lagoon systems. (1) **GENERAL.** (a) **Applicability.** The owner or operator of a permitted wastewater treatment system that consists primarily of a stabilization pond system or a lagoon system may apply for a variance to the ammonia effluent limitations using the procedures in this section. The department may only grant a variance under this section to ammonia effluent limitations for stabilization pond and lagoon systems regulated under ch. NR 210.

Note: The variance procedures in this section are not applicable to industrial facilities.]

(b) **Findings.** As of March 1, 2004, the department finds all of the following:

1. Stabilization pond and lagoon systems subject to ch. NR 210 are operated primarily by communities that serve a population of 2000 or less.

2. Most stabilization pond and lagoon systems cannot meet ammonia effluent limitations determined under s. NR 106.32 during the colder months in the year.

3. In many cases, it will be necessary for owners of the systems in subd. 1. to construct a new wastewater treatment plant to comply with ammonia effluent limitations. Construction of new wastewater treatment facilities for these permittees will result in substantial and widespread adverse social and economic impacts in the area served by the existing stabilization pond or lagoon system.

(c) **Initial variance.** The procedures in this section may be used when an ammonia limit will be required under s. NR 106.33 for the first time in a WPDES permit reissued after March 1, 2004.

(d) **New dischargers.** A point source discharge that has not been authorized by a WPDES permit prior to March 1, 2004 may not receive approval for a variance under this section or pursuant to any other variance procedure.

(e) **Other variance procedures.** 1. A permittee may seek a variance from an ammonia limit in a reissued WPDES permit based on the criteria in s. 283.15 (4) (a) 1. a. to e., Stats., and using the procedures and requirements in s. 283.15, Stats., and ch. NR 200.

2. A permittee with a lagoon or stabilization pond system that is denied a variance under the procedures of this section may not be granted a variance for ammonia based on the criteria in s. 283.15 (4) (a) 1. f., Stats., and using the procedures in ch. NR 200 and s. 283.15, Stats.

(2) **APPLICATION FOR A VARIANCE.** (a) The application for a variance under this section shall be submitted with the WPDES permit application for reissuance, or within 30 days after the permittee receives written notification of the proposed ammonia limits, if the notification occurs later. The application shall be submitted on the form available from the department.

Note: The application form for this variance is available at no cost from the Department of Natural Resources, Bureau of Watershed Management, 101 South Webster Street, P.O. Box 7921, Madison, Wisconsin 53707-7921

(b) The application shall, at a minimum, include the following information:

1. Information in s. NR 200.22 (1) (a), (b) and (d).

2. Any ammonia and pH monitoring data for the applicant's lagoon or pond system collected during the permit term in effect at the time the application is filed. The permittee shall specify the sample location, sample types and dates, analysis dates, lab name and certification number.

3. A statement that the permittee is seeking a variance pursuant to this section.

4. Information on the number of lagoon or pond treatment cells, discharge periods, retention times, population served, influent flow, and available capacity for holding wastewater.

5. Other information requested by the department that is relevant to the review conducted under sub. (3).

Note: It is recommended that the permittee ask for calculation of potential ammonia water quality based limits at least 12 months prior to permit expiration. This information will help the permittee complete their variance request portion of the permit application which is due 180 days prior to permit expiration.

(3) **DEPARTMENT REVIEW.** (a) The department shall review the submitted application for the variance and determine whether the permittee's lagoon or stabilization pond system can meet the ammonia effluent limitations calculated using the procedures in s. NR 106.32. To make this determination, the department shall compare the calculated ammonia effluent limitations to the ammonia effluent data submitted under sub. (2). If the applicant

does not have ammonia discharge data for its system, the department shall use effluent data from a similar lagoon or pond system in the state to make the comparison. When comparing the limitations to effluent data, the department shall consider seasonal and annual temperature variations in the geographic area that occurred during the data gathering period. Any valid, representative effluent data which exceeds a calculated limitation shall be grounds for the department to determine that the existing system cannot meet the calculated ammonia limitations. The department may apply statistical methodology to make its determination on the ability of the system to meet ammonia limitations.

(b) The department's decision to approve or deny a variance under this section shall be made on or before the date of the s. 283.53 (3) (d), Stats., public notice for the proposed permit reissuance and shall be made in accordance with the following:

1. If the department determines that the permittee's lagoon or pond system cannot meet an ammonia effluent limitation, the department shall approve the variance. If the variance is approved, the department shall specify in the permit that the variance has been granted for ammonia, and the requirements in sub. (4) shall also be included in the permit.

2. If the department determines that the applicant's existing lagoon or pond system can meet the ammonia effluent limitations or that effluent limitations are not necessary as determined by s. NR 106.33, the department shall deny the variance and notify the applicant of this determination in writing.

Note: Pursuant to ss. 283.15(4)(d) and (8), and 283.63(4), Stats., there is no right to a contested case hearing on the variance decision for ammonia.

(4) PERMIT TERMS IF VARIANCE IS APPROVED. (a) If the department approves a variance to the ammonia effluent limitations under this section, the following requirements shall be included in the reissued permit:

1. The permittee shall conduct weekly monitoring of ammonia during discharge periods.

2. The permittee shall, to the extent practicable, minimize the non-domestic sources of nitrogen to the system and operate the treatment system to minimize exceedances of the calculated limits.

3. The permittee shall perform WET testing in accordance with s. NR 106.36.

4. Within 36 months following permit reissuance, the permittee shall submit an operational evaluation report that evaluates the ability of the existing stabilization pond or lagoon system to meet the ammonia effluent limitations calculated under s. NR 106.32. The report shall evaluate holding capacity of the stabilization pond or lagoon system and the results of operational changes and other minor system modifications that are designed to reduce ammonia discharges levels. The department's determination shall result in the following:

a. If, based on the operational evaluation required in this subdivision, the department determines the stabilization pond or lagoon system can consistently meet the ammonia effluent limitations calculated under s. NR 106.32 with operational adjustments, these ammonia effluent limitations shall become effective within 30 days of the department's determination, and the permittee is not required to submit a facilities plan under subd. 5. When making this determination the department shall consider weather conditions and wastewater loading during the operational evaluation period, relationship of current to design conditions and other pertinent site-specific factors.

b. If, based on the operational evaluation required in this subdivision, the department determines the stabilization pond or lagoon system cannot consistently meet the ammonia effluent limitations calculated under s. NR 106.32 with operational changes, the department shall renew the variance for the remaining term of the permit, and the permittee shall submit the facilities plan in accordance with subd. 5.

5. If required by subd. 4., the permittee shall, within 48 months of permit reissuance, submit a facilities plan that evaluates alternatives for meeting the ammonia effluent limitations calculated under s. NR 106.32. The facilities plan shall satisfy the requirements in ss. NR 110.08 and 110.09.

(b) Prior to the submittal of the operational evaluation and facilities plan in par. (a), the department shall provide, at the request of the permittee, alternative ammonia effluent limitations calculated using site-specific conditions, provided that such site-specific determinations were not already made by the department at the time of permit reissuance. A site specific study done in accordance with s. NR 106.32 (3) (a) 4. a. or (4) (c) shall be submitted to the department as justification for requesting the calculation of alternative effluent limitations. Any approved alternative ammonia effluent limitations shall be used by the permittee in conducting the operational evaluation and facilities plan submittal in par. (a) 4. and 5. Failure to obtain approval of ammonia effluent limitations based on site-specific conditions under s. NR 106.32 does not relieve the permittee from meeting the operational evaluation or facilities plan submittal requirements in par. (a) 4. and 5.

(5) CONTINUED VARIANCES. (a) If a permittee received approval for a variance to the ammonia standard under this section in a reissued permit, the permittee may request a continued variance from the ammonia standard in a subsequent reissued permit pursuant to the procedures in ch. NR 200 and s. 283.15 (4), Stats.

(b) If a permittee requests a continued variance in a subsequent reissuance because attaining the water quality based ammonia effluent limitations is not feasible because it will cause substantial and widespread adverse social and economic impacts in the area where the permittee is located as provided under s. 283.15 (4) (a) 1. f., Stats., information in s. NR 200.22 (1) and the following information, where applicable, shall be submitted and considered by the department in its decision on this variance request:

1. The date the major components of the stabilization pond or lagoon system were constructed, or most recently substantially modified.

2. The projected design life of the stabilization pond or lagoon system as stated in the approved facilities plan at the time the system was constructed.

3. In addition to the information in s. NR 200.22 (1) (p), information on the remaining debt service associated with the construction of the existing stabilization pond or lagoon system and household income in the service area.

4. An assessment of the current system as reflected by the information submitted to the department under the compliance maintenance annual reporting requirements of ch. NR 208.

5. Any other water quality standards variances previously granted to the permittee.

History: CR 03-050; cr. Register February 2004 No. 578, eff. 3-1-04.

Subchapter VII — Effluent Limitations for Chloride Discharges

NR 106.80 Purpose. The purpose of this subchapter is to specify how the department will regulate the discharge of chloride to surface waters of the state. Nothing in this subchapter shall be construed to prevent or prohibit the use, sale, rental, installation, and service of ion exchange water softeners.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.81 Applicability. The provisions of this subchapter are applicable to point sources which discharge wastewater containing chloride to surface waters of the state. The provisions of this subchapter are not applicable to discharges of storm water run-off regulated by a storm water permit.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.82 Definitions. In this subchapter:

(1) "Calculated limitation" means a chloride water quality-based effluent limitation.

(2) "Consistently meet" means that 95% of the representative effluent data are less than the calculated limitation.

(3) "DIR" means demand initiated regeneration.

(4) "Daily maximum interim limitation" means an effluent limitation calculated by the department which may be either:

(a) The upper 99th percentile of the permittee's representative data available to the department, or

(b) A value no greater than 105% of the permittee's highest representative effluent datum.

(5) "Reasonably meet" means that all of the permittee's representative effluent data would, using appropriate statistical techniques, be expected to be less than or equal to the target limitation following the completion of all of the source reduction efforts required by the permit.

(6) "Representative effluent data" means data, above the level of detection, which is not serially correlated and which represents normally expected effluent concentrations of chloride, collected during a period that can represent current or expected operations, or both, within the term of the permit.

(7) "Target limitation" means an effluent limitation which the permittee can reasonably meet within the term of the permit, following implementation of appropriate voluntary source reduction activities.

(8) "Target value" means an effluent concentration of chlorides which a permittee may be expected to reasonably meet following implementation of appropriate voluntary source reduction activities. A target value is not an enforceable limitation under the terms of the permit program, but establishes a measure of progress of source reduction activities.

(9) "Weekly average interim limitation" means an effluent limitation calculated by the department which may be either:

(a) The upper 99th percentile of the permittee's 4-day average of the representative data available to the department, or

(b) A value no greater than 105% of the permittee's calculated highest weekly average of the representative effluent data.

(10) "WPDES" means Wisconsin pollutant discharge elimination system.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.83 Regulation of chloride discharges.

(1) **CHLORIDE EFFLUENT LIMITATIONS.** The department shall evaluate the need to establish effluent limitations for chloride whenever representative effluent data indicate that the discharge from a point source contains chloride. If the department determines that a water quality-based effluent limitation for chloride is needed, a calculated limitation as defined in s. NR 106.82 (1) shall be included in the permit to meet the applicable water quality standards specified in chs. NR 102 to 105, unless a chloride variance is given pursuant to sub. (2).

(2) **CHLORIDE VARIANCE.** (a) *Findings.* On February 1, 2000, the department finds that:

1. End-of-pipe wastewater treatment technology for chloride is prohibitively expensive;

2. End-of-pipe wastewater treatment technology for chloride produces a concentrated brine that can be as much or more of an environmental liability than the untreated effluent;

3. Appropriate chloride source reduction activities are preferable environmentally to end-of-pipe effluent treatment in most cases; and

4. For some dischargers, attaining the applicable water quality standards specified in chs. NR 102 to 105 may cause substantial and widespread adverse social and economic impacts in the area where the discharger is located.

5. These findings shall be reviewed by the department every 3 years.

(b) *Application.* An existing discharger seeking a chloride variance under this subsection shall submit an application for a chloride variance when it submits its application for permit reissuance. The application shall include the permittee's basis for concluding that the findings in sub. (2) (a) for a chloride variance are applicable to its discharge.

(c) *Department determinations.* The department shall review the application submitted by the permittee. The application shall be approved if the department agrees with the permittee's basis for concluding that the findings in sub. (2) (a) for a chloride variance are applicable to its discharge.

(d) *Permit conditions implementing a chloride variance.* The department shall grant a chloride variance to an existing discharger when:

1. The findings in par. (a) supporting a chloride variance apply to the specific discharge; and

2. The permittee and the department agree upon specific permit language imposing an interim limitation, a target value or, where appropriate, a target limitation, and source reduction activities.

(3) **INTERIM LIMITATIONS, TARGET VALUES AND TARGET LIMITATIONS AND SOURCE REDUCTION ACTIVITIES.** (a) If the permittee and the department agree on the inclusion of voluntary source reduction activities and the imposition of an interim limitation and a target value or a target limitation in its permit, those activities and the interim limitation and target value or target limitations shall become permit requirements.

(b) If the permittee and the department cannot agree on voluntary source reduction activities to be included as permit requirements, those activities may not be included in the permit. If the permittee and the department cannot agree on an interim limitation and target value or a target limitation to be included as permit requirements, those limitations may not be included in the permit.

(c) If the permittee and the department cannot agree on voluntary source reduction activities and both an interim limitation and a target value or an interim limitation and a target limitation to be included as permit requirements, the department shall include a calculated limitation as defined in s. NR 106.82 (1) in the permit to meet the applicable water quality standards specified in chs. NR 102 to 105.

(4) **REAPPLICATION FOR A CHLORIDE VARIANCE.** When a permit containing a chloride variance approved by the department under sub. (2) (c) expires, the permittee may reapply for a chloride variance when it submits its application for permit reissuance. The application shall include the permittee's basis for concluding that the findings in sub. (2) (a) are applicable to its discharge.

(5) **APPLICABILITY OF THE VARIANCE PROCESS IN S. 283.15, STATS.** If a calculated limitation is included in the permit, a permittee may apply to the department for a variance from the water quality standard used to derive the calculated limitation, pursuant to s. 283.15, Stats. Where a permittee has been granted a chloride variance and its permit includes an interim limitation, a target value, a target limitation and requirements for chloride source reduction activities, the provisions of s. 283.15, Stats., are not applicable to the interim and target limitations.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.84. Compliance with Wisconsin water quality antidegradation rules when reissuing a permit. Chapter NR 207 does not apply in those instances in which a reissued permit includes effluent limitations for chloride which represent a lowering of concentration as compared to the interim limitation in the previous permit.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.85 Determination of the necessity for water quality-based effluent limitations. (1) The department shall determine the need for chloride water quality-based effluent limitations for point source discharges whenever the discharges

from the point sources contain chloride at concentrations or loadings which do not, as determined by any method in this section, meet the applicable water quality standards specified in chs. NR 102 to 105.

(2) When considering the necessity for water quality-based effluent limitations, the department shall consider in-stream bio-survey data and data from ambient toxicity analyses whenever the data are available.

(3) When considering the necessity for chloride water quality-based effluent limitations, the department shall compare the upper 99th percentile of available representative discharge concentrations to the calculated limitations, pursuant to s. NR 106.05 (4).

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.86 Monitoring. Notwithstanding any other section in this subchapter, the department shall determine on a case-by-case basis the chloride monitoring frequency to be required in the permit.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.87 Establishment of effluent limitations. (1) **CALCULATED LIMITATIONS.** If water quality-based effluent limitations for chloride are deemed necessary, those limitations shall be derived pursuant to s. NR 106.06 and, for the purposes of this subchapter, shall be labeled "calculated limitations".

(2) **INTERIM LIMITATION.** The interim limitation may be expressed as both a daily maximum and a weekly average, calculated in accordance with s. NR 106.82 (4) and (9).

(3) **TARGET VALUE.** The target value may be expressed as both a daily maximum and a weekly average. The department and the permittee shall consider both the implementation and the anticipated effectiveness of appropriate voluntary source reduction activities in order to determine a target value which is reasonably achievable within the term of the permit.

(4) **TARGET LIMITATION.** The target limitation may be expressed as both a daily maximum and a weekly average. The department and the permittee shall consider both the implementation and the anticipated effectiveness of appropriate voluntary source reduction activities in order to determine a target limitation which is reasonably achievable within the term of the permit.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.88 Application of and compliance with chloride effluent limitations in a permit. (1) If chloride water quality-based effluent limitations are deemed to be necessary in accordance with s. NR 106.85 and the permittee's representative effluent data indicate that the permittee can consistently meet the calculated limitation, the department may include the calculated limitations in the permit with an appropriate compliance schedule.

(2) If chloride water quality-based effluent limitations are deemed to be necessary, and the permittee's representative effluent data indicate that it cannot consistently meet the calculated limitation, and the provisions of s. NR 106.83 for a chloride variance are met, the department may instead include all of the following in the permit:

- (a) Chloride monitoring.
- (b) An interim limitation for chloride which is effective on the date of permit issuance.
- (c) Tier 1 source reduction.
- (d) A target value or a target limitation with an appropriate compliance schedule, which is effective on the last day of the permit.
- (e) If appropriate, either tier 2 or tier 3 source reduction if the department believes that any of the additional conditions in the tier 2 or tier 3 source reduction activities are reasonable and practical within the term of the permit.

(3) Interim limitations, target values and target limitations established according to this subchapter shall be expressed in the permit as a concentration limitation, in units of mg/L or equivalent units. Pursuant to s. NR 106.07 (2), calculated limitations established in accordance with this subchapter shall be expressed in the permit both as a concentration limitation, in units of mg/L or equivalent units, and as a mass limitation, in units of Kg/d or equivalent units.

(4) Effluent limitations based on an acute criterion shall be expressed in permits as daily maximum limitations; and effluent limitations based on a chronic criterion shall be expressed in permits as weekly average limitations.

(5) A determination of compliance with interim, target and calculated limitations and comparison with target values shall be based upon 24-hour composite samples.

(6) Mass limitations shall be determined for calculated limitations pursuant to s. NR 106.07 (2) and (9).

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.89 Alternative whole effluent toxicity monitoring and limitations for dischargers of chloride. (1) In addition to interim, target and calculated water quality-based effluent limitations and target values for chloride, the department may establish whole effluent toxicity testing requirements and limitations pursuant to ss. NR 106.08 and 106.09.

(2) Acute whole effluent toxicity testing requirements and acute whole effluent toxicity limitations may be held in abeyance by the department until source reduction actions are completed if either:

(a) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride exceeds 2,500 mg/L, or

(b) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride is less than 2,500 mg/L, but in excess of the calculated acute water quality-based effluent limitation, and additional data are submitted which demonstrate that chloride is the sole source of acute toxicity.

(3) Chronic whole effluent toxicity testing requirements and chronic whole effluent toxicity limitations may be held in abeyance by the department until source reduction actions are completed if either:

(a) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride exceeds 2 times the calculated chronic water quality-based effluent limitation, or

(b) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride is less than 2 times the calculated chronic water quality-based effluent limitation, but in excess of the calculated chronic water quality-based effluent limitation, and additional data are submitted which demonstrate that chloride is the sole source of chronic toxicity.

(4) Following the completion of source reduction activities, the department shall evaluate the need for whole effluent toxicity monitoring and limitations.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.90 Source reduction. (1) **INTRODUCTION.** A 3-tiered system of source reduction measures is established in ascending order of increasing capital and operating costs.

(2) Tier 1 source reduction measures are those voluntary source reduction activities that identify and quantify chloride and softened water sources and usage, educate users and system operators on the need to minimize salt and softened water demands and promote better housekeeping practices that will reduce chloride and softened water consumption, and other activities similar in nature. Tier 1 source reduction measures may include any of the following:

- (a) For POTWs:

1. Identify sources of chloride to the sewer system.
2. Educate homeowners on the impact of chloride from residential softeners, discuss options available for increasing softener salt efficiency, and request voluntary reductions.
3. Recommend residential softener tune-ups on a voluntary basis.
4. Request voluntary support from local water softening businesses in the efforts described in subs. 2. and 3.
5. Educate licensed installers and self-installers of softeners on providing optional hard water for outside faucets for residences.
6. Request voluntary reductions in chloride input from industrial and commercial contributors.
7. Where a public water utility has been identified as a significant contributor of chloride to the sewer system, request that the water utility conduct activities listed in par. (b).

(b) For direct-discharging municipal or commercial water softening plants:

1. Identify the users of soft water or the processes using soft water, and the amounts they use.
2. Determine which users or processes can tolerate unsoftened water, and determine their impact on demand.
3. Determine which users can close-loop their once-through cooling system or which processes can be close-looped, and determine their impact on demand.
4. Seek voluntary demand reductions.

(c) For dairies, train plant personnel to be more aware of salt conservation, emphasizing simple, cost effective housekeeping measures. For example, spilled salt can be cleaned up as a solid waste rather than flushed down the floor drain.

(d) For those facilities which process vegetables or meats:

1. Train personnel as described in par. (c) in housekeeping measures.
2. Optimize softener operation to ensure the appropriate regeneration interval and salt dosage are used.

(e) For any other facility not listed in pars. (a) to (d), conduct activities that identify and quantify chloride and softened water sources and usage and educate personnel on appropriate housekeeping practices and the need to minimize salt and softened water demands.

(3) Tier 2 source reduction measures are those voluntary source reduction activities that improve and optimize equipment and processes, encourage restricted chloride use by users, eliminate wasteful practices and establish recycling practices where feasible, and other activities similar in nature. Tier 2 source reduction measures may include any of the following:

(a) For POTWs, institute sewer use ordinances that:

1. Require significant industrial and commercial contributors to evaluate their water treatment systems with regard to softened water requirements, with the results of that evaluation being the basis for potential restrictions of chloride inputs.
2. Mandate a DIR and high salt efficiency standard for new residential softeners.
3. Mandate participation in a residential softener tune-up program, which involves qualified periodic servicing to ensure proper control settings and adjustments.

4. Where a public water utility has been identified as a significant contributor of chloride to the sewer system, request that the water utility conduct activities listed in par. (b).

(b) For direct-discharging municipal or commercial water softening plants:

1. Optimize softener operation to ensure the appropriate regeneration interval and salt dosage are used.
2. If the regeneration is manual or timer-initiated, switch to a DIR controller.

3. Evaluate the feasibility of brine reclamation.

(c) For dairies:

1. Improve the handling of salt brines and the handling of cheese into and out of brine systems. Consider capital improvements such as automating the brine system, properly designed drip pans and splash guards.

2. Optimize softener operation to ensure the appropriate regeneration interval and salt dosage are used.

3. If the regeneration is manual or timer-initiated, evaluate the feasibility of switching to a DIR controller.

4. Evaluate the feasibility of softener brine reclamation.

5. Determine which subprocesses can tolerate unsoftened water, and make appropriate changes.

6. Determine whether once-through cooling systems can be close-looped, and make appropriate changes.

7. For plants that condense whey, evaluate the feasibility of using condensate of whey (COW) water for the first rinse for clean-in-place (CIP) systems and for boiler makeup water.

(d) For those facilities which process vegetables:

1. If the regeneration is manual or timer-initiated, evaluate the feasibility of switching to a DIR controller.

2. Evaluate the feasibility of softener brine reclamation.

3. Investigate the feasibility of using a phosphonate additive instead of softening the cooling water.

4. Evaluate the feasibility of reusing once-through cooling water as boiler make-up.

5. Investigate the feasibility of using unsoftened water for container fill.

(e) For those facilities which process meats:

1. If the regeneration is manual or timer-initiated, evaluate the feasibility of switching to a DIR controller.

2. Evaluate the feasibility of softener brine reclamation.

(f) For any other facility not listed in pars. (a) to (e), conduct activities that improve and optimize equipment and processes, eliminate wasteful practices and establish recycling practices to achieve chloride reductions.

(4) Tier 3 source reduction measures are those voluntary source reduction activities that evaluate the feasibility of replacing or upgrading equipment and processes or evaluate the feasibility of using alternative technologies or processes, and other activities similar in nature. Tier 3 source reduction measures may include any of the following:

(a) For POTWs, where residential point-of-use softening is the primary chloride input:

1. Evaluate the requirement for new and replacement softeners to be metered demand type, with a higher, greater than 3350 grains of hardness exchange per pound of salt, efficiency capability.

2. Evaluate the imposition of installation restrictions so that outside hose bibs are on unsoftened water. If restrictions are imposed, new homes and those in real estate transfers should be required to have plumbing restrictions for hard water by-passes, and the requirement should apply to self-installed equipment as well.

(b) For POTWs, where a central water supply softener is the primary chloride input, conduct activities listed in par. (c).

(c) For direct-discharging municipal or commercial water softening plants:

1. Evaluate the feasibility of achieving greater salt efficiencies, greater than 3350 grains of hardness exchange per pound of salt.

2. Evaluate softening alternatives that replace the sodium cycle ion exchange method of softening.

3. Blend softened and unsoftened water to strike a balance between delivered water quality and environmental protection.

(d) For dairies:

1. For plants that make brine salted cheeses, evaluate the feasibility of membrane filtration for reconditioning the brine so that it can be reused.

2. For plants that make brine salted cheeses, evaluate the feasibility of using a no-brine make procedure in which salt is added directly to curd during the manufacturing procedure, thereby reducing salt discharges from spent brines.

(e) For those facilities which process vegetables:

1. Evaluate the feasibility of eliminating brine flotation for quality grading, if applicable.

2. Evaluate the feasibility of installing a closed-loop system for cooling water.

3. Evaluate the feasibility of installing a brine recovery and reuse system for reducing salt waste at the point of supplying flavorings to containers.

(f) For those facilities which process meats:

1. Investigate the feasibility of replacing brine chills with air, water or air-water chills.

2. Reduce drainback through operational and equipment improvements.

3. Investigate the feasibility of chill brine reconditioning and reuse.

4. Evaluate the feasibility of reusing once-through cooling water, or installing a closed-loop cooling water system.

5. Evaluate phosphonate additives instead of softened water.

(g) For any other facility not listed in pars. (a) to (f), evaluate the feasibility of replacing or upgrading equipment and processes, and the use of alternative softening technologies to affect chloride reductions.

(5) **SOURCE REDUCTION REPORTING.** Following the completion of tier 1, 2 or 3 source reduction activities specified in the permit, but no later than 6 months prior to permit expiration, the permittee shall file a written report to the department documenting the current reduction as well as the anticipated future reduction in salt usage and chloride effluent concentrations.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.91 Publicly owned treatment works which accept wastewater from public water systems treating water to meet primary safe drinking water act stan-

dards. Publicly owned treatment works which accept wastewater from a public water system treating water to meet the primary maximum contaminant levels specified in ch. NR 809, if not able to meet the calculated limitation, may be given an interim limitation, a target value, a target limitation and appropriate source reduction requirements, pursuant to s. NR 106.83. No calculated limitation, interim limitation, target value, target limitation, or source reduction requirement shall interfere with the attainment of the primary maximum contaminant levels specified in ch. NR 809.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.92 Authority of a publicly owned treatment works to regulate chloride discharges. A publicly owned treatment works has the authority to regulate the discharge of chloride as enumerated in s. NR 211.40.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.93 New discharges. Any point source which has not been authorized under a WPDES permit prior to February 1, 2000, shall be required to meet the calculated limitations. Relocation of an existing discharge which was issued a WPDES permit prior to February 1, 2000, may not be considered a new discharge.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.94 Relocation of an existing discharge. An existing discharge which was issued a WPDES permit prior to February 1, 2000, and which is relocated after February 1, 2000, may be subject to voluntary source reduction activities and both an interim limitation and a target value or an interim limitation and a target limitation pursuant to s. NR 106.83 if the provisions of ch. NR 207 are met. Relocation includes the diversion of a discharge from a land treatment system to a surface water.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.95 Multiple discharges. The provisions of s. NR 106.11 are applicable to multiple discharges of chloride.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

NR 106.96 Analytical methods and laboratory requirements. The provisions of s. NR 106.14 regarding analytical methods, sample handling and laboratory requirements are applicable to discharges of chloride.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: May 9, 1996

TO: WWM and WRM Supervisors
Permits Staff

FROM: Mary Jo Kopecky - WW/2
Bruce Baker - WR/2

SUBJECT: Wisconsin Strategy for Regulating Mercury in Wastewater

The attached strategy for regulating mercury in wastewater permits is the culmination of an effort started in mid 1993 and reaffirmed in November 1994 as one of the 14 policy issues receiving priority for Permit Streamlining Implementation. The goal of the project is to devise an alternative regulatory approach for mercury which recognizes the analytical limitations, yet makes effective progress in reducing its release to the environment.

The report sets up four levels of regulation or assistance for municipal entities and also makes recommendations for industrial facilities. The approach focuses on source identification and pollution prevention instead of the traditional effluent limitation setting/enforcement process. We believe that due to its particular problems with regulation, mercury lends itself as a pollutant whose control is best undertaken in a cooperative mode, making full use of partnerships.

A summary of comments from both Department staff and stakeholders outside the Department to an earlier draft of this document is available electronically in the streamlining file service at \labtoxic\products\hgcommen.sum. Most of the comments were generally favorable and the document was improved by incorporation of ideas raised by those making comments.

A 3/4 time Wastewater Mercury Specialist, funded through September 30, 1996, will be the focal point for implementing the recommendations of the strategy. This date will probably be extended.

Changes to NR 106 have been proposed as part of the more comprehensive code revisions associated with the Great Lakes Initiative. To further help with implementation, the worksheet for integrating new policy/guidance issues into the streamlined permit process has been completed. Tools for placing requirements into permits are currently available. Brief training presentations will be provided for Department staff responsible for implementing the strategy in permits as opportunities arise.

Approved:

Susan L. Sylvester
Susan L. Sylvester

5/13/96
Date

cc Team Members
Dan Graff - LC/5
Jack Sullivan -TS/6

WWM and WRM Permits Staff
Stephen Jann - EPA Region V
David Pfeiffer - EPA Region V



WISCONSIN STRATEGY

for

REGULATING MERCURY IN WASTEWATER

Prepared by the Wisconsin Department of Natural Resources

May 1996

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WISCONSIN STRATEGY FOR CONTROLLING MERCURY IN WASTEWATER

EXECUTIVE SUMMARY

Mercury is a bioaccumulating toxic substance which is found in aquatic systems and organisms. The Water Permit Streamlining Team on Lab QA and Toxics has investigated the problem of regulating mercury at wastewater treatment facilities. Failure of the current analytical system to provide reliable data on effluent mercury levels at these plants prevents accurate determinations of what facilities have a reasonable potential to cause or contribute to water quality standards violations. This has hampered efforts to regulate mercury in permits following the traditional effluent limit-setting means. A sub-team of the Lab QA and Toxics Team, hereafter called the Team, was assigned to study the problem. The Team's objective was to devise an alternative regulatory approach for mercury which recognizes the analytical limitations and yet makes effective progress in reducing its release to the environment. This report fulfills the charge by describing that new approach.

Our approach sets up four levels of emphasis for municipal entities, based on facility size (mass loadings), sludge mercury concentrations and sensitivity of receiving waters. Recommendations for industrial facilities are also given. The approach focuses on source identification and pollution prevention rather than effluent limitations and monitoring, although effluent limits may still be imposed where information indicates the potential for unusually high effluent mercury levels. The Department has drafted proposed changes to NR 106 which recognizes this type of approach.

The benefits of this approach are that it:

- ▶ Directs Department and permittee attention towards implementing pollution prevention techniques, thereby reducing the release of mercury to the environment and minimizing the potential for water quality standards violations;
- ▶ Reduces requirements for permittees to perform effluent testing for mercury using methods not sensitive enough to provide meaningful results; and
- ▶ Reduces Department and permittee effort and expense associated with permittee attempts to keep limits out of their permits or seek higher limits.

This approach will help reduce the release of mercury to the environment where it can be done effectively and practically. Through a mix of regulatory measures and assistance, it provides an innovative and logical next step in the control of point source mercury release. The immediate future will be a trial period for this innovative strategy. We will use what we learn during this trial to readjust or refine how we regulate mercury and other substances.

As stated above, the purpose of this document is to describe a regulatory approach for wastewater. However, we realize that its success is, in part, dependent on effective public education about the effects of mercury pollution. Thus, parts of our implementation plan are designed to address public education. It also points out the need for a coordinated effort to deal with mercury in a way that addresses protection of all environmental media; water, air and land.

GOALS

The primary goals of this strategy are:

1. To reduce the amount of mercury released to the environment through the wastewater medium.
2. To direct efforts of the Department and permittees toward pollution prevention efforts and away from keeping mercury limits out of permits or demonstrating compliance with limits.
3. To reduce the amount of permit re-work by Department staff, previously made necessary by falsely high effluent monitoring results for mercury.

BACKGROUND

Mercury has re-emerged as an environmental concern and problem. Until recently, many experts assumed that the environmental effects of mercury were solved during previous decades by eliminating direct methylmercury discharges from various industrial processes. However, the discovery of elevated mercury concentrations in fish in relatively remote areas disproves that assumption and implicates atmospheric deposition as a source. It is now believed that the atmosphere is the primary medium which transports mercury to many surface water bodies. Anthropogenic (man made) sources of mercury entering the atmosphere, of which coal combustion, smelting and waste disposal are the largest, considerably exceed natural sources.

The primary toxicological effects of mercury exposure are to the central nervous system. Symptoms include numbness of the extremities, slurred speech, muscular coordination difficulties, deafness, and visual field constriction. Several severe historical episodes have resulted in acute cases, leading to death.

Elemental Mercury in the atmosphere is not particularly toxic. However, once in the water, mercury can be converted to methylmercury. In this organic form, it bioaccumulates and is extremely toxic. Many of Wisconsin's surface waters do not meet the water quality criterion of 2 ng/L for total mercury, set by NR 105 Wisconsin Administrative Code, for the protection of fish-consuming wild and domestic animals. Mercury contamination in fish has also led to the issuance of consumption advisories for people who eat sport fish from Wisconsin waters. Since the state began routinely monitoring for mercury in fish in 1980, 235 lakes and flowages and 350 miles of rivers have been added to the state's fish consumption advisory.

While the major source of surface water mercury contamination appears to be atmospheric deposition, it is appropriate to reduce any release of mercury to the environmental from various human activities, including the discharge of wastewater effluent. Perhaps more importantly, mercury in sludge which is spread on land may eventually contribute to the global mercury problem through its volatilization back to the atmosphere.

The Department has been regulating mercury in wastewater effluents since 1988 using the same approach as for other toxic substances. This approach imposes effluent limitations in WPDES permits if, based on effluent testing, there is a reasonable potential that surface water quality criteria for the

substance will be exceeded. For mercury, this "reasonable potential" has meant any detect in an effluent sample using the standard approved commercial test method.

Due to mercury's tendency to bioaccumulate, numerical effluent limitations are very low, often far below the lowest level that can be detected in water by standard analytical tests. Over the years, routine effluent testing at many facilities has detected mercury relatively frequently. This has resulted in a fairly large number of effluent limits for mercury, particularly in municipal permits.

Once a limit is imposed in a permit, the Department must take regulatory action if the permittee cannot demonstrate compliance with that limit. While biological wastewater treatment processes, which are commonly used by most municipal and some industrial facilities to remove organic wastewater constituents, very effectively remove mercury, there are no treatment technologies which will further reduce effluent mercury levels. Continued occasional detects have driven permittees to expend considerable effort and resources attempting to demonstrate that effluent limits are unnecessary or that they should be allowed variances to water quality standards. This has been an extremely time-intensive process for the Department and a financial burden for permittees which does little or nothing to reduce the loading of mercury to the environment.

All municipal wastewaters contain some level of mercury. Sources include dental and medical waste, some consumer products (for example, broken thermometers), human wastes, rainwater infiltration, flush-out of historical deposits in sewers, etc. Due to the higher volumes of wastewater received, larger plants take in a larger total mass of mercury. A May 1993 paper¹ estimated that the total quantity of mercury received at Wisconsin wastewater treatment plants is equal to approximately 10% of the amount of mercury in precipitation falling on the land surface of the State.

An extremely high percentage of mercury contained in wastewater becomes concentrated in treatment plant sludges. Thus, sludge concentrations can be used to predict which plants may have elevated mercury loadings.

The recently promulgated federal sludge regulation (40 CFR 503) and chapter NR 204, Wisconsin Administrative Code, effective January 1, 1996, establish risk-based cumulative mercury and other pollutant loading limits for land on which municipal sludge is applied. From EPA's risk-based cumulative loading limits to land, conservative assumptions were used to back-calculate sludge concentration levels (high quality) at which the cumulative loading limit would not be reached for 100 years in the "worst case" scenario. A second concentration level (ceiling concentration) was established based on the 99th percentile of actual pollutant concentrations found in municipal sludges through the National Sewage Sludge Survey. Sludge may not be land applied if any of the nine regulated pollutants exceed their ceiling concentrations. No Wisconsin municipality has exceeded this concentration for mercury since the federal rules became effective in February 1993. Ninety seven percent of Wisconsin municipalities are below the high quality level for mercury and need not cumulatively track site loadings due to the low probability of ever approaching the cumulative loading

¹*Quantification of Total Mercury Discharges From Municipal Wastewater Treatment Plants To Wisconsin Surface Waters*, Tom Muga, Wisconsin Department of Natural Resources, Bureau of Wastewater Management

limit. The remaining three percent must keep cumulative loading records to all sites on which they land apply.

The obvious way to reduce above-average mercury levels in a community's sludge is by controlling sources of mercury to its treatment plant. Since mercury is more quantifiable in sludge than in effluents, using sludge data as a trigger for regulatory action would benefit the environment by requiring reduction efforts where influent mercury concentrations are the highest.

CONSIDERATIONS OF THE TEAM

The Wastewater Permit Streamlining Implementation strategy calls for the formation of policy teams to deal with specific issues which are an impediment to timely permit reissuance. Mercury regulatory reform was targeted by permit staff, and the Team was created to determine if changes in how we presently regulate mercury are justified and, if so, to develop procedures for those changes. The Team officially formed as a sub-team of the Lab QA and Toxics Permit Streamlining Implementation Team on January 26, 1995. It is a multi-disciplinary effort, with members from the Municipal Wastewater, Pretreatment and Water Resources programs, representing both the Central Office and District perspectives.

Effluent Data Not Representative

The Team believes that it is not practical to require facilities to routinely generate representative effluent data for mercury at this time. However, we probably can quantify the most significant wastewater source streams with adequate certainty to allow us to trace mercury contributions back to their sources.

It is clear that the EPA approved test method, Cold Vapor Atomic Absorption (CVAA), with a detection limit of 200 ng/L, does not provide adequate sensitivity to measure concentrations of mercury in treatment plant effluents. This has been demonstrated by comparison of effluent data generated by a number of municipalities using the Archeometry Laboratory in Duluth versus various commercial labs. The data from the Duluth Lab show effluent mercury levels much lower than the previously reported values from commercial labs.

Although the Archeometry Lab's data is a great improvement from that previously reported, it appears as if these results could also be biased (high). Lakes researchers, who have been studying the mercury problem for a longer time, have reported similar findings. That is, as detection limits of the test methods have improved, the measured mercury levels in lakes have decreased. There are several reasons for this phenomenon. First, the analytical methods are being pushed to quantify results at levels they were not designed for. Second, due to mercury's high volatility and widespread commercial use, low concentrations in the atmosphere can contaminate analytical supplies, including sampling containers, reagents and laboratory water. This makes it very difficult to produce acceptable blanks during sampling and analysis. Thus, lab instrument sensitivity improvements must be accompanied by elimination of background contamination. Unfortunately, the extreme measures necessary to eliminate contamination to the extent necessary for accurate testing of effluent and surface waters are very expensive and difficult to reproduce without using specially trained staff.

EPA has recently developed two new more sensitive methods for measuring mercury in water. One of these methods appears capable of adequately quantifying effluent levels if steps are taken to avoid

sample contamination. However, the Team believes the costs associated with the necessary clean sampling and analytical steps cannot be justified at this time, because the only feasible control option for wastewater treatment plants is pollution minimization and direct effluent discharges of mercury are overshadowed by atmospheric contributions.

While it is unlikely that we can accurately measure effluent levels without resorting to extreme measures, influent levels are high enough that we can quantify them by taking reasonable precautions. These precautions include increased care during sample bottle preparation and sampling and relatively minor improvements to analytical equipment and the laboratory environment. We believe these steps should allow commonly achievable detection limits in wastewater samples of about 20 to 50 ng/L. Steps taken now to obtain accurate influent data will help target future source reduction efforts.

Under the circumstances, it appears reasonable to consider some innovations if the environmental benefits and the process serve both the Department and the permittees.

Use of Sludge and Influent Data

We have very little historical influent mercury data and much of it is censored (a good percentage of the values are "no detects"). However, we do have sludge measurements taken over an extended period of time for all municipal facilities that land apply sludge. Mercury levels in sludges are more reliably quantified because influent mercury received at treatment plants becomes concentrated in the sludges. Since the sludge is concentrated, sludge testing is not as vulnerable to the contamination problems and sensitivity limitations inherent in effluent testing. Therefore, the sludge mercury data we now have may be useful as a proxy for mercury levels entering the treatment plant and may indicate where source reduction efforts have the greatest potential for success.

We recognize that, due to sludge's matrix problems and variability, sludge data are not without their problems. Before concluding that sludge data accurately represents mercury levels at a given facility, we need to be careful to verify test results and use some statistical methods to correct for variability. Initial steps in the process should include a period for additional data collection, since individual samples from a medium as varied as sludge may not represent an accurate picture of long-term concentrations.

For our initial cut, we believe that a combined approach of looking at both high individual sludge concentrations and high average sludge concentrations provides an indicator of where efforts to control mercury loadings to sanitary sewer systems might be most successful. The Department's municipal sludge database was screened to determine which facilities had the highest sludge mercury levels. The screening process was threefold. First, communities with recent mercury levels above the 40 CFR 503 "high quality" level were identified. Second, communities were ranked by the mean of all their recent sludge values to minimize the impact of high and low values on overall sludge quality. Third, complete data sets from communities with both "high quality" exceedances and mean mercury values which approached but were still below the high quality values, were analyzed over time to determine trends. Several communities showed decreasing mercury concentrations in their sludge, probably due to activities in the community which would be expected to reduce mercury loads. By these steps, the communities with increasing or recent "high quality" exceedances and with mean values near the high quality concentration levels for mercury were identified (Appendix B).

The team wants to make it clear that the "high quality" designation was used merely as a trigger. It does not indicate that these communities are in violation of any standard or that the sludge is not valuable as a soil amendment material.

TEAM RECOMMENDATIONS

General Recommendations

The Team believes that action is warranted to reduce loadings of mercury to wastewater treatment plants in instances of high mercury mass loadings (by our largest municipal treatment plants), high mercury concentrations (as measured in treatment plant sludge) and in particularly sensitive receiving waters (Lake Superior with its "Zero Discharge" goal for mercury). We recommend this be accomplished by pollutant minimization activities. We expect these activities will reduce even further the possibility that direct discharges of mercury to surface waters will exceed water quality standards. They will also improve sludge quality, lessening the opportunities for indirect water quality impacts.

The mercury in municipal waste streams comes from domestic, commercial and industrial users. Because the Department is new at applying waste minimization techniques that will reduce mercury loadings from this diverse group of users, the Team consciously refrained from taking an overly aggressive, regulatory approach at this time. Instead, a cooperative strategy involving the Department and dischargers is the preferred option. We can expect progress in reducing loadings of mercury to treatment plants to be gradual as communities tackle the more easily identified and removable sources first. The approach will serve as a learning phase to be used to better predict achievable mercury source loading reductions. Refined approaches will follow, based on what we learn.

Proposed new language in NR 106, Wisconsin Administrative Code, would allow the Department to require a pollutant minimization program as an alternative to an effluent limitation where use of the most sensitive approved test method does not allow quantification of discharge levels. The change, part of more sweeping revisions to NR 106, should become effective in about a year.

Three factors should be considered when determining what level of effort toward mercury source reduction is appropriate for a given municipality. They are:

1. Community size - Because mercury use is widespread, larger dischargers have the potential for a more significant environmental impact based on total mass of mercury. They also have more capability to pursue mercury reductions.
2. Sludge Mercury Concentration - Facilities with the highest sludge mercury levels are those that have the greatest potential of being successful at locating specific mercury sources and reducing loading to their treatment facilities through source control.
3. Discharge location - Because of the demonstration project goal of zero discharge of bioaccumulating toxic substances to Lake Superior, facilities discharging to the Lake Superior basin need special attention.

The recommendations made below are intended as generalizations. The Team acknowledges that, in rare circumstances, measurable effluent levels could be high enough that effluent limits may be appropriate. However, the need for limits will be the exception, rather than the rule, and this strategy

assumes that representative effluent mercury data will not be available in most cases. On the other hand it does not supersede the requirements in NR 106, Wisconsin Administrative Code, pertaining to the need for limits.

Specific Recommendations for Municipalities

The team recommends that four basic groups of municipal entities be designated, based on the above factors. These groups and their expected levels of effort are as follows:

GROUP 1 - Milwaukee MSD, Madison MSD and Green Bay MSD - These entities will be expected to undertake a mercury identification/reduction program with details to be negotiated between the Department and each of the three permittees. Appendix D, entitled "Municipal Wastewater Mercury Reduction" is a listing of mercury reduction activities to use as a starting point in the design of a mercury reduction plan. The Department will meet with the entities to negotiate mercury reduction plans. An important element of the plans will be for development of the capability, if they do not already have it, to perform influent and collection system mercury monitoring using a method which provides a sensitivity 20 to 50 ng/L or lower. This information will allow entities to perform rough mass balance calculations. At this time we believe sludge monitoring frequencies specified in the current permits are sufficient. Significant mercury sources identified will need to be targeted for source reduction or other control strategies, as specified in the negotiated program documents.

GROUP 2 - All facilities with design flows greater than 5 million gallons per day (MGD) (see Appendix A) - We will continue to require these facilities to perform monthly influent and effluent mercury monitoring and will require them to use a method which provides a sensitivity of 20 to 50 ng/L or lower. The information gained from the monitoring may be used to identify additional large communities for future mercury reduction program development. These facilities currently monitor their sludge three to four times a year.

GROUP 3 - Facilities which have at least two recent exceedances of the high quality sludge designation for mercury (17 mg/kg) and a relatively high, recent, average sludge concentration (see Appendix B for a list of facilities based on currently available sludge data, however facilities may be added to the list, or deleted, as more data becomes available) - At the time of permit reissuance, these facilities will be required through their WPDES permits to perform quarterly influent monitoring using a method which provides a sensitivity of 20 to 50 ng/L or lower and twice yearly sludge mercury monitoring for a period of two years (this frequency is based on the existing list of communities in Group 3, all of which are relatively small in size). If high mercury levels are confirmed, monitoring must continue along with other requirements. If a known source can be easily identified, efforts should be made to reduce loadings from that source immediately. However if a known source is not easily identified and the two years of data show continued high levels of mercury, that facility must comply with a. through c. below. If elevated mercury levels for a facility are disproved, that facility will be dropped from group 3 and no further requirements will apply.

These steps are optional for those facilities with permits not expiring or not being modified for other reasons. However, we will attempt to secure immediate cooperation by providing assistance and informing them that voluntary measures now may avoid regulatory action later.

- a. Inventory non-domestic users to determine those who discharge mercury to the sanitary sewer system. Supply category-specific source control information made available by the Department to each identified user. Ask (selected) mercury dischargers to develop Mercury Minimization Plans. Discuss establishment of a mercury product collection program to reduce deliberate release of mercury to the sanitary sewer and to educate the public.
- b. Survey identified sources annually to determine what measures have been taken to reduce mercury discharge, and to identify reduction measures for the upcoming year.
- c. Submit an annual report to the Department detailing identified sources and efforts taken to reduce mercury discharge.

Additional ideas for mercury source identification and mercury minimization are found in Appendix D, and could be used as appropriate.

GROUP 4 - Facilities that discharge to the Lake Superior Basin (see Appendix C) - As mentioned above, the Lake Superior basin has been designated a demonstration area for the elimination of toxic bioaccumulating discharges. The municipal treatment systems that discharge to the lake, or to surface waters draining to the lake, will be given targeted information and access to networks of people and organizations focusing on the elimination of mercury discharges. Also, we will request these facilities to perform influent mercury monitoring using a method which provides a sensitivity of 20 to 50 ng/L or lower. We will request facilities with design flows greater than 100,000 gallons per day to perform this monitoring yearly. We will request smaller facilities to monitor only twice during the permit term. If monitoring indicates the presence of controllable sources, they will be targeted for source reduction activities. The City of Superior has a pretreatment program and will implement pollution prevention activities as part of that program, similar to those negotiated for Group 1 facilities. The City of Ashland also plans to undertake pollution prevention activities.

In addition to the actions recommended for Groups 1 through 4, the team also urges the Department to place a high priority on a pollution prevention campaign to reduce mercury loadings to the environment from all media. This would be a focused effort from all of the involved programs, including the Bureau of Information and Education. It should include interested partners, such as the University of Wisconsin Extension Solid and Hazardous Waste Education Center (SHWEC), citizen interest groups, educators and professional organizations. The Department will facilitate the collection and sharing of mercury information among all participating communities and industrial groups. As part of the pollution prevention campaign, we will point out that any reductions achieved through these voluntary efforts now may prevent the need for regulation in the future.

A single effluent test using a method which provides a sensitivity of 20 to 50 ng/L or lower will be required for facilities with design flows greater than 1 MGD as part of permit applications. Permits presently containing mercury limits or those being considered for limits based on detects in the effluent using the old standard testing will be reevaluated for any unusual circumstances. If the need for limits is clear, those limits will be retained. On the other hand, in the absence of a compelling need for a limit, they will be treated according to their fit into the above categories. For example, if monitoring shows that the pattern of occasional false detects is apparent, we may make use of the

flexibility allowed by our Representative Date Guidance and elect to remove the effluent limitation requirement.

Direct Discharging Industrial Facilities

Municipal facilities are generally similar to one another in their potential sources of mercury, and we already know a fair amount about the expected levels of mercury at the various points in these treatment plants. However, levels in industrial wastewater are largely unknown and likely to be greatly dependent on the various industrial processes. Therefore, while we believe source reduction is still the best approach to eliminate mercury release from industries, a somewhat different approach for determining the need for limitations, which involves more case-by-case analysis, is appropriate. Some individual discretion will be used to modify the following recommended general approach:

1. All industrial facilities will continue to be required to conduct effluent mercury monitoring with their permit applications. Primary industries, or others with identified sources of mercury, will be required to analyze at least 3 separate samples for this purpose. The analytical work for this monitoring must meet the same 20 to 50 ng/L or lower sensitivity requirement imposed on municipal facilities.
2. The analytical results obtained from the monitoring required in 1. above will be reviewed for quality assurance and representativeness. If mercury is not detected, no additional requirements will be imposed, but voluntary mercury minimization should be sought for mercury users. Detects should not automatically be considered to be representative of discharge quality.
 - a. Data sets which we conclude are representative of effluent quality will be used along with calculated preliminary effluent limitations to make determinations of reasonable potential and, where appropriate, effluent limits will be imposed in permits. If an effluent limitation is imposed, it should be accompanied by a mercury minimization plan requirement, as authorized by 40 CFR, Part 122.44(k), with annual reporting of identified sources and source reduction progress.
 - b. Data sets consisting of one or more detects, particularly if measured results are very near the detection limit, should be considered questionable. In these cases, we may choose not to impose mercury effluent limits. We will enter into discussions with permittees to determine what means can be agreed upon which will allow collection of information to help better define and/or reduce mercury levels in the wastewater. Appropriate language, as agreed to, will be included in the permit. If agreement cannot be reached, we will require, at a minimum, regular effluent monitoring. Examples of requirements we may consider agreeing to include:
 - 1) Facilities employing treatment with solids separation prior to wastewater discharge should monitor effluent levels and treatment plant influent levels using a method with a sensitivity of 20 to 50 ng/L or lower, and generated sludge levels for a rough mass-balance calculation. They should also investigate source reduction measures if the presence of mercury is confirmed. Reasonable attempts to implement source control for preventable sources should be undertaken. In-plant source stream and raw material monitoring and

inventories may be needed to help identify where to concentrate source reduction efforts.

- 2) Facilities not employing treatment with solids separation prior to wastewater discharge should continue effluent monitoring and perform intake water, in-plant source stream and raw material monitoring and inventories to help confirm or disprove the presence of measurable levels of mercury. Again, where necessary for quantification, the 20 to 50 ng/L sensitivity requirement should apply. Reasonable attempts to implement source control for preventable sources should be undertaken.
- 3) After an appropriate term of monitoring (term depends on the frequency) the permittee should decide whether the presence of significant levels of mercury is confirmed or disproved. If it is apparent that the initial detects of mercury were false, there should be no additional requirements. If the conclusion is that mercury is present, the requirements for a mercury minimization plan and annual reporting, similar to 2.a. above, should become effective.

IMPACTS OF THIS STRATEGY

Impacts to the Permitted Entities

We expect this strategy to have little impact upon industrial facilities, since this document merely provides guidance for consistent application of NR 106 principles to the unique situation for mercury. The following paragraphs discuss impacts due to the changed strategy for dealing with municipal dischargers.

Milwaukee MSD and Madison MSD have already begun addressing mercury as part of past permit requirements. This approach will allow them to concentrate their efforts on actual pollution prevention rather than devising ways to demonstrate compliance with effluent limits. These facilities and Green Bay MSD have well-established pretreatment programs and this approach should be compatible with other pretreatment program elements. Expense and effort associated with the need to regulate users should be, at least in part, offset by the benefits of public relations opportunities and reduced liabilities associated with lower levels of mercury in sludges and effluents.

Facilities with relatively high mercury levels in their sludges (Group 3), will eventually benefit by the improvement in sludge quality. Slightly reduced record keeping associated with the "high quality" sludge designation and improved public relations for their sludge programs are further incentives for mercury source reduction measures.

Changes in monitoring requirements for mercury, with emphasis on influent, contributor and sludge monitoring, are an integral part of this strategy. The primary changes are that contributor monitoring will often be required and that monitoring must provide a sensitivity (detection limit) of 20 to 50 ng/L or less. Due to the need to process more samples, Milwaukee, Madison, and Green Bay, will likely perform the monitoring at their own labs and there may be some expense for initial set-up of the procedures. For example, Green Bay recently purchased an analytical system. Some additional cost and effort to eliminate contamination by isolation of a mercury analyzer to a separate part of the lab and by improved quality assurance procedures are also possible.

For permittees who contract their lab tests, we expect that the sensitivity requirement will have a minor effect on the cost of analysis.

Table 1 summarizes the current and proposed mercury monitoring frequency for each of the municipal groups. The current monitoring listed in the table is generally what is required in permits, however this may vary. The frequencies listed assume that facilities do not currently have limits in their WPDES permits (a good assumption most of the time).

TABLE 1 - Mercury Testing Frequencies

	Sample Points	Current	This Strategy
Group 1	Influent	Monthly	Monthly*
	Effluent	Monthly	Monthly
	Sludge	6 x yearly	6 x yearly
	Contributors	***	***
Group 2	Influent	Monthly	Monthly
	Effluent	Monthly	Monthly
	Sludge	3-4 x yearly	3-4 x yearly
	Contributors	None	***
Group 3	Influent	None	Quarterly**
	Effluent	None	None
	Sludge	Annually	2 x yearly**
	Contributors	None	***
Group 4	Influent	None	Yearly or twice per permit
	Effluent	None	None
	Sludge	Annually	Annually
	Contributors	None	***

* Monitoring frequency may vary with ongoing studies.

** For Group 3, the influent monitoring and increased sludge monitoring frequency may be discontinued after two years if above-normal levels are not confirmed.

*** Monitoring frequency depends on whether contributors are identified, types of contributors, variability, etc.

Table 1 indicates that there will be some increased testing of sludge, influent and contributors. However, this should be offset by reduced monitoring presently done by permittees that now have limits in their permits (presumably unwarranted, since there is no apparent correlation between mercury limits and high sludge mercury) and by those attempting to dispute the need for limits. We believe that our new strategy will require about the same total number of mercury tests (not counting the contributor testing called for by the source reduction efforts by the three metropolitan sewerage districts). However, we believe it re-focuses the testing more appropriately. In addition, money will be saved that would otherwise be spent for legal or engineering fees to keep mercury limits out of their permits or to demonstrate why limits already in their permits should be removed.

Impacts to the Department

Presently, Madison, Milwaukee and Green Bay are the only Group 1 facilities, and there are only thirteen Group 3 facilities. This latter group may become smaller if more recent sludge data shows reduced levels at any of the facilities. Administering this program will require Department staff time to negotiate with permittees, review submittals, and provide assistance to municipalities and other mercury sources to determine how best to locate and reduce mercury discharges. We currently have a 3/4 time employee hired under a federal grant for a 1-year term to coordinate work on this program. We hope to extend that position. We believe that much good will be accomplished by a partnership of Department, public and private interest groups. As a bonus, this additional work will be offset by reduced efforts of permit staff in evaluating retest data and in processing variances and adjudicatory requests.

Impacts on the Environment

Perhaps most importantly, this strategy is good for the environment. Past efforts by permittees trying to avoid mercury effluent limit violations or fees will now be directed in a fair, rational way toward reducing mercury releases to the air, water and land.

The Team hopes that this strategy may, in the future, serve as a model of how positive incentives for pollution prevention efforts can work for a cleaner environment and how cooperation may gradually replace regulation as a means to achieve our goals.

APPENDIX A

GROUP 2: FACILITIES WITH DESIGN FLOWS GREATER THAN 5 MGD (COMMUNITIES WITH PRETREATMENT PROGRAMS) NOT INCLUDED IN GROUP 1

Appleton
Beloit
Brookfield
De Pere
Eau Claire
Fond du Lac
Heart of the Valley
Janesville
Kenosha
La Crosse
Manitowoc

Marinette
Neenah-Menasha
Oshkosh
Racine
Sheboygan
S. Milwaukee
Superior
Watertown
Waukesha
Wausau
West Bend

APPENDIX B
GROUP 3: FACILITIES WITH RECENT REPEATED EXCEEDANCES OF THE HIGH
QUALITY SLUDGE LEVEL (1989 - present)

Community Name (District)	# of exceedances (> 17 mg/kg)	Count	Average (mg/kg)
Adell (Southeast)	2	9	8.8
Augusta (Western)	2	4	22.5
Black Earth (Southern)	2 ²	6	12.9
Fennimore (Southern)	5	6	29.5
Grand Geneva Resort (Southeast)	4	5	23.4
Land O Lakes (North Central)	2	6	10.6
New Richmond (Western)	3	5	44.6
Oakfield (Southern)	2	12	9.7
Oconto Falls (Lake Michigan)	1 (62 mg/kg) ³	5	18.2
Pittsville (North Central)	4	5	17.5
Plain (Southern)	3	6	14.5
Port Edwards (North Central)	2	5	21.4
Rib Mountain SD (North Central)	7	33	11.9

Note: The average mean is 3.74 mg/kg.

Note: The identification of any facilities in this report for purposes of increased monitoring is not intended as, and does not constitute, a conclusion by the Department that any of the communities are not in full compliance with applicable laws regulating biosolids, and that the determination of compliance is completely distinct from the intent of this program to use biosolids data as an indicator and trigger for source reduction goals.

² One of Black Earth's exceedances was "<24", therefore not included in their mean. They have other high levels in the 1980s, however.

³ Oconto Falls had 5 exceedances in the 1980s, which supports its high mean value.

APPENDIX C

GROUP 4: MUNICIPAL POINT SOURCE DISCHARGES TO SURFACE WATERS IN THE LAKE SUPERIOR BASIN (all are in DNR's NWD)

Community Name	Receiving Water
Anderson SD #2	Alder Creek, then Potato River
*City of Ashland	Chequamegon Bay, Lake Superior
*City of Bayfield	Lake Superior
Bell SD #1 (Cornucopia)	Dry Run to Lake Superior
Camp Amnicon	Diffuse Surface Water to Lake Superior
Clover SD #1 (Herbster)	Dry run to Lake Superior
Drummond SD #1	Tributary to White River
Grand View SD #1	Dry Run to Bibon Marsh, White River
City of Hurley	to Montreal River via Ironwood, MI
Town of Knight SD (Iron Belt)	Ditch to Cemetery Creek, then Potato River
Knowles Mgmt Corp	Lake Superior
*Madeline SD	Lake Superior
Maple School Dist #2	Bardon Creek, then Lake Superior
*Mellen SD	Bad River
Middle R Health Care Fac.	Middle River
*Village of Montreal	West Fork of Montreal River
T of Pence	Montreal River via Montreal WWTP
Pikes Bay SD	Lake Superior
T of Port Wing	Bibon Lake, outlet to Lake Superior
Saxon SD	Vaughn Creek, Potato River
School Dist of Superior	Copper Creek Tributary of Nemadji River
*City of Superior	Superior Bay
Village of Superior	Pokegama River, then to Lake Superior
*City of Washburn	Lake Superior
WDNR Copper Falls SP	Bad River
WDNR Pattison SP	Black River

* These facilities have design flow discharges of 100,000 gallons per day or greater.

APPENDIX D MUNICIPAL WASTEWATER MERCURY REDUCTION

A Listing of Mercury Reduction Activities to be used in creating a Mercury Reduction Plan. Pieces of this document may be excerpted or modified to fit individual community needs.

GENERAL

The municipal mercury reduction plan should begin with a deliberate structured review of:

- A. Existing municipal legal authority to control discharges of pollutants to the sanitary sewer system, e.g., the local sewer use ordinance, or other enacted legislation.
- B. Existing municipal procedures for implementing this legal authority, e.g., inventory, control, monitoring, and enforcement capabilities applicable to users of the local sanitary sewer system.
- C. Ongoing special municipal pollutant reduction activities applicable, or potentially applicable, to mercury.

A comprehensive mercury reduction plan may need to correct weaknesses in both municipal legal authority to control discharges to the sanitary sewer system, and in the procedures for implementing that authority. Of course, any ongoing or proposed mercury reduction activities will serve as a base on which to build a comprehensive mercury reduction plan.

No time frames have been established in this guidance for implementation of a municipal mercury reduction plan. Time lines will depend on historical and ongoing source control activities, capabilities of the community, and urgency of mercury reduction. A mercury reduction plan will generally follow the order of source "inventory", "control", "monitoring" and "enforcement" activities described below.

An attempt should be made to encourage successful municipal mercury reduction programs to export their experience to nearby communities. WDNR should help facilitate this mentoring process.

NOTE: Wherever mercury monitoring is called for in this reduction program, mercury should be sampled and analyzed with adequate sensitivity to provide quantifiable results. Unquantifiable monitoring should be minimized or eliminated.

NOTE: Not addressed in this strategy are uses or disposal of mercury in the municipal service area that do not affect wastewater treatment systems, e.g., mercury releases to solid waste or air emission media. However, practices that potentially release mercury to multiple media, including to sanitary sewer systems at least in part, are included here.

INVENTORY ACTIVITIES

Depending on the mercury sources and the complexity of the community, the following inventory tools may be used to quantify contributions of mercury to the sanitary sewer system:

A. Inventory regulated (locally permitted) industry for mercury use/discharge:

inventory includes report of mercury used as raw material or mercury contained on site, and may require wastewater analysis;

inventory may be required prior to permit reissuance or as a special report.

B. Inventory non-regulated (not locally permitted) commercial and educational facilities for mercury use/discharge (hospitals, clinics, laboratories, colleges, technical schools, schools):

inventory includes report of mercury used as raw material, analytical tool, or mercury contained on site, and will require wastewater analysis;

inventory required as a special report.

C. Inventory professional offices not included in B. above (doctor, dental offices):

municipal in-office survey only.

D. Inventory incidental mercury introductions at the municipal wastewater treatment plant, such as chlorine produced from mercury cells or mercury levels in pickle liquor:

municipal in-office survey and source analysis.

E. Establish municipal sewerage system sampling and analysis program for mercury:

individual laterals, sewer mains, influent and effluent to/from/interior to municipal treatment plant, and municipal sludge monitoring program are tailored to community, dependent in part on existing data availability.

This data is crucial to establishing baseline data, identifying areas where reduction strategies should be focused, and documenting reduction success.

CONTROL ACTIVITIES

Depending on the mercury sources and the complexity of the community the following control tools may be used. The range of these activities includes a program of formal mercury restrictions (A.) to a program of only voluntary mercury reduction activities (C.):

A. Regulatory

1. Local Wastewater Limits - Establish local mercury discharge limits for (selected) users of the sanitary sewer system; issue or modify local discharge permits to applicable users of the sewerage system. Permits include wastewater sampling for mercury, analytical and progress reports, and compliance schedules. Compliance schedules require a Mercury Minimization Plan.

2. Mercury Minimization Plans - This facility-specific plan includes the following types of elements:

- a) identification of mercury used in processes or contained on site and the potential for release of mercury;
- b) evaluation of processes or product substitution which would eliminate the use of mercury on site, with costs and schedule of implementation;
- c) evaluation of site contamination with mercury and proposals for remediation, with costs and schedule of implementation; and
- d) mercury spill reduction plans.

3. Local Mercury Bans - Establish local mercury discharge bans for users of the sanitary sewer system. The discharge bans may be applied selectively, or broadly and generally, to users of the sanitary sewer system. The ban would preferably be coupled with a Local Mercury Collection Program.

4. Local Mercury Collection Program - Establish a household waste collection program for mercury containing products, e.g., paints with mercury fungicides, to reduce the deliberate release of mercury to the sanitary sewer. These programs can also be used to educate the public about mercury source reduction and alternative products. Permanent collection sites are encouraged for major metropolitan areas. Note: It may eventually be possible to establish a collection program for businesses which generate "very small quantities" of mercury containing wastes, and for schools and nonprofit organizations.

Under this control program, the municipality will distribute mercury reduction resource literature to the regulated community and to the general public as applicable. "Literature" may include brochures about mercury and mercury-containing products, a video or slide presentation on mercury for the general public, guides on best management practices for dental offices, in-service training for teachers, etc. Distribution may be via the partnerships described below and via mailings of sewer/water bills.

The WDNR and the municipality will actively facilitate connections between the regulated community (industries, small businesses, academia, and individuals as appropriate) and pollution prevention staff, e.g., UW Extension - SHWEC, and between the regulated community and potential financial assistance sources, e.g., WDOD. A local mercury advisory committee including environmental nonprofit organizations will be established to facilitate these partnerships.

B. Semi-Regulatory/Semi-Voluntary - This mercury control program would not establish local mercury discharge limits for users of the sanitary sewer system, and would not issue permits to individual users. Selected users of the sanitary sewer system would still be required to submit Mercury Minimization Plans per A.2. above but with voluntary compliance schedules, limited wastewater sampling for mercury, and reduced analytical/progress reports. Local mercury bans and local mercury collection programs may or may not be used. Literature distribution and resource connection would continue per A. above. WDNR would negotiate mercury reduction expectations with the community and actively seek to achieve those reductions.

- C. Voluntary - This mercury control program would further reduce A. above by using only literature distribution and resource connection, without requiring Mercury Minimization Plans from users of the sanitary sewer system, local mercury bans, or local mercury collection programs. However, WDNR would discuss the desirability of mercury reductions, and reduction resource materials available, with the community.

MONITORING ACTIVITIES

Depending on the type of mercury control program used by a community the following methods may be used by that community to periodically monitor progress in mercury reduction:

- A. Compliance with local mercury discharge limits by individual users of the sanitary sewer system based on wastewater sampling and analysis.
- B. Progress on implementation of individual Mercury Minimization Plans including mercury use substitution, site remediation, and mercury spill plan development based on reporting and inspections.
- C. Progress on implementation of mercury discharge bans based on reporting and inspections.
- D. Participation in local mercury collection programs based on the numbers of participating individuals and on the volumes of collected mercury-containing materials.
- E. Community user group participation in municipal, WDNR, SHWEC, and WDOD mercury pollution prevention outreach programs.
- F. Trends in mercury levels in the municipal sewerage system as detected by the municipal collection system, influent, effluent, and sludge monitoring program.

ENFORCEMENT ACTIVITIES

Depending on the type of mercury control program used by a community the following methods may be used by that community to enforce program expectations:

- A. Enforce local sewer use ordinance mercury effluent limits, monitoring, reporting, and compliance schedule requirements for users of the sanitary sewer system.
- B. Enforce local adopted resolutions on discharges of mercury to the sanitary sewer system including expectations for user monitoring, reporting, and Mercury Minimization Plan implementation.
- C. Enforce local adopted bans on the discharge of mercury to the sanitary sewer system as discharges are detected.
- D. Actively continue communication with the mercury using community and publish the accomplishments (or lack of accomplishment) of mercury reduction.
- E. Actively continue monitoring of mercury sources and sewerage system and publish the reductions (or lack of reductions) in mercury levels.



ENVIRONMENTAL LAW & POLICY CENTER
ENVIRONMENT MIDWEST

July 31, 2007

Mary Gade
Regional Administrator
Region 5, USEPA (R-19J)
77 W. Jackson Blvd.
Chicago, IL 60604-3507

Scott Hassett, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin
53707-7921

Re: Wisconsin NPDES Permits and Water Quality Standards

Dear Regional Administrator Gade and Secretary Hassett:

Clean Wisconsin, the Environmental Law and Policy Center, Midwest Environmental Advocates and the Sierra Club have been working with the Wisconsin Department of Natural Resources (“WDNR”) on a large number of NPDES permitting and standards issues. While we have the highest respect for many WDNR officials, we believe that Region 5 must intercede to properly implement the Clean Water Act in Wisconsin in order to avoid serious damage to water quality in Wisconsin rivers, lakes and streams.

There are a number of long-standing deficiencies in the Wisconsin water program that are now causing serious problems. Some of these deficiencies must be addressed immediately while others may require more time to remedy.

As you know, the WDNR is experiencing a change in leadership. In view of these transitions, now is the appropriate time to discuss these issues with the appropriate Region 5 officials and plan for the new leadership. We hope that this meeting can be set up for September. We will also be discussing these issues with the new WDNR Secretary when he is installed.

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Richard Day – Chairperson Howard A. Learner – Executive Director



1. WDNR has claimed it does not have the authority to establish protections against entrainment required by CWA § 316(b).

The history of the legal developments and regulatory proceedings regarding licensing of the Wisconsin Electric Power Company Elm Road Generating Station (“ERGS”) is quite convoluted. It is clear, however, that this issue requires immediate attention by Region 5.

Through the direct testimony of Duane A. Schuettpelz (enclosed), WDNR took the position that Wis. Stat. § 283.31(6) does not currently give WDNR authority to establish water intake requirements. Only the “active involvement of U.S. EPA on this issue triggered a second provision of Wisconsin law” that prohibits issuing a permit to which the U.S. EPA has objected in writing. (at p. 7).

Region 5 initially indicated that it did not concur with WDNR’s belief that the proposed ERGS could be treated as an existing facility. This position was based on an EPA rule that made it extremely clear that the ERGS is a new source. Fed. Reg. Vol. 49 N. 188 (Sept. 26, 1984) p. 39043. However, Region 5 subsequently told WDNR that it did not object to WDNR treating the ERGS as an existing facility based on the issuance of the Subpart J (“existing facilities”) regulations that were promulgated in July 2004. Those regulations were struck down by the Court of Appeals for the Second Circuit in a decision that made clear that the new Elm Road Generating Station must be treated as a “new facility” and regulated as such. *Riverkeeper v. U.S. EPA*, 475 F.3d 83, 119 (2d Cir. 2007).

Accordingly, Region 5 should first establish what authority WDNR has to establish requirements for the ERGS necessary to comply with federal law. If, as WDNR has testified, WDNR does not have authority to write permit requirements necessary to comply with the CWA, EPA should take over the permit.

In any event, EPA should carefully follow the ongoing consideration of the ERGS permit and object to any permit that does not fully implement the performance standards and other requirements applicable to new facilities.

2. WDNR has stated that it will not issue NPDES permits limiting nutrient discharges that cause or contribute to violations of narrative water quality standards.

WDNR has stated that it will not establish NPDES permit limits necessary to prevent nutrient discharges that may cause or contribute to narrative water quality standards. In December 14, 2006 guidance (enclosed), WDNR directed NPDES permits staff that “until there is a guidance or a rule that establishes a general or site-specific methodology for determining reasonable potential to attain narrative water quality

standards as applied to nutrients, WPDES permits should not be issued with nutrient limits based on narrative water quality standards.” (p. 3).

This guidance, on which WPDES permits writers currently rely, plainly violates 40 CFR 122.44(d), the federal regulation that prohibits states from issuing NPDES permits allowing the discharge of pollutants that may cause or contribute to the violation of narrative standards. WDNR’s phrase “until there is guidance,” is a request for guidance, and the EPA should provide it. Moreover, repeated issuance of permits that do not comply with applicable regulations is explicitly listed as a reason for withdrawal of a state NPDES program, 40 CFR 123.63. While we are not asking for withdrawal of the program at this time, we believe WDNR’s failure to properly administer nutrient limits in WPDES permits certainly requires the attention of Region 5.

3. WDNR does not require that a reasonable potential analysis be done to prevent violations of water quality standards.

More generally, WDNR has taken the position that Wisconsin law does not require the department to apply the “reasonable potential analysis” required by federal law at 40 CFR 122.4(d)(1). (see enclosed Ruling on the Scope of the Issues by the State of Wisconsin Division of Hearings and Appeals Case No. IH-06-14; see also enclosed Letter from Helstab to Hanson, page 3 Response to Comment C). WDNR’s position illuminates the state’s failure to develop an adequate NPDES program for developing water quality based effluent limits, which is another reason for withdrawal of Wisconsin’s program pursuant to 40 CFR 123.63. Again, we are not at this time requesting withdrawal of the program, but Wisconsin must remedy its failure to establish regulations and conform its program to federal requirements.

4. WDNR does not control total residual chlorine contained in discharges of non-contact cooling water to waters outside the Great Lakes Basin.

The harmful effects of chlorine are well established and EPA has established a water quality criterion for chlorine of 11ug/L. Nonetheless, at least in the Mississippi River Basin Wisconsin currently prohibits the imposition of water quality based effluent limits on discharges of chlorine in non-contact cooling water if chlorine is added to the non-contact cooling water in a similar amount as is typically added to a public drinking water supply. Indeed, NR 106.10 prohibits proper controls on any additive contained in non-contact cooling water “in similar type and amount to those substances typically added to a public drinking water supply.”

It is our understanding that Region 5 disapproved a provision similar to NR 106.10 in proposed water quality standards for discharges in the Great Lakes basin but that the rule is applied in the Mississippi Basin and may still be applied in the Great Lakes basin despite the EPA disapproval.

EPA can, and has, prevented the issuance of some WPDES permits that allow environmentally dangerous chlorine discharges. However, as you are aware, Region 5 reviews only a few selected draft WPDES permits. Moreover, many discharges of chlorine are permitted under WDNR's general permit for non-contact cooling water and, as a practical matter, are never reviewed by Region 5.

For these reasons, the EPA should provide WDNR with an explicit directive on this issue and assure that harmful chlorine discharges are not permitted.

5. Wisconsin's Antidegradation Implementation Rules do not meet federal requirements.

The coverage and broad *de minimis* exemptions contained in then Wisconsin Antidegradation Rules plainly do not meet the minimum requirements of federal law.

First, the current Wisconsin rules allow a new or increased discharge that consumes 30% of the remaining assimilative capacity to be exempted from antidegradation as not being "significant." Wis. Adm. Code § NR 207.05. As the EPA has recognized, an exemption that would allow new or increased discharges that would consume more than 10% of a water's remaining assimilative capacity cannot qualify as *de minimis*. For example, EPA Region VIII's Guidance for Antidegradation Implementation notes that proposed activities that would "reduce the available assimilative capacity by more than 5%" will be "presumed to pose significant degradation." Similarly, the EPA's Water Quality Guidance for the Great Lakes System: Supplementary Information Document (GLI SID), EPA-820-B-95-001, March 1995, p. 207, allows the use of less than 10% of available assimilative capacity as "insignificant degradation."

In Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp. 2d 732 (S.D. W. Va. 2003) the court declined to overturn the West Virginia rule that would allow a discharger to use 10% of the remaining assimilative capacity without making a Tier II showing of necessity. 279 F. Supp. 2d at 770. However, given the "narrow" and "tightly bounded" nature of the *de minimis* doctrine, this 10% exception is the outer limit. C.f. Alabama Power, 636 F.2d at 360-61; Bestfoods v. United States, 260 F.3d 1320, 1325 (Fed. Cir. 2001) (7% exemption is "relatively generous").

Moreover, there is no cumulative cap on the number or extent of the "de minimis" new or increased discharges allowed. A cumulative cap is necessary to prevent the antidegradation policy from being undermined on a piecemeal basis. Ohio Valley Environmental Coalition, 279 F. Supp. 2d at 770-71.

Further, WDNR allows permitted dischargers to increase total pollution loading to receiving waters without performing an antidegradation review and exempts increased discharges from antidegradation review when the department has promulgated a less stringent water quality criterion for that discharge. Wis. Adm. Code § 207.02(6).

Still further, it appears that WDNR does not fully comply with antidegradation requirements for new or increased discharges insofar as they are permitted under general permits. This is improper. Ohio Valley Environmental Coalition, 279 F. Supp 2d at 761.

Finally, WDNR interprets its antidegradation rules as not requiring that all reasonable alternatives to adding additional pollution to its waters be considered before that pollution is deemed to be necessary and permitted. Specifically, with regard to the ERGS, WDNR decided that it could permit new mercury pollution from a pulverized coal power plant into Lake Michigan without making any determination of whether the same power could feasibly be generated using an alternative coal plant technology (IGCC). As in the case of Indiana's permit to the BP Whiting facility, a state agency has allowed new pollution into the Great Lakes system that may be totally unnecessary; only in this case it is clear that a potentially highly toxic bio-accumulative toxin is being permitted. Such permitting must not continue, and we ask the EPA Region 5 to intervene to remedy WDNR's failure to properly implement necessary antidegradation analyses.

6. Wisconsin does not have thermal water quality standards.

For over twenty five years, Wisconsin has not had effective water quality standards regarding temperature. *See Wisconsin Electric Power Co. v Wisconsin Natural Resources Board*, 90 Wis. 2d 656, 280 N.W.2d 218 (Wis. 1979). It is our understanding that WDNR intends to address this issue by this fall. We look forward to working with the WDNR on these standards. Please be aware that in the meantime, WDNR is continuing to consider and issue permits without proper consideration of thermal impacts.

7. Public Participation in Permit Review is Unreasonably Restrictive.

Wisconsin law provides an opportunity for public review of a WPDES permit only where 5 or more persons petition for review. Wis. Stat. § 283.63. The requirement that 5 or more named persons petition for review effectively restricts public participation insofar as administrative and judicial review of WPDES permits is only available to public participants who can assemble 4 additional named individuals to file a petition challenging the terms of a WPDES permit.

We would like to discuss all of these problems with you and members of your staff concerned with Wisconsin water quality. Hopefully, these issues can be promptly corrected through EPA guidance and corrective measure by WDNR. If, however, WDNR lacks authority to comply with federal law or is otherwise unable to do so promptly, it will be necessary for EPA to publish water quality standards for Wisconsin pursuant to Section 303(c) of the CWA, or to withdraw WDNR authority pursuant to 40 CFR 123.64(b)(8)(vi).

We recognize that, particularly given summer vacations that pulling together the appropriate members of your staff for the requested meeting cannot be done immediately. We ask, however, that efforts begin to set up this meeting for September. Please contact Kelsey Snell at the Environmental Law & Policy Center at (312) 795-3718 to schedule a meeting.

Sincerely,



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cc: Todd Ambs, Water Division Administrator
Linda Holst, Chief, Water Quality Branch, EPA Region 5
Peter Swensen, Branch Chief, NPDES, EPA Region 5



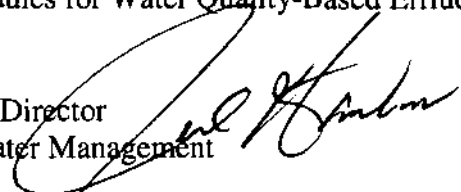
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 10 2007

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management 

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 c.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 c.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES pennit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(I)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a pennit must include the final effluent limitations in the pennit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES pennit, the pennitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "willlead[] to compliance with an effluent limitation . . . " "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(I)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES pennit, the pennitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(I).

7. In order to grant a compliance schedule in an NPDES pennit, the pennitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the pennit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior pennits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior pennit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(I) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The pennitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA's letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.

I. Environmental Assessment for Department Administrative Rules Related to the Revision of the Shoreland Management Program

DECISION ON THE NEED FOR AN ENVIRONMENTAL IMPACT STATEMENT

(This decision is not final until certified by the Director of the Office of Energy and Environmental Analysis.)

In accordance with s. 1.11, Wis. Stats., and Chapter NR 150, Wis. Admin. Code, the Department is empowered to determine whether it has complied with s. 1.11, Wis. Stats.

Authority

The proposed amendments to ch. NR 115 are intended to allow a county more flexibility in how they regulate land use in shorelands, and to give shoreland property owners more land use options, while still protecting the public interest in navigable waters and adjacent shorelands.

Section 281.31(6), Stats., provides that "the department shall prepare and provide to municipality's general recommended standards and criteria for . . . navigable water protection regulations and their administration." Section 59.692 (6), Stats., provides that "if the department, after notice and hearing, determines that a county has enacted an ordinance that fails to meet the shoreland zoning standards, the department shall adopt such an ordinance for the county." Section 59.692 (1) (c), Stats., defines "shoreland zoning standard" to mean "a standard for ordinances enacted under this section that is promulgated as a rule by the department."

Purpose and Need

In 1997, a study by the Department found that the current minimum standards in ch. NR 115 are only providing minimal protection of water quality and wildlife habitat. The study concluded that to meet the statutory objectives of the program, improved minimum standards are needed for shoreland zoning ordinances.¹

In addition, counties across the state have expressed frustration with the current minimum standards found in ch. NR 115. The concerns of counties with existing standards include:

- Standards are too vague or undefined, preventing consistent application across the state.
- Standards do not provide enough direction to allow counties to amend their ordinances, requiring considerable interpretation from Department staff.
- Standards are inflexible, discouraging counties to adopt innovative regulatory programs.

Property owners have also expressed frustration with the current minimum standards, including:

- The "50% rule" for nonconforming structures is not equitable.
- In certain situations, reduced setbacks or improvements to nonconforming structures should not require a variance.

In response to inadequacies identified in the current minimum standards in ch. NR 115, Wis. Admin. Code, and the concerns raised by county staff and property owners, a 28-member advisory committee was formed by the Department in November of 2002 to help guide proposed changes in the rule. Please refer to Attachment 6 for a summary of the rule revision activities and Attachment 5 for advisory committee membership information.

¹ Bernthal, T. October 1997. Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications. Wisconsin Department of Natural Resources.

Affected Environment

A. Physical and biological environments affected by this proposal

This proposal will affect most of Wisconsin's water resources, which include more than 50,000 miles of rivers and streams, more than 15,000 inland lakes, and more 1,017 miles of Great Lakes shoreline. The shoreland zone which falls under the jurisdiction of ch. NR 115, Wis. Admin. Code, is defined in s. 59.692 (1)(b), Wis. Stats., as:

- the area within 1,000 feet of the ordinary high water mark of navigable lakes, ponds, and flowages; and
- the area within 300 feet of the ordinary high water mark of navigable rivers and streams, or to the landward side of the floodplain, whichever distance is greater.

Section 59.692, Wis. Stats., requires the zoning of shorelands on navigable waters by counties in unincorporated areas and by cities and villages in areas annexed after May 7, 1982 and areas incorporated after April 30, 1994.

B. Units of government, industries, organizations and other parties affected by this proposal

Administratively, counties will be the primary party affected by the proposed changes in this rule, but the level of that impact would vary county by county. Many counties have already adopted improved shoreland zoning ordinances, facilitated by the Department's Lakes Planning and Management grants. These counties may only need minimal changes to their ordinances to comply with the proposed changes in ch. NR 115. Other counties still have model ordinance language from the 1970s and 1980s in place, and will need to adopt considerable changes to their ordinances. It is likely in these situations that the counties will once more adopt the model ordinance supplied by the Department.

Shoreland property owners, builders, landscapers and others involved in waterfront activities will be affected once counties amend their ordinances – counties will have two years from the date of publication to revise local ordinances to reflect the new statewide minimum standards. The public that uses and enjoys Wisconsin's navigable waters will also benefit from the proposal.

Environmental effects and their significance

It is the responsibility of the Department, in the discharge of its mandate under ss. 59.692 and 281.31, Wis. Stats., to require county shoreland zoning ordinances to adhere to specific standards and criteria for navigable water protection. Section 281.31, Wis. Stats., provides that:

“Such standards and criteria shall give particular attending to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.”

A. Water Quality

There is no such thing as chemically pure water in nature. In nature, water quality can vary with climate, watershed mineralogy, and materials carried in with precipitation and runoff. As landscapes shift from a “natural” state to a “developed” state, the rain and runoff can carry oils, bacteria, litter, sediment, fertilizers, and foreign chemicals from streets, parking lots, lawns, dumpster pads, and metal roofs. Some 70% of the water pollution in the United States comes from these “nonpoint” sources: the sediment, oils and chemicals that runoff carries from eroding soil, parking lots, and intensely maintained lawns.² Table 1 summarizes common materials in natural and developed watershed and their roles.

² Ferguson, B. K. 1998. Introduction to Stormwater: Concept, Purpose, Design. New York: John Wiley & Sons, Inc.

Table 1. Some of the Constituents of Surface Waters.³

Constituent	Source in Nature	Role in Natural Ecosystem	Source of Developed Area Excess	Role of Excess
Sediment	Banks of meandering channels and shorelines	Maintain stream profile and energy gradient; store nutrients	Construction sites; eroding banks	Abrade fish gills; carry excess nutrients and chemical in absorption; block sunlight; cover gravel bottom habitats
Organic Compounds	Decomposing organic matter	Store nutrients	Car oil; herbicides; pesticides; fertilizers	Deprive water of oxygen by decomposition
Nutrients	Decomposing organic matter	Support ecosystems	Organic compounds; organic litter; fertilizers; food waste; sewage	Unbalance ecosystems; produce algae blooms; deprive water of oxygen by decomposition
Trace Metals	Mineral weathering	Support ecosystems	Cars; construction materials; all kinds of foreign chemicals	Reduce resistance to disease; reduce reproductive capacity; alter behavior
Chloride	Mineral weathering	Support ecosystems	Pavement deicing salts	Sterilize soil and reduce biotic growth
Bacteria	Native animals	Participate in ecosystems	Pet animals; dumpsters; trash handling areas	Cause risk of disease
Oil	Decomposing organic matter	Store nutrients	Cars	Deoxygenate water

Polluted runoff results when storm water or snow melt washes across the land and carries contaminants, such as suspended solids, nutrients, heavy metals, pathogens, and other toxic pollutants to surface waters or ground waters. This polluted runoff can destroy fish habitat, cause direct mortality of fish and other wildlife, reduce drinking water quality, clog harbors and streams with sediment and reduce recreational use of lakes and streams. Nutrients, such as phosphorus and nitrogen, while essential for plant and animal growth, can have harmful effects on waterbodies when they are present in excess, resulting in heavy plant and algae growth, including blue-green algae that may pose serious health threats to animals and humans, lead to fish kills, and impair opportunities for boating, fishing and swimming. When the plants and algae die, decomposition of this excess organic matter significantly depletes the oxygen in the water, which degrades the habitat and limits the fish and invertebrate species that can survive. Sediment covers spawning grounds and negatively affects water clarity and the opportunity for fish to find food.

³ Ferguson, B. K. 1998. Introduction to Stormwater: Concept, Purpose, Design. New York: John Wiley & Sons, Inc.

The short-term environmental effects on water quality are expected to be positive. Effects will be seen in localized or site-specific benefits to water quality. The standards are designed to preserve shoreland buffers, set back structures from the water's edge, and reduce runoff from impervious surfaces, resulting in:

- displacement of sediment-producing activities away from surface waters,
- reduction in the velocity of sediment-bearing runoff, allowing sediments to settle out of the runoff and be deposited in the buffer,
- stabilization of banks, preventing shoreline erosion, and
- moderation of water flow, reducing bed scour.

The long term environmental effects on water quality are also expected to be positive. With restoration of shoreland buffers and implementation of best management practices to control stormwater runoff, there will be a reduction in the pollution loading to waters of the state from shoreland development.

B. Wildlife Habitat

Shorelands provide wildlife habitat by offering foraging and nesting habitat as well as cover for a mix of upland, aquatic and wetland species. Shorelands can also serve as travel corridors for migratory and nomadic, as well as resident, species. Shoreland vegetation protects surface waters and wetlands from temperature fluctuations, which can affect a river's capacity to hold oxygen. The leaf litter and woody debris from trees and shrubs along smaller streams supply most of the energy utilized by creatures within the stream. Woody debris also traps leaf litter, making it available to organisms over a long period of time. Shoreland vegetation also helps stabilize banks, and naturally undercut areas beneath tree roots offer cover for fish, turtles, and other creatures.

Many factors influence the capacity of a buffer to provide wildlife habitat. Several major factors include:

- Landscape position – Buffers can function as both resident (“in-place”) habitat and as travel routes for wildlife. As resident habitat, a buffer's value is supplemented by other habitats to which it is connected. This is important because larger habitat blocks are known to support greater diversity than smaller ones.
- Integrity of the buffer – When buffers become fragmented, the effects can include direct mortality (road kill), modification of animal behavior, alteration of physical or chemical environments, and introduction of exotic species. The effects of buffer fragmentation can extend into aquatic and wetland habitats by altering hydrology, increasing sedimentation, and introducing pollutants.
- Edge effects – When buffers become fragmented strips between land and water, they may be subject to negative edge effects of predation and parasitism, as well as physical effects such as wind, drying, temperature increase, and blow down of trees. Edge habitats tend to harbor disproportionate populations of predators such as blue jays, crows, raccoons, skunks, red foxes, and dogs and cats. A “soft” edge that has a gradual transition into upland areas may reduce the negative edge effects. Essentially this means providing a transitional upland buffer to support the shoreland buffer habitat functions more fully.
- Vegetation type – The species of plants in an area generally determine the animals that will occupy an area. Dense stands of evergreen trees, for example, are known for their value as deer wintering areas, and nut-producing trees, such as oak and hickory, provide food for a number of species, including bear, deer, turkey, and squirrels.
- Habitat structure – The structure provided by a shoreland determines which species can use the habitat. Habitat structure includes:
 - Horizontal diversity
 - Vertical diversity
 - Soil qualities
 - Dead standing trees
 - Downed logs
 - Rocks, boulders, cliffs⁴

The short-term environmental effects on wildlife habitat are expected to be positive. Preserving shoreland vegetation, limiting land disturbing activities, setting structures away from the water's edge, controlling the

⁴ France, R. L., ed. 2002. Handbook of Water Sensitive Planning and Design. New York: Lewis Publishers.

density of shoreland development and decreasing runoff from impervious surfaces will all help limit impacts of shoreland development.

The long-term environmental effects on wildlife habitat are also expected to be positive; although the long-term improvement in wildlife will vary with site specific considerations. In areas that are already heavily developed, wildlife habitat is expected to improve as shoreland buffers are restored and shoreland vegetation recovers. In areas that have not yet been developed however, there will be some initial decline in wildlife habitat as areas become developed, but the decline is less than would be expected without any design standards in place to protect critical shoreland wildlife habitat.

C. Natural Scenic Beauty

Although it is commonly thought that the aesthetics of a shoreline are an intangible concept, people often recognize when it has been converted from a natural state to a more suburban landscape or when shoreline density increases. In fact, shoreline aesthetic preferences have been demonstrated and documented. A 2006 Vilas County, Wisconsin survey of shoreline property owners found that almost all respondents prefer less (53%) or the same (42%) lakefront development density. The same survey found that more public shoreline was preferred. If they could, one of the top three things respondents would do to change their lakes would be to have less shoreland development. Over half of the Vilas respondents knew at least a moderate amount about their lake's water and fishing quality prior to buying the property.⁵

In a Minnesota survey, waterfront property owners and lake users cited cabin and home development over 85% of the time as the cause when they perceived a decline in the scenic quality on the lake they used the most. Other activities at the top list that resulted in a decline in scenic quality included installation of docks and boat lifts, and removal of trees and shrubs in the shoreland area.⁶

These man-made elements are often seen as visual intrusions in a natural setting – they “grab” our attention and interrupt or upset the natural character of a setting. In general, landscape aesthetic assessment literature has found that more natural scenes, those in which human presence or activities are relatively less visually apparent, are consistently preferred over scenes where human development is more obvious.

It is possible however to reduce the obvious nature of man-made elements, especially those which may be prominently located. The contrast between natural and man-made elements can be reduced in a variety of ways, including:

- changing the color to camouflage the structure,
- reducing gloss or reflectivity,
- planting trees and shrubs to screen and shade the structure,
- softening highly visible angularities or structural complexity,
- removing structural elements from ridge lines to reduce the contrast of silhouettes,
- adapting structural forms which reflect the local terrain,
- reducing artificial lighting, and
- keeping clearings and land disturbances to a minimum.⁷

The short-term and long-term environmental effects on natural scenic beauty are expected to be positive. Maintaining or restoring a shoreland buffer, setting structures back from the water's edge, and limiting shoreland land disturbing activities will help preserve the natural beauty of shorelands by preserving shoreland vegetation, and screening structures from the view of people on or across the water.

⁵ Provencher, B. and J. Schoen. 2007. *Results of the 2005 – 2006 Survey of Vilas County Shoreline Property Owners*. University of Wisconsin- Madison. Department of Agricultural and Applied Economics.

⁶ Anderson, K. A., T.L Kelly, R. M. Sushak, C.A. Hagley, D.A. Jensen, G. M. Kreag. 1999. Summary Report on Public Perception of the Impacts, Use, and Future of Minnesota Lakes: Results of the 1998 Minnesota Lakes Survey. A joint publication by the University of Minnesota Sea Grant Program (SH 1) and Minnesota Department of Natural Resources, Office of Management and Budget Services.

⁷ Litton, R., R. Tetlow, J. Sorenson and R. Beatty. 1974. Water and landscape: an aesthetic overview of the role of water in the landscape. Port Washington, NY: Water Information Center, Inc.

Significance of cumulative effects

When a landowner develops a waterfront lot, many changes may take place including the addition of driveways, houses, decks, garages, sheds, piers, rafts and other structures, wells, septic systems, lawns, sandy beaches and more. Cumulatively these isolated alterations on individual lots around or on shared water bodies further decreases the ability of the shoreland area to serve its natural functions- recharging groundwater, filtering polluted runoff and providing wildlife habitat.

A. Water quality

Waterfront property owners may contest that a single alteration in the shoreland makes a difference to lake, stream or river water quality. However, single unchecked shoreline alterations by many property owners cumulatively affect water quality for swimming, fishing and wildlife observation. Soil compaction from construction activity, tree and native plant removal and the addition of impervious surfaces that reduce groundwater recharge and increase storm water runoff all affect water quality.

A shoreland lot with a naturally vegetated buffer and a structure setback should be sufficient to protect water quality. A buffer of natural shoreland vegetation traps and filters sediment and debris from runoff. Depending on the size (length and depth) and complexity of the shoreland buffer, 50 to 100% of the solid particles can settle out as plants slow sediment-laden runoff.⁸ Regulated setbacks and lot sizes improve the ability of buffers to filter, creating adequate space to reduce runoff volumes, sediments, nutrients and toxicants from reaching the buffer. The current law includes some of these controls; however, the 1997 Shoreland Management Program analysis showed the law inadequate to prevent further water quality degradation.⁹

Delavan Lake (Walworth County) and Big Muskego Lake/Bass Bay (Waukesha County) show how developed shorelands have and will continue to impact water quality under the current law, especially as waterfront development continues to boom throughout the state. Development around Delavan increased by 67% from 1981 to 2005, bringing more impervious surfaces that direct fertilizers and pollutants to the lake and stimulate the growth of invasive Eurasian milfoil.¹⁰ The community spent \$7 million to restore lake water quality. The greatest non-agricultural phosphorus source in the Big Muskego Lake/Bass Bay watershed is residential development and 63% of the lake/bay's sediment loading is a result of construction site erosion, making the conversion of land to other uses the biggest nonpoint source for sediment for these waters.¹¹ A \$1 million restoration was completed in 2007. Proactive, more effective shoreland zoning may prevent the need for expensive water quality restoration efforts.

Northern Wisconsin lake associations are aware of the migration to their shores and the pressures to develop these waterfront properties more intensely. Balsam Lake Protection and Rehabilitation District (Polk County), Beaver Dam Lake Management District (Barron County), and Chippewa Flowage Area Property Owners Association (Sawyer County) all have taken active steps to protect water quality, commissioning water quality monitoring studies and engaging in shoreland restoration award programs. Some of these measures are in line with proposed NR 115 revisions.

A number of studies suggest links between shoreland development and increased large plant (macrophyte) growth in nearshore waters—see the water quality impacts associated with excess inputs of organic compounds and nutrients in the preceding section: “Environmental effects and their significance”. One study found that on a number of developed seepage lakes in northwestern Wisconsin aquatic plant growth has increased extensively in the nearshore waters since the 1930s.¹² These findings are supported by a

⁸ Wegner, S. 1999. *A Review of the Scientific Literature on Riparian Buffer Width, Extent and Vegetation*. Office of Public Service and Outreach, Institute of Ecology, University of Georgia. Athens, GA. http://greer.ecology.uga.edu/buffer_litreview.pdf

⁹ Bernthal, T. October 1997. *Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications*. Wisconsin Department of Natural Resources.

¹⁰ Eiswerth, M., R. Kashian, and M. Skidmore. 2005. *What is the Value of a Clean and Healthy Lake to a Local Community?* Delavan Lake Improvement Association.

¹¹ Big Muskego Lake/Bass Bay Protection and Rehabilitation District. June 2004. *Big Muskego and Bass Bay Management Plan*.

¹² Borman, S. C. 2007. *Aquatic plant communities and Lakeshore land use: changes over 70 years in northern Wisconsin lakes*. University of Minnesota (Doctoral dissertation).

Wisconsin study of nearshore sediment cores (measures historic macrophyte growth and decay) in both developed and undeveloped lakes.¹³ The cores from lakes with no shoreline development, with the exception of one, do not show an increase in plant growth compared to cores from developed lakes. Similarly, looking at the relationship between riparian development and habitat/biological changes, another Wisconsin study found that in general more dense development leads to habitat simplification and homogenization and is correlated with a decline in the variety of macrophytes.¹⁴ Two of the top three things Vilas County survey respondents would do to change their lakes would be improve fishing quality and reduce lake weeds. About 22% would strengthen shoreland development restrictions versus 7% would loosen them.¹⁵

B. Fish and wildlife habitat

Wildlife are attracted to lakes and streams because the essentials of life for many species occur there, including food, water, shelter, and a place to raise their young. The aquatic insect community is an important component of the food chain in streams.¹⁶ Over 20 years ago researchers found that aquatic insect diversity drops sharply in streams where watershed impervious surface exceeded 10 to 15%.¹⁷

Fine sediments also affect fish spawning, egg incubation and fry rearing. A study of 47 warm water streams in southeast Wisconsin that found that fish and insect populations decline dramatically when impervious surfaces exceed about 8-10% of the watershed. Streams with more than 12% imperviousness have consistently poor fish communities.¹⁸

A northern Wisconsin study found significant declines on developed shorelines in insect-eating and ground-nesting birds such as loons and warblers, contrasting with increases of seed-eating birds and deciduous-tree nesting birds such as crows and goldfinches.¹⁹ In short, “city birds” are favored on developed shorelines over other species. Fewer green frogs were found on lakes in northern Wisconsin when the shorelines were developed. Frogs were eliminated from shorelines with 100-foot lots (52 homes per mile).²⁰

C. Economics

When purchasing waterfront property, people inherently value clean water, plentiful wildlife and scenic vistas. A study in Maine found that property values would decline approximately \$10.5 million with a three-foot decline in water clarity, roughly 5% of the total property value.²¹ Each year more than 1.5 million anglers spend 17 million days fishing in Wisconsin. They spend \$1.1 billion directly on fishing related expenses, which generates more than \$2.1 billion in economic activity.²²

¹³ Garrison, P. 2000. *Use of paleolimnology to document the effect of lake shoreland development on water quality.* Journal of Paleolimnology. 24: 369-393.

¹⁴ Jennings, M., et al. 2003. *Is Littoral Habitat Affected by Residential Development and Land Use in Watersheds of Wisconsin Lakes?* Lake and Reservoir Management 19(3): 272-279.

¹⁵ Provencher, B. and J. Schoen. 2007. *Results of the 2005 – 2006 Survey of Vilas County Shoreline Property Owners.* University of Wisconsin- Madison. Department of Agricultural and Applied Economics.

¹⁶ Center for Watershed Protection. 2003. *Impacts of Impervious Cover on Aquatic Systems.* Watershed Protection Research Monograph No. 1, March 2003, p.93.

¹⁷ Klein, R. 1979. *Urbanization and Stream Quality Impairment.* *Water Resources Bulletin.* 15(4):948-963.

¹⁸ Wang, L., J. Lyons, P. Kanehl, R. Bannerman, and E. Emmons 2000. *Watershed Urbanization and Changes in Fish Communities in Southeastern Wisconsin Streams.* *Journal of the American Water Resources Association.* 36:5(1173-1187); Wang, L., J. Lyons, and P. Kanehl 2001. *Impacts of Urbanization on Stream Habitat and Fish across Multiple Spatial Scales.* *Environmental Management.* 28(2):255-266.

¹⁹ Lindsay, A. R., S. S. Gillum, and M. W. Meyer. 2002. *Influence of lakeshore development on breeding bird communities in a mixed northern forest.* *Biological Conservation* 107(2002) 1-11.

²⁰ Woodford, J.E. and M. W. Meyer. 2002. *Impact of lakeshore development on green frog (Rana clamitans) abundance.* *Biological Conservation.* 110(2): 277-284; Meyer, M., J. Woodford, S. Gillum, T. Daulton. 1997.

²¹ Maine Department of Environmental Protection Lake Assessment Program. 2000. *More on Dollars and Sense: The Economic Impact of Lake Use and Water Quality.*

²² U.S. Fish & Wildlife Service. 1998. *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, State Overview.*

Changing one waterfront lot may not result in a measurable change in the quality of the lake or stream. The cumulative effects to water quality, wildlife habitat and property values, however, can be enormous and long lasting. Amended shoreland protection standards would help the state adequately and sustainably fulfill its duty to protect the public trust-interest in Wisconsin waters. This is a policy decision that may require continuing education to the regulated community, but certainly one that needs to be weighed heavily when considering the overall health of Wisconsin's lakes and rivers.

Risk or Uncertainty

While the regulations in ch. NR 115 continue to provide statewide minimum standards, it is unclear whether they will be adequate for all water resources to achieve the statutorily mandated water quality, habitat and aesthetic goals of the program. Counties will continue to be able to identify areas where the minimum standards may be inadequate and to develop regulations that work more effectively to protect the water resources in a particular geographic area. Therefore, on a county by county basis, local units of government will be able to act proactively to develop more specific standards for the protection of water quality, wildlife habitat and natural scenic beauty.

Even though counties will continue to be able to develop ordinances that meet their individual local needs, the goal of creating a code of minimum standards for the entire state was difficult. When reviewing and updating an administrative rule that is nearly 40 years old, there are always concerns that the new provisions and regulations may not function as well on the ground as they seem to on paper. The Department in conjunction with a very diverse advisory committee of experts attempted to utilize "real world" models that are currently working in county ordinances. The Advisory Committee includes an automatic check for administration issues with three county code administrators participating who will be charged with the implementation of the revised ch. NR 115 standards. In addition, before requesting a second round of public hearings, the department specifically met with a focus group of county zoning administrators to address administrative and implementation issues. Zoning administrators were asked to bring real permitting examples so we could apply the draft code to real applications and make modification where necessary. These members, in consultation with the Wisconsin County Code Administrators Association and the Wisconsin Counties Association, provided comments on areas of the rule thought to be unenforceable, confusing or misleading. Those areas have been addressed in this package.

Significance of precedent

Promulgation of this rule is in accordance with Sec. 281.31 Wis. Stats., and will satisfy the Department's statutory responsibility to provide statewide minimum standards for county shoreland zoning ordinances for navigable water protection. Specifically, section 281.31, provides that:

"Such standards and criteria shall give particular attending to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations."

The revisions to ch. NR 115 will not prevent a local unit of government from implementing more resource protective measures to guide shoreland development. Several counties have moved forward and classified the water resources in the county and developed resulting shoreland zoning ordinances based on this classification system. It is our intention that these types of initiatives will be able to continue with minimal modifications to reflect modifications to the statewide minimum standards.

The revised ch. NR 115 also contains several areas where the county can choose to utilize a different mechanism for regulation than proposed in the rule. For this new provision, the Department would need to review and approve county developed initiatives to guarantee that they will be at least as protective as the method proposed in ch. NR 115.

Significance of controversy over environmental effects

There continues to be controversy over the proposed rule. Due to the distinct nature of the public trust versus private property rights, there will probably always be a debate over zoning rules and regulations to

protect water quality, wildlife habitat and natural scenic beauty. Just as in general zoning there are debates of a similar nature related to subdivision regulations, noise, odor, and other issues.

The rule revision process has taken over five years, involved a highly diverse and well represented advisory committee, gathered additional detail through five issue specific workgroups with additional affected parties at the table, added a public participation step with eight listening sessions around the state and then accepted comments on five individual drafts of the rule before requesting permission for the first round of formal public hearings. Recognizing that public hearings are the public's formal opportunity to review and comment on the draft proposal, we held eleven hearings in 2005 to update Wisconsin's nearly 40 year old Shoreland Management Program.

After the public hearings in 2005, three specific focus groups were developed in 2006 on mitigation, impervious surfaces and implementation and enforcement. These groups worked on the issues highlighted at the 2005 hearings to come up with potential solutions for the 2007 public hearing draft. Finally, in the summer of 2007, eight additional public hearings around the state were held in summer 2007. With this amount of public involvement, clearly there is an indication that the Department understands the complexity of this issue. Dedication to a complete and thorough public participation process is critical to the success of a revised program. Public hearings provide a means for incorporating the public's values into decisions that affect their lives and also allow the public the opportunity to offer meaningful input into the decision making process. They are intended to produce a code that not only protects the water resources that make Wisconsin so desirable, but also to balance that protection with an understanding of property ownership and introduce a level of flexibility that makes protection of our resources socially and economically feasible.

In 2005, the Department held the first round of public hearings, eleven total around Wisconsin. Comments were accepted until August 26, 2005. Over 1400 people attended the public hearings and over 50,000 comments from nearly 12,000 individuals were received throughout the public comment period. Comments for the second round of eight hearings were accepted until September 7, 2007. Over 730 people attended the hearings, while over 8900 comments from nearly 2400 individuals were received throughout the comment period.

During both comment periods four types of comments were received. All carried the same weight. To be considered as a comment, the respondent was only required to provide their name. All written comments were accepted through regular mail or electronic submittal. Comment types are as follows:

- Written comments received on prepared forms available at the public hearings or the revision update webpage
- Individual letters
- Form letters
- Oral comments received during the public hearings

The department has prepared excel databases cataloging all the comments received throughout the public comment periods. The databases are broken into segments of the code and list all comments related to individual sections. There are also individual pages devoted to miscellaneous comments and comments outside the scope of the NR 115 revision process. Comments have been classified in six different categories including:

- Suggested language modifications
- Neutral (oral comments state "as interest may appear")
- In favor
- In favor, but too permissive
- Support and oppose various sections
- Opposed, too restrictive

General categories of comments and number of respondents from 2007 are listed in the chart below. To see how the Department responded to the public hearing comments in 2007 see attachment 1 at the end of this document and attachment 2 for the 2005 comment summary. To review complete copies of the public comment databases, please contact Toni Herkert at toni.herkert@wisconsin.gov or at (608)266-0161.

NR 115 Issue	Neutral	In Favor	Too Permissive	Support and Oppose Sections	Opposed
General	7	231	18	306	1250
Definitions	4	1	1		98
Shoreland-wetland	5	0	4		5
Land Division	1	0	40		8
Lot Sizes	2	125	38		229
Setbacks	8	97	149		171
Height	8	86	17		206
Buffers	39	137	72		339
Impervious Surfaces	9	292	122	77	468
Mitigation	1	94	7		167
Land Disturbance	3	78	9		67
Administrative-Enforcement	88	1	142		25
Misc. Comments	6	296	295		2027
Outside the scope of NR 115	9	0	4		858
Comment totals by category	111	1438	918	383	5923
Total Comments*	8945				

*Includes 132 undecided and 40 language modification comments.

Each NR 115 issue outlined above contains several components, for example the comments on setbacks deal not only with the minimum 75 foot setback, but also relate to setback reduction, measuring the setback, requiring permits for various activities within the setback, certain exemptions from the setback, the issue of boathouses, wetland setbacks, the definition of structures and others. Therefore, the categories contain several elements that fall within the specific section of the code. For more detail, please see attachment 1 at the end of the document.

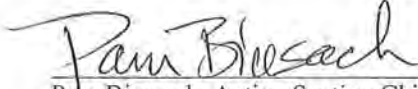
Formal response to comments and summary documents were developed for both public comment periods- see attachments 1 and 2. Many of the issues addressed in the 2007 revision to NR 115 are a response to the 2005 comments. The detailed analyses of the 2007 comments and department responses have informed the final draft submitted for consideration in 2008.

There will always be some controversy associated with shoreland zoning. The controversy seems to stem from the property rights movement and the overall general dissatisfaction with zoning as a regulatory tool. The rule will probably never be able to satisfy everyone. However, the revision is a major step in the right direction, clarifying several gray areas, using common sense and concepts that will work in the “real world,” allowing local innovation to continue and balancing the protection of water quality, wildlife habitat and natural scenic beauty with the needs and wants of today’s riparian owners.

Specific to ch. NR 115 and the rule revision process, there will continue to be some controversy surrounding components of the rule such as shoreland vegetation and the new requirements for impervious surface standards and mitigation. Most of the uneasiness is derived from the fact that the concepts are new to shoreland zoning. The new standards can work and have worked in counties around the state; however, here they are required as minimum standards for all counties. Throughout the public hearing process, the Department listened and made strides to produce the best rule possible to balance the statutory goals of the program with the understanding that private citizens need to have a certain degree of latitude when developing waterfront properties. Shoreland management is a balancing act, attempting to protect our navigable water resources while respecting the rights of individual landowners. Given the opportunity, the Department can attain this goal.

Recommendation

The attached analysis of Proposed Revisions of chapter NR 115, Wis. Admin. Code, pertaining to the revision of the shoreland management program is of sufficient scope and detail to conclude that this is not a major state action which would significantly affect the quality of the human environment. An environmental impact statement is not required prior to final action by the Department to adopt this rule.



Pam Biersach, Acting Section Chief
Waterways Protection

3-3-08
Date



Toni Herkert, Evaluator


3/19/08
Date



Russell A. Rasmussen, Director
Bureau of Watershed Management

3/19/2008
Date

Certified to be in compliance with WEPA



Director, OEEA (or designee)

02/21/2008
Date

II. Issue Identification Activities and Agency Contacts

A. Rule Revision Public Participation Process

The NR 115 Advisory Committee was developed to aid the department with a comprehensive revision to the State's Shoreland Management Program. The group met eight times between November 2002 and November 2003 and again in June 2006 to discuss issues surrounding shoreland development and to identify areas of concern. Initial meetings of the advisory committee reviewed scientific research and legal perspectives on shoreland development. The remainder of the meetings focused on specific issues related to shoreland management – setbacks and buffers, nonconforming structures, and development density. The committee worked with the Department to develop an initial set of concepts for proposed changes to ch. NR 115, Wis. Admin. Code.

In the summer of 2003, the Department, with support and participation by the Advisory Committee members, decided to convene five work-groups to flesh out remaining issues in the revision. The five work-groups, agriculture, alternative development, forestry, recreational areas and urbanized waters, each met a number of times in person or via phone conference and/or e-mail to discuss pertinent issues. Each work-group was led by a Department staff member involved in the revision process and the membership included Advisory Committee representatives and other affected or interested parties in specialized fields related to the subject matter. (Please refer to attachment 4 for work-group membership information.)

In November and December of 2003, the initial set of recommendations was taken to eight listening sessions around the state to gather public comments. This was an extra step the Department chose to take to ensure public participation throughout the revision process. Over 1300 comments were received during the listening session comment period.

Based on the statutory objectives of the program, initial recommendations from the advisory committee, and public comments from the listening sessions, the Department drafted a first copy of proposed changes to ch. NR 115, Wis. Admin. Code. Up until this point, the advisory committee and the public were responding to concepts. Beginning in May 2004, the NR 115 Advisory Committee met five times and reviewed five drafts of proposed changes to ch. NR 115, Wis. Admin. Code.

In July and August of 2005, the department held eleven public hearings around the state and collected over 12,000 comments during the public comment period (comments are available upon request and the 2005 comment summary can be found in attachment 2). After the hearings, three focus groups were formed to flesh out specific issues identified during the hearing process. These focus groups worked on the issues of impervious surfaces, mitigation and implementation and met in the fall and winter of 2006. (Please refer to attachment 3 for focus group membership information.)

Due to the amount of change that had occurred in the proposal based on 2005 hearing comments and the results of the focus group work, the department received permission to take a revised proposal back out to the public for a second round of public hearings in the summer of 2007. In July and August of 2007 the Department held eight public hearings around the state and collected over 8900 comments during the public comment period that extended until September 7, 2007.

Intra-Agency Cooperation

The Shoreland Program within the Waterway Protection Section of the Bureau of Watershed Management was the Department's primary participant in the rule-development process. The Runoff Management Section of the Bureau of Watershed Management, the Bureau of Fisheries Management and Habitat Protection, the Division of Forestry, the Office of the Great Lakes, the Bureau of Legal Services and the Bureau of Integrated Science Services were consulted with on and provided recommended modification to the provisions on shoreland buffers, water quality improvement structures, wildlife and fisheries habitat improvement structures, and impervious surfaces.

Inter-Agency Cooperation

The Department of Commerce was contacted and consulted on private on-site sewage disposal and sanitary sewer systems as well as infiltration standards contained in the mitigation section of the rule. The Department of Administration was consulted on the plat review provisions in the land division section of the revision and the Wisconsin Department of Transportation was consulted on the distinction of public and

private roads for common ownership properties like condominium developments. In addition, County Zoning Departments across the state were involved in varying degrees of review throughout the revision process. Some were members on the full advisory committee, some participated in work groups or focus groups, most provided comments during public comment periods and several were briefed individually numerous times during the 5 year process to ensure continued dialogue. Forty-nine County Zoning Departments also responded to the “County cost to amend shoreland zoning ordinances” survey conducted in late 2006. We also worked with Regional planning agencies to secure innovative land use and zoning methods for discussion and potential inclusion in the revision.

Agency Contacts

Todd Ambs – Water Division Administrator
Russ Rasmussen – Director, Bureau of Watershed Management
Toni Herkert – Policy Coordinator, Bureau of Watershed Management
Gregg Breese – Shoreland Team Leader, Bureau of Watershed Management

Additional Information

Attached to this document is the 2007 Response to Comments Summary (Attachment 1), NR 115 2005 Public Hearing Summary (Attachment 2), NR 115 Focus Group Membership (Attachment 3), NR 115 Work Group Membership (Attachment 4), NR 115 Advisory Committee Membership (Attachment 5) and the Summary of Rule Revision Activities (Attachment 6).

III. NR 115 Revision Description

A. Proposal objectives

The revision of ch. NR 115, Wis. Admin. Code, was initiated because the Department had concluded that the current minimum standards were not achieving the statutory objectives of the program. Section 281.31 (1), Wis. Stats., provides that shoreland subdivision and zoning regulations shall “further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.”

It is the responsibility of the Department, in the discharge of its mandate under ss. 59.692 and 281.31, Wis. Stats., to require county shoreland zoning ordinances to adhere to specific standards and criteria for navigable water protection. Section 281.31, Wis. Stats., provides that:

“Such standards and criteria shall give particular attending to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations.”

The Shoreland Management Program is also a key component in the fulfillment of the Department’s responsibility to uphold Wisconsin’s Public Trust Doctrine. Under the Public Trust Doctrine, Wisconsin’s lakes and rivers are public resources, owned in common by all Wisconsin citizens. While it was once primarily interpreted to protect public rights to transportation on navigable waters, the Public Trust Doctrine has been broadened to protect public rights to water quality and quantity, recreational activities, and scenic beauty.²³

Wisconsin law recognizes that owners of lands bordering lakes and rivers - "riparian" owners - hold rights in the water next to their property. These riparian rights include the use of the shoreline, reasonable use of the water, and a right to access the water. However, the Wisconsin State Supreme Court has ruled that when conflicts occur between the rights of riparian owners and public rights such riparian rights are still subject to the public's paramount right and interest in navigable waters.²⁴

²³ Quick, J. 1994. “The Public Trust Doctrine in Wisconsin.” Wisconsin Environmental Law Journal, Vol. 1, No. 1.

²⁴ *State v. Bleck*, 114 Wis. 2d 454 , 338 N.W. 2d 492 (1983)

The primary objective of this rule revision was to develop standards that satisfy both the statutory objectives of Shoreland Management Program, as well as the Department's responsibility to all citizens under the Public Trust Doctrine. However, as mentioned in the Purpose and Need section, other equally important goals of the revision effort were to address concerns raised by counties regarding amending and administering shoreland zoning ordinances, and to address concerns raised by property owners regarding the regulations of nonconforming structures.

B. Key Studies, assumptions or policies

The concept of revising the Shoreland Management Program stemmed from several objectives noted above. A key assumption that initiated the revision process was that existing standards were not adequately achieving the statutory objectives of the program. Key studies that helped shape the proposal are listed below. This is not exhaustive list of studies referenced, but a compilation of some of the key references used.

Bernthal, T. 1997. Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications. Madison, WI: Wisconsin Department of Natural Resources.

Christensen, D., B. Herwig, D. Schindler, and S. Carpenter. 1996. "Implications of Lakeshore Residential Development on Coarse Woody Debris in North Temperate Lakes." Ecological Applications. Vol. 6, No. 4.

Engel, S. and J. Pederson, Jr. 1998. The Construction, Aesthetics, and Effects of Lakeshore Development: A Literature Review. Wisconsin Department of Natural Resources, Research Report 177.

Ferguson, B. K. 1998. Introduction to Stormwater: Concept, Purpose, Design, New York: John Wiley & Sons, Inc.

Fischer, R. and J. Fischenich. 2000. Design Recommendations for Riparian Corridors and Vegetated Buffer Strips. US Army Engineer Research and Development Center, ERDC TN-EMRRP-SR-24. <http://www.wes.army.mil/el/emrrp/pdf/sr24.pdf>

France, R. L., ed. 2002. Handbook of Water Sensitive Planning and Design. New York: Lewis Publishers.

Graczyk, D., Hunt, R., S. Greb, S. Buchwald, and J. Krohelski. 2003. Hydrology, Nutrient Concentrations, and Nutrient Yields in Nearshore Areas of Four Lakes in Northern Wisconsin, 1999 – 2001. U.S. Geological Survey.

Haycock, N., T. Burt, K. Goulding, and G. Pinay. 1997. Buffer Zones: Their Processes and Potential in Water Protection.

Jennings, M., M. Bozek, G. Hatzenbeler, D. Fago, K. Schmude, K. Otis, R. Piette, R. Kahl, R. Hay, R. Sonntag, J. Coke, R. Chenowith, and T. Kapper. 1996. Shoreline Protection Study: A Report to the Wisconsin State Legislature. Wisconsin Department of Natural Resources, PUBL-RS-921-96.

Johnson, A.W. and D. M. Ryba. 1992. A Literature Review of Recommended Buffer Widths to Maintain Various Functions of Stream Riparian Areas. King County Surface Water Division.

Konkel, D., S. Borman, and K. Voss. 1997. The Effect of Shoreline Use on the Aquatic Plant Communities of West Central Wisconsin Lakes. Wisconsin Department of Natural Resources.

Krysel, C., E. Marsh Boyer, C. Parson, and P. Welle. 2003. Lakeshore Property Values and Water Quality: Evidence from Property Sales in the Mississippi Headwaters Region. Mississippi Headwaters Board and Bemidji State University.

Litton, R., R. Tetlow, J. Sorenson and R. Beatty. 1974. Water and landscape: an aesthetic overview of the role of water in the landscape. Port Washington, NY: Water Information Center, Inc.

Schueler, T. R. 2000. "The Importance of Imperviousness." The Practice of Watershed Protection. Center for Watershed Protection.

Wang, L., J. Lyons, P. Kanehl, and R. Gatti. 1997. "Influences of Watershed Land Use on Habitat Quality and Biotic Integrity in Wisconsin Streams." Fisheries: Bulletin of the American Fisheries Society. Vol 22, No. 6.

Wenger, S. 1999. A Review of the Scientific Literature on Riparian Buffer Width, Extent and Vegetation. Athens, GA: Office of Public Service and Outreach, Institute of Ecology, University of Georgia. http://outreach.ecology.uga.edu/tools/buffers/lit_review.pdf

Yanggen, D. and J. Kusler. 1968. "Natural Resource Protection through Shoreland Regulation: Wisconsin." Land Economics.

C. Major provisions and new requirements

Major provisions of the proposal include adding definitions to the rule for clarity; requiring counties to set standards for multi-unit development, mobile home parks, and campgrounds; providing exemptions for certain activities from shoreland setback and shoreland vegetation standards and establishing impervious surface standards to replace the regulation of nonconforming structures with a standard based on the size and location of structures. These changes will significantly decrease the number of variances granted by counties, allowing certain activities to be allowed with a simple administrative permit by the county. A brief description of the proposal follows.

Section NR 115.09 – Land division review

- The requirement for land division review is changed from the creation of "3 or more lots" to the creation of "one or more lots" to ensure that all new lots created meet minimum lot size requirements. This standard was added to protect prospective property owners and ensure that all lots have a compliant building location.
- If new lots are created that are divided by a stream or river, one side of the lot shall have a compliant building location. This provision will safeguard property owners by ensuring a building location on the lot.

Section NR 115.11 – Lot size and development density

- Minimum lot size and density standards have changed eliminating a distinction between sewered and unsewered areas. The new minimum lot size for all lots created after the effective date of the rule is 20,000 square feet and a minimum width of 100 feet computed as the average width of the building setback line, the ordinary high water mark, and one other location measured within 300' of the OWHM.
- Counties may allow development on a substandard lot if the lot is a legal lot of record that complied with the applicable lot size requirements in effect at the time the lot was recorded at the county register of deeds office and the proposed construction of a structure will comply with all other standards in the code.
- Counties are required to develop minimum lot size and density requirements for multi-family residential structures, mobile home parks and campgrounds.
- Counties may approve reduced non-riparian lot sizes for planned unit developments if the planned unit development plan includes larger shoreland buffers and larger setbacks on those lots adjacent to the water.

Section NR 115.13 – Minimum setback

- Language is added to address structures exempted by other state or federal laws from the minimum setback standards.
- Provisions are added to allow counties to exempt structures from the minimum setback if they meet certain requirements outlined in NR 115.13 (4).
- The construction of new dry boathouses is still exempted; however a maximum size of 250 square feet has been added to the rule.
- Standards are established to qualify a lot for a reduced setback if there is not a compliant building location and if the new setback is at least 50 feet.

Section NR 115.15 – Height Requirements

- A new section on structure height was added to protect and preserve the natural scenic beauty of lake and riverine environments.

Section NR 115.17 – Shoreland vegetation and buffers

- Language governing management of shoreland vegetation in the primary shoreland buffer is improved, resulting in a more functional buffer protecting habitat and water quality.
- Tree and shrubbery pruning is allowed. Removal of trees and shrubs may be allowed if exotic or invasive species, diseased or damaged, or if an imminent safety hazard, but must be replaced.
- Provisions are added to allow counties to exempt 6 types of activities from the shoreland vegetation provisions.
- A formula for the width of access corridors is provided, replacing the “30 feet in any 100 feet” provision, which was confusing if a lot had less than 100 feet of frontage. A second formula for lots with greater than 200 feet of frontage was also added to address larger developments adjacent to the water.

Section NR 115.19 – Impervious surfaces

- Development is regulated through the use of percentages of total impervious surface rather than through the use of a nonconforming structure provision. The total impervious surface coverage allowance within 300 feet of the ordinary high water mark is 10%, but may be exceeded up to a maximum of 20% total impervious surface cover if mitigation measures are implemented and maintained.
- Provisions are also included for counties to authorize impervious surface area coverage in excess of 20% to a maximum of 30% through a specific permitting system with qualifying requirements.
- Provisions are also included for shared impervious surfaces, expansion, enclosing existing impervious surfaces, replacements and relocation.

Section NR 115.21 – Mitigation

- The mitigation provisions are now performance standards to protect, preserve and enhance water quality and wildlife habitat while achieving natural scenic beauty.
- There is a water quality standard and a wildlife habitat standard that the counties will have to flesh out in their individual ordinances. The water quality standard will require infiltration of runoff. The habitat standard will require maintaining or restoring primary vegetation buffers.
- A provision on proportionality has been added to ensure the mitigation measures required will not outweigh the impacts of the proposed project.
- A computer program has been developed to help counties and/or property owners determine whether the performance standards have been met.

Section NR 115.23 – Land disturbing construction activities

- Section removed. Determined that Land division review standards meet the goals of this section.

D. Exemptions provided by this proposal

The proposal provides exemptions to some of the standards. Most exemptions are left to county discretion, if all of the applicable conditions are satisfied; however, the proposal does include some required exemptions resulting from other state or federal laws.

Section NR 115.13 –Minimum setback

The following structures are exempted from the minimum setback required by other state or federal laws, if all of the applicable conditions are satisfied:

- Open-sided and screened structures (s. 59.692 (1v), Wis. Stats.)
- Fishing rafts on the Wolf River and Mississippi River (s. 30.126, Wis. Stats.)
- Satellite dishes and antennas (47 CFR 1.4000 and 25.104)
- Reasonable accommodations for disabled persons (federal Americans with Disabilities Act and Fair Housing Act, and Wisconsin Open Housing Law)
- Utilities (Comm 83, s. 196.491, Wis. Stats.)

Counties may permit structures within the shoreland setback if they are designed, constructed and maintained to minimize runoff to navigable waters and have as their fundamental purpose one or more of the following goals:

- To provide safe, pedestrian access to navigable waters, including public walkways or trails,
- To ensure public health and safety,
- To control significant, on-going erosion or slope stabilization,
- To maintain or improve fish and wildlife habitat, or
- To maintain or improve water quality

Section NR 115.15 – Shoreland vegetation

The following activities are exempt from the shoreland vegetation standards if all of the applicable conditions are satisfied:

- Forest management activities
- Natural areas management activities
- Dam and levee maintenance activities
- Utility maintenance activities
- Road intersection and driveway line-of-sight maintenance activities
- Temporary access to project sites
- Some exemptions are available for agricultural practices and farm drainage ditches without stream history pursuant to s. 30.10 (4)(c)

IV. Environmental Consequences

A. Anticipated impacts on the physical and biological environment

The environmental impact of this proposal will be positive, although the resulting improvement in water quality and fish and wildlife habitat may not be seen for some time. This proposal will set in motion a process of recovery for Wisconsin's water resources while preventing further degradation of lakes, rivers, streams, and wetlands. Direct impacts resulting from the proposal include less sediment, nutrients (phosphorus and nitrogen), and other contaminants washing into water resources.

Longer, indirect impacts will be improvements to fish and wildlife habitat, increased populations of desirable fish species, increased water clarity, more stable stream banks and lake shores, more natural appearing shorelines, and more balanced aquatic ecosystems.

B. Anticipated direct and indirect economic impacts

There will be direct economic impacts as a result of the proposal on the affected parties. Positive economic impacts from cleaner water can be expected in terms of increased recreational and tourism opportunities, improved ecosystem health, enhanced aesthetics, and increased property values. Builders, contractors, building centers, and others can expect additional positive benefits from increased spending on improvements and replacements to, which are currently limited to 50% of the current equalized assessed value of a structure over the life of the structure, if a county utilizes the "50% rule". Landscapers, nurseries, and garden centers can also expect positive economic impacts as property owners restore primary shoreland buffers along lakes and rivers.

It will cost money on the part of local governments, landowners and developers to implement the proposal, although some of these costs may be offset. For example, cost savings may be realized in decreased permitting costs when projects that may currently require a variance and public hearing could be allowed with a simple administrative permit from county zoning staff.

To help counties defray the cost of ordinance amendments, the proposal allows counties to take up two years to bring their ordinance into compliance. This extended compliance period allows counties to develop their own timetable for amendments, synchronizing the amendments to the county shoreland zoning ordinance with other regularly scheduled ordinance amendments to limit costs related to informational meetings, public notices, and public hearings. Delaying implementation by two years will also allow counties to apply for Lakes Planning grants and River planning grants from the Department to help defray amendment costs.

A fiscal estimate for the proposal was written for the impacts on state agencies and local units of governments and is included in the attachments.

C. Impacts on social or cultural environments, the regional availability of energy or other features not previously addressed

The impacts on social and cultural environments are expected to be positive. Achieving the goal of improved water quality and fish and wildlife habitat for lakes, rivers, streams and wetlands will be an asset to the communities surrounding these water resources by providing increased recreational opportunities, improved aesthetics, gathering places for community events and celebrations or quiet places for reflection.

The Department also considered environmental justice in the analysis of these rules. The Department defines environmental justice as a continuous decision-making process that ensures participation by minority and low income populations in affected areas, along with majority populations, in order to ensure that as an outcome all people receive the benefits of clean, healthy and sustainable environments, regardless of race, national origin, or income. As the rules are implemented, there is an expectation that environmental justice will be considered, both in terms of proving opportunities for participation by low income and minority populations and of the impacts on these groups. Such impacts might be reducing the health risk of children playing in a polluted neighborhood river, having healthier fisheries available to low-income populations that rely on fish for food, or maintenance of wild rice beds for harvest by Native American communities.

The regional availability of energy will be maintained by this proposal by allowing counties to exempt utility structures from shoreland setback requirements and by exempting utility maintenance activities from shoreland vegetation standards.

V. Alternatives and Their Impacts

A. No Action

The “no action” alternative would be a failure by the Department to meet the statutory objectives of the Shoreland Management Program, and also would be a failure in the Department’s responsibility as a trustee of Wisconsin’s lakes and rivers, as mandated by the Public Trust Doctrine. This alternative would result in maintenance of inadequate minimum standards for shoreland zoning ordinances.

No action would also fail to address concerns with the existing standards raised by counties. Many of the innovative proposals from counties to update their shoreland zoning regulations are not allowed under the current structure of ch. NR 115, Wis. Admin. Code. If counties adopt these innovative techniques, the county and the Department would be open to legal challenges from other parties, for failure to meet the requirements of ch. NR 115, Wis. Admin. Code.

If no action were taken, property owners would also continue to be frustrated with the inability to get permits for improvements to nonconforming structures, and with the cost and delay associated with getting variances.

B. Selection of Different Standards

An advisory committee of affected parties and other stakeholders, along with work groups and focus groups throughout the process that focused on very specific issues, developed the proposed rule. Input from the public on the rule proposal was also gathered through listening sessions and two rounds of public hearings. The rule proposal is intended to address the major impacts of shoreland development and provide opportunities to mitigate those impacts, while allowing development to occur.

The Department believes that the provisions of the proposed rule revision represent the most integrated standards needed to address the most significant impacts of shoreland development in a cost-effective manner. Selection of different standards could either have a positive or negative effect on the environment, depending on which standard is selected. Standards that were considered by the Advisory Committee, but not included in the proposal, included establishing a wetland setback, requiring merger of title for nonconforming lots in common ownership, prohibiting boathouses and prohibiting setback averaging, because of potential negative impacts to shoreland property owners.

The standards in the rule proposal were modified and reworked based on comments from Advisory Committee members, private citizens, and representatives of organizations, such as the Wisconsin County Code Administrators, Wisconsin Campground Owners Association and the Wisconsin Housing Alliance. The resulting proposal reflects, as closely as possible, a compromise position. The rule proposal cannot satisfy all people or groups on all issues. The Department has used extensive public outreach to develop standards based on public input, and believes the proposal is ready for passage by the State Legislature.

C. Legislative Alternative: Rely Solely on State Implementation of Standards with No Option for Local Involvement

The proposal shall be implemented and enforced as minimum statewide standards through local ordinances with the state acting as an oversight entity. The alternative of implementing and enforcing the standards at the state level might result in a more consistent approach, but it is unlikely that enough staff resources would be made available for adequate implementation, monitoring, and enforcement. In addition, a statewide approach would remove the aspect of local control and eliminate the potential for counties to develop more protective standards to meet their specific resource needs. As a result, this alternative may be ultimately more detrimental to the environment.

The department intends to prepare a model ordinance to afford some consistency to local governments who wish to adopt the model. Other communities will prefer to use their own ordinance format; however, local adoption and administration of ordinances is expected to result in higher compliance rates as communities work together to develop ordinances that meet the minimum statewide standards, but also meet local resource protection goals. Administration at the local level, rather than the state level, is closer to the source of the issue, driven by local officials and ultimately more acceptable to the regulated community.

EA ATTACHMENT 1

RESPONSE TO PUBLIC COMMENTS AND 2007 PUBLIC HEARINGS

Proposed Revisions to Statewide Minimum Shoreland Zoning Standards NR 115, Wisconsin Administrative Code

This document is a summary of the approximately 8,945 comments from 2,381 individuals which were received by the Wisconsin Department of Natural Resources during the public comment period for the revision of the Shoreland Protection Program (Wis Admn Code, ch. NR 115) in the summer of 2007. This summary does not contain each individual comment received. For a copy of the complete comment database please contact Toni Herkert: toni.herkert@wisconsin.gov or (608) 266-0161.

Definitions

Purpose of section: Define words used in the rule. This section does not set standards. We strive to reinforce common dictionary usage and to be consistent with other law and rules wherever possible.

Public Comment

(1) Access and viewing corridor:

- Clarify that structures providing access to the water (i.e. walkways, steps) are permitted and don't require that the corridor be completely vegetated.
- Remove term "pedestrian" to avoid confusion over public access

Response: Remove the requirement that the access and viewing corridor is vegetated

Public Comment

(2) Accessory structure:

- Delete: In code, terms "structure" and "impervious surface" are used to refer to accessory structures but the term is never used
- Term should include existing boathouses, deer stands, duck blinds

Response: The code applies to structures that are accessory, including those mentioned by commenters, but does not treat them differently, so no definition is needed. To add a definition or examples adds complexity and risks additional confusion.

Public Comment

(4) Best management practices:

- Refer to as "technical standards"

Response: A note on technical standards was added stating that the list of technical standards is adequate to meet the BMP's.

Public Comment

(5) Compliant building location:

- Clarify "30 foot deep"
- 30 feet deep too small for modern construction or a high value home

Response: No action. After testing options, the term "deep" was the most readily understood way to describe the location. Add a graphic in a note to the model ordinance for further clarity.

Public Comment

(6) Conditional use or special exception

- Separate these terms
- Define but delete when or how they are issued

Response: "Special exception" deleted from definition, although general zoning law uses these terms interchangeably and governs local procedures.

Public Comment

(11) Expansion:

- Revise to state “addition of impervious surface”
- Clarify. Change “larger, taller, or both” to “an addition to an existing structure that increases the footprint of the building, or both”
- Concern that roofline alteration/pitch-change would fall under expansion and trigger mitigation while not necessarily adding to net usable/livable space

Response: Clarify rule language. Change to “larger in any dimension”.

Public Comment

(15) Impervious surface

- Given important nature of this term, the phrase “a large portion” needs further definition.
- Concern with inclusion of driveways (should consider different soils) and decks

Response: No change to definition as it is used in NR151. Add requirement that the Department maintain a technical standard based on scientific testing for the imperviousness of surfaces.

Public Comment

(18) Lift

- State specific type of lift: for humans or boats or no difference

Response: Delete definition. Lifts would be allowed to provide safe pedestrian access to the water in NR 115.13(4).

Public Comment

(19) Lot

- Do not tie term to specific form of access. Current term excludes island lots
- “Note”: may conflict with findings

Response: Reference to “access” deleted from definition, although ownership of navigable waterway bed does not change the measures needed to protect habitat, water quality. The provision is consistent with the use of OHWM, is ecologically consistent and administratively simple. No action.

Public Comment

(23) Ordinary High Water Mark:

- OHWM should be set by the DNR, not the counties, as it’s a significant factor in establishing criteria for this code.

Response: No change. It is beyond the scope of the rule to specify. In many cases OHWM is obvious and it would be administratively burdensome for the DNR to make each OHWM determination. DNR consults with trained county staff on difficult cases.

Public Comment

(24) Primary shoreland buffer:

- “Vegetated buffer strip” language does not convey allowance of access/viewing corridor structures.

Response: No change made to definition; however, change made to “Shoreland vegetation and buffer” section.

Public Comment

(27) Secondary shoreland buffer:

- Inclusion of this term is extraneous as it is essentially turf grass. More language but does not contribute resource protective measures to the code.

Response: No change. Because the choice exists not to vegetate and invasive plants are a risk, the standard is needed along with the definition.

Public Comment

(28) Structure:

- Definition overly broad. Consider whether term includes both primary (principal) and accessory structures

- Boathouses “temporarily placed on the ground” dredges up the same controversy faced on the St. Croix and Mississippi Rivers

Response: No change other than deletion of “note” that gave examples of structures. Anything meeting the long-standing definition has the potential for impact. Differences in impact are addressed by differences in standards. “Principal structure” is defined and “accessory structure” is addressed above. Houseboats on land are structures. In the water, they are governed by state waterway and boating laws.

Public Comment

(32) Variance:

- Decide whether to include “use” variances.
- Definition should not limit the code to “dimensional” variances. Delete “dimensional” so both use and dimensional variances are an option.

Response: Delete and rely on authority given to local units of government by the Wisconsin Legislature to engage the variance process using existing procedures. Minimum shoreland standards do not generally establish uses in the shoreland zone. Uses are specified only for the wetland district; other uses eliminate wetland and so require rezoning.

Public Comment

Suggested definition additions:

- Lake
- Structural alteration: only limited to changes that increase impervious surface
- Maintenance and repair: any change made to a structure that does not constitute expansion
- Height: concern that if not defined, an increase in roof pitch could fall under “Expansion” or “Structural alteration”
- Planned development districts

Response: Planned development district added. No other changes in this section. Lake is a term in common use not requiring definition for purposes of this code. Suggestions for the other definitions relate to standards rather than definition and will be addressed elsewhere.

Applicability

Purpose of section: This section provides a consolidated reiteration of various sections of the statutes requiring shoreland zoning for specific geographic areas, including statutory provisions adopted since enactment of the original rule.

Current Provision: The provisions of this chapter apply to county regulation of development in unincorporated shoreland areas. Unless specifically exempted by law, all cities, villages, towns, counties and, when s. 13.48 (13), Stats., applies, state agencies are required to comply with, and obtain all necessary permits under, local shoreland ordinances. The construction, reconstruction, maintenance and repair of state highway and bridges, carried out under the direction and supervision of the Wisconsin Department of Transportation are not subject to local shoreland zoning ordinances, if s. 30.2022(1), Stats. applies.

History: Cr Register, July, 1980, No. 295, eff. 8-80; am. Register, October, 1980, No. 298, eff. 11-1-80; **correction made under s. 13.93(2m)(b)7., Stats.**

Proposed Provision: “The provisions of this chapter are applicable to county regulation of the use and development of unincorporated shoreland areas, and to county, city or village regulation of previously unincorporated shoreland areas that were annexed by a city or village after May 7, 1982 or incorporated as a city or village after April 30, 1994. References in this chapter to a county, or county government agencies, shall be read to apply to cities and villages, or city and village agencies, when this chapter is applied to annexed or incorporated areas in situations where s. 59.692 (7), Stats., requires that shoreland zoning is to continue in effect.”

Public Comment: Two themes are raised:

- Revised NR 115 should apply to the entire state regardless of municipal boundaries
- As worded, revised NR 115 will retroactively apply to all areas annexed after 1982.

Response:

Modify the rule language to further clarify. The intent of the revision language is to provide a consolidated statement of the statutory requirements for the geographic areas subject to shoreland zoning. Areas of cities and villages within the municipal boundary before May 7, 1982 are not, and are not proposed to be, required to have shoreland zoning. The statute requires cities and villages to apply the county shoreland provisions in effect at the time of annexation to areas annexed after May 7, 1982 and areas incorporated since April 30, 1984.

While a clarification was added for rule applicability in annexed and incorporated areas after specific dates, it is beyond the scope of the Department’s authority to require local governments to adopt shoreland zoning in areas not required by the legislature.

Shoreland-wetland zoning districts

Purpose of section: Ensures that counties designate all shorelands in the county identified as wetlands on the Wisconsin wetland inventory maps or Wisconsin wetland inventory map amendments as “shoreland-wetland zoning districts”.

Current Provision: Includes provisions for the adoption of shoreland wetland maps, permitted and prohibited uses, along with re-zoning criteria and processes.

Proposed Rule: Deletes the provisions for the adoption of the shoreland wetland maps and includes the remainder of the original language with a noted change to the standard for re-zoning shoreland wetlands. The proposed change states “...there is a practicable alternative or if...” There are also modern terminological drafting changes that refer to the correct offices.

Public Comment:

- Several comments were received with respect to the proposed change in the standards for re-zoning questioning the need for the change.
- Comments were also made requesting an opportunity to challenge the Wisconsin wetland maps.

Response:

Revert to existing language, removing the reference to a “practicable alternative,” changing proposed s. NR 115.07(5)(d) to read:

(d) In order to ensure that the shoreland protection objectives found in s. 281.31, Stats., will be accomplished by the county shoreland-wetland zoning ordinance, a county may not rezone a shoreland-wetland zoning district, or portion thereof, ~~if there is a practicable alternative or~~ if the proposed rezoning may result in a significant adverse impact upon any of the following:

This proposed change is an attempt to fully align this rule with the state and federal wetland standards. As the change would in some instances potentially require additional analysis at the local level, the change will not be made.

~~Instead of the change above, we will add a note at the end of the section that states: “Note: State and federal permits may be required prior to altering a shoreland wetland.”~~

Language is also edited to reflect the modern process of digitizing shoreland-wetland inventory maps and the associated changes to the county review process for wetland inventory map amendments. Counties will have the opportunity to challenge inaccuracies or discrepancies if a narrative accompanies the notice to the department explaining the problem areas.

Land Division Review

Purpose of section: Provide an administrative mechanism to implement standards that manage density of structures to preserve space for infiltrating runoff, for fish and wildlife habitat, and avoiding a predominance of artificial features.

Current Provision: Review of 3 or more parcels of 5 acres each within 5 year period for factors including conformity to code provisions

Proposed Provision: Must review creation of one or more lots 5 acres or smaller; must comply with lot size requirements and consider same factors as in current rule.

Addresses lots divided by streams so that they may exist but requires that one side of stream have compliant building location.

Public Comment:

- Retain current level of review to avoid increased local workload
- Factors for review beyond scope of shoreland zoning and are vague
- Should apply to lots created after date of ordinance
- Applies to lots that do not abut waterways

Response:

Remove factors for review and leave to county discretion.

Continue to review all lot divisions – If there is no review of one to three lots less than five acres substandard lots would continue to be created and sold that may not be able to be developed as desired. Local review process can be streamlined – review at this stage saves time later in that it avoids creating lots that will require variances or specialized measures in order to build on – with resulting harm to fish and wildlife habitat, water quality and natural scenic beauty.

As part of the Department duties, DNR will provide information to landowners and help implement the requirement through its ongoing coordination with surveyors and plat review staff.

Lot Size

Purpose of section: Provide a minimum amount of area to preserve space for infiltrating runoff, for fish and wildlife habitat, and some natural scenic features.

Current Provision: 20,000 square feet unsewered; 10,000 square feet sewerer

Proposed Provision: 20,000 square feet and 100 feet wide at OHWM and setback for all newly created lots.

Public Comments:

- Requiring minimum lot width at OHWM and setback line precludes development of many irregular lots – use only lot width at OHWM
- Don't increase lot size as density is good – more infrastructure, unaffordable waterfront
- Increase lot size – Increase lot size and width to meet habitat and natural scenic beauty objective
- Require combining of substandard lots in common ownership

Response:

Ten-thousand square foot lots simply cannot accommodate the typical home size along with typical accessory structures and surfaces that commenters say are needed or desired while meeting all the dimensional shoreland zoning requirements. A reduction allowance for sewerer lots has been eliminated

because having a sewer-connection does not remedy the impacts to fish and wildlife habitat and natural scenic beauty. Increased lot size standard of 20,000 square feet for new lots will be retained.

The lot width measurement has been changed to allow the 100-foot width to be an average computed using three width measurements— 1) at the OHWM, 2) at the setback and 3) one other location of the owners' choosing on the lot within 300 feet of the OHWM.

The final draft of NR 115, allows planned unit developments to have increased densities on non riparian lots as long as standards for water quality, habitat and natural scenic beauty are met for the entire development by requiring larger buffers and setbacks for riparian lots. Counties must develop their own minimum lot size and density requirements for multi-family residential structures, mobile home parks and campgrounds as part of their shoreland ordinance.

Combination of substandard lots in common ownership will not be required; however, standards are now included that address how adjacent commonly owned lots smaller than the revised lot size requirements may retain their substandard status.

Minimum Setbacks

Purpose of section: Provide a minimum space between the water and structures for infiltrating runoff, for fish and wildlife habitat, and for some natural scenic features.

Current Provision: 75 foot minimum setback for structures; small number of exempted structures (piers, boat hoists, boathouses, open sided structures); allows setback averaging.

Proposed Provision: 75 foot minimum setback for structures; expanded exemptions for water-related purposes (fishing rafts, satellite dishes/antennas, utilities, flagpoles, water quality and habitat restoration structures). New setback reduction process allows properties with no compliant location due to a unique property feature to reduce setback to allow a 30' building envelope. Reduced setback cannot be smaller than 50'. Impervious surface and mitigation standards automatically apply because building will be closer than 75'. Setback averaging no longer allowed.

Public Comment:

- Support for long-standing, well-understood 75 foot setback.
- Issue with method of measuring setback: (1) call for allowing measurement to extend to the foundation w/exceptions rather than the overhang/eaves, but allowing counties to be more restrictive; (2) concern about influence of a wetland boundary pushing setback further back
- Boathouse issues: Whether new boathouses should be allowed in the buffer; if so, comments supporting 250 square foot size and other stating not big enough. Concern boathouse issue too big to include in this revision and that should be removed and addressed through separate legislation
- New setback reduction process: Apply to existing structures proposing substantial changes and apply to commercial as well as residential. Concern that definition of "unique property features" uncertain. Call for more data on impacts on ability to build on lots. Support for clear, limited setback reduction circumstances
- Concern that setback be considered in land division review to avoid creating lots w/o legal building locations.
- Concern expressed that existing setback averaging process will be compromised or discontinued. And conversely, support for its elimination
- Concern that broad "structure" definition will lead to setback requirements being imposed on recreational equipment
- Clarify which "best management practices" employed for exempted utilities w/in the setback
- Concern that "exempted structures" too broad
- Concern that DNR-County OHWM location discrepancy resolution process is included in the code

- Call to differentiate between urban and rural setbacks: Concern that a 75 foot urban setback will counter planning efforts to control sprawl through increasing density.

Response:

No major changes. The comments convey a wide range of perspectives and recommendations. The proposal maintains a balance between protection and development. While the concept of different setbacks for different waterways is attractive, a general reduction of the setback below 75 feet is inconsistent with scientific data questioning whether water quality remedies can be engineered in small spaces and there is no substitute is available for the waterfront space required for survival of shoreland wildlife species.

Height Requirements

Purpose of section: To address the wildlife habitat and natural scenic beauty mandate of NR115 this new standard limits the height of new residential development within 300’ of the OHWM and encourages height caps to achieve natural scenic beauty and habitat objectives for commercial, agricultural and industrial uses where those are allowed by general zoning in the shoreland zone.

Current Provision: None

Proposed Provision: “To protect and preserve the wildlife habitat and natural scenic beauty of lake and riverine environments, after the effective date of this rule [revisor insert date], a county may not permit the construction or placement of a structure on a lot within 300 feet of the ordinary high-water mark of a lake or stream unless the structure height does not exceed 35 feet. A county may create specific standards for height that apply to zoning districts for commercial, agricultural or industrial development within the shoreland zone provided those standards are incorporated into the county’s shoreland zoning ordinance.”

Public Comment:

- Opposition to state defined height limit: Natural beauty should be county defined; Addressed case-by-case; Apply only to pristine waters not to urban and rural development; Limits size of waterfront home, thus its value
- Limit height to 26’ (two stories)
- No exception for commercial, agricultural, industrial, or *multi-family*/condominiums (exempt silos, farm buildings, smokestacks)
- Concern about point or vantage point from which 35’ would be measured
- Would like this to include cellular towers
- Would like religious buildings (i.e. steeples) to be excluded
- Concern that counties won’t have resources to enforce

Response:

To address issue with church steeple height or other objects attached to the roof, change language to “unless the highest point of the roof pitch does not exceed 35 feet.” How counties measure the 35-foot structure height limit is left to county discretion. In addition, the height limits for ~~planned development districts~~, commercial, agricultural and industrial permitted uses shall be created by counties and written into their ordinances if such uses are allowed in the shoreland zone.

It is likely that urban waterfront development in unincorporated areas will be either commercial or mixed-use. The counties are being given the flexibility to define limits for non-residential districts. Condo development typically occurs in residential districts, thus in the 300’ shoreland zone condos would be limited in height. Not defining a vantage point from which to measure height will allow counties with exiting height limits to maintain their measurement methods.

Shoreland Vegetation and Buffers

Purpose of section: This provision addresses the three major goals of shoreland management - water quality, fish and wildlife habitat and natural scenic beauty. The vegetation section has been updated to

remove uncertainty and ensure protection of Wisconsin's waterways by controlling erosion and sedimentation and preserving the natural scenic qualities which provide vital habitat for shoreland wildlife.

Current Provision: Cutting of trees and shrubbery is regulated to protect natural beauty, control erosion and reduce the flow of effluents, sediments and nutrients from the shoreland area.

1. In the strip of land 35 feet wide inland from the ordinary high-water mark, no more than 30 feet in any 100 feet shall be clear-cut.

2. In shoreland areas more than 35 feet inland, trees and shrub cutting shall be governed by consideration of the effect on water quality and consideration of sound forestry practices and soil conservation practices.

3. The tree and shrubbery cutting regulations required by this paragraph shall not apply to the removal of dead, diseased or dying trees or shrubbery.

Proposed Provision:

Primary buffer – Property owners shall preserve or establish, and maintain a buffer of native shoreland vegetation in the area that extends 35 feet inland from the ordinary high-water mark under the following circumstances:

1. When a new principal structure is constructed
2. When required under NR 115. 21 (mitigation)
3. When required by a county's ordinance

Secondary buffer – As a general requirement everywhere, property owners shall preserve or establish, and maintain, a secondary buffer of native or nonnative, non invasive, ground layer vegetation, and including from the primary buffer to the structural setback for the same conditions as the primary buffer.

Viewing and access corridor – 40 ft or 30% (whichever is less) for the first 200 feet of frontage or 200 ft or 20% (whichever is less) for greater than 200 feet of frontage.

Exemptions – Specific exemptions are created for agricultural practices and farm drainage ditches, Forest management activities, natural areas management activities; dam, levee, utility and roadway maintenance and temporary access.

Public Comment:

- Opposed to mandatory vegetation buffer requirements for all new principal structures.
- Opposed to the reduction in access size for lots less than 100 feet of frontage.
- Tall grasses may increase health and safety risks.
- Conflict in Department regulations NR 115 requiring buffers and DNR forestry requiring clearing around structures for fire safety.
- 35 foot buffer is inadequate, support 50 foot buffer.
- Proposed rule should not preclude additional cutting if done in accordance with an approved forest management or shoreline vegetation management plan.
- There should be an emphasis on maintaining the 35-foot primary buffer with natural vegetation.
- The requirement for buffers provides excellent habitat, water quality protection and ensures improved waterfront aesthetics.
- This is one of the most important aspects of NR 115, and yet, the importance of vegetated buffers for stormwater infiltration, habitat and natural scenic beauty is assumed, but not described anywhere in the new code. Sections 1 (a) and (b) should be combined under an intent section and instead of referring to “sound forestry and soil conservation practices,” require compliance with BMPs for shoreland areas established by the DNR Forestry Division.
- Support the 35 foot primary buffer to protect habitat, however, stronger reference to habitat is needed and more intent/purpose/direction language on vegetation management.
- Vegetation removal and management should be combined applying the same performance standards to both.

Response:

Remove automatic requirement to re-establish a primary shoreland buffer when a new principal structure is being constructed, but it will be one option if mitigation is required. However, the buffer rules will still

require the preservation and maintenance of intact buffers on newly created lots. The goal is to not lose additional existing shoreland buffers and the hope is to gain more shoreland buffers through volunteer restorations or through mitigations.

In this draft, the department proposes to combine the vegetation management section (1)(b) with the removal section (2)(d) and create one section under (1)(b) entitled “vegetation management.” In addition, the section (1)(a) will be combined with the general section in (1) moving the title “vegetation removal criteria” to the beginning of this section.

The 35 foot primary buffer size will be maintained because smaller buffers don’t offer adequate protection for water quality, wildlife habitat and natural scenic beauty.

Riparian vegetation is the most critical ingredient of lake and river habitat. Although researchers have estimated that animal habitat can be affected up to 1,500 feet away from human activities and structures, it may be possible to limit the impact of these disturbances by preserving and restoring shoreland vegetation. Ninety-percent of rare species depend on the shoreland zone for all or part of their life cycle. Riparian habitat cannot be replaced anywhere other than at the lake or stream edge.

Impervious Surfaces

Purpose of section: Provide a minimum amount of area to preserve space for infiltrating runoff, for fish and wildlife habitat, and avoid complete predominance of artificial features.

Current Provision: Current rule contains no impervious surface provisions

Proposed Provision: For new development, if 10% of the area within 300 feet of the OHWM is covered by impervious surfaces mitigation is triggered; no more than 20% coverage is allowed. Existing development may have up to 15% impervious surface coverage before triggering mitigation and also may not have more than 20% coverage. No expansions are permitted in primary buffer or closer to the water if setback not met. Unlimited maintenance and repair is allowed without conditions.

Public Comment:

- Allow expansion of impervious surface in primary buffer in exchange for mitigation - prohibiting of expansion of impervious surface in primary buffer limits usability of home and value
- Impervious surface limits too restrictive
- Eliminate or modify impervious surface thresholds
 - Unclear what surfaces are included
 - Don’t include public or private streets
 - Clarify that trigger and cap have an effect only when expanding – not automatic on exceedance
 - Total too small
 - Use other ways to manage runoff
- Keep impervious surface limits:
 - Caps already exceed scientifically determined threshold of ecological effect
 - 20% cap should be absolute
 - Apply caps to entire shoreland zone
- Allow counties the option of keeping the 50% rule

Response:

The Impervious surface section has been reorganized for better ease of interpretation. The section maintains that simply exceeding impervious surface standards does not create an automatic requirement for immediate action; a change to the property must first be proposed.

Unlimited maintenance and repair will still be allowed without mitigation. Mitigation is required for replacement of structures where caps are exceeded.

In the final proposal, expansions to structures that are partially within the secondary buffer are allowed as long as the expansion to the existing structure is wholly beyond the setback. Absolutely no expansions are permitted in the primary buffer.

Negative impacts to aquatic ecosystems are documented at 8% impervious surface coverage. To stay as close to the science as possible, the threshold for both existing and new development will be 10% total impervious cover of the lot within 300 feet of the ordinary high water mark. Any additions to impervious surface cover up to 20% must be accompanied by mitigation. To expand beyond 20%, a relief valve has been added in the form of the “Excess Impervious surface authorization” provision. For properties that meet the minimum setback, this provision enables the 20% cap to be exceeded up to a maximum of 30% as long as specific requirements are met. Variances may still provide minimum relief. Public streets remain included in impervious surface calculations because they contribute to impact; shared surfaces are divided so that they do not unduly restrict a single property.

Mitigation

Purpose of section: Mitigation is used to allow more development flexibility while continuing to achieve statutory objectives.

Current Provision: There is no mitigation in the current administrative code. Variances are the only relief mechanism. Mitigation is statutorily required in for gazebos and similar 200 square foot structures less than 75 feet from the water [s. 59.692(1)(v)].

Proposed Provision: The proposal provides choices among mitigation measures when dimensional standards are exceeded. The mitigation standards are performance based and in proportion to the amount by which the dimensional standard is exceeded.

Public Comment:

General support for the concept of mitigation with several concerns:

- Uncertainty of what will be required to meet the standards.
- A restored or protected shoreland buffer should meet the entire mitigation requirement.
- Structural expansions should not trigger mitigation.
- Expense of possible mitigation practices.
- Mitigation should be required for all projects that exceed dimensional standards

Response:

The Mitigation section intent is now clearly stated to be used “when a person or property owner proposes construction, reconstruction, expansion, replacement, or relocation of a structure or impervious surface” which will exceed specific thresholds. “Expansion” has been redefined to mean to make “larger in any direction”.

The entire section has been reorganized, making it clearer that meeting the performance standards for water quality and fish and wildlife habitat are sufficient to meet the natural scenic beauty performance standard.

Also, the section has been clarified so that counties understand they can simply adopt the requirement of a full primary buffer restoration into their ordinances for a mitigation system because a naturally vegetated functioning primary buffer will meet the goals of the performance standards.

Technical standards have been added referencing the computer program made available by the Department that will help counties conclude whether mitigation measures meet the code-required performance standards. Counties must choose to adopt the computer program, full buffer restorations, or a county-specific mitigation system to implement these performance standards.

Specific mitigation practices are not prescribed because at least 17 counties have mitigation systems in place today and it is the intent of this proposal to allow those systems to remain in place with minor modifications in some cases and no changes in others.

If counties decide to develop their own mitigation system, they have the authority to simplify their system by requiring a single or limited number of mitigation measures. Fewer mitigation options give certainty but limit flexibility. Many available mitigation measures are low or no cost. Property owners can control costs through their choices about whether and how much to exceed dimensional standards and choices among mitigation measures.

In the absence of a mitigation system, the result of unlimited modification of the shoreland zone are increased public costs for treatment of nuisance levels of algae and aquatic plants, lake and stream restorations and reduced local revenues from visitors and lower property values.

Land disturbing construction activities

Purpose of section: Reduce sediment, nutrient and stormwater runoff impacts from construction immediately adjacent to lakes and streams

Current Provision: “*Filling, grading, lagooning, dredging, ditching, and excavating* may be permitted only in accordance with the provisions of sub. (2), the requirements of ch. 30, Stats., and other state and federal laws where applicable, and only done in a manner designed to minimize erosion, sedimentation, and impairment of fish and wildlife habitat.”

Proposed Provision: Counties must establish a permit system to control erosion and sedimentation. Counties may choose to exempt projects with state permits under ch. 30 or NR 216. Counties may act as agent of DNR, using county permit to simultaneously grant state approval if MOA (memorandum of agreement) developed and approved.

Public Comment:

- General support for regulation: water quality protection; enables addressing of regional land differences (soils, slopes)
- Standard should include minimum (threshold) area, slope or other standards for land disturbing activities that require county permits and a standard for determining compliance (set performance standard similar to NR 151).
- Include language to enable counties to issue permits for those less than the minimum threshold mentioned above
- Counties should not be responsible for issuing separate permits (i.e. duplicative erosion control permit) for land disturbance. Suggest one comprehensive zoning permit for structure construction that includes erosion control. Exempt those subject to UDC permitting.
- Beyond ch. 30 and NR 216, counties should not be able to exempt under this standard
- Don't allow counties to exempt grading

Response:

Entire section removed from the code. The goals of the section are met by the Land division review section.

Adoption of administrative and enforcement provisions

Purpose of section: Establish requirement for base level of operations and procedures essential to ensure meeting of minimum statewide standards to protect habitat, water quality and natural scenic beauty for users. Current rule includes many specific administrative requirements because it was adopted when many Wisconsin counties had no zoning provisions and general zoning law was not as well developed as it is today.

Current Provision: Current rule requires a variety of procedural and administrative measures.

Proposed Provision: No change from current rule

Public Comment:

Inspection, permit requirement and other administrative requirements increase workload for local governments.

Response:

The following changes have been made to provide local flexibility. ~~Timing changed from “regular” to “periodic” required inspections of permitted work in progress.~~ Counties shall now include a plan for ensuring that landowners in unincorporated areas are informed of shoreland zoning requirements, but without specifications for how to coordinate the plan.

A variety of recording methods are allowed to provide additional flexibility for how counties keep records of board of adjustment and planning and zoning committee proceedings. The procedure to be followed for allowing disabled persons to take actions otherwise prohibited allowing equitable access to property has been clarified. The requirement that site diagrams be submitted with permit applications has been removed.

Department Duties

Purpose of section: The section describes tasks required of the department in order to set and maintain minimum statewide standards and to assist local governments in effective administration of ordinances.

Current Provision: The rule requires a handful of basic tasks.

Proposed Provision: The proposed rule requires additional specific activities, including a model ordinance and mitigation design tool, in addition to existing required Department activities.

Public Comment: No comments.

Recommendation:

No changes based on comments. One provision was added requiring the Department to evaluate the effectiveness of the NR 115 revision—new provisions—in upholding the statutory goals of the program and submit a report to the Natural Resources Board ten (10) years after the effective date of the code. Note that in addition to duties specified by rule, the Department:

- Contracts annually with the UW-Extension’s Center for Land Use Education for services to local zoning programs including training and handbooks, and
- Assigns specific statewide and regional staff to work closely with zoning offices and the Wisconsin County Code Administrators and similar groups to provide technical assistance and oversight under the current code, investing an average of \$268,551 and more than 15,000 hours of staff time annually on shoreland zoning.

Cost of county administration

Purpose of section: Not a section of the code. There were a number of miscellaneous comments concerning the potential cost counties might incur implementing and enforcing the proposed code.

Current Provision: No language in the current rule on this issue.

Proposed Provision: No language proposed.

Public Comment:

- Counties do not have staff and funding required for adopting and administering new rule requirements.
- Oppose adoption until state funds are provided.

Response:

With the exception of Milwaukee and Menomonee Counties, all counties currently administer shoreland ordinances. Ordinance development and adoption are eligible for DNR Lake and River grants of \$10,000 to \$50,000 available on an annual basis. In the past, many counties have taken advantage of available grants to revise ordinances and improve administrative practices.

By rule the Department cannot provide or require funding or specific commitments of funds. However, the Department may be able to set priorities for its existing grant programs (see above) to fund ordinance adoption during the two-year adoption period and develop model grant proposals for ordinance adoption. Another possibility is for the Department to help develop and support legislative change to allow pass-through of state fees when local governments administer state requirements. And, whenever budget conditions allow, the Department might be able to support appropriate state investment in local shoreland zoning activities.

Additionally, the changes to the Administrative and enforcement provisions create more flexibility and may reduce county costs—less strict inspection schedule, county determined unincorporated areas-outreach plan, various methods for recording proceedings and removal of permit application site diagram review requirement. Some of the Department duties reduce local costs, such as providing a model ordinance, availability of the mitigation computer program and initial and ongoing training for local governments.

Property rights and property values

Current Provision: Current rule caps modification of and structural repairs to nonconforming uses, which greatly constrains what owners can do on their shoreland properties. Although no section in the code explicitly deals with these issues, there were a number of miscellaneous comments claiming the revised rules will constitute a violation of private property rights and will constrain property values.

Proposed Provision: The proposed rule helps maintain property values by allowing much more maintenance, expansion and modification than the current rules. Greater flexibility is given to property owners, although there are constraints that require owners to make decisions about how extensively they will develop their shoreland property.

Public Comment:

- Property rights are given up through ordinance controlled building sites
- Property values will go down if constraints are placed on building

Response:

No change to provisions. Studies show that property values do not decrease in response to zoning ordinances, but rather in many cases actually increase under more restrictive zoning provisions. Searches revealed no data showing that property values have decreased as a result of the adoption of zoning standards.

Data from Wisconsin and across the nation demonstrate that water quality, fish and wildlife, and natural scenic beauty have a quantifiable positive effect on property values and recreation-based economic sectors:

- Shoreline frontage values in Vilas and Oneida counties increased an average of 7% to 12% when towns had zoning requirements with a minimum 200 feet of water frontage for lots, according to a University of Wisconsin study based on data collected on 892 vacant lakefront properties from 1986-1995. The study indicated that the zoning requirement, by preserving clean water, natural scenic beauty and peace and quiet, generated an economic gain that more than offset the economic loss resulting from the constraints on development.
- Housing prices were 32% higher if they were located next to a greenbelt buffer in Colorado. Nationally, buffers were thought to have a positive or neutral impact on adjacent property values in 32 of 39 communities surveyed.

- A California study found homes near stream restoration projects had a 3% to 13% higher property value than similar homes along un-restored streams. Most of the perceived value of the restored stream was due to the enhanced buffer, habitat, and recreation afforded by the restoration.
- The loss of property value due to lake water clarity declining below the regional average was estimated to be \$256 to \$512 million for 191 Maine lakes, a University of Maine study showed. The same study was used to determine potential future tax losses in one Maine Township where 60% of the 211 million property tax valuation is from lakefront property. A 3-foot decline in average minimum water clarity would cause a loss of \$10.5 million, roughly 5% in total property value.

Local and state economies are affected by water quality, fish and wildlife and natural scenic beauty, as demonstrated by studies in Wisconsin and elsewhere. The following data show that the presence of water resources of good quality contribute positively to local economic activity:

- Scenic beauty and relaxation were the top reasons tourists gave for visiting Wisconsin and spending \$11.4 billion in the state in 2001. Tourism supported 380,000 full-time jobs and generated nearly \$1.8 billion in revenues for state and local governments.
- Without state and local revenues yielded from travel expenditures, each household would have to pay an additional \$932 in taxes to maintain existing services.
- Each year more than 1.5 million anglers spend 17 million days fishing in Wisconsin. They spend \$1.1 billion directly on fishing related expenses which generates more than \$2.1 billion in economic activity.
- Sport-fishing supports 30,000 jobs and generates more than \$75 million in tax revenues for the state for use on critical services like education and health care.
- 400 Wisconsin business executives surveyed in 2000 gave Wisconsin its highest rankings relative to other states for its quality of life, government services, and loyalty to area. Availability and quality of water were the highest ranked quality of life topics.

Searching revealed no data showing that tax revenues or jobs are negatively affected by zoning limitations.

Private property rights are fundamental to American society and are recognized in the proposed rule (e.g., provisions increasing flexibility for continued use of existing buildings and substandard lots; proposed standards do not strictly adhere to scientific thresholds for water quality or habitat impacts). Socially and legally, the right to use property is not so absolute that it allows the right to harm others (*Just v. Marinette*, 1972). With the importance of water resources to Wisconsin's economy and culture, the state's Constitution, legislative, judicial and administrative systems treat lakes and streams as if they are owned by all, seeks to maximize the benefits for all (*Hixon v. PSC*).

Cost to Property Owner

Current Provision: No language in the current rule on this issue.

Proposed Provision: No language proposed.

Public Comment:

Concern expressed that code compliance will increase costs for property owners to develop or improve their waterfront properties.

Response:

No changes made to the proposed code. The revision, while it offers more flexibility than current law, will result in waterfront property owners having to make calculated decisions when considering improving or

making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. In most cases, costs will not change from the cost of implementing the current code; permits will still be part of the equation and there are a variety of decisions one can make to vary costs.

Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. The proposed rule provides choices among mitigation practices ranging from zero cost, do-it-yourself measures to moderate cost landscaping. Rain gardens, a common mitigation measure for single-family residential lots cost between \$3.00 to \$5.00 per square foot if using purchased plants and volunteer labor and \$10.00 to \$12.00 per square foot if completed by a landscaper according to the publication Rain Gardens-A How to Manual for Homeowners (publication WT-776 2003, UW-Extension and Wisconsin).

In some cases, mitigation measures may save money for property owners. Corporate landowners can save between \$270 to \$640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf. No engineering or other professional measurement, calculation or drawing is required to select or design mitigation measures, unless a property owner chooses to retain professional services. The Department has provided a computer-based mitigation design tool to provide specifications and instructions for mitigation measures for counties that do not already have them or choose to develop their own. The tool requires that a property owner supply information about their lot (size, soil type, slope), impervious areas (how many, size, distance from water), and vegetation (ground cover, tree canopy) to receive alternative mitigation measures and instructions.

On a societal level, the revised shoreland zoning provisions may decrease costs in the form of fewer public infrastructure extensions to waterfront properties (since there is no longer an incentive for sewerred lots) and reductions in lake and river restoration costs. Both are costs that are often passed off to property owners via taxes.

General Support

Public Comment:

- Widespread support in 2005 (rule comments in favor 38,185, opposed 11,369, neutral 1104)
- Substantial support in 2007 (rule comments in favor 1438, too permissive 918, support and opposed parts 383, neutral 111)
- Current rule is out-of-date
- Proposed rule is a substantial improvement
- Rule not protective enough
- Adhere to scientific parameters
- Regulations necessary to prevent pollution, to protect wildlife habitat and ground water
- Revisions follow proactive counties
- Provides platform and opportunities for partnerships.

Response:

Substantive comments on specific provisions not offered here, thus rule will be promulgated with the modifications discussed in the specific rule sections above. In 2005, three times as many comments indicated support over dissent or neutrality. Fewer comments were submitted in support of the 2007 revisions, with fewer total comments overall: approximately 50,000 in 2005 and 8900 in 2007. Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.35, Wis. Stats.). While some supporters prefer more restrictive standards or explicit adherence to scientifically derived parameters (e.g., impervious surface cover limits of 8%), the rule follows the scientific direction while, as a matter of equity, recognizing and not seeking to reverse the current amount of development along Wisconsin's lakes and streams.

General Opposition

Public Comment:

- Not protective enough
- Greater opposition to revision than support (rule comments opposed 5923, support and opposed parts 383, in favor 1438, too permissive 918, neutral 111)
- Oppose wrapping currently unregulated items into code: camping trailers, fences, patios, retaining walls, driveways, sidewalks [NOTE: These structures— camping trailers, fences, patios, retaining walls, driveways, sidewalks— actually are currently regulated.]
- Concern regarding nature of the data/scientific literature: improved water quality claims and whether studies cited are peer reviewed, controlled, published, verified
- Perception of inconsistencies between what is required of small time shoreland owners and the “more powerful”, such as airports, wealthy shoreland owners, certain DNR/government programs, other land-uses beyond shoreland in watershed
- Concern that this perceived one-size-fits-all-approach won’t work statewide
- Too complex

Response:

Substantive comments on specific provisions not offered here, thus rule will be promulgated with the modifications discussed in the specific rule sections above. Commenters opposed the revision claiming it does not offer enough shoreline protection, while others oppose its restrictiveness. Some oppose the concept of regulating shoreland development altogether. However, the department has a statutory requirement to set minimum statewide shoreland zoning standards that meet standards set by the legislature. Modern, sustainability-focused landscape practices would better meet the statutory objectives while providing additional landowner flexibility and so the Department has an affirmative duty to complete the updating and revision of this rule.

EA ATTACHMENT 2

NR 115 2005 PUBLIC HEARING COMMENT SUMMARY

This document is a summary of the approximately 50,658 comments from nearly 12,000 individuals which were received during the public comment period in the summer of 2005. This summary does not contain each individual comment received. For a copy of the complete comment database please contact Toni Herkert at toni.herkert@wisconsin.gov of (608) 266-0161.

DEFINITIONS AND APPLICABILITY

1. Structure - 300 comments requesting changes in the definition. Too broad, overly encompassing and confusing.
2. Ordinary maintenance and repair – 73 comments requesting clarification in definition
3. Structural repair – 72 comments requesting clarification in definition
4. Shoreland wetland zoning – 22 comments indicate wetland definition is confusing and request clarification on permitted uses – can they only be allowed with a permit?
5. Native vegetation – 8 comments requested a definition for native vegetation
6. Back lot – 8 comments requested a definition for back lot
7. Access lot – 8 comments requested a definition of access lot or keyhole development
8. Campgrounds – 16 comments stating the definition of campsite, non-permanent, camping unit and residence need clarification. In addition, expansion principles and lot sizes are not appropriate.
9. Additional definitions requested include: basal area, boathouse, parcel, common ownership, substandard lot, applicable standards, unstable or steep conditions, administrative permit, accessory uses, out lot, best management practices and ground layer vegetation.
10. Comments suggested modifications to the following definitions: mobile home park, gravel, natural areas management activity, residence, mitigation, shoreland zone, impervious surface, open fence, replacement, vegetative buffer, lot, shoreland frontage and land disturbing activities (should be consistent with NR 151)

SETBACKS

11 Specific Opposition Issues

1. Measuring setbacks - NR 115.13(1)(b) – 159 comments indicated the retroactive effective date will cause problems and may make a number of structures nonconforming
2. Permit required - NR 115.13(2) – 154 comments indicated this provision will require property owners to obtain another permit, pay another fee and could prolong the development approval process
3. One stairway per 100 feet of frontage - NR 115.13(4)(b) 154 comments indicated that this should only apply to new lots and that replacing walkways in order to reduce stormwater runoff could be very expensive
4. Signs and flagpoles - NR115.13(4)(c) – 586 comments opposed to this provision is unnecessary and difficult to enforce
5. Significant on-going erosion – NR 15.13(4)(f) - 153 comments opposed to demonstrating on-going erosion for erosion control structures
6. Steps and landings – NR 115.13(4)(n) – 562 comments indicating size limitations are a clear safety issue
7. Boathouses meeting 75 foot setback – 221 comments indicated this provision would be problematic
8. Accessory structure regulation – 212 comments indicated regulation too strict
9. Prohibiting storage of a boat or ice shanty within 75 feet – 218 comments indicated regulation too strict
10. Definition of OHWM for Lake Michigan and Lake Superior – 43 comments indicated that the current definition is not appropriate to measure setbacks on the Great Lakes
11. Setback averaging – 422 comments requested modifications to this provision ranging from allowing averaging for a garage and vacant lots to be utilized in the averaging calculation

2 Specific Issues of Support

1. Greater setback – 20 comments indicated a need to work towards the 75 foot setback and no less and setbacks suggested of 90 and 100 feet
2. Wetland setback – 20 comments indicated that a 10 to 75 foot wetland setback or buffer should be included in NR 115
3. Exempted structures – 11 comments regarding the regulation to be too permissive
4. OHWM and wetland determinations – 4 comments concerned with the regulation potentially allowing a structure closer than 75 feet

General Comments: 74 generally opposed each with minimal mention, 12 neutral, 18 specifically support and 53 comments support but stated regulation was too permissive

Of special note – out of the 1,227 comments received in the setback section, only 2 comments were opposed to the 75 foot setback because it was too restrictive.

LAND DIVISION

2 Specific Opposition Issues

1. Division of land – create or reconfigure language – 154 comments indicated this provision would add additional regulatory and oversight burdens to already financially strapped county zoning administrations and staff
2. Substandard lots in common ownership – 158 comments indicated that counties currently have the authority to regulate these lots, therefore, the regulation is unnecessary

Additional Comments

1. Reflect standards in section 236.45 Wisconsin Statutes – 4 comments felt consistency with NR 115 and plat review statute was important
2. NR 115.09(2) – 4 comments indicate that the use of the word reconfigure in this section is confusing
3. Streams bisecting properties – 3 comments confused by regulation

General Comments: 9 generally opposed, 8 neutral, 4 specifically support and 5 comments support but stated regulation was too permissive

LOT SIZE

4 Specific Issues of Support

1. Minimum lot sizes – 9042 comments indicated that lot sizes should be 20,000 square feet with a width of 150 feet or more regardless of sewer
2. Multi-family – 40 comments indicated multi-family development should be required to meet the same lot size and density standards as single family development
3. Access lots – 14 comments indicated that access lots should have the same requirements for size, buffers, width, etc as other lots
4. Keyhole development – 9 comments indicated no keyhole development allowed and 10 comments indicated if key holing is allowed, the lots should meet the same requirements as a residential lot

4 Specific Opposition Issues

1. Multi-family – 243 comments indicate the lot sizes for multi-family development are too large and will make condo developments prohibitively expensive
2. Lot widths – 644 comments indicated that the new mechanism for measuring lot widths would result in new nonconformities
3. Back lots – 89 comments indicate that this regulation is unnecessary in this rule

4. Access lots (keyhole development) – 89 comments indicate that giving counties this flexibility may have a significant adverse impact on the value and usability of lots

Additional Comments

1. Campgrounds – 17 comments indicate more clarity or flexibility is necessary in the lot size section for campgrounds
2. Other lot size suggestions – no less than 40,000 sq. ft., 43,000 sq. ft with 150 ft. of frontage and a 300 ft. depth, 43,560 sq. ft.,
3. Minimum lot sizes –8 comments indicate that 7,000 sq. ft. for a single family dwelling is too large – other options include 6,000 and 5,000 sq. ft.

General Comments: 43 generally opposed, 15 neutral, 5 specifically support and 35 comments support but stated regulation was too permissive

VEGETATIVE BUFFERS

7 Specific Issues of Support

1. Primary buffer – 9015 comments indicated that the primary buffer should be increased to 50 feet or more
2. Primary buffer – 11 comments indicated that the primary buffer should be increased to 75 feet or more
3. Wetland buffer – 9,035 comments indicated that wetland buffer standards should be required in NR 115
4. Vegetation plans – 15 comments indicated strong support for vegetation plans
5. Lawns – 10 comments indicated that existing lawns should be replaced with natural vegetation within the primary buffer
6. Native vegetation – 13 comments indicated that the final rule should require a diversity of native vegetation in the primary buffer
7. Access corridor – 7 comments stated the corridor requirements were too large and fragmented habitat. One access corridor is sufficient regardless of the frontage.

5 Specific Opposition Issues

1. Vegetation plans – 619 comments indicated that this requirement will add increased costs and could unreasonably delay the construction process. Counties do not have the staff or expertise to properly review such plans
2. Multi-unit development plans – 155 comments indicated the new formula will create more nonconforming projects and the costs for development and implementation would be significant and ongoing
3. Access Corridor – 162 comments indicated that the size limitations on access corridors is too small for smaller lots
4. Primary buffer – 7 comments specifically objected to establishing vegetation in the primary buffer

Additional Comments

1. Ban on fertilizer – 2 comments indicated a desire to ban the use of any fertilizer within the 75 foot setback area
2. Rivers – 32 comments indicated that rivers should be treated differently than lakes with regards to the vegetative buffer requirements. Buffer requirement is not appropriate for small lots on rivers.
3. Administration and Enforcement – 7 comments indicated that the vegetative provisions would be difficult to administer and enforce due to county staffing and expertise
4. Flexibility – 6 comments indicated that the counties need more flexibility in this area
5. Primary buffer – 10 comments indicated that all property owners should be required to maintain or replace vegetative buffers and that all properties should have the same buffer requirements
6. Nuisance – 15 comments indicated that vegetative buffers will increase undesirable species such as mosquitoes, snakes and other insects and pests.

General Comments – 19 comments are general housekeeping items, 17 generally opposed, 3 neutral and 16 comments support but stated regulation was too permissive.

IMPERVIOUS SURFACES

3 Specific Issues of Support

1. Limit – 9,041 comments indicated that impervious surfaces should be limited to 20% of the lot
2. Limit – 19 comments indicated that impervious surfaces should be limited to 10-15% of the lot – some said within 200-300 feet of the OHWM
3. Cap – 10 comments indicated that there should be a cap on the amount of impervious surfaces regardless of the type of development
4. More protective – 7 comments indicated that the regulations are necessary but the section is too permissive (did not provide an alternative)

3 Specific Opposition Issues

1. Limit – 385 comments were in opposition to a statewide impervious surface standard and the trigger for re-vegetation
2. Limit – 173 comments indicated that impervious surface limits will place unreasonable limit on the size of homes on and near waterfront property
3. Zero increase – 92 comments indicated that this stormwater runoff standard will cost homeowners thousands of dollars

Additional Comments

1. Best management practices – 6 comments supported implementation and maintenance of BMPs and cautioned the need for appropriate minimum standards of BMPs to gauge effectiveness
2. Definitions – 24 comments on the need for greater clarification for definition of impervious surface
3. Runoff – 3 comments indicated that consideration should be made as to whether the surfaces contribute to runoff
4. Small lots – 6 comments indicated that smaller lot sizes and river lots need to be taken into consideration
5. Trigger – 2 comments indicated that the trigger for mitigation should be reduced to 15% impervious cover
6. Primary buffer – 3 comments indicated that no new impervious surfaces should be allowed within 35 feet
7. Others: Different slopes should have different standards, regulations should distinguish between rater and volume of discharge, concerned about time delays of permits for this section

LAND DISTURBANCES

3 Specific Issues of Support

1. Activities – 11 comments indicated that no land disturbing activities near the water or wetlands should never be approved
2. Plans – 5 comments indicate that the need for erosion control and vegetation plans is strongly supported, but would favor firmer restrictions
3. Slopes – 4 comments indicated that filling and grading activities should be restricted on steep slopes

3 Specific Opposition Issues

1. Erosion control and vegetation plans – 153 comments indicated that this provision could be very expensive

2. Application – 3 comments indicated that this provision should only apply to riparian lots and not the entire shoreland zone
3. Conservation – 4 comments indicated that vegetative buffers, in some cases, can create a shoreland unfit for sound conservation practices

Additional Comments

1. Permits and exemptions – 13 comments pertained to requiring too many permits, not exempting enough structures or exempting too many structures
2. Other activities – 4 comments indicated that soil compaction and tree damage are associated with land disturbing activities and are not accounted for in this section
3. Staffing – 3 comments indicated that the staff requirements would be excessive therefore making the provision difficult to enforce and monitor erosion control and vegetation plans
4. Flexibility – one comment offered the suggestion to allow minimal land disturbing activities without triggering an erosion control or vegetation plan.

NONCONFORMING

5 Specific Issues of Support

1. Maintenance and Repair – 500 comments indicated that NR 115.21(4)(a)and(b), the allowance of ordinary maintenance and repair, is a good change
2. Replacement – 395 comments indicated that NR 115.21(4)(d), allowing replacement of some nonconforming structures, will greatly benefit property owners by protecting investments in their homes
3. Replacement and expansion – 41 comments indicated that NC principal structures should not be allowed to be replaced or expanded if there is a legal building site on the lot
4. 50% rule – 14 comments indicated that counties need more than the 50% rule to regulate proposed changes to principal structures
5. Appendix A – 11 comments indicated that appendix A is problematic because the maximum footprints were too large considering people can easily build up to three stories. There should be a 1,200 to 1,500 sq. ft. maximum

9 Specific Opposition Issues

1. Boathouses – 222 comments indicated that prohibiting the alteration or replacement of a boathouse foundation unless moved to a compliant location is problematic
2. NC use provision – 154 comments indicated that this prohibition exceeds the DNR’s authority and the statutory protections afforded to property owners under the 50% rule
3. NC accessory structures – 154 comments indicated that the prohibition on structural alteration unless mitigation is implemented is more onerous than the current 50% rule
4. Structural alteration – 154 comments indicated the prohibition on structural alteration for principal structures unless mitigation is implemented is more onerous than the current 50% rule
5. Expansion – 154 comments indicated that the proposed footprint maximums for structures between 35 and 75 ft will severely restrict the size of expansions allowed for NC structures
6. Straddling – 155 comments indicated the need to allow more expansion beyond the 75 foot setback
7. Minimum lot size – 568 comments indicated that the minimum lot size of 7,000 sq. ft. for expansion and replacement is both arbitrary and unfair
8. Campground expansions – 843 comments indicated that only the portion of the campground being expanded should have to come into compliance with the revised NR 115.
9. Camping units – 836 comments indicated that camping units within the shoreland zone should be able to be expanded to industry specific sizes essentially replacing and existing unit

Additional Comments

1. Additional provisions – 11 comments indicated that there should be provisions for distinguishing between NC uses, structures and substandard lots and standards applicable to each circumstance

2. Organization – 8 comments indicated that this section of the code needs to be clearer. As written it is difficult to follow and could be left to interpretation, therefore, making it difficult to enforce
3. Local control – 6 comments indicated that local government should decide regulations for NC structures
4. Improvement – 4 comments indicated that in relation to NC structures, the revised code is a significant improvement over the existing NR 115 provision

Points to Ponder

- Footprint expansion limited to one-time per property, not per owner
- Could the DNR provide incentives for the removal of nonconforming structures
- Minimum size to expand should be defined by the minimum principal structure size of the zoning district where the structure resides
- It is better to apply the foundation restriction only to those accessory structures that are buildings
- The rule is unclear as to whether a landowner can elect to not replace portions of the original structure closest to the water to gain additional square footage for expansion
- Minimum lot size for expansion and replacement should be 6,500 sq. ft. consistent with the model ordinance

General Comments: 33 generally opposed, 11 neutral, 11 specifically support and 25 comments support but stated regulation was too permissive

MITIGATION

2 Specific Issues of Support

1. Septic system – 171 comments indicated that inspection and upgrading of septic systems is a good definitive mitigation standard
2. Recording – 10 comments indicated that mitigation should be contractual

3 Specific Opposition Issues

1. Mitigation – 257 comments indicated that the requirement is expensive, unfair, too subjective and will create uncertainty among property owners
2. General – 212 comments indicated that the mitigation requirements are too prescriptive and they remove local governments' ability to apply standards appropriate to local conditions
3. Recording – 7 comments indicated that recoding and monitoring of shoreland buffer restorations would be difficult

Additional Comments

1. Technical standards are needed for mitigation and the public needs easy access to them
2. Counties should be provided with state funding for additional staff needed to implement the new rules
3. The concept of mitigation should be evaluated to see if results are in the public's benefit
4. Preservation and maintenance is subjective and will cause confusion
5. Buffer mitigation will never compensate for buffer area reduction and increased development density
6. Erosion control, conservation, safety and health should become the crucial factual determination in any mitigating standard
7. Mitigation should only apply to riparian lots
8. Specify that the cost of mitigation cannot exceed a specified fraction (5%) of the overall cost of the project

General Comments: 16 generally opposed, 5 neutral, 9 specifically support and 6 comments support but stated regulation was too permissive

EA ATTACHMENT 3

NR 115 FOCUS GROUP MEMBERSHIP

IMPERVIOUS SURFACE FOCUS GROUP

- Earl Cook – Riparian, Springbook and AC member
- Roland Tonn – Wisconsin Chapter of the American Planning Association and AC member
- Nancy Russell – Planning and Zoning Committee, Walworth County and AC Member
- Tom Larson – Wisconsin Realtors Association and AC member
- Marc Schultz – Riparian, Onalaska - retired UW Extension and AC member
- Phil Gaudet – Wisconsin County Code Administrators, Washington County and AC member
- Jay Verhulst – Taxpayers for Fair Zoning and AC member
- Paul Kent – Marine Contractors Association and AC member
- Jerry Deschane – Wisconsin Builder’s Association and AC member
- Chuck Mitchell – Citizens for Scenic Wisconsin and AC member
- Bud Styer and Wayne Schultz – Wisconsin Campground Owner’s Association
- Ezra Meyer – Wisconsin Association of Lakes, technical specialist
- Lynn Markham – Land Use Education Center, Steven’s Point
- Jeremy Balousek, P.E. Dane County Land Conservation Department
- Kevin Kirsch – Wisconsin Department of Natural Resources, stormwater engineer
- Paul McGinley - University of Wisconsin – Stevens Point

MITIGATION FOCUS GROUP

- Elmer Goetsch – Wisconsin Association of Lakes and AC member
- Karl Kastrovsky – Wisconsin County Code Administrators, Bayfield County and AC member
- John Larson – Applied Ecological Services and AC member
- Lori Grant – Wisconsin River Alliance and AC member
- Pam Labine – Wisconsin county code Administrators, Forest County and AC member
- John Kisiel – Wisconsin Builder’s Association and AC member
- Lori Severson – Wisconsin Campground Owner’s Association
- Carroll Schaal – Wisconsin Department of Natural Resources – Lakes Program
- Steve Greb – USGS
- Mike Meyer – Wisconsin Department of Natural Resources – Science Services, Research
- Tom Bernthal – Wisconsin Department of Natural Resources – Wetland Program

IMPLEMENTATION FOCUS GROUP

- Matthew Stohr, Wisconsin Counties Association
- Michael Stapleton – Zoning Administrator – Columbia county
- Rebecca Frisch – Zoning Administrator – Langlade County
- Daniel Miller – Zoning Administrator – Lincoln County
- Peter Tarnowski – Zoning Administrator – Manitowoc County
- Jim Burgener – Zoning Administrator – Marathon County
- Tom Onofrey – Zoning Administrator – Marquette County
- Pete Wegner – Zoning Administrator – Oneida County

Note: In addition, each county was sent a preliminary draft of NR 115 at the time the implementation focus group was meeting. All the counties were given 6 weeks to comment on the draft for implementation and administrative issues before the 2007 public hearing draft was developed.

All NR 115 Advisory Committee members were able to provide input on work group issues, even if they did not attend a work group meeting.

EA ATTACHMENT 4

NR 115 WORK GROUP MEMBERSHIP

AGRICULTURE WORK GROUP

- Mr. Keith Foye, Wisconsin Department of Agriculture, Trade and Consumer Protection
- Mr. Dick Gorden, Farmer
- Ms. Cindy Jarvis, Wisconsin Farm Bureau Federation
- Mr. Marty Melchoir, C.F.P., Stream Ecologist, Inter-Fluve, Inc.
- Mr. William Pielsticker, Trout Unlimited (NR 115 Advisory Committee member)
- Mr. Richard Stadelman, Wisconsin Towns Association (NR 115 Advisory Committee member)
- Mr. Paul Zimmerman, Wisconsin Farm Bureau Federation (NR 115 Advisory Committee member)

ALTERNATIVE DEVELOPMENT WORK GROUP

- Mr. Jack Broughton, Bielinski Homes
- Mr. Mike Dresen, University of Stevens Point, Center for Land Use Education (NR 115 Advisory Committee member)
- Mr. Karl Kastrovsky, Bayfield County (NR 115 Advisory Committee member)
- Mr. John Larson, Applied Ecological Services (NR 115 Advisory Committee member)
- Mr. William O'Connor, Wisconsin Association of Lakes

FORESTRY/NATURAL LANDS WORK GROUP

- Mr. Miles Benson, Governor's Council on Forestry (NR 115 Advisory Committee member)
- Mr. Al Barden, Wisconsin Woodland Owners Association
- Mr. Earl Gustafson, Wisconsin Paper Council
- Ms. Pam Labine, Forest County (NR 115 Advisory Committee member)
- Ms. Lynn Markham, University of Stevens Point, Center for Land Use Education
- Ms. Collette Mathews, Wisconsin County Forests Association
- Mr. Matthew Stohr, Wisconsin Counties Association (NR 115 Advisory Committee member)
- Mr. Jim Wise, Environmentally Concerned Citizens of Lakeland Areas, Inc. (NR 115 Advisory Committee member)
- Mr. Darrell Zastrow, Director, Bureau of Forest Sciences, Wisconsin Department of Natural Resources

RECREATION AREAS WORK GROUP

- Mr. Earl Cook, Springbrook (NR 115 Advisory Committee member)
- Mr. Mike Dresen, University of Stevens Point, Center for Land Use Education (NR 115 Advisory Committee member)
- Ms. Kate Fitzgerald, Section Chief, Land Management, Wisconsin Department of Natural Resources
- Mr. Elmer Goetsch, Wisconsin Association of Lakes (NR 115 Advisory Committee member)
- Ms. Dorothy Pasko, Moose Lake Resort/Sawyer County Resort Owners

URBANIZED WATERS WORK GROUP

- Mr. Jeff Christensen, Project Coordinator, Radtke Contractors, Inc.
- Mr. Jerry Deschane, Wisconsin Builders Association (NR 115 Advisory Committee member)
- Mr. Phillip Gaudet, Washington County (NR 115 Advisory Committee member)
- Ms. Kathy Moore, Senior Planner, Waukesha County Planning and Zoning Division
- Cheryl Nenn, Milwaukee River Corridor Director, Friends of Milwaukee's Rivers
- Mr. Roland Tonn, Wisconsin Chapter of American Planning Association (NR 115 Advisory Committee member)

All NR 115 Advisory Committee members were able to provide input on work group issues, even if they did not attend a work group meeting.

EA ATTACHMENT 5

NR 115 ADVISORY COMMITTEE MEMBERSHIP

LOCAL GOVERNMENT REPRESENTATIVES

Wisconsin County Code Administrators

- Mr. Phillip Gaudet, Washington County
- Mr. Karl Kastrosky, Bayfield County
- Ms. Pam Labine, Forest County

County Planning Zoning and Committee Members

- Mr. Neal Nielsen III, Vilas County (resigned May, 2004)
- Ms. Nancy Russell, Walworth County

Municipal Associations

- Mr. Mark O'Connell and Mr. Matthew Stohr, Wisconsin Counties Association
- Mr. Richard Stadelman, Wisconsin Towns Association
- Mr. Roland Tonn, Wisconsin Chapter of American Planning Association

PUBLIC RESOURCE REPRESENTATIVES

- Mr. Elmer Goetsch, Wisconsin Association of Lakes
- Ms. Lori Grant, River Alliance of Wisconsin
- Mr. Paul Mongin, Conservation Congress (resigned May, 2004)
- Mr. William Pielsticker, Trout Unlimited
- Mr. Jim Wise, Environmentally Concerned Citizens of Lakeland Areas, Inc. (resigned July 2005)

RIPARIAN OWNER REPRESENTATIVES

- Mr. Earl Cook, Springbrook
- Mr. Jim Libert, Hartland
- Mr. Chuck Mitchell, Wauwatosa
- Mr. Marc Schultz – Onalaska
- Mr. Jay Verhulst, Arbor Vitae (representing Taxpayers for Fair Zoning)

ACADEMIC REPRESENTATIVES

- Mr. Scott Craven, University of Wisconsin – Madison (wildlife habitat issues)
- Mr. Mike Dresen, University of Stevens Point, Center for Land Use Education (land use issues)
- Mr. Paul McGinley, University of Wisconsin – Stevens Point (water quality issues)

PRIVATE BUSINESS REPRESENTATIVES

- Mr. Miles Benson, Governor's Council on Forestry
- Mr. Jerry Deschane, Wisconsin Builders Association
- Mr. Paul Kent, Riparian Owners and Marine Contractors Association
- Mr. Tom Larson, Wisconsin Realtors Association
- Mr. John Larson, Applied Ecological Services
- Mr. Glenn Schiffmann, Natural Resources Board Appointee
- Mr. Paul Zimmerman, Wisconsin Farm Bureau Federation

Marty Melchoir, Rich Bogovich, and Denny Canneff also served on the Committee for the River Alliance of Wisconsin.

Alternates who served on the Advisory Committee included Tom Onofrey, Marquette County, for Karl Kastrosky; Larry Konopacki for Paul Kent; Carol Nawrocki for Richard Stadelman; and John Kassner for Jerry Deschane.

EA ATTACHMENT 6

SUMMARY OF RULE REVISION ACTIVITIES

Date	Activity Summary
October 16, 2002	NR 115 Advisory Committee Invitation letter mailed
October 22, 2002	Press release: "State Shoreland Protection Standards to be Reviewed"
October 24, 2002	E-mail update sent to ~ 250 people regarding the rule revision process and formation of the Advisory Committee
November 11, 2002	Follow-up letter mailed to NR 115 Advisory Committee members
November 12, 2002	Press release: "Advisory Committee Formed to Update Shoreland Protection Rules"
November 14, 2002	E-mail update sent to ~ 475 people regarding the new NR 115 rule revision web-page
November 21, 2002	First NR 115 Advisory Committee meeting
December 12, 2002	Second NR 115 Advisory Committee meeting
January 21, 2003	E-mail update sent to ~ 600 people regarding Advisory Committee meeting agendas, and research summary on shoreland buffers
January 22, 2003	Press Release: "Committee Considers Shoreland Protection Options"
January 23, 2003	Letter mailed to ~ 25 people regarding Advisory Committee meeting agendas, notes and research summary on shoreland buffers
January 30, 2003	Third NR 115 Advisory Committee meeting
January 31, 2003	Press Release: "State Gets Input on Revising Shoreland Protection Rules"
February 27, 2003	E-mail update sent to ~ 600 people regarding Advisory Committee meetings with shoreland buffers, and nonconforming uses and structures option packages
March 4, 2003	Press Release: "Research Revealing Harmful Effects of Shoreline Development on Fish"
March 17, 2003	Letter mailed to ~ 25 people regarding Advisory Committee meetings with shoreland buffers, and nonconforming uses and structures option packages
March 18, 2003	Press Release: "Shoreland Rule Revision Committee to Address Nonconforming Structures"
March 24 – 25, 2003	Fourth NR 115 Advisory Committee meeting
April 1, 2003	E-mail update sent to ~ 800 people regarding a summary of the March Advisory Committee meeting on nonconforming regulations
April 11 – 13, 2003	Wisconsin Lakes Convention with session providing update on the NR 115 Rule Revision process.
May 1, 2003	Letter mailed to ~ 35 people regarding Advisory Committee meeting and option package for nonconforming regulation
May 2, 2003	E-mail update sent to ~ 900 people regarding Advisory Committee meeting and option package for nonconforming regulation
May 6, 2003	Fifth NR 115 Advisory Committee meeting
May 13, 2003	Letter mailed to ~ 40 people and e-mail update sent to ~ 900 regarding the summary information on nonconforming regulation including a definition package and summary PowerPoint presentation
May 28, 2003	Wisconsin Water Law Conference with session to discuss NR 115 Rule Revision Process and update on the Advisory Committee progress
June 10, 2003	Letter mailed to ~ 40 people and e-mail update sent to ~ 900 people regarding Advisory Committee meeting and summary information and option package on shoreland development density and impervious surfaces.
June 17, 2003	Press Release: "Shoreland Advisory Committee Makes Progress Addressing 'Nonconforming' Structures"
June 24, 2003	Sixth NR 115 Advisory Committee meeting
July 24 – August 20, 2003	NR 115 Work Group Meetings: Agriculture, Alternative Development, Forestry/Natural Lands, Recreation Areas, and Urbanized Waters
August 13, 2003	E-mail update sent to ~ 900 regarding the August Advisory Committee

	meeting agenda and summary of workgroup activities
August 26, 2003	Seventh NR 115 Advisory Committee meeting
September 23, 2003	E-mail update sent to ~ 900 regarding Advisory Committee meeting and draft summary document for public listening sessions
October 2003	Wisconsin Natural Resources magazine article: "Life on the Edge"
October 9, 2003	Eighth NR 115 Advisory Committee meeting
October 28, 2003	Press Release: "Listening Sessions Set on Shoreland Protection Rule Proposals" Letter mailed to ~ 55 people and e-mail sent to ~ 900 people regarding the public listening session announcement, listening session brochure and the Advisory Committee preliminary proposal to update NR 115
November 11 – December 11, 2003	Eight listening sessions held in Spooner, Lake Tomahawk, Eau Claire, Onalaska, Grand Chute, Crivitz, Madison, and Waukesha
February 19, 2004	Meeting with Great Lakes Indian Fish and Wildlife Commission (GLIFWC) to give an update on the NR 115 Rule Revision process
March 3 – 4, 2004	Meeting with Northern Region zoning and land conservation staff with session providing an update on the NR 115 Rule Revision process
March 18, 2004	E-mail update sent to ~ 900 regarding the agenda for the March Advisory Committee meeting and summary of listening session comments
March 24, 2003	E-mail update sent to ~ 900 postponing the March Advisory Committee Meeting and rescheduling for May
April 15 – 17, 2004	Wisconsin Lakes Convention with session providing update on the NR 115 Rule Revision process
April 22, 2004	UWEX Local Government Center WisLine Series on Local Land Use Planning and Zoning: "Managing Wisconsin's Shorelands (NR 115 Update)"
May 3, 2004	E-mail update sent to ~1300 people regarding the May 18 NR 115 Advisory Committee meeting with meeting information
May 13, 2004	E-mail update sent to ~1300 people regarding the May 18 NR 115 Advisory Committee meeting with a copy of the first draft of proposed changes
May 18, 2004	Ninth NR 115 Advisory Committee meeting to review first draft of proposed changes
May 25, 2004	Press Release: "Revisions to Shoreland Rules to Take Extra Time"
June 1, 2004	E-mail update sent to ~1300 people regarding the outcome of the May 18 NR 115 Advisory Committee meeting with information on the June 10 NR 115 Advisory Committee meeting
June 10, 2004	Tenth NR 115 Advisory Committee meeting to review continue review of first draft of proposed changes
June 14, 2004	E-mail update sent to ~1300 people regarding the outcome of the June 10 NR 115 Advisory Committee meeting
June 16, 2004	Letter mailed to ~85 people regarding the outcome of listening sessions and future work of the NR 115 Advisory Committee
August 12, 2004	E-mail update sent to ~1300 people regarding August 24 NR 115 Advisory Committee meeting with meeting information
August 18, 2004	E-mail update sent to ~1600 people regarding August 24 NR 115 Advisory Committee meeting with a copy of the second draft of proposed changes
August 24, 2004	Eleventh NR 115 Advisory Committee meeting to review second draft of proposed changes
September 1, 2004	Letter mailed to ~400 people regarding future work of the NR 115 Advisory Committee
September 2, 2004	E-mail update sent to ~1600 people regarding the outcome of the August 24 NR 115 Advisory Committee meeting with information on the October Advisory Committee meeting
September 27, 2004	Wisconsin Corporation Counsel meeting with session providing update on the NR 115 Rule Revision process
October 20, 2004	E-mail update sent to ~1600 people regarding the October 26 NR 115 Advisory Committee meeting with a copy of the third draft of proposed changes

October 20 – 21, 2004	Wisconsin County Code Administrators Fall Conference with session providing update on the NR 115 Rule Revision process
October 22, 2004	First meeting with Wisconsin Association of Campground Owners (WACO) to discuss campground proposals
October 26, 2004	Twelfth NR 115 Advisory Committee meeting to review third draft of proposed changes
November 2, 2004	E-mail update sent to ~1600 people regarding the outcome of the October 26 NR 115 Advisory Committee meeting with a summary information
November 12, 2004	E-mail update sent to ~1600 people regarding the November 16 NR 115 Advisory Committee meeting with a copy of the fourth draft of proposed changes
November 16, 2004	Thirteenth NR 115 Advisory Committee meeting to review fourth draft of proposed changes
December 22, 2004	E-mail update sent to ~1600 people regarding the November 16 NR 115 Advisory Committee meeting with information on a January Advisory Committee meeting
January 4, 2005	E-mail update sent to ~1600 people regarding a January 5 NR 115 Advisory Committee meeting with a copy of the fifth draft of proposed changes
January 5, 2005	Fifth draft of proposed changes distributed to NR 115 Advisory Committee members for review (Members decided against holding a meeting to review fifth draft)
January 28, 2005	Second meeting with Wisconsin Association of Campground Owners (WACO) to discuss campground proposals
February 17, 2005	UWEX Local Government Center WisLine Series on Local Land Use Planning and Zoning: “Managing Wisconsin’s Shorelands (NR 115 Update)”
February 18, 2005	E-mail update sent to ~1600 people regarding January comments received from the NR 115 Advisory Committee on the fifth draft of proposed changes and a summary of the timetable for the process from this point forward.
March 21, 2005	Presentation to the Inter-County Coordinating Committee comprised of Columbia, Dodge, Green Lake, Jefferson and Sauk counties. Membership includes county board members and planning and zoning staff. Discussed Draft 5 and the proposed revisions to NR 115.
April 8, 2005	Wisconsin County Code Administrators Spring Conference with session providing update on the NR 115 Rule Revision process
April 28-30	Lake Home and Cabin Show with presentations on shoreland stewardship and a session providing an update on the NR 115 Rule Revision process. In addition there will be several shoreland displays with information related to the rule revision and how the public can get involved.
April 28 – 30, 2005	Wisconsin Lakes Convention with 3 sessions providing update on the NR 115 Rule Revision process
May 5-6, 2005	Wisconsin Association of Corporation Counsels – presentation and discussion on the revision to NR 115
May 25, 2005	DNR Board authorized public hearings for NR 115
June 24, 2005	NW Lakes Convention – presentation and discussion on the revision to NR 115
August 5, 2005	Wisconsin County Code Executive Board Meeting - presentation and discussion on the revision to NR 115
August 12, 2005	Rice Lake Technical College Regional Lakes Workshop - presentation and discussion on the revision to NR 115
September 6, 2005	WCCA meeting to discuss revisions to NR 115
October and November 2005	Met or talked with advisory committee members individually about the revision process and potential changes to the code based on hearings
December 7, 2005	WCCA meeting to discuss revisions to NR 115
December 8, 2005	Land and Water conservation Association Meeting - presentation and discussion on the revision to NR 115
January 12, 2006	Lakes Partnership Meeting - presentation and discussion on the revision to NR 115

January 19, 2006	WCCA Executive Board Meeting - presentation and discussion on the revision to NR 115
February 7, 2006	Northern Region Zoning and Land Conservation Meeting - presentation and discussion on the revision to NR 115
March 29-31, 2006	WCCA Spring Conference - presentation and discussion on the revision to NR 115
April 6, 2006	WAPA Spring Conference - presentation and discussion on the revision to NR 115
April 20-22, 2006	Wisconsin Association of Lakes annual convention - presentation and discussion on the revision to NR 115
April 21-23, 2006	Lake Home and Cabin Show- Minneapolis – information available on the rule revision also a sign up sheet for updates on the revision
April 28-30, 2006	Lake Home and Cabin Show – Milwaukee - information available on the rule revision also a sign up sheet for updates on the revision
June 8, 2006	Advisory Committee Meeting – discuss public hearing outcome, disseminate comment summary, outline process and discuss potential policy modifications
June 14, 2006	Shoreland and Shallows Summit – Discussions on shoreland management in a broader context in relation to other environmental programs related to the near shore area.
July 20, 2006	Coastal Workshop in Ashland - presentation and discussion on the revision to NR 115
July 25, 2006	Release update: “Effort to update shoreland protection rules enters new phase-groups to focus in on areas citizens criticized in original proposal”
August 1, 2006	Impervious surface focus group meets
August 2, 2006	Mitigation focus group meets
August 30, 2006	Mitigation focus group meets
August 31, 2006	Impervious surface focus group meets
October - December 2006	County shoreland zoning amendment survey and analysis
October 10-12, 2006	Meetings with 6 NW counties on the revisions to NR 115
October 17-19	Meetings with 5 NE counties on the revisions to NR 115
October 24-26	Meetings with 5 centrally located counties on the revisions to NR 115
November 8, 2006	Release update: “Shoreland protection rule revision process moves forward-focus groups finalize recommendations”
February 13, 2007	Northern Region Zoning and Land Conservation Meeting - presentation and discussion on the revision to NR 115
February 27, 2007	Implementation focus group meets
March 13, 2007	West Central Zoning Administrators meeting - presentation and discussion on the revision to NR 115
March 15, 2007	Wisconsin Campground Owner’s Association annual meeting - presentation and discussion on the revision to NR 115
March 21, 2007	Implementation focus group meets
March 28-30, 2007	WCCA Spring Convention - presentation and discussion on the revision to NR 115
April 26-28, 2007	Wisconsin Association of Lakes annual convention – discussion on the revision to NR 115
May 22-23, 2007	Request authorization for a second round of public hearings from the Natural Resources Board.
June 2007	Preparation of “County Shoreland Protection Program Funding Opportunities” fact sheet for hearings
July 2007	Press Release: “Public hearing set on update of shoreland development rules”
July 24, 2007	Public hearing in Wausau
July 25, 2007	Public hearing in Rhinelander
July 26, 2007	Public hearing in Rice Lake
July 31, 2007	Public hearing in Tomah
August 2, 2007	Public hearing in Green Bay
August 7, 2007	Public hearing in Waukesha
August 8, 2007	Public hearing in Stoughton

August 15, 2007	Public hearing in Oshkosh
August – October 2007	Public comments entered into database
October 2007	“Frequently Asked Questions about the Proposed NR 115 Revision” prepared
October – November 2007	Department prepares response to public comments
December 2007	List of mitigation options prepared based on approved county shoreland ordinances statewide
November 2007 – February 2008	Final Redraft of NR 115, Environmental Analysis and Fiscal note completed.

II. Issue Identification Activities and Agency Contacts

A. Rule Revision Public Participation Process

The NR 115 Advisory Committee was developed to aide the department with a comprehensive revision to the State's Shoreland Management Program. The group met eight times between November 2002 and November 2003 and again in June 2006 to discuss issues surrounding shoreland development and to identify areas of concern. Initial meetings of the advisory committee reviewed scientific research and legal perspectives on shoreland development. The remainder of the meetings focused on specific issues related to shoreland management – setbacks and buffers, nonconforming structures, and development density. The committee worked with the Department to develop an initial set of concepts for proposed changes to ch. NR 115, Wis. Admin. Code.

In the summer of 2003, the Department, with support and participation by the Advisory Committee members, decided to convene five work-groups to flesh out remaining issues in the revision. The five work-groups, agriculture, alternative development, forestry, recreational areas and urbanized waters, each met a number of times in person or via phone conference and/or e-mail to discuss pertinent issues. Each work-group was led by a Department staff member involved in the revision process and the membership included Advisory Committee representatives and other affected or interested parties in specialized fields related to the subject matter. (Please refer to attachment 4 for work-group membership information.)

In November and December of 2003, the initial set of recommendations was taken to eight listening sessions around the state to gather public comments. This was an extra step the Department chose to take to ensure public participation throughout the revision process. Over 1300 comments were received during the listening session comment period.

Based on the statutory objectives of the program, initial recommendations from the advisory committee, and public comments from the listening sessions, the Department drafted a first copy of proposed changes to ch. NR 115, Wis. Admin. Code. Up until this point, the advisory committee and the public were responding to concepts. Beginning in May 2004, the NR 115 Advisory Committee met five times and reviewed five drafts of proposed changes to ch. NR 115, Wis. Admin. Code.

In July and August of 2005, the department held eleven public hearings around the state and collected over 12,000 comments during the public comment period (comments are available upon request and the 2005 comment summary can be found in attachment 2). After the hearings, three focus groups were formed to flesh out specific issues identified during the hearing process. These focus groups worked on the issues of impervious surfaces, mitigation and implementation and met in the fall and winter of 2006. (Please refer to attachment 3 for focus group membership information.)

Due to the amount of change that had occurred in the proposal based on 2005 hearing comments and the results of the focus group work, the department received permission to take a revised proposal back out to the public for a second round of public hearings in the summer of 2007. In July and August of 2007 the Department held eight public hearings around the state and collected over 8900 comments during the public comment period that extended until September 7, 2007.

Intra-Agency Cooperation

The Shoreland Program within the Waterway Protection Section of the Bureau of Watershed Management was the Department's primary participant in the rule-development process. The Runoff Management Section of the Bureau of Watershed Management, the Bureau of Fisheries Management and Habitat Protection, the Division of Forestry, the Office of the Great Lakes, the Bureau of Legal Services and the Bureau of Integrated Science Services were consulted with on and provided recommended modification to the provisions on shoreland buffers, water quality improvement structures, wildlife and fisheries habitat improvement structures, and impervious surfaces.

Inter-Agency Cooperation

The Department of Commerce was contacted and consulted on private on-site sewage disposal and sanitary sewer systems as well as infiltration standards contained in the mitigation section of the rule. The Department of Administration was consulted on the plat review provisions in the land division section of the revision and the Wisconsin Department of Transportation was consulted on the distinction of public and

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARINGS
WT-28-04

NOTICE IS HEREBY GIVEN that pursuant to ss. 59.692, 227.11(2)(a) and 281.31, Stats., interpreting ss. 59.69, 59.692, 59.694 and 281.31, Stats., the Department of Natural Resources will hold public hearings on revisions to ch. NR 115, Wis. Adm. Code, relating to minimum standards for county shoreland zoning ordinances. Major provisions of the proposed rule include changes to vegetation management in the primary shoreland buffer and changes to regulation of nonconforming structures. New requirements include minimum lot size and density requirements for multi-unit residential development, mobile home parks and campgrounds; two formulas to calculate reduced shoreland setbacks; an impervious surface standard; and mitigation standards. The proposals include:

Land Division Review – NR 115.09

1. The requirement for land division review is changed from the creation of "3 or more lots" to the creation of "one or more lots" to ensure that all new lots created meet minimum lot size requirements.
2. If new lots are created that are divided by a stream or river, one side of the lot shall have a compliant building location.

Lot Size and Development Density – NR 115.11

1. Minimum lot size and density standards have changed eliminating a distinction between sewered and unsewered areas. The new minimum lot size for all lots created after the effective date of the rule is 20,000 square feet and 100 feet of width at the building setback and ordinary high water mark. Counties may allow development on a substandard lot.
2. Counties are required to develop minimum area or lot size requirements for multi-family residential structures, mobile home parks and campgrounds.
3. Counties may request the approval of standards for alternative forms of development with reduced lot sizes for planned unit developments, cluster developments, conservation subdivisions and other similar alternative forms of development if they include larger shoreland buffers, larger lot sizes or larger setbacks on those lots adjacent to the water.

Shoreland Setback – NR 115.13

1. Language is added to address structures exempted by other state or federal laws from the shoreland setback standards.
2. Provisions are added to allow counties to exempt structures from the shoreland setback if they meet certain requirements outlined in s. NR 115.13(4).
3. The construction of new dry boathouses is still exempted; however, a size limit of 250 square feet has been added to the rule.
4. Standards are established to qualify a lot for a reduced setback if there is not a compliant building location.

Height Requirements – NR 115.15

1. A new section on structure height was added to protect and preserve the natural scenic beauty of lake and riverine environments.

Shoreland Vegetation and Buffers – NR 115.17

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1. Language governing management of shoreland vegetation in the primary shoreland buffer is improved, resulting in a more functional buffer protecting habitat and water quality.

2. Tree and shrubbery pruning is allowed. Removal of trees and shrubs may be allowed if they are exotic or invasive species, diseased or damaged, or if an imminent safety hazard, but removed trees and shrubbery must be replaced.

3. Provisions are added to allow counties to exempt 7 types of activities from the shoreland vegetation provisions.

4. A formula for the width of access corridors is provided, replacing the "30 feet in any 100 feet" provision, which was confusing if a lot had less than 100 feet of frontage. A second formula for lots with greater than 200 feet of frontage was also added to address larger developments adjacent to the water.

Impervious Surfaces – NR 115.19

1. Development is regulated through the use of percentages of total impervious surface rather than through the use of a nonconforming structure provision. The impervious surface percentages of 10% for new principal structures or 15% for existing development may be exceeded up to a maximum of 20% total impervious surface within 300 feet of the ordinary high water mark if mitigation measures are implemented and maintained.

2. Provisions are also included for shared impervious surfaces, expansion, enclosing existing impervious surfaces, replacements and relocation.

Mitigation Provisions – NR 115.21

1. Provisions are now a performance measure to protect, preserve and enhance water quality and wildlife habitat while achieving natural scenic beauty.

2. There is a water quality standard and a wildlife standard that the counties will have to flesh out in their individual ordinances. The water quality standard will require infiltration of runoff.

3. A provision on proportionality has been added to ensure the mitigation measures required will not outweigh the impacts of the proposed project.

Land Disturbing Construction Activities – NR 115.23

1. A county permit is required for land disturbing construction activities in the shoreland zone to minimize erosion and sedimentation.

2. Counties shall exempt from the permit requirement activities that have already received permits from other identified permitting authorities.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to s. 227.114, Stats., it is not anticipated that the proposed rule will have an economic impact on small businesses.

NOTICE IS HEREBY FURTHER GIVEN that the Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on the comments received, the Department may prepare an environmental analysis before proceeding with the proposal. This environmental review document would summarize the Department's consideration of the impacts of the proposal and reasonable alternatives.

NOTICE IS HEREBY FURTHER GIVEN that the Department will hold an open house from 4:30 p.m. to 5:30 p.m. prior to each hearing. Department staff will be available to answer questions regarding the proposed rules.

NOTICE IS HEREBY FURTHER GIVEN that the hearings will be held on:

July 24, 2007 Auditorium, Health & Science Bldg., North Central Tech College, 1000 W. Campus Dr.,
Tuesday Wausau at 5:45 p.m.

- July 25, 2007 Auditorium, Rhinelander High School, 665 Coolidge Avenue, Rhinelander
Wednesday at 5:45 p.m.
- July 26, 2007 Blue Hills Masonic Center, 225 West South Street, Rice Lake
Thursday at 5:45 p.m.
- July 31, 2007 Community Room, Farmers & Merchants Bank, 1001 Superior Avenue, Tomah
Tuesday at 5:45 p.m.
- August 1, 2007 Neville Museum Theater, 210 Museum Place, Green Bay
Wednesday at 5:45 p.m.
- August 7, 2007 Lower Level, Pewaukee City Hall, W240 N3065 Pewaukee Road, Pewaukee
Tuesday at 5:45 p.m.
- August 8, 2007 Opera House, 381 E. Main Street, Stoughton
Wednesday at 5:45 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Toni Herkert at (608) 266-0161 with specific information on your request at least 10 days before the date of the scheduled hearing.

The proposed rule and fiscal estimate may be reviewed and comments electronically submitted at either of the following Internet sites: <http://dnr.wi.gov/org/water/wm/dsfm/shore/news.htm> or <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Toni Herkert, Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until September 7, 2007. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the proposed rule and fiscal estimate may be obtained from Ms. Herkert.

Dated at Madison, Wisconsin

June 12, 2007

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett

Scott Hassett, Secretary

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARINGS
WM-19-07

NOTICE IS HEREBY GIVEN that pursuant to ss. 29.014, 29.041, 29.197, 29.885 and 227.11(2)(a), Stats., interpreting ss. 29.014, 29.041 and 29.885, Stats., the Department of Natural Resources will hold public hearings on revisions to ch. NR 10, Wis. Adm. Code, relating to the 2007 migratory game bird seasons. Season dates and bag limits will be set for ducks and Canada geese. The daily bag limit is expected to be 6 ducks, including no more than 4 mallards, of which only one may be a hen, one black duck, one pintail, 2 wood ducks, 2 redheads and 3 scaup. The season lengths for Canada geese are expected to be: Collins Zone – 62 days; Horicon Zone – 62 days; Exterior Zone – 85 days; and Mississippi River Subzone – 70 days.

The Department is also proposing to:

- Require the use of non-toxic shot for rail, snipe and moorhen statewide.
- Require the use of non-toxic shot for mourning doves on department-managed lands only beginning in 2008.
- Allow the placement of decoys and shooting at birds that are within a 75-yard area around the boundary of the Horizon National Wildlife Refuge as long as the hunter is more than 75 yards from the boundary.
- Relax Canada goose nuisance control requirements for airports.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to s. 227.114, Stats., is it not anticipated that the proposed rule will have an economic impact on small businesses. The Department's Small Business Regulatory Coordinator may be contacted at SmallBusiness@dnr.state.wi.us or by calling (608) 266-1959.

NOTICE IS HEREBY FURTHER GIVEN that the Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on the comments received, the Department may prepare an environmental analysis before proceeding with the proposal. This environmental review document would summarize the Department's consideration of the impacts of the proposal and reasonable alternatives.

NOTICE IS HEREBY FURTHER GIVEN that the hearings will be held on:

August 6, 2007 Rooms B-19 and B-20, State Office Bldg., 3550 Mormon Coulee Road, La Crosse
Monday at 7:00 p.m.

August 7, 2007 Room R228, Meggers Hall, UW-Barron County, 1800 College Drive, Rice Lake
Tuesday at 7:00 p.m.

August 8, 2007 Main Conference Room, Agricultural Services Center, 3369 W. Brewster St., Appleton
Wednesday at 7:00 p.m.

August 9, 2007 Main Conference Room, State Office Bldg., 141 N.W. Barstow Street, Waukesha
Thursday at 7:00 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Ms. Kim Benton at (608)

261-6458 with specific information on your request at least 10 days before the date of the scheduled hearing.

The proposed rule and fiscal estimate may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Ms. Kim Benton, Bureau of Wildlife Management, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until August 9, 2007. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the proposed rule and fiscal estimate may be obtained from Ms. Benton.

Dated at Madison, Wisconsin

June 12, 2007

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett

Scott Hassett, Secretary

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARING
LE-07-07

NOTICE IS HEREBY GIVEN that pursuant to ss. 29.03 and 29.972, Stats., interpreting ss. 29.03 and 29.972, Stats., the Department of Natural Resources will hold a public hearing on the creation of NR 8, subch. II, Wis. Adm. Code, relating to implementation of the Wildlife Violators Compact. 2005 Wisconsin Act 282 authorized the Department to enter into a Wildlife Violator Compact with other states. Under the compact, convictions of wildlife law and revocation of license privileges and approvals that authorize the pursuing, taking or possession of wildlife that occur in any member state are treated as if they occurred in all member states. Before the Department can formally become a member state, rules need to be promulgated which establish procedures to:

1. Assure all violators receive notification when their license privileges and approvals have been revoked by this state or any other member state.
2. Assure the exchange of information between the department, the district attorney and the clerk of courts.
3. Provide an administrative appeal process by which the department can establish if sufficient grounds exist to deny a person's application for an approval or the revocation of their existing approvals.

The proposed rules require the department to revoke all issued hunting, fishing or trapping license privileges and approvals or deny new applications for approvals, for any person who fails to respond to a summons or warrant, fails to appear on their court date without having made a deposit, or fails to appear before the court and is subject to a bench warrant. These rules are also required to ensure that due process is accorded to individuals subject to revocation in this state or who are revoked in another member state. These rules are also necessary to assure records and information on revocations is shared with the clerks of court in the counties where the violation occurs.

Once the new rules and procedures are in place, the department will apply to become a member state.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to s. 227.114, Stats., it is not anticipated that the proposed rule will have an economic impact on small businesses. The Department's Small Business Regulatory Coordinator may be contacted at SmallBusiness@dnr.state.wi.us or by calling (608) 266-1959.

NOTICE IS HEREBY FURTHER GIVEN that the Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on the comments received, the Department may prepare an environmental analysis before proceeding with the proposal. This environmental review document would summarize the Department's consideration of the impacts of the proposal and reasonable alternatives.

NOTICE IS HEREBY FURTHER GIVEN that the hearing will be held on:

July 26, 2007 Room 405, GEF #2, 101 South Webster Street, Madison
Thursday at 2:00 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Thomas Van Haren at

(608) 266-3244 with specific information on your request at least 10 days before the date of the scheduled hearing.

The proposed rule and fiscal estimate may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Mr. Thomas Van Haren, Bureau of Law Enforcement, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until July 27, 2007. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the proposed rule and fiscal estimate may be obtained from Mr. Van Haren.

Dated at Madison, Wisconsin June 12, 2007

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARING
FH-28-07(E)

NOTICE IS HEREBY GIVEN THAT pursuant to ss. 23.09(2)(intro.), 23.091, 23.11(1), 23.22(2)(a) and (b)6., 27.01(2)(j), 29.041, 227.11(2)(a) and 227.24(1)(a), Stats., interpreting ss. 23.09(2)(intro.), 23.22(2)(a), 29.014(1), 29.041 and 227.11(2)(a), Stats., the Department of Natural Resources will hold public hearings on Natural Resources Board Emergency Order No. FH-28-07(E) which revises chs. NR 19 and 20, Wis. Adm. Code, pertaining to control of fish diseases and invasive species. This emergency order was published on May 27, 2007 and revised Natural Resources Board Emergency Order FH-22-07(E) which took effect on April 7, 2007 and Natural Resources Board Emergency Order No. FH-25-07(E). This rule will aid the Department in controlling the spread of viral hemorrhagic septicemia virus (VHS) in the following ways: Natural Resources Board Emergency Order FH-28-07(E) extends the restrictions on the movement and use of fish, fish parts and water taken from the Great Lakes and Mississippi River drainages to the Lake Winnebago system and the Fox River from Lake Winnebago to Green Bay and allows extensions to other waters in the event that the VHS virus is discovered in those waters.

NOTICE IS HEREBY FURTHER GIVEN that the hearing will be held on:

July 11, 2007 Room 413, GEF #2, 101 South Webster Street, Madison
Wednesday at 10:00 a.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Bill Horns at (608) 266-8782 with specific information on your request at least 10 days before the date of the scheduled hearing.

The emergency rule and fiscal estimate may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Mr. Bill Horns, Bureau of Fisheries Management and Habitat Protection, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until July 13, 2007. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearing. A personal copy of the emergency rule and fiscal estimate may be obtained from Mr. Horns.

Dated at Madison, Wisconsin

June 12, 2007

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By Scott Hassett
Scott Hassett, Secretary

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARING
WT-26-07(E)

NOTICE IS HEREBY GIVEN THAT pursuant to ss. 30.12(1) and (3)(br), 30.2035, 30.206, 227.11(2)(a) and 227.24, Stats., interpreting ss. 30.12(1), (3) and (3m) and 30.206, Stats., the Department of Natural Resources will hold a public hearing on Natural Resources Board Emergency Order No. WT-26-07(E) pertaining to general permits for dredging in Great Lakes navigable waterways. The emergency rule revises ch. NR 345, Wis. Adm. Code, to establish a new general permit with appropriate conditions. The rule establishes standards for projects to be eligible for a general permit for dredging, including operation of a motor vehicle, on the beds of the Great lakes to remove algae, mussels, dead fish and similar large plant and animal nuisance deposits.

The emergency rule establishes a general permit for an activity that would otherwise require an individual permit. The general permit will permit lakefront property owners to remove plant and animal nuisance deposits on the beds of outlying waters more efficiently while complying with general permit conditions created to protect the public interest in the lakebed. The general permit has a \$50 application fee and is processed within 30 days.

NOTICE IS HEREBY FURTHER GIVEN that the hearing will be held on:

July 10, 2007 Lake Michigan Room, Green Bay Service Center, 2984 Shawano Ave., Green Bay
Tuesday at 3:00 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Roberta Lund at (608) 266-2220 with specific information on your request at least 10 days before the date of the scheduled hearing.

The emergency rule may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Mr. Martye Griffin, Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until July 20, 2007. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the emergency rule may be obtained from Ms. Lund.

Dated at Madison, Wisconsin

June 12, 2007

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett

Scott Hassett, Secretary

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARINGS
WT-28-04

NOTICE IS HEREBY GIVEN that pursuant to ss. 59.692, 227.11(2)(a) and 281.31, Stats., interpreting ss. 59.69, 59.692 and 281.31, Stats., the Department of Natural Resources will hold public hearings on revisions to ch. NR 115, Wis. Adm. Code, relating to minimum standards for county shoreland zoning ordinances. The proposed revisions are intended to meet the statutory objectives of the program, while providing certainty and flexibility to counties and property owners. Changes include adding definitions to the rule for clarity; establishing standards for multi-unit residential development, mobile home parks and campgrounds; providing exemptions for certain activities from shoreland setback and shoreland vegetation standards; establishing impervious surface standards; and replacing the "50% rule" for nonconforming structures with a standard based on the size and location of structures. These changes will significantly decrease the number of variances granted by counties, allowing certain activities to be allowed with a simple administrative permit by the county. Substantive changes include:

- Language is added to advance the statutory purposes of the program found in s. 281.31(1), Stats.
- Language is added recognizing that this rule only establishes minimum standards for county shoreland zoning ordinances, and counties may adopt more protective regulations to adequately protect local resources.
- Language consistent with s. 59.692(7), Stats., is added to clarify how this rule impacts lands annexed or incorporated by cities and villages.
- Language clarifying the authority of the town shoreland zoning ordinances is added.
- Language clarifying the applicability of ch. NR 115 in areas under the jurisdiction of ch. NR 118 is added.
- The number of definitions was increased from 13 to 52 to help provide consistency in interpretation of county shoreland zoning ordinances
- The requirement for land division review is changed from the creation of "3 or more lots" to the creation of "one or more lots" to ensure that all new lots created meet minimum lot size requirements. This standard was added to protect prospective property owners and ensure that all lots have a buildable area.
- If new lots are created that are divided by a stream or river, one side of the lot must meet minimum lot size requirements and density standards. No portion of a lot or parcel divided by a navigable stream may be developed unless that portion of the lot or parcel meets or is combined to meet the minimum lot size requirements and density standards. This provision will ensure that development only takes place on lots or parcels which meet minimum lot size requirements, again safeguarding property owners.
- Counties may adopt standards to regulate substandard lots in common ownership.
- Minimum lot size and density standards are established for multi-unit residential development, mobile home parks, campgrounds and other types of uses.
- Counties may request the approval of an alternative regulation for campgrounds that is different than the minimum standards in ch. NR 115. Counties utilizing this option must demonstrate how the alternative regulation would achieve the statutory purposes of the program.
- Counties are granted the flexibility to regulate keyhole lots.
- New lot width measurement is developed which will accommodate irregular shaped lots.
- Counties are granted the flexibility to regulate backlots in the shoreland zone.
- Outlots may be created as part of a subdivision plat or certified survey map.
- Counties may request the approval of standards for alternative forms of development with reduced lot sizes and development densities for planned unit developments, cluster developments, conservation subdivisions, and other similar alternative forms of development if

they include, at a minimum, a required shoreland setback of more than 75 feet and a larger primary buffer than is required in s. NR 115.15(2).

- Language is added to address structures exempted by other state or federal laws from the shoreland setback standards.
- Provisions are added to allow counties to exempt 15 types of structures from the shoreland setback, an increase from 3 exempted structures.
- The construction of new dry boathouses is prohibited.
- Standards are established to qualify a lot for a reduced setback and two methods of calculating the reduced setback are provided. Counties may also request approval of an alternative setback reduction formulate, demonstrating how the alternative is as effective in achieving the purposes of s. 281.31(1) and (6), Stats.
- Language governing management of shoreland vegetation in the primary shoreland buffer is improved, resulting in a more functional buffer protection habitat and water quality.
- Tree and shrubbery pruning is allowed. Removal of trees and shrubs may be allowed if exotic or invasive species, diseased or damaged, or if an imminent safety hazard, but must be replaced.
- Provisions are added to allow counties to exempt 7 types of activities from the shoreland vegetation provisions.
- A formula to calculate the vegetative buffer mitigation requirements for existing multiple-unit developments was added to proportionately mitigate based on the intensity of the project.
- A formula for the width of access corridors is provided, replacing the "30 feet in any 100 feet" provision, which was confusing if a lot had less than 100 feet of frontage.
- Existing lawns may be maintained indefinitely in the primary shoreland buffer, unless a property owner decides to initiate one of 5 actions that require restoration of the primary shoreland buffer.
- Best management practices must be implemented and maintained that, to the maximum extent practicable, result in no increase in storm water discharge from impervious surfaces.
- If a project results in a lot being covered with 20% or more impervious surfaces, the shoreland buffers must be preserved or restored in compliance with the standards in s. NR 115.15 (applies only to lots with lands within 75 feet of the ordinary high water mark).
- An erosion control and revegetation plan is required for land disturbing activities to minimize erosion and sedimentation caused by the activity.
- A county permit is required for land disturbing activities in the shoreland zone if the project includes 2,000 square feet or more of land.
- Counties shall exempt from the permit requirement activities that have already received permits from other identified permitting authorities.
- Counties may require a wetland buffer to minimize the impacts of land disturbing activities to prevent damage to wetlands.
- The "50% rule" is removed, and a standard for the regulation of nonconforming structures based on the location and size of structures is used.
- Unlimited ordinary maintenance and repairs is allowed on nonconforming structures.
- Structural alternations are allowed on nonconforming structures if mitigation is implemented as specified by the county.
- Expansion and replacement of nonconforming accessory structures is prohibited, unless located in a campground or mobile home park, and certain standards are satisfied.
- Expansions of nonconforming principal structures is allowed is the structure is set back at least 35 feet from the ordinary high water mark, if the footprint cap is not exceeded, if mitigation is implemented as specified by the county and if other standards are met.
- Replacement of nonconforming principal structures is allowed on the existing foundation anywhere within the shoreland setback area, and on new foundations if the structure is setback at least 35 feet from the ordinary high water mark, if mitigation is implemented as specified by the county, and if other standards are met.
- Replacement of nonconforming principal structures is prohibited if the structure has no foundation, the foundation extends below the ordinary high water mark or the structure extends over the ordinary high water mark.

- Counties shall adopt a mitigation system that is roughly proportional to the impacts of activities proposed.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to s. 227.114, Stats., it is not anticipated that the proposed rule will have an economic impact on small businesses. The Department's Small Business Regulatory Coordinator may be contacted at SmallBusinessReg.Coordinator@dnr.state.wi.us or by calling (608) 266-1959.

NOTICE IS HEREBY FURTHER GIVEN that the Department has prepared an Environmental Assessment in accordance is s. 1.11, Stats., and ch. NR 150, Wis. Adm. Code, that has concluded that the proposed rule is not a major state action which would significantly affect the quality of the human environment and that an environmental impact statement is not required.

NOTICE IS HEREBY FURTHER GIVEN that the Department will hold question and answer session from 4:30 p.m. until 5:45 p.m. prior to each hearing. Department staff will be available to answer questions regarding the proposed rules.

NOTICE IS HEREBY FURTHER GIVEN that the hearings will be held on:

July 12, 2005 Chippewa Valley Technical College, 620 Clairemont Avenue, Eau Claire
Tuesday at 6:00 p.m.

July 13, 2005 Wis. Indianhead Technical College, 2100 Beaser Avenue, Ashland
Wednesday at 6:00 p.m.

July 14, 2005 Egg Harbor Room, Landmark Resort, 7643 Hillside Road, Egg Harbor
Thursday at 6:00 p.m.

July 19, 2005 Western WI Technical College, 304 6th Street North, La Crosse
Tuesday at 6:00 p.m.

July 21, 2005 Sentry World Theater, 1800 North Point Drive, Stevens Point
Thursday at 6:00 p.m.

July 26, 2005 UW Washington County, 400 University Drive, West Bend
Tuesday at 6:00 p.m.

July 27, 2005 Grand Chute Town Hall, 1900 Grand Chute Boulevard, Grand Chute
Wednesday at 6:00 p.m.

July 28, 2005 Nicolet Technical College, County Highway G, Rhinelander
Thursday at 6:00 p.m.

August 2, 2005 Lake Lawn Resort, 2400 East Geneva Street, Delavan
Tuesday at 6:00 p.m.

August 4, 2005 Oak Hall Room, Fitchburg Community Center, 5520 Lacy Road, Fitchburg
Thursday at 6:00 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of information material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Toni Herkert at (608) 266-0161 with specific information on your request at least 10 days before the date of the scheduled hearing.

The proposed rule and fiscal estimate may be reviewed and comments electronically submitted at the following Internet site: adminrules.wisconsin.gov. Written comments on the proposed rule may be submitted via U.S. mail to Toni Herkert, Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707. Comments may be submitted until August 12, 2005. Written comments whether submitted electronically or by U.S. mail will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the proposed rule and fiscal estimate may be obtained from Ms. Herkert.

Dated at Madison, Wisconsin

June 15, 2005

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Scott Hassett

Scott Hassett, Secretary



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

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REPLY TO THE ATTENTION OF

WN-16J

JUN 04 2007

Russell A. Rasmussen, Director
Bureau of Watershed Management
Division of Water
Wisconsin Department of Natural Resources
101 South Webster Street - WT/2
Madison, Wisconsin 53707-7921

Re: Domtar Paper Company, LLC
Rothschild
Permit No. WI0026042

Dear Mr. Rasmussen:

The United States Environmental Protection Agency (U.S. EPA) has reviewed the draft permit for the above-referenced facility, and will not object to the reissuance of this permit as drafted, under the following conditions:

1. The discharge of noncontact cooling water through Outfall 015 has chlorine concentrations at levels which have the reasonable potential to cause or contribute to exceedences of water quality standards ("reasonable potential"), but the permit does not include a water quality based effluent limit for chlorine. Consistent with the requirements of 40 CFR 122.44(d), the permit must be revised to include a water quality based effluent limit, and appropriate monitoring conditions, for discharges of noncontact cooling water through Outfall 015.
2. NR 106.145 includes provisions for setting permit limits for mercury discharges in NPDES permits issued by the Wisconsin Department of Natural Resources (WDNR), including provisions for determining whether a discharge has reasonable potential. General procedures for determining reasonable potential are contained in NR 106.05.

In a letter from Jo-Lynn Traub to Todd Ambs, dated September 21, 2006, U.S. EPA requested that the WDNR submit NR 106.145 for review as a proposed revision to Wisconsin's NPDES permit program. In that letter, U.S. EPA stated that NPDES program revisions are not effective

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2

review permits according to the approved and effective reasonable potential WDNR regulations under NR 106.05.

As discussed in Attachment C, Mercury Permit Conditions, of the Fact Sheet accompanying the above-referenced permit, WDNR did not perform a reasonable potential analysis for mercury, citing the provisions at NR 106.145 which require a minimum sample size before the analysis can be performed.

Consistent with the September 21, 2006, letter, WDNR must determine whether there is reasonable potential for the discharge of mercury to cause or contribute to a violation of water quality standards using the procedures at NR 106.05. If reasonable potential is found, a limit for mercury consistent with State water quality standards must be placed in the permit.


You must resubmit the permit to the USEPA for review if:

- a. Prior to the actual date of issuance, an effluent guideline or standard is promulgated which is applicable to the permit and which would require revision or modification of a limitation or condition set forth in the draft permit;
- b. A variance is granted and the permit is modified to incorporate the results of that variance; or
- c. There are additional revisions to be incorporated into the final permit which have not been agreed to by this Agency.

If the State complies with the above conditions, the permit may be issued in accordance with the Memorandum of Agreement and pursuant to the Clean Water Act.

When the final permit is issued, please forward one copy and any significant comments received during the public notice to this office at the above address, attention NPDES Programs Branch.

Sincerely yours,



Peter Swenson, Chief
NPDES Programs Branch

cc: Duane Schuettpelz, WDNR
Tom Mugar, WDNR
Michael Hammers, WDNR

March 12, 2008

Russ Rasmussen
Wisconsin Department of Natural Resources
101 S. Webster Street – WT/3
P.O. Box 7921
Madison, WI 53703

Dear Mr. Rasmussen,

The Petenwell and Castle Rock Stewards (“PACRS”) are committed to improving water quality and the fishery of the Petenwell and Castle Rock Flowages. On Monday, March 11, we met with Mr. Mike Hammers regarding the Draft Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit No. WI-0026042 for Domtar Paper Company (formerly Weyerhaeuser) in Rothschild, Wisconsin, that was public noticed on March 26, 2007. This permit has not yet been issued and PACRS is concerned by its delay.

We are writing today to request that Domtar’s WPDES permit be issued. PACRS would like to see this permit released and issued as soon as possible, as it requires reductions in phosphorus discharges during the term of the permit. Any further delays put our goals of reducing phosphorus in the Flowages by 2010 in jeopardy.

PACRS appreciates the cooperative efforts of the DNR to address the phosphorus issues in the Petenwell and Castle Rock Flowages. We look forward to receiving a response from you that Domtar’s WPDES permit has been issued and will be in effect in the near future.

Thank you for your attention to this matter. PACRS looks forward to working with you and the DNR on future efforts to reduce phosphorus levels in the Wisconsin River.

Sincerely,

Bruce Carlson
Chairman – PACRS



WPDES PERMIT

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
**PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE
ELIMINATION SYSTEM**

Didion Ethanol LLC

is permitted, under the authority of Chapter 283, Wisconsin Statutes, to discharge from a facility
located at
N1/2 of the N1/2 of the NE1/4 of the SW1/4, S5, T12N, R12E, Town of Courtland, Columbia County, WI
to

**An Unnamed tributary of the North Branch of Duck Creek in the
Duck Creek and Rocky Run Watershed (LW20) of the Lower Wisconsin River Basin**

in accordance with the effluent limitations, monitoring requirements and other conditions set
forth in this permit.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit, according to Chapter NR 200, Wis. Adm. Code, at least 180 days prior to the expiration date given below.

State of Wisconsin Department of Natural Resources
For the Secretary

By _____
Lloyd L. Eagan
South Central Regional Director

Date Permit Signed/Issued

PERMIT TERM: EFFECTIVE DATE - April 01, 2008

EXPIRATION DATE - December 31, 2012

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1 Surface Water Requirements

1.1 Sampling Point(s)

The discharge(s) shall be limited to the waste type(s) designated for the listed sampling point(s).

Sampling Point Designation	
Sampling Point Number	Sampling Point Location, WasteType/Sample Contents and Treatment Description (as applicable)
001	The sample will be collected from a 6 inch pipe that discharges to an area of rip rap on the west bank of an intermittent tributary to Duck Creek. Lat: 43 32 13.8380 Long: 089 05 51.2196 The discharge will consist of cooling tower blowdown combined with RO reject water and filter backwash from a process used to polish the groundwater intake to the ethanol production process .

1.2 Monitoring Requirements and Effluent Limitations

The permittee shall comply with the following monitoring requirements and limitations.

1.2.1 Sampling Point (Outfall) 001 - Cooling Tower Blowdown

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		gpd	Daily	Total Daily	
pH Field	Daily Max	9.0 su	Weekly	Grab	
pH Field	Daily Min	6.0 su	Weekly	Grab	
Dissolved Oxygen	Daily Min	5.0 mg/L	Weekly	Grab	
Temperature	Daily Max	89 deg F	Monthly	Grab	
Suspended Solids, Total	Daily Max	10 mg/L	Weekly	Grab	Samples shall be taken during the sand filter backwash operation.
BOD ₅ , Total		mg/L	Monthly	Grab	Monitoring is only required for the first 12 months of effluent discharge.
Chlorine, Total Residual	Weekly Avg	7.3 µg/L	Monthly	Grab	
Chlorine, Total Residual	Daily Max	38 µg/L	Monthly	Grab	
Chlorine, Total Residual	Daily Max	0.06 lbs/day	Monthly	Grab	
Chlorine, Total Residual	Weekly Avg	0.01 lbs/day	Monthly	Grab	
Phosphorus, Total		mg/L	Monthly	Grab	See section 1.2.1.4 below.
Zinc, Total Recoverable	Weekly Avg	340 µg/L	Monthly	Grab	See section 1.2.1.2 below.
Zinc, Total Recoverable	Daily Max	690 µg/L	Monthly	Grab	See section 1.2.1.2 below.

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Zinc, Total Recoverable	Weekly Avg	0.57 lbs/day	Monthly	Grab	See section 1.2.1.2 below.
Zinc, Total Recoverable	Daily Max	1.2 lbs/day	Monthly	Grab	See section 1.2.1.2 below.
Arsenic, Total Recoverable	Monthly Avg	50 µg/L	Monthly	Grab	See section 1.2.1.2 below.
Copper, Total Recoverable		mg/L	Quarterly	Grab	See section 1.2.1.3 below.
Nickel, Total Recoverable		mg/L	Quarterly	Grab	See section 1.2.1.3 below.
Chloride		mg/L	Monthly	Grab	See section 1.2.1.1 below.
Hardness, Total as CaCO ₃		mg/L	Quarterly	Grab	See section 1.2.1.3 below.
Acute WET		TU _a	Quarterly	24-Hr Flow Prop Comp	See sections 1.2.1.9 and 1.2.1.10 below.
Chronic WET		rTU _c	Quarterly	24-Hr Flow Prop Comp	See sections 1.2.1.9 and 1.2.1.10 below.

1.2.1.1 Chloride Monitoring

When 11 or more representative results have been provided to the Department, the permittee may request that the Department make a determination of the need for further monitoring. Within 60 days of such request, the Department shall make that determination. If the Department determines that further monitoring is unnecessary, the Department shall notify the permittee, and the monitoring requirements shall be eliminated. This action shall take place without public notice.

1.2.1.2 Zinc and Arsenic – Potential Removal of Effluent Limitations

Whenever 11 or more representative results for zinc and arsenic have been provided to the Department, the permittee may request that the Department make a determination of the need for a limit under section NR 106.05, Wisconsin Administrative Code. For this request, the samples shall be evenly spaced over the period or periods of discharge during at least 12 months time and must be tested according to the “Sampling and Testing Procedures” in the Standard Requirements section in this permit. Within 60 days of such request, the Department shall make that determination. If the Department determines that effluent limitations are unnecessary based on the procedures in NR 106.05, the Department shall notify the permittee and the monitoring requirements for zinc and arsenic shall be reduced to quarterly. This action shall take place without public notice thereof.

1.2.1.3 Copper, Nickel and Hardness Monitoring

Monitoring is only required for the first year following permit issuance. Hardness is only monitored in conjunction with these metals because of its relationship to the daily maximum limits based on acute toxicity criteria.

1.2.1.4 Total Phosphorus Monitoring

Phosphorus monitoring beyond the first 12 monthly effluent sample results will not be required as long as the 12 month running average concentration is below 1.0 mg/L and the discharge quantity averaged over the entire year does not exceed 60 pounds per month.

1.2.1.5 BOD Monitoring

Additional effluent sample results are necessary to have sufficient representative data to determine the need for effluent limitations in the next permit reissuance.

1.2.1.6 Total Metals Analyses

Measurements of total metals and total recoverable metals shall be considered as equivalent.

1.2.1.7 Applicable Mass Limits for Total Residual Chlorine

The applicable mass limits for Total Residual Chlorine are 0.06 pound per day (daily maximum), and 0.01 pound per day (weekly average). See Standard Requirements for "Applicability of Alternative Wet Weather Limitations".

1.2.1.8 Additives

The permittee shall report the dosage rate of all additives used on a monthly basis. Attach a summary page including each additive description, the dosage rate, and the total amount used to the monthly discharge monitoring report forms.

1.2.1.9 Whole Effluent Toxicity (WET) Testing

Samples shall be taken after resumption of tower blowdown immediately following the 60 minute "lockout" period that occurs after the addition of the Biotrol-120 additive.

Primary Control Water: Primary control water should be the unnamed tributary of the North Branch of Duck Creek, upstream of the confluence with the point of discharge of effluent. In the event that there is no flow in the unnamed tributary, primary control water should be the North Branch of Duck Creek, upstream of the point of confluence with the unnamed tributary.

Instream Waste Concentration (IWC): 100 %

Dilution series: At least five effluent concentrations and dual controls must be included in each test.

- **Acute:** 100, 50, 25, 12.5, 6.25% and any additional selected by the permittee.
- **Chronic:** 100, 30, 10, 3, 1% (if the IWC \leq 30%) or 100, 75, 50, 25, 12.5% (if the IWC $>$ 30%) and any additional selected by the permittee.

WET Testing Frequency: Tests are required for each quarter in a permit year unless the sampling frequency has been reduced to annually and then sampling shall occur during the following quarters.

- **Acute:** July 1 – September 30, 2009, October 1 – December 31, 2010, January 1 – March 31, 2011, April 1- June 30, 2012
- **Chronic:** July 1 – September 30, 2009, October 1 – December 31, 2010, January 1 – March 31, 2011, April 1- June 30, 2012

Reporting: The permittee shall report test results on the Discharge Monitoring Report form, and also complete the "Whole Effluent Toxicity Test Report Form" (Section 6, "*State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 2nd Edition*"), for each test. The original, complete, signed version of the Whole Effluent Toxicity Test Report Form shall be sent to the Biomonitoring Coordinator, Bureau of Watershed Management, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921, within 45 days of test completion. The original Discharge Monitoring Report (DMR) form and one copy shall be sent to the contact and location provided on the DMR by the required deadline.

Determination of Positive Results: An acute toxicity test shall be considered positive if the Toxic Unit - Acute (TU_a) is greater than 1.0 for either species. The TU_a shall be calculated as follows: If LC₅₀ \geq 100, then TU_a = 1.0. If LC₅₀ is $<$ 100, then TU_a = 100 \div LC₅₀. A chronic toxicity test shall be considered positive if the Relative Toxic Unit -

Chronic (rTU_c) is greater than 1.0 for either species. The rTU_c shall be calculated as follows: If $IC_{25} \geq IWC$, then $rTU_c = 1.0$. If $IC_{25} < IWC$, then $rTU_c = IWC \div IC_{25}$.

Additional Testing Requirements: Within 90 days of a test which showed positive results, the permittee shall submit the results of at least 2 retests to the Biomonitoring Coordinator on "Whole Effluent Toxicity Test Report Forms". The retests shall be completed using the same species and test methods specified for the original test (see the Standard Requirements section herein).

1.2.1.10 Whole Effluent Toxicity (WET) testing – Potential Reduction of Sample Frequency

Whenever 4 passing test results and no failures for Acute and Chronic WET testing have been provided to the Department within the previous permit year, the permittee may request that the Department make a determination to reduce sampling frequency. Each permit year begins on April 1st and ends on March 31st of the following calendar year. For purpose of this request, the samples shall be evenly spaced over the 4 quarterly periods of discharge during the 12 months in the previous permit year and must be tested according to the procedures specified in the *"State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 2nd Edition"* (PUB-WT-797, November 2004) as required by NR 219.04, Table A, Wis. Adm. Code referenced in the Standard Requirements section in this permit. Within 60 days of such request, the Department shall make that determination. If the Department determines that there have been no Acute or Chronic WET test failures in the previous permit year, the Department shall notify the permittee and the monitoring frequency shall be reduced to annually. This action shall take place without public notice thereof.

1.2.1.11 Groundwater Discharges Not Authorized

This permit does not authorize groundwater discharges such as land spreading of wet or dried distiller's grains or leaching from bulk storage piles of wet or dried distiller's grains.

2 Standard Requirements

NR 205, Wisconsin Administrative Code (Conditions for Industrial Dischargers): The conditions in ss. NR 205.07(1) and NR 205.07(3), Wis. Adm. Code, are included by reference in this permit. The permittee shall comply with all of these requirements. Some of these requirements are outlined in the Standard Requirements section of this permit. Requirements not specifically outlined in the Standard Requirement section of this permit can be found in ss. NR 205.07(1) and NR 205.07(3).

2.1 Reporting and Monitoring Requirements

2.1.1 Monitoring Results

Monitoring results obtained during the previous month shall be summarized and reported on a Department Wastewater Discharge Monitoring Report. The report may require reporting of any or all of the information specified below under 'Recording of Results'. This report is to be returned to the Department no later than the date indicated on the form. When submitting a paper Discharge Monitoring Report form, the original and one copy of the Wastewater Discharge Monitoring Report Form shall be submitted to the return address printed on the form. A copy of the Wastewater Discharge Monitoring Report Form or an electronic file of the report shall be retained by the permittee.

All Wastewater Discharge Monitoring Reports submitted to the Department should be submitted using the electronic Discharge Monitoring Report system. Permittees who may be unable to submit Wastewater Discharge Monitoring Reports electronically may request approval to submit paper DMRs upon demonstration that electronic reporting is not feasible or practicable.

If the permittee monitors any pollutant more frequently than required by this permit, the results of such monitoring shall be included on the Wastewater Discharge Monitoring Report.

The permittee shall comply with all limits for each parameter regardless of monitoring frequency. For example, monthly, weekly, and/or daily limits shall be met even with monthly monitoring. The permittee may monitor more frequently than required for any parameter.

An Electronic Discharge Monitoring Report Certification sheet shall be signed and submitted with each electronic Discharge Monitoring Report submittal. This certification sheet, which is not part of the electronic report form, shall be signed by a principal executive officer, a ranking elected official or other duly authorized representative and shall be mailed to the Department at the time of submittal of the electronic Discharge Monitoring Report. The certification sheet certifies that the electronic report form is true, accurate and complete. Paper reports shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

2.1.2 Sampling and Testing Procedures

Sampling and laboratory testing procedures shall be performed in accordance with Chapters NR 218 and NR 219, Wis. Adm. Code and shall be performed by a laboratory certified or registered in accordance with the requirements of ch. NR 149, Wis. Adm. Code. Groundwater sample collection and analysis shall be performed in accordance with ch. NR 140, Wis. Adm. Code. The analytical methodologies used shall enable the laboratory to quantitate all substances for which monitoring is required at levels below the effluent limitation. If the required level cannot be met by any of the methods available in NR 219, Wis. Adm. Code, then the method with the lowest limit of detection shall be selected. Additional test procedures may be specified in this permit.

2.1.3 Recording of Results

The permittee shall maintain records which provide the following information for each effluent measurement or sample taken:

- the date, exact place, method and time of sampling or measurements;
- the individual who performed the sampling or measurements;
- the date the analysis was performed;
- the individual who performed the analysis;
- the analytical techniques or methods used; and
- the results of the analysis.

2.1.4 Reporting of Monitoring Results

The permittee shall use the following conventions when reporting effluent monitoring results:

- Pollutant concentrations less than the limit of detection shall be reported as < (less than) the value of the limit of detection. For example, if a substance is not detected at a detection limit of 0.1 mg/L, report the pollutant concentration as < 0.1 mg/L.
- Pollutant concentrations equal to or greater than the limit of detection, but less than the limit of quantitation, shall be reported and the limit of quantitation shall be specified.
- For the purposes of reporting a calculated result, average or a mass discharge value, the permittee may substitute a 0 (zero) for any pollutant concentration that is less than the limit of detection. However, if the effluent limitation is less than the limit of detection, the department may substitute a value other than zero for results less than the limit of detection, after considering the number of monitoring results that are greater than the limit of detection and if warranted when applying appropriate statistical techniques.

2.1.5 Records Retention

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 3 years from the date of the sample, measurement, report or application, except for sludge management forms and records, which shall be kept for a period of at least 5 years.

2.1.6 Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or correct information to the Department.

2.2 System Operating Requirements

2.2.1 Noncompliance Notification

- The permittee shall report the following types of noncompliance by a telephone call to the Department's regional office within 24 hours after becoming aware of the noncompliance;
 - any noncompliance which may endanger health or the environment;
 - any violation of an effluent limitation resulting from an unanticipated bypass;
 - any violation of an effluent limitation resulting from an upset; and
 - any violation of a maximum discharge limitation for any of the pollutants listed by the Department in the permit.
- A written report describing the noncompliance shall also be submitted to the Department's regional office within 5 days after the permittee becomes aware of the noncompliance. On a case-by-case basis, the

Department may waive the requirement for submittal of a written report within 5 days and instruct the permittee to submit the written report with the next regularly scheduled monitoring report. In either case, the written report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times; the steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance; and if the noncompliance has not been corrected, the length of time it is expected to continue.

- The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

NOTE: Section 292.11(2)(a), Wisconsin Statutes, requires any person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance to notify the Department of Natural Resources **immediately** of any discharge not authorized by the permit. The discharge of a hazardous substance that is not authorized by this permit or that violates this permit may be a hazardous substance spill. To report a hazardous substance spill, call DNR's 24-hour HOTLINE at **1-800-943-0003**.

2.2.2 Scheduled Bypassing

Any construction or normal maintenance which results in a bypass of wastewater from a treatment system is prohibited unless authorized by the Department in writing. If the Department determines that there is significant public interest in the proposed action, the Department may schedule a public hearing or notice a proposal to approve the bypass. Each request shall specify the following minimum information:

- proposed date of bypass;
- estimated duration of the bypass;
- estimated volume of the bypass;
- alternatives to bypassing; and
- measures to mitigate environmental harm caused by the bypass.

2.2.3 Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control which are installed or used by the permittee to achieve compliance with the conditions of this permit. The wastewater treatment facility shall be under the direct supervision of a state certified operator as required in s. NR 108.06(2), Wis. Adm. Code. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training as required in ch. NR 114, Wis. Adm. Code, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

2.2.4 Spill Reporting

The permittee shall notify the Department in accordance with ch. NR 706 (formerly NR 158), Wis. Adm. Code, in the event that a spill or accidental release of any material or substance results in the discharge of pollutants to the waters of the state at a rate or concentration greater than the effluent limitations established in this permit, or the spill or accidental release of the material is unregulated in this permit, unless the spill or release of pollutants has been reported to the Department in accordance with s. NR 205.07 (1)(s), Wis. Adm. Code.

2.2.5 Planned Changes

In accordance with ss. 283.31(4)(b) and 283.59, Stats., the permittee shall report to the Department any facility expansion, production increase or process modifications which will result in new, different or increased discharges of pollutants. The report shall either be a new permit application, or if the new discharge will not violate the effluent limitations of this permit, a written notice of the new, different or increased discharge. The notice shall contain a description of the new activities, an estimate of the new, different or increased discharge of pollutants and a description of the effect of the new or increased discharge on existing waste treatment facilities. Following receipt of this report, the Department may modify this permit to specify and limit any pollutants not previously regulated in the permit.

2.2.6 Duty to Halt or Reduce Activity

Upon failure or impairment of treatment facility operation, the permittee shall, to the extent necessary to maintain compliance with its permit, curtail production or wastewater discharges or both until the treatment facility operations are restored or an alternative method of treatment is provided.

2.3 Surface Water Requirements

2.3.1 Permittee-Determined Limit of Quantitation Incorporated into this Permit

For pollutants with water quality-based effluent limits below the Limit of Quantitation (LOQ) in this permit, the LOQ calculated by the permittee and reported on the Discharge Monitoring Reports (DMRs) is incorporated by reference into this permit. The LOQ shall be reported on the DMRs, shall be the lowest quantifiable level practicable, and shall be no greater than the minimum level (ML) specified in or approved under 40 CFR Part 136 for the pollutant at the time this permit was issued, unless this permit specifies a higher LOQ.

2.3.2 Appropriate Formulas for Effluent Calculations

The permittee shall use the following formulas for calculating effluent results to determine compliance with average limits and mass limits:

Weekly/Monthly average concentration = the sum of all daily results for that week/month, divided by the number of results during that time period.

Weekly Average Mass Discharge (lbs/day): Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34, then average the daily mass values for the week.

Monthly Average Mass Discharge (lbs/day): Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34, then average the daily mass values for the month.

2.3.3 Visible Foam or Floating Solids

There shall be no discharge of floating solids or visible foam in other than trace amounts.

2.3.4 Chloride Notification

The permittee shall notify the Department in writing of any proposed changes which may affect the characteristics of the wastewater, which results in an increase in the concentration of chloride, under the authority of sections 283.31(4)(b) and 283.59(1), Stats. This notification shall include a description of the proposed source of chlorides and the anticipated increase in concentration. Following receipt of the notification, the Department may propose a modification to the permit.

2.3.5 Total Residual Chlorine Requirements (When De-Chlorinating Effluent)

Test methods for total residual chlorine, approved in ch. NR 219 - Table B, Wis. Adm. Code, normally achieve a limit of detection of about 20 to 50 micrograms per liter and a limit of quantitation of about 100 micrograms per liter. Reporting of test results and compliance with effluent limitations for chlorine residual and total residual halogens shall be as follows:

- Sample results which show no detectable levels are in compliance with the limit. These test results shall be reported on Wastewater Discharge Monitoring Report Forms as "< 100 µg/L". (Note: 0.1 mg/L converts to 100 µg/L)
- Samples showing detectable traces of chlorine are in compliance if measured at less than 100 µg/L, unless there is a consistent pattern of detectable values in this range. These values shall also be reported on Wastewater Discharge Monitoring Report Forms as "<100 µg/L." The facility operating staff shall record actual readings on logs maintained at the plant, shall take action to determine the reliability of detected results (such as re-sampling and/or calculating dosages), and shall adjust the chemical feed system if necessary to reduce the chances of detects.
- Samples showing detectable levels greater than 100 µg/L shall be considered as exceedances, and shall be reported as measured.
- To calculate average or mass discharge values, a "0" (zero) may be substituted for any test result less than 100 µg/L. Calculated values shall then be compared directly to the average or mass limitations to determine compliance.

2.3.6 Additives

In the event that the permittee wishes to commence use of a water treatment additive, or increase the usage of the additives greater than indicated in the permit application, the permittee must get a written approval from the Department prior to initiating such changes. This written approval shall provide authority to utilize the additives at the specific rates until the permit can be either reissued or modified in accordance with s. 283.53, Stats. Restrictions on the use of the additives may be included in the authorization letter.

2.3.7 Whole Effluent Toxicity (WET) Monitoring Requirements

In order to determine the potential impact of the discharge on aquatic organisms, static-renewal toxicity tests shall be performed on the effluent in accordance with the procedures specified in the *"State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 2nd Edition"* (PUB-WT-797, November 2004) as required by NR 219.04, Table A, Wis. Adm. Code). All of the WET tests required in this permit, including any required retests, shall be conducted on the *Ceriodaphnia dubia* and fathead minnow species. Receiving water samples shall not be collected from any point in contact with the permittee's mixing zone and every attempt shall be made to avoid contact with any other discharge's mixing zone.

2.3.8 Whole Effluent Toxicity (WET) Identification and Reduction

Within 60 days of a retest which showed positive results, the permittee shall submit a written report to the Biomonitoring Coordinator, Bureau of Watershed Management, 101 S. Webster St., PO Box 7921, Madison, WI 53707-7921, which details the following:

- A description of actions the permittee has taken or will take to remove toxicity and to prevent the recurrence of toxicity;

- A description of toxicity reduction evaluation (TRE) investigations that have been or will be done to identify potential sources of toxicity, including some or all of the following actions:
 - (a) Evaluate the performance of the treatment system to identify deficiencies contributing to effluent toxicity (e.g., operational problems, chemical additives, incomplete treatment)
 - (b) Identify the compound(s) causing toxicity
 - (c) Trace the compound(s) causing toxicity to their sources (e.g., industrial, commercial, domestic)
 - (d) Evaluate, select, and implement methods or technologies to control effluent toxicity (e.g., in-plant or pretreatment controls, source reduction or removal)
- Where corrective actions including a TRE have not been completed, an expeditious schedule under which corrective actions will be implemented;
- If no actions have been taken, the reason for not taking action.

The permittee may also request approval from the Department to postpone additional retests in order to investigate the source(s) of toxicity. Postponed retests must be completed after toxicity is believed to have been removed.

3 Summary of Reports Due

FOR INFORMATIONAL PURPOSES ONLY

Description	Date	Page
Wastewater Discharge Monitoring Report	no later than the date indicated on the form	5

Report forms shall be submitted to the address printed on the report form. Any facility plans or plans and specifications for municipal, industrial, industrial pretreatment and non industrial wastewater systems shall be submitted to the Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707-7921. All other submittals required by this permit shall be submitted to:

South Central Region, 3911 Fish Hatchery Road, Fitchburg, WI 53711-5397

CORRESPONDENCE/MEMORANDUM

DATE: January 16, 2008

FILES REF: 3200

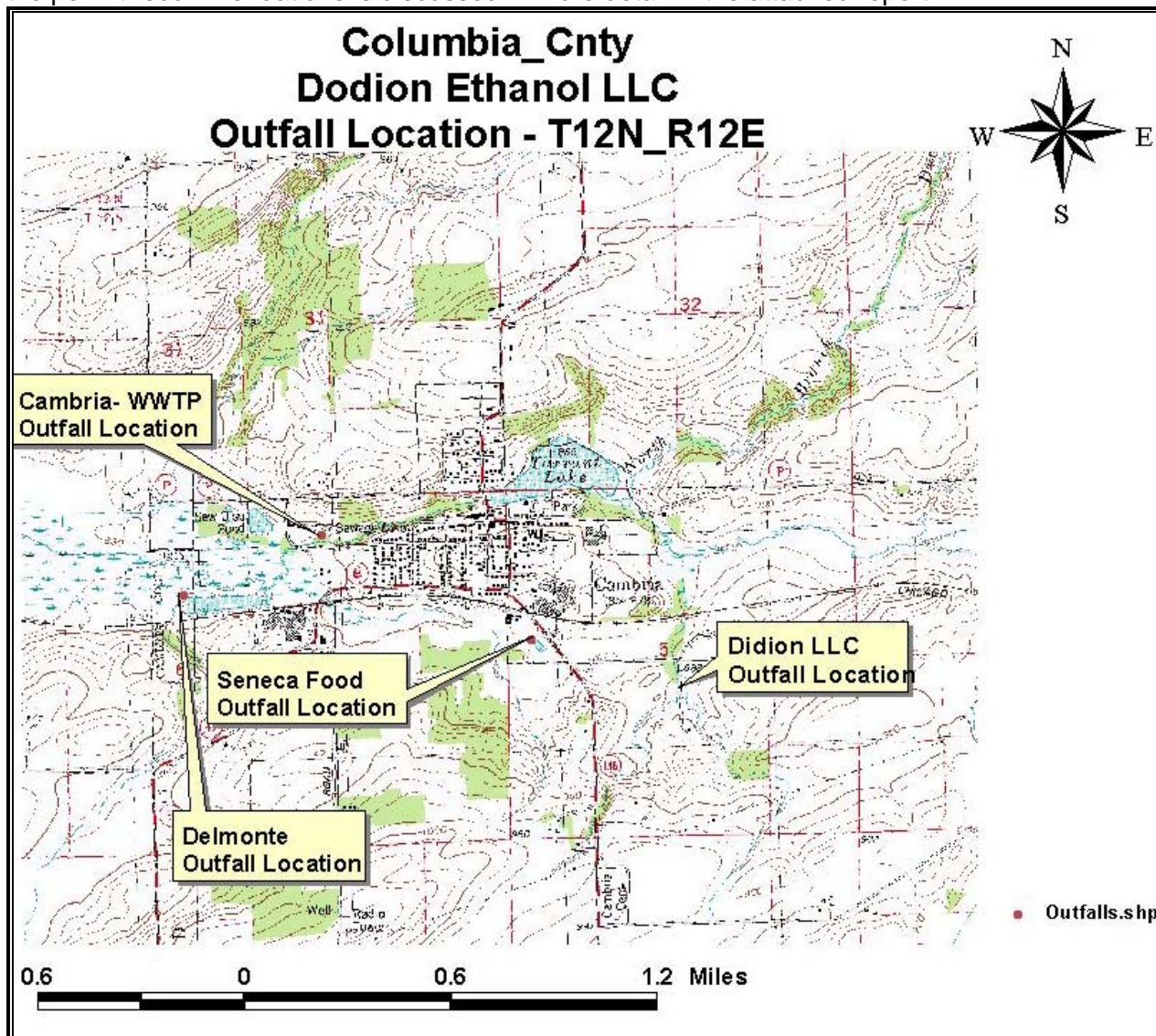
TO: Dan Joyce – WT/3, Brenda Howald - SCR

FROM: Susan Sylvester - WT/3

SUBJECT: Water Quality-based Effluent Limitations for proposed new discharge from Didion Ethanol LLC Plant in Town of Courtland - Columbia County.

This is in response to your request for an evaluation of water quality-based effluent limitations for proposed new discharge of combined flow of cooling tower blowdown, sand filter backwash and reverse osmosis from Didion facility to an unnamed tributary of North Branch of Duck Creek. The effluent limitations for this discharge were evaluated using chapters NR 102, 104, 105, 106, 207, 217 and 209 Wis. Adm. Code (where applicable).

The discharge is located in the Duck Creek and Rocky Run Watershed (LW20) of the Lower Wisconsin River Basin. Outfall is located at NE ¼ of SW ¼ of Section 5, T12N_R12E (see the following map). The evaluation of the permit recommendations is discussed in more detail in the attached report.



Since this is a new discharge to surface water, a ch. NR 207 review is required. The fish and aquatic life procedures found in s. NR 207.04 were used for evaluation of the proposed new discharge. Water quality based effluent limitations will set to prevent the lowering of water quality in the downstream fish and aquatic life waters.

Based on our review, the following effluent limitations listed below are recommended for discharge of 0.2045 mgd. These limitations will be protective of downstream stretch of the receiving water as well.

Table #1 RECOMMENDED EFFLUENT LIMITATIONS FOR OUTFALL – 001	
pH	6.0 s.u. – 9.0 s.u.
BOD₅	Monitoring only
TSS	10 mg/L – daily maximum
Total residual chlorine	38 ug/L (0.06 lbs/d) daily max. 7.3 ug/L (0.01 lbs/d) weekly avg.
Zinc	690 ug/L (1.2 lbs/d) – daily max. 340 ug/L (0.57 lbs/d)– weekly avg.
Arsenic	50 ug/L – monthly average
Copper, nickel & chloride	Monitoring only
Phosphorus	Monitoring only
Hardness	Monitoring only
WET testing: Acute & Chronic	1x yearly tests during the permit term

If there are any questions or comments, please contact Nasrin Mohajerani at (608) 275-3239.

PREPARED BY:



Nasrin Mohajerani, P.E.
Water Resources Engineer

cc: Duane Schuettpelez – WT/3
Nasrin Mohajerani – SCR

Water Quality-Based Effluent Limitations for The Didion Ethanol LLC – Town of Courtland

Prepared by: Nasrin Mohajerani - SCR

General Discussion:

Water quality-based effluent limitations are evaluated in this report for toxic substances based upon water quality criteria in ch. NR 105, including acute toxicity criteria (ATC), chronic toxicity criteria (CTC), wildlife criteria (WC), human threshold criteria (HTC) and human cancer criteria (HCC). If the discharge is to water classified as a public water supply, limits based on taste and odor criteria (TOC) from ch. NR 102 are also evaluated. Effluent limitations for toxic substances are calculated using the procedures in ch. NR 106.

A. Facility Information

Project Description

Didion Ethanol LLC is constructing a grain ethanol facility near Cambria in Courtland Township. Ethanol is a liquid alcohol (ethyl alcohol) that is manufactured by the fermentation of grains such as wheat, barley, corn, wood and also sugar cane and can be used as:

- An octane enhancer in fuels ;
- An oxygenated fuel additive that can reduce carbon monoxide vehicle emissions
- A non – petroleum based gasoline extender

Most ethanol is used in its primary form for blending with unleaded gasoline and other fuel products.

Didion intends to process 18.2 million bushels of corn annually and produce 50 million gallons of denatured fuel grade ethanol and 165,000 tons of dried distiller's grain with soluble per year.

The ethanol production process breaks down available starches found in a combination of whole and fractionated corn and water mash through an enzymatic reaction. Starch conversion is done in a continuous flow process. The sugars in the mash are then converted to ethanol in a process known as fermentation. After fermentation, the ethanol concentration is 12-17 percent by volume. Next, the ethanol is separated from the water and solids to a 200 proof concentration (anhydrous ethanol) in a stripper column and molecular sieve beds.

Ethanol Production Process in more detail:

The major steps in the dry milling process are outlined below.

Milling: The corn first passes through hammer mills, which grind it into a fine powder, called meal. The meal is then fed to the mashing system

Mashing: The meal is mixed with water and alpha-amylase, and passes through cookers. The action of heat liquefies the starch, and enzymes begin the process of breaking down the starch to sugars. The mash from the cookers is then cooled and pumped to a fermenter.

Fermentation: Yeast is added to the mash to convert the sugars to ethanol and carbon dioxide. Using a continuous process, the fermenting mash is allowed to flow, or cascade, through several fermenters, until the mash leaving the final tank is fully fermented.

Distillation: The fermented mash, now called "beer", contains about 10% alcohol, as well as all the non-fermentable solids from the corn and the yeast cells. The mash is then pumped to the continuous flow, multi-column distillation system, where the alcohol is removed from the solids and water. The alcohol leaves the top of the final column at about 96% strength, and the residue mash, called stillage, is transferred from the base of the column to the co-product processing area.

Dehydration: The alcohol from the top of the column passes through a patented dehydration system (a molecular sieve dehydrator), where the remaining water is removed. The alcohol product at this stage is called anhydrous (pure) alcohol or ethanol.

Rectification: The ethanol can be further purified (or 'rectified') to produce industrial and beverage grade alcohol.

Co-Products:

Carbon Dioxide: This gas, given off in great quantities during fermentation, is collected and cleaned of any residual alcohol. It is compressed and sold as an industrial commodity for food freezing and carbonation of beverages.

Dried Distillers Grains (DDGS): The stillage is processed in a series of dewatering and drying steps to produce DDGS, a high protein and energy animal feed.

The result of this activity is discharge of combined flow of cooling tower blowdown, sand filter backwash and reverse osmosis to unnamed tributary of North Branch of Duck Creek.

Water treatment additives are used and are discussed later in this report.

B. Receiving Water Description

1. Receiving Water Classification

Duck Creek is classified as *warm water sport fish community* according to proposed chs. NR 102.04(3) (c) and is not classified as a public water supply. Classification of unnamed tributary of North Branch of Duck Creek by default is warm water sport fish community.

2. Receiving Water Flows

The receiving water flows used in establishing effluent limitations is zero because discharge is to a tributary of North Branch Duck Creek.

Outfall Location:

Proposed outfall location is at NE ¼ of the SW ¼ of Section 5 in the town of Courtland (T12N_R12E) (see attached map).

Evaluation of chemical-specific Toxicants:

Effluent concentration data: Since this is a new surface water discharge the sources of the effluent concentration for toxic substances are from estimated effluent concentrations using the intake water and effluent data from a similar ethanol facility.

General Basis for Permit Recommendations:

Using the procedures in s. NR 106.05, there are four cases in which water quality-based effluent limitations are required to be included in WPDES permits.

1. If there is a categorical limit and the water quality-based limit is more stringent (lower) than the categorical limit, the water quality-based limit must be included in the permit pursuant to s. NR 106.04 (1). The categorical limitations represent the maximum allowable discharge for this type of facility.
2. If the maximum effluent concentration exceeds the water quality-based limitation, the limitation must be included in the permit pursuant to s. NR 106.05 (3). For purposes of evaluating this case, the 1-day maximum effluent concentration is compared to the daily maximum limit, the 4-

day maximum effluent concentration (the highest mean effluent concentration calculated using 4 consecutive days of data) is compared to the weekly average limit, and the 30-day maximum effluent concentration (the highest mean effluent concentration calculated using 30 consecutive days of data) is compared to the monthly average limit.

3. If there are fewer than eleven detected values for a substance and the mean effluent concentration exceeds 1/5 of the calculated water quality-based limitation, the limitation must be included in the permit pursuant to s. NR 106.05 (6).
4. If there are 11 or more detected values and the 99th upper percentile (P99) value exceeds the limit, comparing the 1-day P99 to the daily maximum limit, the 4-day P99 to the weekly average limit, and the 30-day P99 to the monthly average limit, the limit must be included in the permit pursuant to s. NR 106.05 (4).

The permit application included only one estimated flow of 0.2045 mgd for all and no estimates of flow rate for (daily maximum, maximum 7-day average, maximum 30-day average & maximum annual average) were provided. Therefore, any mass limits will be calculated using the 0.2045 mgd.

This facility is categorized as a minor industry, discharging less than 1.0 mgd and is not a primary industry. Therefore, the permit application required effluent sample analyses for a limited number of common pollutants.

Effluent Limitations Summary Tables:

The following sets of tables list the water quality-based limitations for this permittee along with the results of testing on that permittee's discharge(s). In each table, the "Course of Action" column notes where permit limitations may be necessary based on a comparison of the limitations to the available effluent data using the procedures in ss. NR 106.04 and 106.05. If the course of action actually involves recommending permit limitations, those limitations are discussed in more detail following the tables for each alternative.

The effluent limit summaries will include only those substances that were detected. Concentrations are indicated in units of ug/L except for hardness (mg/l).

EFFLUENT LIMIT CALCULATIONS FOR: Didion Ethanol LLC					
RECEIVING WATER: Unnamed trib. to N. Branch Duck Creek					
RECEIVING WATER INFORMATION:					
CLASSIFICATION: Warmwater Sport Fish, Warm Water Forage, and Limited Forage Communities (Non-Public Water Supply)					
FLOWS (cfs):		7Q10	7Q2	90Q10	Harmonic Mean
=	=	0.0	0.0	0.0	0.0
% USED FOR MIXING	=				
HARDNESS	=	470 PPM	From WET data		
EFFLUENT INFORMATION: DAILY FLOW					
OUTFALL NUMBER	f	(mgd)	(cfs)		
	-----	-----	-----		
001	0	0.2045	0.316		
EFFLUENT HARDNESS	=	1300	PPM	From reported data	
EFFLUENT DILUTION					
DUE TO ZID	not applicable				

CALCULATION OF EFFLUENT LIMITATIONS BASED ON ATC (ug/L)						COURSE OF ACTION
SUBSTANCE	REF. HARD. or pH	ATC	MAX. EFFL. LIMIT	1/5 OF EFFL. LIMIT	MEAN EFFL. CONC.	
Chlorine		19.03	38.06	7.61		A
Arsenic		339.80	679.60	135.92	22.8	
Chromium (+3)	301	4445.84	8891.68	1778.34	25.9	
Copper	427	58.28	116.56	23.31	5.3	
Nickel	157	2219.01	4438.02	887.60	8.8	
Zinc	333	344.68	689.36	137.87	515.5	
Chloride		7.57E+05	1.51E+06	3.03E+05	16500	

CALCULATION OF EFFLUENT LIMITATIONS BASED ON CTC (ug/L)						COURSE OF ACTION
SUBSTANCE	REF. HARD. or pH	CTC	WEEKLY AVE. LIMIT	1/5 OF EFFL. LIMIT	MEAN EFFL. CONC.	
RECEIVING WATER FLOW =		0 cfs				
Chlorine		7.28	7.28	1.46		A
Arsenic		152.20	152.20	30.44	22.8	
Chromium (+3)	301	325.75	325.75	65.15	25.9	
Copper	427	41.29	41.29	8.26	5.3	
Nickel	157	246.88	246.88	49.38	8.8	
Zinc	333	344.68	344.68	68.94	515.5	
Chlorides		3.95E+05	3.95E+05	7.90E+04	16500	

CALCULATION OF EFFLUENT LIMITATIONS BASED ON HTC (ug/L)					
RECEIVING WATER FLOW		0 cfs			
SUBSTANCE	HTC	MEAN BACK-GRD.	MO'LY AVE. LIMIT	1/5 OF EFFL. LIMIT	MEAN EFFL. CONC.
Chromium (+3)	2.50E+06		2500000	500000	25.9
Nickel	43000		43000	8600	8.8

CALCULATION OF EFFLUENT LIMITATIONS BASED ON HCC (ug/L)					
RECEIVING WATER FLOW		0 cfs			
SUBSTANCE	HCC	MEAN BACK-GRD.	MO'LY AVE. LIMIT	1/5 OF EFFL. LIMIT	MEAN EFFL. CONC.
Arsenic	50		50	10	22.8

STANDARD COURSES OF ACTION:	
A	A permit limit is recommended because the mean effluent concentration at the mix point exceeded 1/5 of the calculated limit (s. NR 106.05 (6)).
B	A permit limit is recommended because the P99 value at the mix point exceeded the calculated limit (s. NR 106.05 (4)).
C	A permit limit is recommended because the maximum effluent concentration exceeded the calculated limit (s. NR 106.05 (3)).
D	The substance was not detected, but the reported level of detection exceeded 1/5 of the limit. A better test method may be available such that the level of detection may be reduced to an acceptable level. The effluent limit is recommended in the permit subject to removal based on the results of additional testing using a better test method and/or level of detection. The limit(s) may be removed from the permit following that initial test if that substance either is not detected using the indicated test method or is not detected at a level of detection equal to or less than 1/5 the indicated limit.
E	The substance was not detected, but the reported level of detection exceeded 1/5 of the limit. The reported level of detection is considered consistent with levels achievable by other industrial and municipal dischargers using current analytical technology. Until sufficient technological advances are made such that the expected levels of detection are significantly lowered, additional testing is unwarranted. No additional testing is necessary prior to the next permit reissuance application.
F	One test is recommended with the next permit reissuance application, but no limit is recommended pending submittal of that test result.
G	Monitoring of this parameter is necessary because the permittee failed to provide this monitor data with the permit reissuance application. One test is recommended within 12 months preceding expiration of the reissued permit, so that result may be submitted with the next reissuance application. At this time, no limit is recommended.
H	Although a permit limitation may be warranted under A), B), C) or D) above, that limitation is not recommended at this time because there is a lower limitation already recommended for the permit(s) over a similar or shorter averaging period than that which is applicable here.
I	No additional testing is recommended because it is not expected that the indicated substance will be present in this discharge.
J	This substance is discussed in the permit recommendation section below.

PERMIT RECOMMENDATIONS:

Based on the above information and the WPDES permit application, the following water quality-based effluent limitations are recommended.

BOD₅: In establishing BOD₅ limitations, the primary intent is to prevent a lowering of dissolved oxygen levels in the receiving water below water quality standards as specified in s. NR 102.04(4)(e). The 26-lb method is the most frequently used approach for calculating BOD₅ limits. The BOD₅ limitations based on water quality standards is calculated and summarized in the following table.

BOD LIMIT CALCULATIONS (26 LB Method)	Didion LLC	
RECEIVING WATER: unnamed tributary of NB of Duck Crk		
PROPOSED DESIGN FLOW (MGD)	0.2045	0.2045
RIVER FLOW 7Q10 (cfs)	0	0
RIVER TEMPERATURE	24	3
EFFLUENT DO (mg/L)	7	7
BACKGROUND DO (mg/L)	7	7
MIX DO (mg/L)	7	7
DO CRITERION (mg/L)	5	5
BOD5 Concentration Limits (mg/L)	4.8	9.7
Mass (lbs/d) based on proposed design flow	8.18	16.56
BOD5 (mg/L) = 2.4(DO _{bg} -DO _{cr})[a](0.967 ^(T-24)) =		
where: a = (Q _{7,10} (0.645) + Q _d)/Q _{df}		
Mass = (Design flow MGD)*(BOD5 mg/L)*(8.34)		

Recommendations: Based on this review, a weekly average BOD₅ limit of 5 mg/L for summer and 10 mg/L (rounded) for winter is calculated for outfall 001 however, since effluent test result indicated that BOD is not detected as we were expecting, we don't recommend any BOD limitations at this time. On the other hand because this is a new discharge, for the time being it is recommended that an appropriate monitoring frequency be requested in order to have sufficient representative data for the effluent BOD evaluation for the permit reissuance. The need for limitations would be based on the results of effluent monitoring.

Total Suspended Solids (TSS): Effluent limitations for total suspended solids are applied primarily to maintain or improve water clarity and prevent deposition. Such limits are not water quality-based in the sense of needed to comply with numerical criteria. Normally suspended solids limitations are thus established the same as the BOD₅ limitations in accordance with s. NR 102.04 to prevent objectionable deposits on shores or beds of receiving waters. Therefore, a limit of 10 mg/L for TSS is recommended to go in the permit.

Ammonia Nitrogen: Water quality-based effluent limitations are evaluated in this report for Ammonia Nitrogen based upon water quality criteria in ch. NR 105 (as revised in March, 2004), using the procedures in s. NR 106.32. The acute criteria relate to the pH of the effluent; the chronic criteria relate to both the pH and temperature of the receiving water body. This approach will establish criteria that are necessary to assure attainment of the designated use for the water body receiving the discharge.

Since effluent test results indicate that ammonia (<0.04 mg/L, nitrate <0.008 mg/L and nitrite <0.008 mg/L) are not detected in the effluent as we were expecting and effluent pH is 8.1 s.u., effluent limitations or monitoring for ammonia is not recommended at this time.

Chlorine: If chlorine is used for disinfection, a chlorine limit is applicable. The permittee's ability to comply with those limits will determine if these additives can be used and at which rate they can be applied.

Chlorine Recommendation: Daily maximum limit of 38 ug/L and weekly average limit of 7.3 ug/L is recommended in the reissued permit. Mass limits are also recommended based on effluent flow rate.

Zinc: Given the limited data available for zinc it appears that zinc is potentially present in the discharge therefore zinc is a water quality concern. The average of two sample results (515.5 ug/L) is greater than level of concern which is 1/5 of the calculated limits for both acute and chronic. As a result a daily maximum limit of 690 ug/L and weekly average limit of 340 ug/L (rounded) is recommended. However, because this is a new discharge to surface water, for chronic 1/3 of the total assimilative capacity of the stream should be given but since the stream flow is zero 1/3 of the limit is the same as full assimilative capacity.

Arsenic: A single arsenic sample was detected at 22.8 ug/L which is exceeded one-fifth of the calculated monthly average effluent limitation for arsenic based on Human Cancer Criteria limit. As a result a monthly average limit of 50 ug/L is recommended. However, because this is a new discharge to surface water, for chronic 1/3 of the total assimilative capacity of the stream should be given but since the stream flow is zero 1/3 of the limit is the same as full assimilative capacity.

Note: These limitations for zinc and arsenic are subject to removal if the result of sufficient effluent data (using the approved test method) shows the average p99 value does not exceed the level of concern or the limit.

Chloride: chloride monitoring is recommended to establish the p99 levels according to s. NR 106.85. Eleven or more detected chloride values are needed. A single chloride sample was detected at 16.5 mg/L which is lower than level of concern for Acute and chronic limits however, a single chloride result is

not sufficient to know the effluent concentration for chloride. It is recommended that at least 12 data be provided for the next permit reissuance. The need for limitations would be based on the results of effluent monitoring.

Additional monitoring: It is possible that trace concentrations of copper and nickel be present in the effluent therefore, quarterly monitoring is recommended for the first year following permit reissuance. Also quarterly monitoring for hardness is recommended for the first year because of the relationship between hardness and daily maximum limits based on acute toxicity criteria.

Phosphorus: A 1.0 mg/L monthly average phosphorus limit is required under chapter NR 217 if the discharge (averaged over the entire year) exceeds 60 pounds per month. .

In order to determine whether the phosphorus limit is necessary at Didion Ethanol Plant, it is recommended that phosphorus monitoring be required at this time. Based on a review of the provided effluent phosphorus data, the Department will determine if the facility discharges more than 60 pounds of phosphorus in any given month. As a result of that evaluation, the need for a limit can be established. Also, water quality-based phosphorus standards are currently under development which may result in a phosphorus effluent limitation lower than 1 mg/L. Therefore, the facility should be designed in a manner which would allow for future changes to meet a phosphorus effluent limitation at or below 1 mg/L.

Antidegradation Evaluation:

Potential Downstream Impacts: This discharge eventually joins to North Branch of Duck Creek (NBDC). In order to evaluate potential downstream impacts, in this particular case, the concentrations of substances that were detected in the effluent were compared to effluent limitations were calculated for downstream with a small dilution of $Q_{7,10} = 0.02$ cfs (this is the stream flow used for the Village of Cambria) for warm water sport fish classification. As an example we took a look at zinc which calculated weekly average limit at the proposed outfall is 345 ug/L (rounded) and zinc limit for downstream would be 366 ug/L the difference would be 21 ug/L take a 1/3 of the assimilative capacity which is 7 ug/L then added to 345 would be 352 ug/L which is greater than limit of 345 at the outfall location. The very same conclusions would be reached for all substances therefore; calculated limitations at the outfall are more stringent than downstream limitations. As a result, no water quality impact is expected downstream of outfall.

Evaluation of Additives:

The Didion Ethanol LLC Plant is proposing to use a total of 6 additives. Acute and chronic toxicity information is available on some of the additives. Some additives may also have pH-related concerns which will be addressed via the pH limits. The procedure in s. NR 106.10 is used to generate limits for these additives if that will be needed in the permit. Acute toxicity-based daily maximum limits are calculated as 1/10 of the lowest LC50 or EC50 if rainbow trout was not tested or 1/5 of the lowest if it was tested.

According to NR 106.10 (a) there should be at least one 48-hour LC50 value available for daphnia magna and at least one 96-hour LC50 value available for rainbow trout to be able to establish water quality based effluent limitations.

The following additives limit recommendations are based on the provided toxicity data for each substance.

The toxicity information and addition rates for each additive are summarized below.

1- CWT- 530, Composition: (2-phosphono -1,2 4-Butanetricarboxylic Acid, Acrylate Terpolymer, Sodium Hydroxide, Tolytriazole, sodium salt)

Yellow liquid with acid odor, solubility in water 100%, pH=10 s.u. specific gravity 10.4 lb/gal

Addition rate = 17 lbs/day concentration 80 PPM

Ceriodaphnia dubia 48 hour acute toxicity (estimated), LC50 > 1000 mg/L
Fathead minnow 96 hour Acute toxicity (estimated), LC50 >1000 mg/L

Recommendation: Since the calculated concentration of this chemical in the effluent is less than the 1/10 of the lowest LC50 (100 mg/L) according to NR 106.10, no limit is recommended.

2- Sulfuric Acid (H₂SO₄): (pH control – cooling tower) Sharp penetrating odor amber heavy oily liquid, pH <1, Specific Gravity ~ 1.84 (98%). Stable at room temperature in closed container it is harmful to aquatic life in very low concentration.

Addition Rate: 74 lbs/day, maintain pH = 8.0- 8.5 s.u.

No toxicity data available, address indirectly via pH limit and WET testing.

3- Chlorine: Addition Rate: 40 lbs/day, concentration is zero at the outfall because of dechlorination
Address via chlorine limit

4 - Biotrol – 120 Composition (Peroxyacetic Acid, Hydrogen Peroxide Acetic Acid)

Clear liquid pungent odor specific gravity 1.11

Addition rate = 40 lbs/day concentration 0* PPM

* Biotrol -120 feed to the cooling tower is followed by a 60 minute Lock out period where discharge is stopped to allow the product to work and degrade, therefore the concentration in the discharge is zero.

5- RO- 503 Composition (2-phosphono -1,2 4-Butanetricarboxylic Acid, Sodium polyacrylate, Acrylate/sulfonate Copolymer)

Clear to yellow liquid with pungent odor Specific gravity of 8.91 lb/gal, pH 3.5, Solubility in water 100%,

Addition rate = 4 lbs/day concentration 15 PPM

Ceriodaphnia dubia 48 hour acute toxicity (estimated), LC50 > 1000 mg/L
Fathead minnow 96 hour Acute toxicity (estimated), LC50 >1000 mg/L

Recommendation: Since the calculated concentration of this chemical in the effluent is less than the 1/10 of the lowest LC50 (100 mg/L) according to NR 106.10, no limit is recommended.

6- BWT-104: (Sodium Bisulfite) is a clear yellow green liquid, sulfur dioxide odor, pH 3.7-5.3 s.u.
Specific Gravity ~ 1.33. Stable under normal use conditions and temperature.

Is used as dechlorination agent to bring chlorine levels down to zero ppm in the discharge. It will be injected into the cooling tower blowdown based on flow rate as needed and chlorine will be controlled at <.10 mg/L and sulfite residual of <5 mg/L.

Addition Rate: 60 lbs/day, concentration 0.8 ppm

No toxicity data available, address indirectly via chlorine limit and WET testing.

It is further recommended that the Department be notified of **any changes** in the use of water quality additives consistent with the requirement of S. NR 205.07(3) Wis Adm. Code.

Whole Effluent Toxicity:

Since Didion Ethanol Plant proposed to use additives, a minimum of once per year whole effluent toxicity testing is normally recommended for new discharges. Additional testing may be required in the future based on compounds found in the effluent. Therefore, the initial recommendation for this plant is once per year acute and chronic toxicity test batteries. Testing should start within three months of the initial startup of the operation and once per year thereafter. Tests should be done in rotating quarters, in order to collect seasonal information about this discharge.

Acute WET: In order to assure that the discharge is not acutely toxic to organisms in the receiving water, WET tests must produce a statistically valid LC₅₀ greater than 100% effluent.

Chronic WET: In order to assure that the discharge from outfall 001 is not chronically toxic to organisms in the receiving water, WET tests must produce a statistically valid IC₂₅ greater than the instream waste concentration (IWC). The IWC is an estimate of the proportion of effluent to total volume of water (receiving water + effluent). The IWC was calculated according to the following equation:

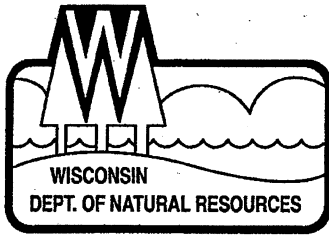
$$\text{IWC (as \%)} = \frac{Q_e}{(1-f) Q_e + Q_s} \times 100$$

Q_e = annual average 0.2045 mgd = 3.16 cfs

f = fraction of the Q_e withdrawn from the receiving water = 0

Q_s = Based on 100% of the estimated flow of receiving water (Q_{7,10} = 0 cfs)

Based on the effluent and receiving stream flow conditions summarized above, the dilution-based instream waste concentration (IWC) is estimated as 100%.



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

April 30, 2008

Mr Bruce Carlson
Chairman, Petenwell and Castle Rock Stewards
PO Box 8
Arkdale WI 54613

Dear Mr. Carlson,

Thank you for your commitment to improving water quality in the Petenwell and Castle Rock Flowages. You wrote to express concern regarding the delay in issuing a WPDES discharge permit for the Domtar Paper Company in Rothschild, Wisconsin. As you correctly point out, the public notice for the permit began in March 2007. During that public notice, the US Environmental Protection Agency (EPA) objected to the permit on two grounds – 1. that the permit did not contain a chlorine limit for non-contact cooling water; and 2. that the permit did not include a reasonable potential analysis, and possible effluent limit, for mercury. This is important because the state cannot issue a permit under the Federal Clean Water Act, if EPA objects to it. In addition, Domtar expressed concerns regarding their ability to meet the reduced phosphorus limit.

Since receiving these comments, we have delayed the permit issuance while we try to resolve as many issues as possible. As you may know, the phosphorus limit is expressed as a 12-month rolling average. Domtar has met the reduced limit of 1.0 mg/l for the last ten consecutive months. We believe that if the company is able to meet the reduced limit for twelve months, they will be more comfortable with this particular provision. It should be noted that the company has been meeting the stricter phosphorus limit, even without issuance of the permit.

The mercury issue involves a difference between state law and EPA guidance. EPA guidance states that a reasonable potential analysis for mercury can be conducted with no data. State law requires that the analysis be conducted with at least twelve data points collected over two years. We have asked Domtar to speed up their data collection for mercury so that we can conduct a reasonable potential analysis in an expedited time frame. We expect to have the necessary data points by this fall (2008) which will enable us to complete an analysis and determine if a limit is needed for mercury at that time.

The chlorine issue is more problematic. State law provides an exemption for non-contact cooling water if the chlorine in the discharge does not exceed drinking water standards. EPA regulations do not allow for this exemption. If we issue the permit without a chlorine limit, EPA will still object to the permit which means it does not go into effect. If we issue the permit with a chlorine limit, Domtar could



challenge that provision as not being consistent with state law. However, parts of the permit that are not challenged would still be in effect.

We would like to issue the permit after the concerns about the phosphorus limit (expressed by Domtar) and reasonable potential for mercury (expressed by EPA) have sorted themselves out. The chlorine limit will then be the only remaining issue. In the meantime, since Domtar has been meeting the reduced phosphorus limit in the proposed permit, the delay has had no impact on the reduction of phosphorus to the Flowages. If this does not continue to be the case, we will certainly consider issuing the permit more expeditiously.

I hope this brief explanation of a complex matter is clear. If you have further questions, please contact either Mike Hammers or me. Thank you again for your concern and commitment to the water quality in the Petenwell and Castle Rock Flowages.

Sincerely,

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

Russell Rasmussen
Director, Bureau of Watershed Management

cc: The Honorable Senator Julie Lassa
Todd Ambs – AD/8
Mike Hammers – WT/3
Scott Watson – WCR
Dennis Caneff – River Alliance of Wisconsin

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

PETITION FOR ADJUDICATORY HEARING

Permit Number: WI-0026042-07-0
Name and Address of Permittee: Domtar Paper Company, LLC.
200 North Grand Avenue
Rothschild, Wisconsin
Date of Issuance of the Permit: March 10, 2009

RECEIVED

6 MRD
MAY 06 2009

OFFICE OF THE
SECRETARY

Hand-delivered

Pursuant to § 283.63 Wis. Stats. and NR 203 Wis. Adm. Code, Domtar Paper Company, LLC. ("Petitioner") hereby petitions for review of WPDES Permit No. WI-0003671-07-0 ("the Permit") issued by the Wisconsin Department of Natural Resources ("the Department or DNR") to Petitioner's Rothschild, Wisconsin facility (the "Facility") on March 10, 2009.

The Petitioner is the permittee. The specific issues to be reviewed and the reasons a hearing is warranted are:

1. Section 2.2.4 of the Permit imposes water quality based effluent limitations (expressed as both mass and concentration based effluent limitations) and related sampling and reporting requirements for total residual chlorine at Outfall 015 (hereinafter collectively referred to as the "Challenged Conditions").
2. NR 106.10(1) Wis. Adm. Code precludes DNR from imposing the Challenged Conditions in the Permit because:

- A. The discharge at Outfall 015 is comprised of non-contact cooling water (NCCW);
- B. Petitioner adds chlorine containing substances to treat its water supply, including the water used for NCCW;
- C. Chlorine containing substances similar to that used by the Petitioner are used to treat public drinking water supplies; and
- D. Petitioner adds the chlorine containing substance in a manner and amount similar to that added to public drinking water supplies.

3. Petitioner has added chlorine containing substances as described in paragraph 2 above for over seven (7) years and the prior WPDES permit issued to the Facility did not contain limitations or restrictions related to total residual chlorine.

4. Based on the foregoing and on such other information as Petitioner may present at the hearing, the Challenged Conditions are unreasonable, unnecessary, inconsistent with applicable administrative rules, inconsistent with past Department practice and otherwise exceed the Department's authority.

5. Petitioner requests that the Challenged Conditions be deleted from the Permit.

REQUEST FOR CONTESTED CASE HEARING

The Petitioner also hereby requests a contested case hearing pursuant to § 227.42 Wis. Stats.:

1. The agency action or inaction which is the basis for this request is the reissuance of Petitioner's WPDES permit;

2. The substantial interests which are threatened by the Department's action or inaction are set forth above;

3. The evidence of legislative intent that the interests are to be protected is Chapter 283 Wis. Stats.;

4. The injury to Petitioner is different in kind and degree from injury to the general public because Petitioner is the permittee;

5. The disputed issues to be resolved in the hearing are set forth above; and

6. Section 283.63 Wis. Stats. accords Petitioner a right to a hearing.

Dated this 5th day of May, 2009.

QUARLES & BRADY

By: 

Thomas P. McElligott


Quarles & Brady
411 E. Wisconsin Ave.
Milwaukee, WI. 53202
State Bar # 1000079
414-277-5531

Attorneys for Domtar Paper Company, LLC.

VERIFICATION

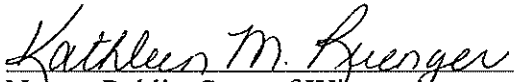
STATE OF WISCONSIN)
)
MARATHON COUNTY)

Scott C. Mosher, being first duly sworn on oath, deposes and says that he/she has general management responsibilities for the Rothschild facility of Domtar Paper Company, LLC and he/she has read the foregoing Petition for Adjudicatory Hearing and the information contained therein is true to the best of his/her knowledge and belief.



General Manager Nekoosa/Rothschild

Subscribed and sworn to before me
this 4th day of May, 2009.



Notary Public, State of Wisconsin
My Commission Expires: November 8, 2009



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 17 2009

REPLY TO THE ATTENTION OF

WN-16J

Mr. Matthew J. Frank
Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Frank:

I am writing in response to a May 30, 2007 letter in which the Wisconsin Department of Natural Resources (WDNR) submitted Wis. Admin. Code § NR 106.145 to the U.S. Environmental Protection Agency Region 5 for review. Pursuant to the Clean Water Act §402 and the regulations at 40 C.F.R. § 123.62, EPA hereby disapproves specific revisions, proposed in Wis. Admin. Code § NR 106.145, to the approved National Pollutant Discharge Elimination System (NPDES) permitting program administered by WDNR. EPA approves an amendment to the October 26, 2000 addendum to the NPDES Memorandum of Agreement (MOA) with WDNR. For the purposes of judicial review and 40 C.F.R. § 23.2, this action of the Administrator (the authority for which has been delegated to the Regional Administrator) shall be effective two weeks from today's date.

Disapproval of the Wis. Admin. Code § NR 106.145

As discussed below and in the enclosure, EPA disapproves the following subparts of Wis. Admin. Code § NR 106.145:

Wis. Admin. Code § NR 106.145(2)(b)2

EPA finds that Wis. Admin. Code § NR 106.145(2)(b)2 is not consistent with the Final Water Quality Guidance for the Great Lakes System at 40 C.F.R. Part 132, Appendix F, Procedure 5. Wis. Admin. Code § NR 106.145(2)(b)2 requires 12 monitoring results collected over 24 months before the State can determine whether a mercury effluent limitation is necessary. This provision prevents the State from imposing a mercury water quality-based effluent limit (WQBEL) when the minimum data requirements are not met, even if available information shows that a discharge will cause, have a reasonable potential to cause, or contribute to an exceedance of the mercury water quality criteria.

EPA also finds that Wis. Admin. Code § NR 106.145(2)(b)2 does not conform to 40 C.F.R. § 122.44(d)(1) outside the Great Lakes System. Where minimum data requirements are not met, § NR 106.145(2)(b)2 prevents the State from imposing a mercury WQBEL, even if

available information shows that a discharge will cause, have a reasonable potential to cause, or contribute to an exceedance of the mercury water quality criteria.

Accordingly, EPA disapproves this revision to the approved Wisconsin NPDES program within and outside the Great Lakes System.

Wis. Admin. Code § NR 106.145(3)

Wis. Admin. Code § NR 106.145(3) establishes procedures that are predicated on subpart (2). EPA disapproves this revision to the approved Wisconsin NPDES program to the extent that it authorizes the inclusion of a monitoring condition in lieu of WDNR determining the need for a WQBEL for mercury. This disapproval applies both within and outside the Great Lakes System.

Wis. Admin. Code § NR 106.145(7)(b)

Wis. Admin. Code § NR 106.145(7)(b) establishes procedures that are predicated on subpart (2) (among others). EPA disapproves this revision to the approved Wisconsin NPDES program to the extent that it authorizes the inclusion of a pollutant minimization plan in lieu of WDNR determining the need for a WQBEL for mercury. This disapproval applies both within and outside the Great Lakes System. EPA clarifies that this disapproval is not an objection to the use of pollution minimization plans as conditions of permits.

Approval of the Amendment to the October 26, 2000 Addendum to the NPDES MOA

During the review of Wis. Admin. Code § NR 106.145 under CWA § 303(c) and 40 C.F.R. § 131.21, WDNR and EPA agreed to amend the October 26, 2000 Addendum to the NPDES MOA. Wisconsin signed the amendment revising the approved Wisconsin NPDES program on May 30, 2007. It reflects WDNR's commitment to not approve a variance to mercury water quality criteria or include alternative effluent limitations under Wis. Admin. Code § NR 106.145 for any building, structure, facility or installation from which there is or may be a discharge of pollutants to the Great Lakes System, the construction of which commenced after March 23, 1997. Pursuant to 40 C.F.R. § 123.62, EPA hereby approves this revision to the Wisconsin NPDES program. I have signed the MOA amendment and am enclosing a copy with this letter.

Conclusion

Because EPA has disapproved Wis. Admin. Code § NR 106.145(2)(b)2, (3) and (7)(b), WDNR must issue NPDES permits in accordance with the applicable approved State program requirements, including but not limited to Wis. Admin. Code § NR 106.05. See 65 Fed. Reg. 66511 (November 6, 2000). EPA may object to permits that deviate from the approved requirements or 40 C.F.R. Part 123.

This action addresses only those elements of Wis. Admin. Code § NR 106.145 specifically identified in the enclosure as subject to review and approval or disapproval under the authority of section 402 of the CWA and NPDES regulations published in 40 C.F.R. Part 123.

EPA previously acted on specific sections of Wis. Admin. Code § NR 106.145 under section 303(c) of the CWA and 40 C.F.R. Part 131. To the extent that the submitted regulations are not within the scope of the NPDES or Water Quality Standards programs, EPA takes no action on those regulations.

Thank you for providing an opportunity for EPA to review Wis. Admin. Code § NR 106.145. If you have any questions, please contact me or your staff may contact Peter Swenson, Chief, NPDES Programs Branch, at (312) 886-0236.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Mathur', with a long horizontal stroke extending to the right.

Bharat Mathur
Acting Regional Administrator

Enclosures

cc: Todd L. Ambs
Administrator, Division of Water
Wisconsin Department of Natural Resources

EPA Review of NPDES Program Revisions in Wis. Admin. Code § NR 106.145

Wis. Admin. Code § NR 106.145 applies state-wide. Within the Great Lakes System, EPA reviewed Wis. Admin. Code § NR 106.145 for consistency with the Final Water Quality Guidance for the Great Lakes System at 40 C.F.R. Part 132 (the Great Lakes Guidance). As applied outside of the Great Lakes System, EPA reviewed the regulation for conformance to 40 C.F.R. § 123.25(a).

Wis. Admin. Code § NR 106.145 describes the purposes of the rule as:

This subchapter provides an alternative means of regulating mercury in WPDES permits through the establishment of alternative mercury effluent limitations and other requirements and is intended as a supplement to the authority and procedures contained in other subchapters of this chapter. For purposes of this subchapter, an alternative mercury effluent limitation represents a variance to water quality standards specified in Wis. Admin. Code chs. NR 102 to NR 105.

EPA identified the following subparts of Wis. Admin. Code § NR 106.145 as revisions to Wisconsin's authorized NPDES program under 40 C.F.R. § 123.62:

- Wis. Admin. Code § NR 106.145(2)(b)2 sets a requirement of at least 12 monitoring results spaced out over a period of at least 24 months. These data must be collected before WDNR can apply its statistical procedure to determine whether a discharge will cause, have a reasonable potential to cause, or contribute to an exceedance of the water quality criterion for mercury.
- Wis. Admin. Code § NR 106.145(3) references subpart (2) to require monitoring only if the data requirements of subpart (2) are not met.
- Wis. Admin. Code § NR 106.145(7)(b) references subpart (2) and subpart (3). If the reissued permit requires data generation under subpart (3), the permit will trigger the requirement to establish a Pollutant Minimization Program (PMP) Plan if the first 24 months of data demonstrate that a limit is necessary under subpart (2).

In the May 30, 2007, letter submitting Wis. Admin. Code § NR 106.145 for review, WDNR discussed how Wis. Admin. Code § NR 106.145 is as protective as the requirements of the Great Lakes Guidance, App. F, Procedure 5. WDNR relied upon the following to support its rationale:

- 1) Wastewater mercury discharges are insignificant compared with other sources including atmospheric deposition and
- 2) The definition of "representative" data provided in Wis. Admin. Code § NR 106.145 is more scientifically defensible for mercury than the procedure contained in the Great Lakes Guidance.

As discussed below under the heading "Response to Significance of Discharge and Scientific Defensibility Arguments", these arguments did not address EPA's concerns.

Wis. Admin. Code § NR 106.145 (2)(b)2

Consistency with the Great Lakes Guidance

The regulation at 40 C.F.R. Part 132, Appendix F, Procedure 5 states that “[W]hen facility-specific effluent monitoring data are available, the permitting authority shall make the determination [of whether a discharge will cause, has the reasonable potential to cause or contribute to an exceedance of a water quality standard] by developing preliminary effluent limitations (PEL) and comparing those effluent limitations to the projected effluent quality (PEQ) of the discharges in accordance with” the provisions in Procedure 5. “In *all* cases, the permitting authority shall use *any* valid, relevant, and representative information that indicates a reasonable potential to exceed any Tier I criterion or Tier II value” (emphasis added). At B.2.c., Procedure 5 states that “[i]f the PEQ exceeds the PEL... the permitting authority *shall* establish a water quality based effluent limit (WQBEL) in an NPDES permit for such pollutant” (emphasis added).

Wis. Admin. Code § NR 106.145(2)(b)(2) requires a minimum of 12 data points for mercury levels in the effluent over at least 24 months. If these data are not available, a discharger is issued a permit without a limit because the Department cannot conduct an evaluation to determine the need for mercury limits. The rule would direct Wisconsin to ignore valid and representative data that may demonstrate the need for a permit limit for mercury.¹

Wisconsin’s procedure is not consistent with Procedure 5 because it could result in permits being issued without limitations when limitations would be required by Procedure 5.

Conformance to 40 C.F.R. § 122.44(d)

The regulation at 40 C.F.R. § 122.44(d) requires that a permitting authority, when issuing a permit, determine whether a WQBEL is needed. The regulation requires a WQBEL whenever the pollutant in an effluent “is or may be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion above State water quality criteria”. See 40 C.F.R. § 122.44(d)(1)(iii). Wisconsin’s NPDES program “must have the legal authority to implement ...and must be administered in conformance with” the requirements at 40 C.F.R. § 122.44(d)(1) outside of the Great Lakes System. 40 C.F.R. § 123.25(a)(15).

The requirements at 40 C.F.R. § 122.44(d)(1) seek to identify instances when a limit is needed to help remedy an existing exceedance and also to prevent exceedances from happening. Site-specific factors that could influence how a discharge affects the receiving waters, such as existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, and (where appropriate) the dilution of the effluent in the receiving water, must be taken into account under 40 C.F.R. § 122.44(d)(1)(ii). In identifying these factors, 40 C.F.R. § 122.44(d) does not specify the nature of the information or the number of data points required, but recognizes that permitting authorities may have varying amounts and types of information. To ensure that limits are included in permits when technology-based

¹ For simplicity, EPA’s remarks will reference the 11 data points that could potentially be ignored in order to meet the 12 data point requirement. In addition, the minimum 24 month timeframe could exclude a substantially greater number of valid and representative data from consideration (e.g. monthly sampling could generate up to 23 points).

controls are not sufficient to meet water quality standards (WQS), the regulation requires a decision at the time of permit issuance. It does not provide an option of deferring a decision until the next time a permit is issued.²

Wisconsin's procedure for determining when a WQBEL is needed requires the State to have a minimum of 12 data points collected over at least 24 months. If such data do not exist, the State's regulations provide for the permit to be issued without an effluent limitation. Wisconsin acknowledges that due to levels of mercury in the waters of the State, effluent limits would be needed in most permits and those limits would be derived from the criterion without dilution or mixing. See May 30, 2007 letter at page 4. The minimum data requirement allows a permit to be issued without a WQBEL when such a limit is necessary to attain the mercury water quality criterion. Such an approach does not conform to 40 C.F.R. § 122.44(d) because it allows the State to defer a decision until the next time a permit is issued, even in instances where the available information demonstrates that the discharge will cause, have a reasonable potential to cause, or contribute to an excursion above water quality criteria for mercury.

Response to Significance of Discharge and Scientific Defensibility Arguments

In the May 30, 2007 letter submitting the Wisconsin Mercury Rule for review, the WDNR attempted to address preliminary EPA concerns as to whether parts of the Wisconsin Mercury Rule would be as protective as the requirements of the Great Lakes Guidance. WDNR relied upon the following arguments to support its contention that Wis. Admin. Code § NR 106.145 is as protective as the reasonable potential procedure in the Great Lakes Guidance:

- 1) Wastewater mercury discharges are insignificant compared with other sources including atmospheric deposition and
- 2) The definition of "representative" data provided in Wis. Admin. Code § NR 106.145 is more scientifically defensible for mercury than the procedure contained in the Great Lakes Guidance.

WDNR's first argument, which focuses on other sources of mercury loadings, is immaterial. The relevant issue regards the need to determine whether mercury discharged in wastewater effluent needs to be restricted with an effluent limit in the permit in order to meet the water quality standard. While atmospheric mercury may be the dominant source of mercury in water bodies, the occurrence and existence of atmospheric mercury does not alleviate the need to control mercury additions from point sources to water bodies. Wisconsin recognizes that permit limits on effluents and pollution minimization programs are an appropriate control strategy within the larger context of overall mercury control. See May 30, 2007 letter at page 3. Federal NPDES regulations provide procedures to implement these controls in permits both inside and outside the Great Lakes System. EPA or the Great Lakes state is required to ensure that these requirements are properly implemented in NPDES permits. A state regulation that allows NPDES permits to be issued that do not limit the amount of mercury that point sources can

² The procedure establishes a low threshold for making a decision to include a WQBEL (are or *may be* discharged at a level which will cause, have the *reasonable potential to cause, or contribute* to an excursion above any state water quality standard). Indeed, EPA recognizes that a permitting authority may include a water quality-based effluent limit even in the absence of facility-specific effluent data. Technical Support Document for Water Quality-based Toxics Controls, EPA/505/2-90-001 (U. S. EPA Office of Water, March 1991) at 50.

discharge in situations where federal regulations would otherwise limit such discharges is not as protective as those regulations, regardless of whether there are other sources of mercury loadings.

EPA also is not persuaded by Wisconsin's reliance on 40 C.F.R. § 132.4(h) to support the State's contention that the Wisconsin procedure is more scientifically defensible than EPA's procedure for determining the need for a WQBEL for mercury. The regulation at 40 C.F.R. § 132.4(h) allows alternative procedures when a State can demonstrate that a procedure in the Great Lakes Guidance regulations is not scientifically defensible. That provision was intended to be applied only with respect to pollutants identified in the future for which the Great Lakes Guidance's methodologies or procedures may not be technically appropriate. See 58 Fed. Reg. 20843 (April 16, 1993); See also, Supplemental Information Document for the Water Quality Guidance for the Great Lakes System (March 23, 1995) (SID) at 58-59.)³ Mercury was identified as a major issue of concern throughout the development of the Great Lakes Guidance. In fact, both the proposed and final Great Lakes Guidance included numeric criteria for mercury, and the permit program implementation procedures were written to apply to mercury in addition to other pollutants. Finally, the regulations' scientific defensibility provision was intended to only be applied to a specific situation, not in an "across-the-board" manner. See 58 Fed. Reg. 20,802, 20,843 (April 16, 1993); Supplemental Information Document (SID) at 58-59; Northeast Ohio Regional Sewer District v. EPA, 411 F. 3d 726, 736 (6th Cir. 2005).

In the May 30, 2007 letter, WDNR discusses the uncertainties of assessing compliance before promulgation of EPA Method 1631 in 1999 and the difficulties faced by WDNR in establishing reliable sampling and monitoring based on the method. WDNR explains that it established the Wisconsin Mercury Rule because of these uncertainties. EPA Method 1631 has been successfully utilized in the field and laboratories nationwide. EPA is not persuaded that any difficulties that may have been experienced in the initial implementation of Method 1631 explain why 12 samples are needed to determine that a discharge causes or has the reasonable potential to cause, or contribute to an exceedance of the mercury criterion.

EPA is likewise unpersuaded that 12 samples collected over a 24 month period are needed to ensure that representative data are available to determine whether a limit is needed, and that it is scientifically indefensible to use a smaller number of samples. "Representative," as used in EPA's regulation, means that the sample was taken under normal operating conditions (for example, not during an "upset" at the treatment plant) and therefore represents the effluent under normal operating conditions.⁴ While EPA agrees that increasing the amount of data

³ 40 C.F.R. § 132.4(h) does not provide a vehicle for parties to challenge anew the provisions of the Great Lakes Guidance itself. The CWA requires the States to adopt policies, standards and procedures that are consistent with the Great Lakes Guidance promulgated by EPA. CWA § 118(c)(2)(C). EPA reviews submissions of Great Lakes states to determine their consistency with the Great Lakes Guidance but EPA does not reopen any provision of the Great Lakes Guidance itself in conducting this review. See Response to Comments on the GLI- Docket No. C00001C Comment C.1 Response

⁴ See Response to Comments on the GLI- Docket No. C00001C Comment C.3 Response

improves the characterization of effluent variability, such additional data do not render a procedure that relies on fewer samples "scientifically indefensible". The purpose of a reasonable potential procedure is to project whether excursions beyond water quality criteria may occur and compare that projection to an estimated WQBEL, not to establish with certainty that any limit would be exceeded on a repeated basis over time. Finally, even if the scientific indefensibility procedure were to apply, any alternative state procedure would have to meet minimum federal standards. EPA has found that Wisconsin's requirement is inconsistent with 40 C.F.R. § 122.44(d)(1). For all of these reasons, EPA finds Wisconsin's "scientific indefensibility" rationale is not valid under 40 C.F.R. § 132.4(h) and is not a basis for EPA to approve Wisconsin's regulatory revision as being as protective as the Great Lakes Guidance.

AMENDMENT TO THE OCTOBER 26, 2000 ADDENDUM TO THE NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT
BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION
V AND THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES CONCERNING
MERCURY & WISCONSIN'S GREAT LAKES RULES AND PROCEDURES

Whereas, pursuant to Appendix F, Procedure 2, Part I of 40 CFR 132, the Department of Natural Resources (hereinafter "Department") must submit all proposed water quality standard variances for point source discharges to the Great Lakes System to the Environmental Protection Agency (hereinafter "EPA") for review and approval, and

Whereas, pursuant to Appendix F, Procedure 2, Part A of 40 CFR 132, EPA will not approve a variance from a water quality standard for any building, structure, facility or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997, and will accordingly object to any WPDES permit that includes such a variance,

The Department agrees that it will not approve a variance to the mercury water quality standard or include alternative effluent limitations under § NR 106.145, Wisconsin Administrative Code, for any building, structure, facility or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2) to the Great Lakes System, the construction of which commenced after March 23, 1997.

FOR THE DEPARTMENT OF NATURAL RESOURCES

Scott Hassett 5/30/07
Scott Hassett Date
Secretary

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Bharat Mathur
~~Mary A. Gade~~ Date 2-17-09
~~Region V Administrator~~
Bharat Mathur
Acting Regional Administrator

Scope Statement
Relating to proposed changes to ch. NR 207,
Water Quality Antidegradation

Description of the Objective of the Proposed Rule

The Department of Natural Resources is proposing to revise administrative rules pertaining to implementation of the state's antidegradation policy. The antidegradation policy is found in Chapter NR 102.05(1)(a), Wisconsin Administrative Code, and establishes that no waters shall be lowered in water quality unless it has been demonstrated that the change is justified as a result of necessary economic and social development. In no case, however, can water quality be lowered to the point where it becomes injurious to any assigned uses (or existing uses) of the receiving water. Chapter NR 207, Wisconsin Administrative Code, establishes procedures to implement the antidegradation policy including when proposed new or increased discharges are significant enough to invoke antidegradation procedures, what procedures must be followed, and how the antidegradation analysis will be evaluated.

Description of Relevant Existing and New Policies and Analysis of Policy Alternatives

Chapter NR 207 was originally developed to address point source pollution discharges from industrial processes or from municipal wastewater treatment facilities. Since the rule was first promulgated in 1989, changes to Federal guidance and concomitant changes to state regulations require certain storm water discharges to be permitted through the Clean Water Act, and therefore are subject to antidegradation requirements. However, the nature of stormwater discharge is similar to nonpoint source discharges and the definitions and implementation procedures currently in Chapter NR 207 do not apply well. The Department proposes to add sections in Chapter NR 207 to establish implementation procedures and to add or revise certain definitions to allow for application of the state antidegradation policy to general permits, stormwater discharges, and to consider whether additional procedures are needed for concentrated animal feeding operations (CAFOs).

In conjunction with the revisions being considered as related to the general permits, stormwater, and CAFOs, other issues were raised regarding consistency between the current language in Chapter NR 207 for point source discharges and the changes in Federal regulations. Those issues are as follows:

1. Language in Chapter NR 207 must be reviewed to insure antidegradation is applied based on both the existing and designated uses of receiving waters in order to be consistent with the water quality standards goals in Chapter NR 102.
2. An evaluation of the current public participation process for input on antidegradation decisions is needed to determine if it is timely and sufficient, with suggested additional measures if it is determined to be insufficient.
3. Existing language in Chapter NR 207 requires a specific evaluation of alternatives when a proposed discharge would result in significant lowering of water quality. Recent Federal guidance provides for the alternatives analysis at a tighter threshold than is currently provided in Chapter NR 207, so this language must be reviewed and revised as necessary.
4. Chapter NR 207 currently contains language that exempts an increased limit from antidegradation when the increase is solely the result of changes in water quality criteria.

- Chapter NR 207 must be reviewed to determine if this exemption is consistent with Federal regulations and those in effect in other States.
5. Increases in existing discharges to receiving waters are subject to antidegradation only insofar as such increases would exceed limits in existing discharge permits. Questions were raised about the need to apply antidegradation to discharges where the mass loading of a regulated substance increases, but the permit has no limitations on the mass discharge of that substance.
 6. As noted earlier, the antidegradation policy allows lowering of water quality when such a change is necessary based on necessary economic and social development. Chapter NR 207 lists a number of general conditions relating to employment, production, efficiency, community growth and benefit, and correction of environmental problems on which these development questions are to be judged. The Department was requested to re-evaluate this approach based on Federal regulations and to consider more specific guidelines on how those conditions are to be assessed.

Statutory Authority

The statutory authority for Chapter NR 207 is found in sections 281.15, 283.13 (5), 283.33 (8), and 227.11(2), Wis. Stats.

Estimate of Time and Other Resources Necessary to Develop the Rule

Approximately 1000 hours of staff time, primarily within the Bureau of Watershed Management.

Description of all Entities Affected by the Rule

Owners or operators of facilities or activities that must obtain Wisconsin Pollution Discharge Elimination System (WPDES) stormwater discharge permits (approximately 240) will be required to conform to the revised antidegradation implementation procedures. CAFOs, builders, developers and environmental organizations may also be affected. In addition, since revisions to the language pertaining to new or increased point source discharges are also being considered, the revised antidegradation implementation procedures may also impact municipal wastewater treatment systems and industries with specific or general WPDES permits. Any additional public participation procedures may impact permittees as well as Department staff since it may result in additional workload and time needed to process and issue WPDES permits.

Summary and Preliminary Comparisons with Existing or Proposed Federal Regulations

The counterpart Federal regulation is 40 CFR 131.12. This regulation requires antidegradation review for all point source discharges that have the potential to lower water quality. It imposes a necessity test and an important social and economic development test before the discharge can be approved. When Chapter NR 207 was first promulgated in 1989, stormwater discharges were not regulated under federal law, so the rule did not address them. Federal regulations now require permits for stormwater discharges, so antidegradation provisions need to be updated to include them. The proposed revision will address this issue, as well as the others issues mentioned above.

Name, Address, Telephone Number and E-mail Address of the Agency Contact:

Name: Russell Rasmussen, Director, Bureau of Watershed Management
Address: 101 S. Webster Street, P.O. Box 7921, Madison, WI 53707-7921
Telephone/email: 608-267-7651; e-mail: Russell.Rasmussen@wisconsin.gov

DATE: March 20, 2009

TO: Natural Resources Board members

FROM: Matthew J. Frank

SUBJECT: Scope Statement Relating to the revision of NR114 Rule Amendment

Objective of the Rule

The Department is proposing revisions to NR 114 subchapter I Certification Requirements of Waterworks and Wastewater Treatment Plant Operators. As a result of advances/changes in wastewater and computer technologies, there are now many ways for operators to receive education and training to gain knowledge and competency in the wastewater profession besides through examination alone. The Department plans to review and clarify the wastewater treatment plant classifications and subclasses, and possibly propose changes in the certification exam process and certification requirements for wastewater treatment plant operators.

The Department also proposes to revise NR114 subchapter II - Certification of Septage Servicing Operators. The Department proposes amendments to clarify code language to better reflect general requirements for newly certified operators and career advancement certification levels. Also proposed is the removal of outdated grandfathering language.

Statutory Authority

Statutory authority falls under s. 281.17(3), Wis. Stat. authorizing the Department to establish a program for the certification of operators of water systems, wastewater treatment plants and septage servicing vehicles.

Estimate of Time Needed to Develop the Rule

The estimated time to develop the rule will likely be 18-24 months. During this time, the Department plans to meet with operator trainer stakeholders in the state as well as form a NR 114 Technical Advisory Committee (TAC) in the development of this rule revision.

Summary and Comparison with Existing or Proposed Federal Regulations

Surrounding states including Illinois, Michigan, Minnesota and Iowa all have licensing programs for domestic septage. Though not specifically required by 40CFR part 503 regulations, most states operate a license/certificate program for septage service operators, though some delegate to individual counties or municipalities. Record keeping, certification of pathogen reduction, vector attraction requirements, odor control, crop restrictions, nutrient management, and protection to the environment are the main points of emphasis in typical state septage programs.

All Entities Affected by the Rule

Entities affected by this rule amendment include:

1. Wisconsin Wastewater Operators Association (WWOA) that serves over 2,000 wastewater treatment plant professionals serving municipalities and industries throughout the state.
2. Wisconsin Rural Water Association (WRWA) that supports water & wastewater systems and operators.
3. Central States Water Environment Association (CSWEA) whose objectives include advancement of technology in the design and management of water quality systems and facilities and to promote

- sound policy in matters relating to the water environment.
4. Wisconsin Liquid Waste Carriers Association (WLWCA) that represent septage hauling businesses servicing portable toilets and private septic systems, septage hauling businesses that transport liquid wastes to treatment plants, and those that dispose liquid wastes through land application.
 5. Others affected by the rule include septage servicing operators not represented by the WLWCA.
 6. Technical colleges across the state, private trainers and consultants.
 7. Septage disposal administrators at the county level.

Another possible affected entity is Department of Workforce Development (DWD) that would be involved in the creation of a state approved Wastewater Treatment Plant Operator Apprenticeship Program. This is likely to provide another method for training operators, especially for larger facilities, and a possible means to obtain an advanced certification level.

Department Contacts

The Department wastewater program contact is Jack Saltes, 101 S. Webster St., Madison, WI, 608-264-6045, Jack.Saltes@wisconsin.gov

The Department septage servicing program contact is Fred Hegeman, 101 S. Webster St., Madison, WI, 608-267-7611, Fredrick.Hegeman@wisconsin.gov

The Department administrative program contact is Kelly Thompson, 101 S. Webster St., Madison, WI, 608-266-8948, Kelly.Thompson@wisconsin.gov

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JOHN DOMINO, MARGO DOMINO,
ROGER SPRINGMAN, LEONORE NEUMANN
VERONICA NEUMANN-THOMPSON,
NICHOLAS THOMPSON and YVONNE NEHRING,

Plaintiffs,

v.

Case No. 3:09-cv-00213-bbc

DIDION ETHANOL, LLC,

Defendant.

SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs John Domino, Margo Domino, Roger Springman, Leonore Neumann, Veronica Neumann-Thompson, Nicholas Thompson and Yvonne Nehring (collectively, "Plaintiffs") filed this action against Defendant Didion Ethanol, LLC ("Defendant") (Plaintiffs and Defendant are collectively the "Parties") on April 9, 2009, alleging that Defendant violated the terms and conditions of WPDES Permit No. WI-0063771-01-0 ("Permit"), issued to Defendant by the Wisconsin Department of Natural Resources ("WDNR") with an effective date of April 1, 2008; and

WHEREAS, on May 21, 2009, Defendant ceased discharging wastewater pursuant to the Permit; and

WHEREAS, on April 19, 2010, the Court approved (Dkt. 92) a joint stipulation in this matter (Dkt. 91) to suspend all case deadlines for twenty-one days pending the preparation of a final settlement agreement; and

WHEREAS, the State of Wisconsin Columbia County Circuit Court, through a special judicial assignment to the Hon. Gregory J. Potter (Wood County), approved a stipulated settlement between Defendant and the State of Wisconsin on April 23, 2010, and entered judgment on April 26, 2010, in *State of Wisconsin v. Didion Milling, Inc. and Didion Ethanol LLC*, Case No. 10-CX-000002 (the "State Enforcement Action"); and

WHEREAS, the Eighteenth through Twenty-third Claims in the Civil Complaint filed in the State Enforcement Action alleged violations of the terms and conditions of Defendant's Permit and other laws of the State of Wisconsin; and

WHEREAS, the allegations that form the basis for the State Enforcement Action are substantively similar to or duplicative of those included in the Plaintiffs' Civil Complaint filed in this action; and

WHEREAS, Plaintiffs and Defendant have agreed that, in light of the State Enforcement Action, settlement of this matter without continued litigation or appeal is the most appropriate means of resolving this action and is in the public interest and in the interest of the Parties;

NOW, THEREFORE, the Parties hereby agree as follows:

AGREEMENT

1. The foregoing recitals are incorporated herein as if fully set forth below.
2. The provisions of this Agreement apply to and are binding upon the Plaintiffs and Defendant, and upon any of Plaintiffs' and Defendant's respective successors and assigns or other entities or persons otherwise bound by law.

3. This Agreement is the final settlement agreement contemplated by the joint stipulation (Dkt. 91) and constitutes a full and complete settlement of the claims contained in the Complaint filed in this action.

4. Plaintiffs agree that this Agreement fully and finally resolves all of Plaintiffs' claims against Defendant (including its officers, directors, members and employees) and Plaintiffs hereby release Defendant from any relief that Plaintiffs sought or could have sought in this action or the State Enforcement Action, including but not limited to declaratory judgment, injunctive relief, the imposition of civil penalties, the award of costs and a demand for attorneys' and experts' fees.

5. The Parties stipulate to the entry by the Court of a judgment of dismissal of this action with prejudice.

6. The Parties agree that the Court should retain jurisdiction of this matter for the purpose of construing or enforcing the terms of this agreement.

A. Community Projects

7. Defendant agrees to pay the amount of sixty-five thousand dollars (\$65,000), to be used for those Community Projects ("Projects") described in Appendix A, attached hereto and incorporated herein by reference. The Parties acknowledge and agree that the Projects are intended to remediate, improve and protect the water quality and communities of the North Branch of Duck Creek, Duck Creek, and Tarrant Lake, in Columbia County, Wisconsin. Defendant agrees to make payments to the following organizations to support the Projects, as follows:

- (a) Twenty thousand dollars (\$20,000) shall be paid no later than seven (7) calendar days after the Court enters a judgment of dismissal of this action

with prejudice to the Tarrant Lake Preservation Committee for the construction of a fishing pier and improvements related to the Tarrant Lake Management Plan. This payment shall be mailed to:

Tarrant Lake Preservation Committee
ATTN: Ms. Lois Frank, Village of Cambria Clerk - Treasurer
PO Box 295
Cambria, WI 53923

- (b) Five thousand dollars (\$5,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Village of Cambria to assist with the cost of reconstructing the Tarrant Lake dam gate. This payment shall be mailed to:

Village of Cambria
ATTN: Ms. Lois Frank, Village Clerk - Treasurer
PO Box 295
Cambria, WI 53923-0295

- (c) Three thousand dollars (\$3,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Village of Wyocena to assist with the stocking of fish and fish habitat restoration in Lake Wyonna. This payment shall be mailed to:

Village of Wyocena
ATTN: Mr. Almon F. Porter, Jr., Village Clerk - Treasurer
PO Box 913
165 East Dodge Street
Wyocena, WI 53969

- (d) Two thousand dollars (\$2,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Cambria-Friesland Historical Society to offset a portion of the costs of constructing signage promoting Tarrant Lake and the mill history of the lake and Village. This payment shall be mailed to:

Cambria-Friesland Historical Society
ATTN: Mr. Jay Williams
P.O. Box 501
112 N Madison St
Cambria, WI, 53923

- (e) Thirty-five thousand dollars (\$35,000) shall be paid no later than May 5, 2011, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Columbia County Land & Water Conservation Department to continue and expand water monitoring in the Duck Creek Watershed and to work with local land owners to enter into conservation programs to benefit the health of Tarrant Lake. This payment shall be mailed to:

Mr. Kurt Caulkins, Director
Columbia County Land and Water Conservation Department
ATTN: Tarrant Lake Watershed
P.O. Box 485
Portage, WI 53901

8. Defendant shall notify Plaintiffs' counsel of the foregoing payments within a reasonable time following each Project payment described in paragraph 7, above.

B. Attorneys' Fees and Costs

9. Defendant agrees to pay Plaintiffs the amount of one-hundred eighty-five thousand dollars (\$185,000) to reimburse Plaintiffs for the cost of their reasonable attorneys' fees

and costs of litigation incurred in this action. This reimbursement shall be made in installments, as follows, and mailed to:

Midwest Environmental Advocates, Inc.
551 W. Main Street, Suite 200
Madison, WI 53703

- (a) Sixty-thousand dollars (\$60,000) shall be paid no later than seven (7) calendar days after the Court enters a judgment of dismissal of this action with prejudice by check payable to Midwest Environmental Advocates, Inc.;
- (b) Sixty-thousand dollars (\$60,000) shall be paid no later than January 5, 2011 by check payable to Midwest Environmental Advocates, Inc.; and
- (c) Sixty-five thousand dollars (\$65,000) shall be paid no later than May 5, 2011 by check payable to Midwest Environmental Advocates, Inc., provided the Court has entered a judgment of dismissal of this action with prejudice.

C. General Provisions

10. Nothing contained in this Agreement shall be construed as an admission of liability by Defendant in any proceeding now pending or hereafter commenced.

11. The undersigned counsel for each Party certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to bind the respective Parties hereto.

12. The material terms of this Agreement shall not be changed, revised or modified except by a written instrument signed by the Parties.

Dated this 19th day of May, 2010.

For Plaintiffs John Domino, Margo Domino,
Roger Springman, Leonore Neumann,
Veronica Neumann-Thompson, Nicholas
Thompson, and Yvonne Nehring



Elizabeth R. Lawton
Wis. Bar No. 1050374

MIDWEST ENVIRONMENTAL
ADVOCATES, INC.

551 W. Main Street, Suite 200
Madison, WI 53703
Tel: (608) 251-5047
Fax: (608) 268-0205
blawton@midwestadvocates.org

Attorneys for Plaintiffs John Domino, Margo
Domino, Roger Springman, Leonore
Neumann, Veronica Neumann-Thompson,
Nicholas Thompson and Yvonne Nehring

For Defendant DIDION ETHANOL, LLC



Eric M. McLeod
Wis. Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP

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Madison, WI 53701-1806
Telephone: 608.257.3501
Fax: 608.283.2275
emmcleod@michaelbest.com

Attorneys for Defendant Didion Ethanol
LLC

APPENDIX A:

COMMUNITY PROJECTS

This Appendix describes the Community Projects ("Projects") that the Parties intend to be benefited by Defendant's payments under paragraph 7 of the foregoing Agreement.

A. Objective

The Parties have identified the following Projects, which are intended to improve and protect the overall water quality of the North Branch of Duck Creek, and its tributaries, Duck Creek, and Tarrant Lake, in Columbia County, Wisconsin and the community's use and enjoyment of these waters.

B. Project 1: Construction and Upkeep of Fishing Pier on Tarrant Lake

1. Project Description

The Tarrant Lake Preservation Committee will use Project funds to design and construct a fishing pier on Tarrant Lake and fund related improvements and upkeep on the fishing pier and other public access points to the lake and further the goals of the Tarrant Lake Management Plan. This project will provide additional public access to and community enjoyment of Tarrant Lake.

2. Project Administrator:

Tarrant Lake Preservation Committee
ATTN: Nicholas J.A. McConochie
PO Box 295
Cambria, WI 53923

C. Project 2: Dam Gate Reconstruction

1. Project Description

The Village of Cambria will use the Project funds to assist with the cost of reconstructing the Tarrant Lake dam gate. This project will assist the Village in maintaining water quality in Tarrant Lake and the North Branch of Duck Creek.

2. Project Administrator:

Village of Cambria
ATTN: Mr. Glen J. Williams, Village President
PO Box 295
Cambria, WI 53923-0295

D. Project 3: Fish Stocking in Lake Wyonna

1. Project Description

The Village of Wyocena will use the Project funds to stock fish in Lake Wyonna. This project will provide additional community use and enjoyment of Lake Wyonna and the North Branch of Duck Creek.

2. Project Administrator:

Village of Wyocena
ATTN: Mr. Jim Struck, Village President
PO Box 913
165 East Dodge Street
Wyocena, WI 53969

E. Project 4: Construction of Signage Promoting Tarrant Lake

1. Project Description

The Cambria-Friesland Historical Society will use Project funds to construct signage promoting Tarrant Lake and the mill history of the lake and Village.

2. Project Administrator:

Cambria-Friesland Historical Society
ATTN: Mr. Jay Williams
P.O. Box 501
112 N Madison St
Cambria, WI, 53923

F. Project 5: Water Quality Monitoring and Conservation Programs

1. Project Description

The Columbia County Land & Water Conservation Department will use Project funds to expand water monitoring in the Duck Creek Watershed and to work with local land owners to enter into conservation programs to benefit the health of Tarrant Lake and Duck Creek.

2. Project Administrator:

Mr. Kurt Caulkins, Director
Columbia County Land and Water Conservation Department
P.O. Box 485
Portage, WI 53901

G. Supervision of Projects and Expenditure of Project Funds

The Parties agree that the individual Project Administrators identified above will control the ultimate use of the Project funds. As a condition of receiving project funds each Project Administrator shall agree to expend the funds for the purposes set forth in the Project Description and to supervise each project in a manner consistent with this Appendix and the foregoing Settlement Agreement. Neither Defendant nor Plaintiffs shall have any obligation to monitor the progress of the Projects or the expenditure of Project funds. Plaintiffs shall not accept any unexpended Project funds from the Project Administrators.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JOHN DOMINO, MARGO DOMINO,
ROGER SPRINGMAN, LEONORE NEUMANN
VERONICA NEUMANN-THOMPSON,
NICHOLAS THOMPSON and YVONNE NEHRING,

Plaintiffs,

v.

Case No. 3:09-cv-00213-bbc

DIDION ETHANOL, LLC,

Defendant.

SETTLEMENT AGREEMENT

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WHEREAS, on May 21, 2009, Defendant ceased discharging wastewater pursuant to the Permit; and

WHEREAS, on April 19, 2010, the Court approved (Dkt. 92) a joint stipulation in this matter (Dkt. 91) to suspend all case deadlines for twenty-one days pending the preparation of a final settlement agreement; and

WHEREAS, the State of Wisconsin Columbia County Circuit Court, through a special judicial assignment to the Hon. Gregory J. Potter (Wood County), approved a stipulated settlement between Defendant and the State of Wisconsin on April 23, 2010, and entered judgment on April 26, 2010, in *State of Wisconsin v. Didion Milling, Inc. and Didion Ethanol LLC*, Case No. 10-CX-000002 (the "State Enforcement Action"); and

WHEREAS, the Eighteenth through Twenty-third Claims in the Civil Complaint filed in the State Enforcement Action alleged violations of the terms and conditions of Defendant's Permit and other laws of the State of Wisconsin; and

WHEREAS, the allegations that form the basis for the State Enforcement Action are substantively similar to or duplicative of those included in the Plaintiffs' Civil Complaint filed in this action; and

WHEREAS, Plaintiffs and Defendant have agreed that, in light of the State Enforcement Action, settlement of this matter without continued litigation or appeal is the most appropriate means of resolving this action and is in the public interest and in the interest of the Parties;

NOW, THEREFORE, the Parties hereby agree as follows:

AGREEMENT

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2. The provisions of this Agreement apply to and are binding upon the Plaintiffs and Defendant, and upon any of Plaintiffs' and Defendant's respective successors and assigns or other entities or persons otherwise bound by law.

3. This Agreement is the final settlement agreement contemplated by the joint stipulation (Dkt. 91) and constitutes a full and complete settlement of the claims contained in the Complaint filed in this action.

4. Plaintiffs agree that this Agreement fully and finally resolves all of Plaintiffs' claims against Defendant (including its officers, directors, members and employees) and Plaintiffs hereby release Defendant from any relief that Plaintiffs sought or could have sought in this action or the State Enforcement Action, including but not limited to declaratory judgment, injunctive relief, the imposition of civil penalties, the award of costs and a demand for attorneys' and experts' fees.

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6. The Parties agree that the Court should retain jurisdiction of this matter for the purpose of construing or enforcing the terms of this agreement.

A. Community Projects

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- (a) Twenty thousand dollars (\$20,000) shall be paid no later than seven (7) calendar days after the Court enters a judgment of dismissal of this action

with prejudice to the Tarrant Lake Preservation Committee for the construction of a fishing pier and improvements related to the Tarrant Lake Management Plan. This payment shall be mailed to:

Tarrant Lake Preservation Committee
ATTN: Ms. Lois Frank, Village of Cambria Clerk - Treasurer
PO Box 295
Cambria, WI 53923

- (b) Five thousand dollars (\$5,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Village of Cambria to assist with the cost of reconstructing the Tarrant Lake dam gate. This payment shall be mailed to:

Village of Cambria
ATTN: Ms. Lois Frank, Village Clerk - Treasurer
PO Box 295
Cambria, WI 53923-0295

- (c) Three thousand dollars (\$3,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Village of Wyocena to assist with the stocking of fish and fish habitat restoration in Lake Wyonna. This payment shall be mailed to:

Village of Wyocena
ATTN: Mr. Almon F. Porter, Jr., Village Clerk - Treasurer
PO Box 913
165 East Dodge Street
Wyocena, WI 53969

- (d) Two thousand dollars (\$2,000) shall be paid no later than September 5, 2010, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Cambria-Friesland Historical Society to offset a portion of the costs of constructing signage promoting Tarrant Lake and the mill history of the lake and Village. This payment shall be mailed to:

Cambria-Friesland Historical Society
ATTN: Mr. Jay Williams
P.O. Box 501
112 N Madison St
Cambria, WI, 53923

- (e) Thirty-five thousand dollars (\$35,000) shall be paid no later than May 5, 2011, provided the Court has entered a judgment of dismissal of this action with prejudice, to the Columbia County Land & Water Conservation Department to continue and expand water monitoring in the Duck Creek Watershed and to work with local land owners to enter into conservation programs to benefit the health of Tarrant Lake. This payment shall be mailed to:

Mr. Kurt Caulkins, Director
Columbia County Land and Water Conservation Department
ATTN: Tarrant Lake Watershed
P.O. Box 485
Portage, WI 53901

8. Defendant shall notify Plaintiffs' counsel of the foregoing payments within a reasonable time following each Project payment described in paragraph 7, above.

B. Attorneys' Fees and Costs

9. Defendant agrees to pay Plaintiffs the amount of one-hundred eighty-five thousand dollars (\$185,000) to reimburse Plaintiffs for the cost of their reasonable attorneys' fees

and costs of litigation incurred in this action. This reimbursement shall be made in installments, as follows, and mailed to:

Midwest Environmental Advocates, Inc.
551 W. Main Street, Suite 200
Madison, WI 53703

- (a) Sixty-thousand dollars (\$60,000) shall be paid no later than seven (7) calendar days after the Court enters a judgment of dismissal of this action with prejudice by check payable to Midwest Environmental Advocates, Inc.;
- (b) Sixty-thousand dollars (\$60,000) shall be paid no later than January 5, 2011 by check payable to Midwest Environmental Advocates, Inc.; and
- (c) Sixty-five thousand dollars (\$65,000) shall be paid no later than May 5, 2011 by check payable to Midwest Environmental Advocates, Inc., provided the Court has entered a judgment of dismissal of this action with prejudice.

C. General Provisions

10. Nothing contained in this Agreement shall be construed as an admission of liability by Defendant in any proceeding now pending or hereafter commenced.

11. The undersigned counsel for each Party certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to bind the respective Parties hereto.

12. The material terms of this Agreement shall not be changed, revised or modified except by a written instrument signed by the Parties.

Dated this 19th day of May, 2010.

For Plaintiffs John Domino, Margo Domino,
Roger Springman, Leonore Neumann,
Veronica Neumann-Thompson, Nicholas
Thompson, and Yvonne Nehring



Elizabeth R. Lawton
Wis. Bar No. 1050374

MIDWEST ENVIRONMENTAL
ADVOCATES, INC.

551 W. Main Street, Suite 200
Madison, WI 53703
Tel: (608) 251-5047
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blawton@midwestadvocates.org

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Domino, Roger Springman, Leonore
Neumann, Veronica Neumann-Thompson,
Nicholas Thompson and Yvonne Nehring

For Defendant DIDION ETHANOL, LLC



Eric M. McLeod
Wis. Bar No. 1021730

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Telephone: 608.257.3501
Fax: 608.283.2275
emmcleod@michaelbest.com

Attorneys for Defendant Didion Ethanol
LLC

APPENDIX A:

COMMUNITY PROJECTS

This Appendix describes the Community Projects ("Projects") that the Parties intend to be benefited by Defendant's payments under paragraph 7 of the foregoing Agreement.

A. Objective

The Parties have identified the following Projects, which are intended to improve and protect the overall water quality of the North Branch of Duck Creek, and its tributaries, Duck Creek, and Tarrant Lake, in Columbia County, Wisconsin and the community's use and enjoyment of these waters.

B. Project 1: Construction and Upkeep of Fishing Pier on Tarrant Lake

1. Project Description

The Tarrant Lake Preservation Committee will use Project funds to design and construct a fishing pier on Tarrant Lake and fund related improvements and upkeep on the fishing pier and other public access points to the lake and further the goals of the Tarrant Lake Management Plan. This project will provide additional public access to and community enjoyment of Tarrant Lake.

2. Project Administrator:

Tarrant Lake Preservation Committee
ATTN: Nicholas J.A. McConochie
PO Box 295
Cambria, WI 53923

C. Project 2: Dam Gate Reconstruction

1. Project Description

The Village of Cambria will use the Project funds to assist with the cost of reconstructing the Tarrant Lake dam gate. This project will assist the Village in maintaining water quality in Tarrant Lake and the North Branch of Duck Creek.

2. Project Administrator:

Village of Cambria
ATTN: Mr. Glen J. Williams, Village President
PO Box 295
Cambria, WI 53923-0295

D. Project 3: Fish Stocking in Lake Wyonna

1. Project Description

The Village of Wyocena will use the Project funds to stock fish in Lake Wyonna. This project will provide additional community use and enjoyment of Lake Wyonna and the North Branch of Duck Creek.

2. Project Administrator:

Village of Wyocena
ATTN: Mr. Jim Struck, Village President
PO Box 913
165 East Dodge Street
Wyocena, WI 53969

E. Project 4: Construction of Signage Promoting Tarrant Lake

1. Project Description

The Cambria-Friesland Historical Society will use Project funds to construct signage promoting Tarrant Lake and the mill history of the lake and Village.

2. Project Administrator:

Cambria-Friesland Historical Society
ATTN: Mr. Jay Williams
P.O. Box 501
112 N Madison St
Cambria, WI, 53923

F. Project 5: Water Quality Monitoring and Conservation Programs

1. Project Description

The Columbia County Land & Water Conservation Department will use Project funds to expand water monitoring in the Duck Creek Watershed and to work with local land owners to enter into conservation programs to benefit the health of Tarrant Lake and Duck Creek.

2. Project Administrator:

Mr. Kurt Caulkins, Director
Columbia County Land and Water Conservation Department
P.O. Box 485
Portage, WI 53901

G. Supervision of Projects and Expenditure of Project Funds

The Parties agree that the individual Project Administrators identified above will control the ultimate use of the Project funds. As a condition of receiving project funds each Project Administrator shall agree to expend the funds for the purposes set forth in the Project Description and to supervise each project in a manner consistent with this Appendix and the foregoing Settlement Agreement. Neither Defendant nor Plaintiffs shall have any obligation to monitor the progress of the Projects or the expenditure of Project funds. Plaintiffs shall not accept any unexpended Project funds from the Project Administrators.

SUBJECT:

Request adoption of emergency Board Order AM-48-10(E) and authorization for public hearing for Board Order AM-17-10, proposed rules affecting NR 400, 405, and 407 pertaining to major source thresholds for sources of greenhouse gas emissions.

FOR: DECEMBER, 2010 BOARD MEETING

TO BE PRESENTED BY: Andrew Stewart, Chief, Permits & Stationary Source Modeling Section

SUMMARY:

On May 13, 2010, US EPA set greenhouse gas (GHG) thresholds and deadlines in rules generally referred to as the GHG Tailoring Rule to define when New Source Review Prevention of Significant Deterioration and Title V operating permits are required for new and existing industrial sources [75 FR 31514, June 3, 2010].

This action was necessary because without it, the unintended effect of EPA's emission standard for GHG emissions from motor vehicles promulgated on April 1, 2010 would subject literally tens of thousands of sources across the country to some of the most complex air permit and emission control regulations.

Under current state statutes and administrative code, Wisconsin sources will be subject to permit and emission control requirements for GHG on January 2, 2011. However, Wisconsin sources will not benefit from the federal tailoring rule limiting applicability under air permit and emission control regulations until revisions can be made to Wisconsin administrative code.

If revisions to current administrative code are not made, many Wisconsin businesses not currently regulated as major sources under air permit regulations will be so regulated for GHG. Examples include municipal landfills, hospitals, asphalt plants, wastewater treatment plants, small wood fired boilers and agricultural digesters. In addition, this situation, if not remedied, has the potential to overwhelm DNR permitting staff, divert resources away from significant environmental issues and delay issuance of construction permits for critical projects for expanding businesses.

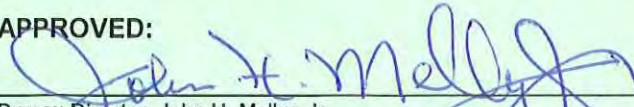
It is anticipated that there will be a high degree of interest in this rulemaking. However, this proposal limits the applicability of Department permitting consistent with the federal permit program and therefore is not expected to be controversial. The Board has not dealt with this issue before.

RECOMMENDATION: That the Board adopt emergency Board Order AM-48-10(E) and authorize public hearing on Board Order AM-17-10.

LIST OF ATTACHED MATERIALS:

- | | | | | | |
|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input type="checkbox"/> | Fiscal Estimate Required | Yes | <input checked="" type="checkbox"/> | Attached |
| No | <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes | <input type="checkbox"/> | Attached |
| No | <input type="checkbox"/> | Background Memo | Yes | <input checked="" type="checkbox"/> | Attached |

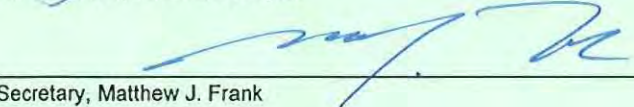
APPROVED:


Bureau Director, John H. Melby, Jr.

11/2/10
Date


Administrator, Suzanne Bangerter

11/3/10
Date


Secretary, Matthew J. Frank

11-17-10
Date

DATE: November 16, 2010 FILE REF: 4530

TO: Natural Resources Board Members

FROM: Matthew J. Frank, Secretary *MJF*

SUBJECT: Background memo on requests for adoption of emergency Order AM-48-10(E) and public hearing authorization for Order AM-17-10, proposed rules affecting NR 400, 405 and 407, pertaining to major source permit thresholds for sources of greenhouse gas emissions.

Why is this rule being proposed?

On April 1, 2010, U.S. EPA (EPA) promulgated the first standard for regulating motor vehicle emissions contributing to climate change, i.e., greenhouse gases or GHG. Because of the way the Clean Air Act is structured, once GHG emissions from motor vehicles are subject to regulation, stationary sources become regulated for these gases. Without further action by EPA, this standard has the unintended affect of subjecting literally tens of thousands of sources across the country to some of the most complex air permit and emission control regulations. In order to mitigate this unintended effect, EPA promulgated on June 3, 2010 (75 FR 31514), an additional "tailoring" rule that limits the number of sources subject to the permit and emission control regulations.

Under current state statutes and administrative code, Wisconsin sources will become subject to permit and emission control requirements on January 2, 2010. However, Wisconsin sources will not benefit from the tailoring rule limiting applicability under air permit and emission control regulations until revisions can be made to Wisconsin Administrative Code. This order proposes to revise the administrative code to make it consistent with the new federal rule. Specifically, this proposal will define the greenhouse gases subject to regulation, establish greenhouse gas emission thresholds, that if exceeded, will trigger permitting and emission control requirements, and establish global warming potential factors which are used to calculate individual greenhouse gas emissions on an equivalent and comparable basis.

If revisions to current administrative code are not made, many Wisconsin businesses not currently regulated as major sources under air permit regulations will be so regulated. Examples include municipal landfills, hospitals, asphalt plants, wastewater treatment plants, small wood fired boilers, and agricultural digesters.

In addition, this situation, if not remedied, has the potential to overwhelm DNR permitting staff, divert resources away from significant environmental issues and delay issuance of construction permits for critical projects for expanding businesses.

This emergency order must be put into effect prior to, but as close as possible to the effective date of January 2, 2011 for the federal rules, to exclude many Wisconsin businesses with small emissions from major permit and control requirements that are not required by federal law. This timing provides for the exclusion to be in effect during the development of the permanent rule.

What event or action triggered the proposal?

The series of events leading to this proposal began with an April, 2007 Supreme Court decision.

In *Massachusetts v. EPA*, 549 US 497, the Supreme Court found that GHG are air pollutants covered by the Clean Air Act and directed the EPA to make a finding as to whether emissions of these gases from new motor vehicles cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare. On December 7, 2009 EPA made their official finding, referred to as the "endangerment finding" establishing the prerequisite to regulating GHG emissions from motor vehicles.

Subsequent to this finding, the EPA and US DOT finalized regulations on April 1, 2010 establishing standards for GHG emissions from new light duty motor vehicles, starting with model year 2012. (Additional information on the endangerment finding and motor vehicle regulation can be found at: <http://www.epa.gov/climatechange/endangerment.html> & <http://www.epa.gov/oms/climate/regulations.htm>)

The combined effect of the Supreme Court decision and the finalized motor vehicle rule adds GHG to the list of pollutants that are regulated under the Clean Air Act. This in turn subjects stationary sources (i.e., electric utilities, factories, small business, etc.) to the prevention of significant deterioration (PSD) & Title V permitting programs if their GHG emissions exceed established threshold amounts.

Prior to the series of federal actions described above, the Title V program applied to sources that emit or have the potential to emit 100 tons per year of criteria pollutants, while the PSD program applied to sources in certain categories at a 100 tons per year level and to other sources at a 250 tons per year level. Sources regulated under the PSD program also had thresholds that determined what was a significant increase in emissions for new projects at the source that would trigger a review of control requirements. These significant increase thresholds for pollutants previously regulated under PSD ranged from 1200 pounds per year (lead) to 100 tons per year (carbon monoxide). No significance level for GHG previously existed under the PSD program.

EPA recognized it as unrealistic to apply these thresholds to sources of GHG for two primary reasons. First, carbon dioxide, a prevalent GHG, is emitted in amounts that are orders of magnitude higher than pollutants such as particulate matter and sulfur dioxide. Applying these thresholds to sources of carbon dioxide emissions would bring literally hundreds of thousands, maybe millions, of sources into the PSD program nationwide forcing state agencies to process permits in numbers that far exceed what their current administrative resources could accommodate. Second, the combined emissions from the vast majority of these sources make up a small percentage of the total. Regulating these sources under programs designed to control emissions from sources such as electric utilities, large manufactures and foundries would be highly ineffective and result in little or no environmental benefit.

In order to prevent this from happening, EPA issued on June 3, 2010, a regulation known as the GHG Tailoring Rule. This rule establishes a GHG emission applicability threshold for the PSD and Title V programs at 100,000 tons per year and establishes a threshold for what will be considered a significant increase in GHG emissions at 75,000 tons per year. In addition, this regulation phases in PSD and Title V requirements in two steps.

Wisconsin rules need to be revised to incorporate the higher applicability and significance thresholds, and phased in approach established by the federal tailoring rule to avoid GHG emissions from stationary sources being subject to regulation for GHG on January 2, 2011

What issues are addressed by this rule?

The primary issue being addressed by this rule is to make Wisconsin consistent with federal regulations in order to prevent the unintended applicability of the Title V and PSD program to small sources of GHG emissions in Wisconsin.

The following table shows the difference between the current thresholds in Wisconsin and the finalized thresholds for GHG under the federal tailoring rule. If Wisconsin does not revise its regulations, sources that emit between 100 and 100,000 tons per year GHG will be subject to legal uncertainty and potentially complex control determinations. In addition, thousands of sources which did not require a Title V permit before will now require one. The administrative burden for each of these programs is extremely high for

both the permittee and the DNR since most of these permittees are not used to being regulated under the Clean Air Act.

Comparison of GHG Thresholds		
	Current WI Thresholds	Finalized Thresholds under the Federal Tailoring Rule
PSD Major Source Thresholds	100 and 250 tpy	100,000 tpy
PSD Major Modification Significance level	0 tpy increase	75,000 tpy increase
Title V permit threshold	100 tpy	100,000 tpy

Summary of the Rules

The rule proposes to:

- Define greenhouse gases as the six pollutants listed in the endangerment finding (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride);
- Define how to calculate a carbon dioxide equivalency (CO₂e) for the six pollutants;
- Define a major source of GHG emissions at 100,000 tons per year CO₂e;
- Define a significance level for PSD permitting at 75,000 tons per year CO₂e;
- Establish a two step phased-in implementation schedule;
- Define an inclusion level for emission sources that will be included in a Title V permit; and
- Establish the global warming potential for the greenhouse gases being regulated.

The first five bullets summarize requirements identical to federal regulations. The last two however are not explicitly established in the federal tailoring regulation and warrant further explanation.

Defining an inclusion level for emission sources that will be covered by a Title V permit. It is necessary to propose an inclusion level for smaller GHG emitting units at sources subject to Title V permitting requirements as it is the sum of GHG emissions from these smaller sources that are compared to the major source threshold being proposed. Existing inclusion levels in Wisconsin’s Title V rules for other pollutants are generally set at 10 percent of a significance level applicable to the pollutant of concern. With the exception of nitrous oxides, this order proposes to establish the inclusion level for the other greenhouse gases at 10 percent of the PSD major source threshold, or 10,000 tons of CO₂e.

An inclusion level for nitrous oxide already exists in Wisconsin’s Title V rules, as it is regulated in Wisconsin as a hazardous air contaminant. The current level is lower than what would be established under this order so there is no need to revise it for greenhouse gas regulation.

Establishing the global warming potential for the greenhouse gases being regulated. It is necessary to propose the global warming potential (GWP) for the greenhouse gases being regulated as it is an essential component of how the carbon dioxide equivalency is calculated which in turn determines whether or not a source is subject to regulation. In the federal tailoring rule, EPA applies the GWP values from the Mandatory Greenhouse Gas Reporting rule, by reference to Table A-1 to Subpart A of 40 CFR Part 98, in its definition of carbon dioxide equivalency, omitting the specific GWP values themselves. This order proposes to establish GWP values directly in the rule, using the same EPA values in Table A-1 to 40 CFR Subpart 98. (See Table B in Section 4 – 405.07(9) of the proposed order and rule)

How does this proposal affect existing policy?

This proposal modifies existing policy by setting the major source threshold for sources of GHG emissions at 100,000 ton per year of CO₂e rather than at 100 and 250 tons per year. It also increases the

significance threshold to determine the level for subjecting modifications to the PSD permitting program from 0 (any increase) to 75,000 tons per year of CO₂e. In addition it establishes a phased-in implementation schedule.

January 2, 2011 – June 30, 2011

- Only sources currently subject to the PSD permitting program (i.e., those that are newly-constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) would be subject to permitting requirements for their GHG emissions under PSD.
- For these projects, only GHG increases of 75,000 tpy or more of total GHG, on a CO₂e basis, would need to determine the Best Available Control Technology for their GHG emissions.
- Similarly for the Title V operating permit program, only sources currently subject to the program (i.e., newly constructed or existing major sources for a pollutant other than GHG) would be subject to Title V requirements for GHG.
- During this time, no sources would be subject to Clean Air Act permitting requirements due solely to GHG emissions.

July 1, 2011 and after

- PSD permitting requirements will cover for the first time new construction projects that emit GHG emissions of at least 100,000 tpy even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase GHG emissions by at least 75,000 tpy will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant.
- Title V operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tpy CO₂e will be subject to Title V permitting requirements.

Has the Board dealt with these issues before? If so, when and why?

The Board has not dealt with this issue before.

Who will be impacted by the proposed rule? How will they be impacted?

This proposal will lessen the impact of changes at the federal level for existing and new major and minor sources of GHG emissions in Wisconsin.

This proposal will ensure that thousands of small sources of GHG will not become subject to the Title V and PSD permit programs. It will also ensure that increases of CO₂e emissions between 0 and 75,000 tons per year will not trigger complex control requirements at stationary sources. Furthermore, it will prevent increases of emissions of other pollutants currently regulated under the minor source construction program from becoming subject to the PSD program. Without the revisions proposed in this rule small sources such as schools with boilers and homes with residential wood boilers will become subject to the PSD and Title V permit programs.

The greenhouse gas endangerment finding (74 FR 66496), EPA's memorandum entitled "Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (75 FR 17004) and the motor vehicle (75 FR 25324) and tailoring (75 FR 31514) rules have been challenged by various parties, nationally. In the event that courts or Congress stay or otherwise invalidate the finding, interpretation and both rules related to greenhouse gases the Department will act to invalidate the emergency rule and re-evaluate the need for a permanent rule in light of the court's or Congressional actions.

Information on environmental analysis.

Under s. NR 150.03(3), Wis. Adm. Code, an environmental analysis is not needed because this proposal

is considered a Type III Action. A Type III Action is one that normally does not have the potential to cause significant environmental effects, normally does not significantly affect energy usage, and normally does not involve unresolved conflicts in the use of available resources.

Small business analysis.

The Department did not conduct an independent analysis of the effect on small business, but is relying on the analysis performed by the EPA. This analysis can be found in EPA's rule docket for Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule [EPA-HQ-OAR-2009-0517; FRL-8966-7], October 27, 2009 (74 FR 55292).

The proposed rules will prevent unintended impacts to small businesses resulting from promulgation by EPA of emission standards for GHG, by limiting the number of small businesses that may become subject to the Title V and PSD permitting programs.

Fiscal Estimate — 2009 Session

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number AM-17-10, AM-48-10(E)

Subject

Order AM-17-10 and emergency order AM-48-10(E), proposed rules affecting NR 400, 405 and 407, pertaining to major source permit thresholds for sources of greenhouse gas emissions

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues

- Increase Costs — May be possible to absorb within agency's budget.
 Yes No
 Decrease Costs

Local: No Local Government Costs

1. Increase Costs
 Permissive Mandatory
 Decrease Costs
3. Increase Revenues
 Permissive Mandatory
 Decrease Revenues

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

This proposal limits the applicability of Department permitting consistent with the federal permit program, resulting in fewer permit actions. This translates to an expected cost avoidance for both the Department and the private sector over what costs will be imposed if the proposal is not approved. The following information and assumptions were used in estimating the cost avoidance, which are summarized in the table on the next page. (Note that estimates in this analysis are based on EPA proposed rules published in September, 2009. EPA's final rule establishes applicability thresholds much higher than originally proposed, therefore, the cost avoidance numbers go up significantly from what is presented here.)

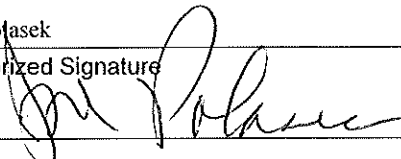
National average dollar per permit costs and national numbers of permits avoided comes from Tables 3-1 and 3-2 in US EPA's *Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Final Report, September, 2009*.

Number of permits avoided in Wisconsin was determined by taking a percentage of the national estimate of permits avoided.

Number of industrial sources subject to PSD - Currently the Department issues 8-10% of the nation's PSD permits annually due the historically large manufacturing base in Wisconsin. While there will be some correlation between the industrial base and sources of greenhouse gas emissions it is not expected to be as high as what the Department currently sees under the existing PSD program. For the purposes of this Fiscal Estimate 5% is being applied to the national estimate of 3,299 permits avoided.

Number of commercial and residential sources subject to PSD - Based on an assumption that Wisconsin's number of sources is proportional to percentage of the national population, 2% is being applied to the national estimate of 37,197 permits avoided.

Long-Range Fiscal Implications

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	11-02-10

Fiscal Estimate — 2009 Session

**Page 2 Assumptions Narrative
 Continued**

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number AM-17-10, AM-48-10(E)

Assumptions Used in Arriving at Fiscal Estimate – Continued

Number of new industrial sources subject to Title V - Currently the Department issues approximately 3% of the nations Title V permits. Therefore 3% of the national estimate of 195,895 permits avoided is used in this Fiscal Estimate.

Number of new commercial and residential sources subject to Title V - Based on an assumption that Wisconsin's number of sources is proportional to percentage of the national population, 2% is being applied to the national estimate of 5,956,513 permits avoided.

US EPA notes that significant uncertainties exist in their estimates due to the lack of historical record and permitting experience upon which to base resource needs for including greenhouse gas sources in the PSD and Title V permitting programs. The Department does not have Wisconsin specific information that allows the estimates to be better refined for this Fiscal Estimate.

	Source cost to obtain permit	Agency cost to issue permit	Number of permits	Avoided Cost Private Sector	Avoided Cost Department
New Source Permits					
Source subject to PSD Permitting-Industrial	\$84,530	\$46,350	165	\$13,947,450 (annual)	\$7,647,750 (annual)
Source subject to PSD Permitting-Commercial & Residential	\$16,887	\$4,986	744	\$12,563,928 (annual)	\$3,709,584 (annual)
Title V Permits					
New Industrial	\$46,350	\$19,688	5877	\$272,398,950 (one time)	\$115,706,376 (one time)
New Commercial & Residential	\$4,986	\$1,978	119,130	\$593,982,180 (one time)	\$235,639,140 (one time)

Fiscal Estimate Worksheet — 2009 Session
 Detailed Estimate of Annual Fiscal Effect

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number AM-17-10, AM-48-10(E)

Subject

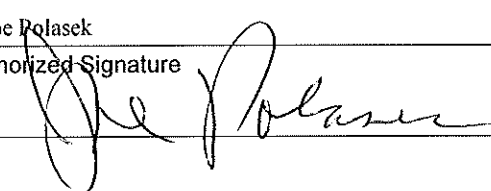
Order AM-17-10 and emergency order AM-48-10(E), proposed rules affecting NR 400, 405, and 407, pertaining to major source permit thresholds for sources of greenhouse gas emissions

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes		\$ 0	\$ - 0
(FTE Position Changes)		(FTE)	(- FTE)
State Operations — Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$	\$ -
B. State Costs by Source of Funds			
GPR		\$ 0	\$ - 0
FED			-
PRO/PRS			-
SEG/SEG-S			-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$ 0	\$ - 0
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		\$ 0	\$ - 0

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	11-02-10

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an emergency order to **amend** 407.02 (4) (b) (intro.), and Table 3 in 407.05 (5) and to **create** NR 400.02 (74m), 400.03 (3) (om), and (4) (go) and (ki), 405.02 (28m), 405.07 (9), 407.02 (8m) and 407.075 relating to major source permitting thresholds for sources of greenhouse gas emissions and affecting small business.

AM-48-10(E)

Analysis Prepared by the Department of Natural Resources

- 1. Statute interpreted:** Sections 227.11 (2) (a), 227.14 (1m) (b), 285.11 (1) and (16), and 285.60, Stats. The State Implementation Plan developed under s. 285.11 (6), Stats., is revised.
- 2. Statutory authority:** Sections 227.11 (2) (a), 227.14 (1m) (b), 227.24 (1) (a), 285.11 (1) and (16), Stats.
- 3. Explanation of agency authority:** Section 227.11 (2) (a), Stats., gives state agencies general rulemaking authority. Section 227.14 (1m) (b), Stats., allows the Department to use the format of federal regulations in preparing a proposed rule if it determines that all or part of a state environmental regulatory program is to be administered according to standards, requirements or methods which are similar to standards, requirements or methods specified for all or part of a federal environmental program. Section 227.24 (1)(a), Stats., gives the Department the authority to promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under ch. 227, Stats., if necessary for the preservation of the public welfare. Section 285.11 (1), Stats., gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11 (16), Stats., requires the Department to promulgate rules that specify the amounts of emissions that result in a stationary source being classified as a major source. This section requires the rules to be consistent with but no more restrictive than the federal Clean Air Act.
- 4. Related statute or rule:** None
- 5. Plain language analysis:** On April 1, 2010, US EPA promulgated the first standard for regulating motor vehicle gases contributing to climate change, i.e., greenhouse gases or GHG. Because of the way the Clean Air Act (CAA) is structured, once GHG emissions from motor vehicles are subject to regulation, stationary sources become regulated for these gases. Without further action by EPA, this standard has the unintended affect of subjecting literally tens of thousands of sources across the country to some of the most complex air permit and emission control regulations. In order to mitigate this unintended effect, EPA promulgated on June 3, 2010 (75 FR 31514), an additional "tailoring" rule that limits the number of sources subject to the permit and emission control regulations.

Under current state statutes and administrative code, Wisconsin sources will become subject to permit and emission control requirements on January 2, 2010. However, Wisconsin sources will not benefit from the tailoring rule limiting applicability under air permit and emission control regulations until revisions can be made to Wisconsin administrative code. This order proposes to revise the administrative code to make it consistent with the new federal rule.

Specifically, this proposal will define the greenhouse gases subject to regulation, establish greenhouse gas emission thresholds, that if exceeded, will trigger permitting and emission control requirements, and establish global warming potential factors which are used to calculate individual greenhouse gas emissions on an equivalent and comparable basis.

- 6. Summary of, and comparison with, existing or proposed federal regulation:**
U.S. EPA promulgated rules in 40 CFR parts 51 and 70 as revised on June 3, 2010 (75 FR 31514) to relieve overwhelming permitting burdens that would, in the absence of these rule, fall on permitting authorities and sources. They accomplished this by tailoring the applicability criteria that determine which

GHG emission sources become subject to the PSD and Title V programs of the CAA. In particular, EPA established with this rulemaking a phase-in approach for PSD and Title V applicability, and established the first two steps of the phase-in for the largest emitters of GHG.

Under these federal rules, the first step, which will begin on January 2, 2011, PSD or Title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or Title V anyway due to their non-GHG pollutants. Therefore, EPA will not require source owners or operators to evaluate whether they are subject to PSD or Title V requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG emissions by at least 75,000 tpy carbon dioxide equivalent emissions, but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the Title V program, only owners or operators of existing sources with, or new sources obtaining, Title V permits for non-GHG pollutants will be required to address GHG during this first step.

The second step of the federal rules, beginning on July 1, 2011, will phase in additional large sources of GHG emissions. New sources as well as existing sources not already subject to Title V that emit, or have the potential to emit, at least 100,000 tpy carbon dioxide equivalent emissions will become subject to the PSD and Title V requirements. In addition, sources that emit or have the potential to emit at least 100,000 tpy carbon dioxide equivalent emissions and that undertake a modification that increases net emissions of GHG by at least 75,000 tpy carbon dioxide equivalent emissions will also be subject to PSD requirements.

An important provision of these federal rules is that PSD and Title V permitting is only triggered when both the appropriate traditional mass-based applicability threshold, i.e., 100 tpy or 250 tpy, and the GHG carbon dioxide equivalent emission threshold are exceeded.

U.S. EPA also makes certain commitments to conduct studies related to potential regulatory burdens which could result from lowering the applicability threshold from what is contained in the current rule. Except for these federal commitments, the rules proposed here are consistent with the federal rules.

The greenhouse gas endangerment finding (74 FR 66496), EPA's memorandum entitled "Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (75 FR 17004) and the motor vehicle (75 FR 25324) and tailoring (75 FR 31514) rules have been challenged by various parties, nationally. In the event that courts or Congress stay or otherwise invalidate the finding, interpretation and both rules related to greenhouse gases the Department will act to invalidate the emergency rule and re-evaluate the need for a permanent rule in light of the court's or Congressional actions.

7. Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan, and Minnesota): The states of Illinois and Minnesota are US EPA delegated states so they do not need to amend their state rules to implement the provision of the federal tailoring rule. Michigan and Iowa are SIP approved states like Wisconsin, so they will need to implement rules similar to what are being proposed here in order to modify their permit program and implement the provisions of the federal rule.

8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen: The proposed rule is based on the federal rule changes. Information on the federal rule changes can be obtained from federal registers published on October 27, 2009 (74 FR 55292), October 30, 2009 (74 FR 56260), and June 3, 2010 (75 FR 31514).

9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact report: The Department did not conduct an independent analysis of the effect on small business, but is relying on the analysis performed by the US EPA. This analysis can be found in US EPA's rule docket for Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule [EPA-HQ-OAR-2009-0517; FRL-8966-7], October 27, 2009 (74 FR 55292).

10. Effect on small business: This proposal will prevent unintended impacts to small businesses resulting from promulgation by U.S. EPA of emission standards for GHG, by limiting the number that may become subject to the Title V and PSD permitting programs.

11. Agency contact person: Andrew Stewart, 608-266-6876, andrew.stewart@wisconsin.gov

SECTION 1. NR 400.02 (74m) is created to read:

NR 400.02 (74m) “Greenhouse gases” or “GHG” means an air pollutant that is the aggregate of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

SECTION 2. NR 400.03(3) (om) and (4) (go) and (ki) are created to read:

NR 400.03 (3) (om) “SF₆” – sulfur hexafluoride

(4) (go) “GHG” – greenhouse gases

(ki) “PFC” – perfluorocarbon

SECTION 3. NR 405.02 (28m) is created to read:

NR 405.02 (28m) “Subject to regulation under the Act” means, for any air contaminant, that the contaminant is subject to either a provision of the Act, or a nationally applicable regulation codified by the administrator in title 40, Chapter I, subchapter C of the CFR, that requires actual control of the quantity of air emissions of the contaminant, and that the control requirement has taken effect and is operative to control, limit, or restrict the quantity of emissions of the contaminant released from the regulated activity.

SECTION 4. NR 405.07 (9) is created to read:

NR 405.07 (9) (a) Emissions of greenhouse gases at a stationary source shall only be subject to regulation under the Act as follows:

1. Beginning January 2, 2011, if the stationary source is any of the following:

a. A new major stationary source for a regulated NSR contaminant other than GHG, which will emit or will have the potential to emit 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

b. An existing major stationary source for a regulated NSR contaminant other than GHG, which will have an emissions increase of a regulated NSR contaminant other than GHG, and an emissions increase of 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

2. Beginning July 1, 2011, in addition to the provisions in par. (a), if the stationary-source is any of the following:

a. A new stationary source that will emit or have the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis.

b. An existing stationary source that emits or has the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis, and the source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

Note: The Department intends to regulate GHG consistent with the 40 CFR 51.166 (June 3, 2010). In the event of litigation or congressional action which impacts the federal regulations, the Department will commence rulemaking to remain consistent with the resulting federal regulations.

(b) For purposes of this subsection, emissions of GHG on a carbon dioxide equivalent basis shall be determined by multiplying the mass amount of emissions, in tons per year, for each of the constituent gases in the pollutant GHG by the associated global warming potential for the gas in Table B, and then summing the products obtained.

Table B
Global Warming Potentials (GWP)

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
1.	Carbon dioxide	124-38-9	CO ₂	1
2.	Methane	74-82-8	CH ₄	21
3.	Nitrous oxide	10024-97-2	N ₂ O	310
4.	HFC-23	75-46-7	CHF ₃	11,700
5.	HFC-32	75-10-5	CH ₂ F ₂	650
6.	HFC-41	593-53-3	CH ₃ F	150
7.	HFC-125	354-33-6	C ₂ HF ₅	2,800
8.	HFC-134	359-35-3	C ₂ H ₂ F ₄	1,000
9.	HFC-134a	811-97-2	CH ₂ FCF ₃	1,300
10.	HFC-143	430-66-0	C ₂ H ₃ F ₃	300

Table B
Global Warming Potentials (GWP)

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
11.	HFC-143a	420-46-2	C ₂ H ₃ F ₃	3,800
12.	HFC-152	624-72-6	CH ₂ FCH ₂ F	53
13.	HFC-152a	75-37-6	CH ₃ CHF ₂	140
14.	HFC-161	353-36-6	CH ₃ CH ₂ F	12
15.	HFC-227ea	431-89-0	C ₃ HF ₇	2,900
16.	HFC-236cb	677-56-5	CH ₂ FCF ₂ CF ₃	1,340
17.	HFC-236ea	431-63-0	CHF ₂ CHFCF ₃	1,370
18.	HFC-236fa	690-39-1	C ₃ H ₂ F ₆	6,300
19.	HFC-245ca	679-86-7	C ₃ H ₃ F ₅	560
20.	HFC-245fa	460-73-1	CHF ₂ CH ₂ CF ₃	1,030
21.	HFC-365mfc	406-58-6	CH ₃ CF ₂ CH ₂ CF ₃	794
22.	HFC-43-10mee	138495-42-8	CF ₃ CFHCFHCF ₂ CF ₃	1,300
23.	Sulfur hexafluoride	2551-62-4	SF ₆	23,900
24.	Trifluoromethyl sulphur pentafluoride	373-80-8	SF ₅ CF ₃	17,700
25.	Nitrogen trifluoride	7783-54-2	NF ₃	17,200
26.	PFC-14 (Perfluoromethane)	75-73-0	CF ₄	6,500
27.	PFC-116 (Perfluoroethane)	76-16-4	C ₂ F ₆	9,200
28.	PFC-218 (Perfluoropropane)	76-19-7	C ₃ F ₈	7,000
29.	Perfluorocyclopropane	931-91-9	C-C ₃ F ₆	17,340
30.	PFC-3-1-10 (Perfluorobutane)	355-25-9	C ₄ F ₁₀	7,000
31.	Perfluorocyclobutane	115-25-3	C-C ₄ F ₈	8,700
32.	PFC-4-1-12 (Perfluoropentane)	678-26-2	C ₅ F ₁₂	7,500
33.	PFC-5-1-14 (Perfluorohexane)	355-42-0	C ₆ F ₁₄	7,400
34.	PFC-9-1-18	306-94-5	C ₁₀ F ₁₈	7,500
35.	HCFE-235da2 (Isoflurane)	26675-46-7	CHF ₂ OCHClCF ₃	350
36.	HFE-43-10pccc (H-Galden 1040x)	E1730133	CHF ₂ OCF ₂ OC ₂ F ₄ OCHF ₂	1,870
37.	HFE-125	3822-68-2	CHF ₂ OCF ₃	14,900
38.	HFE-134	1691-17-4	CHF ₂ OCHF ₂	6,320
39.	HFE-143a	421-14-7	CH ₃ OCF ₃	756
40.	HFE-227ea	2356-62-9	CF ₃ CHFOCF ₃	1,540
41.	HFE-236ca12 (HG-10)	78522-47-1	CHF ₂ OCF ₂ OCHF ₂	2,800
42.	HFE-236ea2 (Desflurane)	57041-67-5	CHF ₂ OCHFCF ₃	989
43.	HFE-236fa	20193-67-3	CF ₃ CH ₂ OCF ₃	487
44.	HFE-245cb2	22410-44-2	CH ₃ OCF ₂ CF ₃	708
45.	HFE-245fa1	84011-15-4	CHF ₂ CH ₂ OCF ₃	286
46.	HFE-245fa2	1885-48-9	CHF ₂ OCH ₂ CF ₃	659
47.	HFE-254cb2	425-88-7	CH ₃ OCF ₂ CHF ₂	359
48.	HFE-263fb2	460-43-5	CF ₃ CH ₂ OCH ₃	11
49.	HFE-329mcc2	67490-36-2	CF ₃ CF ₂ OCF ₂ CHF ₂	919
50.	HFE-338mcf2	156053-88-2	CF ₃ CF ₂ OCH ₂ CF ₃	552
51.	HFE-338pcc13 (HG-01)	188690-78-0	CHF ₂ OCF ₂ CF ₂ OCHF ₂	1,500
52.	HFE-347mcc3	28523-86-6	CH ₃ OCF ₂ CF ₂ CF ₃	575
53.	HFE-347mcf2	E1730135	CF ₃ CF ₂ OCH ₂ CHF ₂	374

**Table B
Global Warming Potentials (GWP)**

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
54.	HFE-347pcf2	406-78-0	CHF ₂ CF ₂ OCH ₂ CF ₃	580
55.	HFE-356mec3	382-34-3	CH ₃ OCF ₂ CHF ₂ CF ₃	101
56.	HFE-356pec3	160620-20-2	CH ₃ OCF ₂ CF ₂ CHF ₂	110
57.	HFE-356pcf2	E1730137	CHF ₂ CH ₂ OCF ₂ CHF ₂	265
58.	HFE-356pcf3	35042-99-0	CHF ₂ OCH ₂ CF ₂ CHF ₂	502
59.	HFE-365mcf3	378-16-5	CF ₃ CF ₂ CH ₂ OCH ₃	11
60.	HFE-374pc2	512-51-6	CH ₃ CH ₂ OCF ₂ CHF ₂	557
61.	HFE-449sl (HFE-7100)	163702-07-6	C ₄ F ₉ OCH ₃	297
	Chemical blend	163702-08-7	(CF ₃) ₂ CF ₂ OCF ₂ OCH ₃	
62.	HFE-569sf2 (HFE-7200)	163702-05-4	C ₄ F ₉ OC ₂ H ₅	59
	Chemical blend	163702-06-5	(CF ₃) ₂ CF ₂ OCF ₂ OC ₂ H ₅	
63.	Sevoflurane	28523-86-6	CH ₂ FOCH(CF ₃) ₂	345
64.	HFE-356mm1	13171-18-1	(CF ₃) ₂ CHOCH ₃	27
65.	HFE-338mmz1	26103-08-2	CHF ₂ OCH(CF ₃) ₂	380
66.	(Octafluorotetramethylene) hydroxymethyl group	NA	X-(CF ₂) ₄ CH(OH)-X	73
67.	HFE-347mmy1	22052-84-2	CH ₃ OCF(CF ₃) ₂	343
68.	Bis (trifluoromethyl)-methanol	920-66-1	(CF ₃) ₂ CHOH	195
69.	2,2,3,3,3-pentafluoropropanol	422-05-9	CF ₃ CF ₂ CH ₂ OH	42
70.	PFPME	NA	CF ₃ OCF(CF ₃)CF ₂ OCF ₂ OCF ₃	10,300

¹ The Chemical Abstract Service or CAS numbers refer to the unique chemical abstracts service registry number assigned to a specific chemical, isomer or mixture of chemicals or isomers and recorded in the CAS chemical registry system by the Chemical Abstracts Service, PO Box 3012, Columbus OH 42310, phone: 1-614-447-3600.

Note: The GWPs in Table B are based upon the GWPs codified by the EPA at 40 CFR part 98, Subpart A, Table A-1, as of October 22, 2010.

SECTION 5. NR 407.02 (4) (b) (intro.) is amended to read:

NR 407.02 (4) (b) (intro.) A stationary source that directly emits, or has the potential to emit, 100 tpy or more of any air contaminant subject to regulation under the Act other than particulate matter emissions. For particulate matter emissions, a stationary source is a major source if it has emits, or has the potential to emit, 100 tpy of PM₁₀ emissions. The fugitive emissions of a stationary source may not be considered in determining whether it is a major source for the purposes of this definition, unless the source belongs to one of the following categories of stationary sources:

SECTION 6. NR 407.02 (8m) is created to read:

NR 407.02(8m) "Subject to regulation under the Act" has the meaning given in s. NR 405.02 (28m).

SECTION 7. A column heading in Table 3 of NR 407.05 is amended, a new table entry added in alphabetical order, and footnotes added to read:

NR 407.05 (5) Table 3

Air Contaminant Name	Sources of Regulation (See Footnotes Below)	Chemical Abstract Service Number ⁷	Inclusion Level (lbs/yr <u>unless otherwise noted</u>)
Greenhouse gases	10	*	10,000 tpy on a carbon dioxide equivalent basis ⁹

⁹ Emissions of GHG on a carbon dioxide equivalent basis shall be determined according to s. NR 405.07 (9) (b).

¹⁰ Federal greenhouse gases listed under 40 CFR Part 70.

SECTION 8. NR 407.075 is created to read:

NR 407.075 **Greenhouse gases.** Emissions of greenhouse gases at a stationary source shall only be subject to regulation under the Act if, on or after July 1, 2011, the source emits or has the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis. For purposes of this section, emissions of GHG on a carbon dioxide equivalent basis shall be determined according to s. NR 405.07 (9) (b).

SECTION 9. STATEMENT OF EMERGENCY. The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public welfare. Preservation of the public welfare necessitates putting the forgoing rules into effect prior to the time that it would take if the Department complied with normal procedures.

On April 1, 2010, the U.S. EPA promulgated the first emission standard for gases contributing to climate change, i.e., greenhouse gases or GHG, which will become effective on January 2, 2011. While these standards target automobile emissions, under the Clean Air Act, this action will unintentionally

subject stationary sources across the country to complex prevention of significant deterioration (PSD) and Title V permitting and emission control requirements. U.S. EPA attempted to mitigate this unintended effect by promulgating additional rules, which became effective on June 3, 2010, limiting applicability of the permitting requirements. However, Wisconsin sources will not be affected by the new U.S. EPA rules since existing state statute and administrative code do not contain the same applicability limiting provisions. State rules consistent with those at the federal level must be in effect on January 2, 2011 in order to provide the relief U.S. EPA intended for Wisconsin sources. Without these proposed emergency rules, many sources, including municipal landfills, hospitals, asphalt plants, wastewater treatment plants, small wood fired boilers and agricultural digesters, will be considered major emissions sources of GHG, and therefore subject to the permit and emission control requirements for GHG. These permit and control requirements were never intended or designed to address the type or size of sources that could now be affected. Without the proposed changes, the existing rules would have the potential to overwhelm DNR permitting staff, divert resources away from significant environmental issues, and delay issuance of construction permits for critical projects for expanding businesses.

Therefore, the Department finds that the proposed emergency rules are necessary and appropriate for the preservation of the public welfare.

SECTION 10. EFFECTIVE DATE. This rule shall take effect on the day of publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.

SECTION 11. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin
Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **amend** 407.02 (4) (b) (intro.), and Table 3 in 407.05 (5) and to **create** NR 400.02 (74m), 400.03 (3) (om), and (4) (go) and (ki), 405.02 (28m), 405.07 (9), 407.02 (8m) and 407.075 relating to major source permitting thresholds for sources of greenhouse gas emissions and affecting small business.

AM-17-10

Analysis Prepared by the Department of Natural Resources

1. Statute interpreted: Sections 227.11(2)(a), 227.14(1m)(b), 285.11(1) and (16), and 285.60, Stats. The State Implementation Plan developed under s. 285.11(6), Stats., is revised.

2. Statutory authority: Sections 227.11 (2) (a), 227.14 (1m) (b), 285.11 (1) and (16), Stats.

3. Explanation of agency authority: Section 227.11(2)(a), Stats., gives state agencies general rulemaking authority. Section 227.14(1m)(b), Stats., allows the Department to use the format of federal regulations in preparing a proposed rule if it determines that all or part of a state environmental regulatory program is to be administered according to standards, requirements or methods which are similar to standards, requirements or methods specified for all or part of a federal environmental program. Section 285.11(1), Stats., gives the Department authority to promulgate rules consistent with ch. 285, Stats. Section 285.11(16), Stats., requires the Department to promulgate rules that specify the amounts of emissions that result in a stationary source being classified as a major source. This section requires the rules to be consistent with but no more restrictive than the federal Clean Air Act.

4. Related statute or rule: None

5. Plain language analysis: On April 1, 2010, US EPA promulgated the first standard for regulating motor vehicle gases contributing to climate change, i.e., greenhouse gases or GHG. Because of the way the Clean Air Act (CAA) is structured, once GHG emissions from motor vehicles are subject to regulation, stationary sources become regulated for these gases. Without further action by EPA, this standard has the unintended affect of subjecting literally tens of thousands of sources across the country to some of the most complex air permit and emission control regulations. In order to mitigate this unintended effect, EPA promulgated on June 3, 2010 (75 FR 31514), an additional "tailoring" rule that limits the number of sources subject to the permit and emission control regulations.

Under current state statutes and administrative code, Wisconsin sources will become subject to permit and emission control requirements on January 2, 2010. However, Wisconsin sources will not benefit from the tailoring rule limiting applicability under air permit and emission control regulations until revisions can be made to Wisconsin administrative code. This order proposes to revise the administrative code to make it consistent with the new federal rule.

Specifically, this proposal will define the greenhouse gases subject to regulation, establish greenhouse gas emission thresholds, that if exceeded, will trigger permitting and emission control requirements, and establish global warming potential factors which are used to calculate individual greenhouse gas emissions on an equivalent and comparable basis.

6. Summary of, and comparison with, existing or proposed federal regulation:

U.S. EPA promulgated rules in 40 CFR parts 51 and 70 as revised on June 3, 2010 (75 FR 31514) to relieve overwhelming permitting burdens that would, in the absence of these rule, fall on permitting authorities and sources. They accomplished this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD and Title V programs of the CAA. In particular, EPA established with this rulemaking a phase-in approach for PSD and Title V applicability, and established the first two steps of the phase-in for the largest emitters of GHG.

Under these federal rules, the first step, which will begin on January 2, 2011, PSD or Title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or Title V anyway due to their non-GHG pollutants. Therefore, EPA will not require source owners or operators to evaluate whether they are subject to PSD or Title V requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG emissions by at least 75,000 tpy carbon dioxide equivalent emissions, but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the Title V program, only owners or operators of existing sources with, or new sources obtaining, Title V permits for non-GHG pollutants will be required to address GHG during this first step.

The second step of the federal rules, beginning on July 1, 2011, will phase in additional large sources of GHG emissions. New sources as well as existing sources not already subject to Title V that emit, or have the potential to emit, at least 100,000 tpy carbon dioxide equivalent emissions will become subject to the PSD and Title V requirements. In addition, sources that emit or have the potential to emit at least 100,000 tpy carbon dioxide equivalent emissions and that undertake a modification that increases net emissions of GHG by at least 75,000 tpy carbon dioxide equivalent emissions will also be subject to PSD requirements.

An important provision of these federal rules is that PSD and Title V permitting is only triggered when both the appropriate traditional mass-based applicability threshold, i.e., 100 tpy or 250 tpy, and the GHG carbon dioxide equivalent emission threshold are exceeded.

U.S. EPA also makes certain commitments to conduct studies related to potential regulatory burdens which could result from lowering the applicability threshold from what is contained in the current rule. Except for these federal commitments, the rules proposed here are consistent with the federal rules.

7. Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan, and Minnesota): The states of Illinois and Minnesota are US EPA delegated states so they do not need to amend their state rules to implement the provision of the federal tailoring rule. Michigan and Iowa are SIP approved states like Wisconsin, so they will need to implement rules similar to what are being proposed here in order to modify their permit program and implement the provisions of the federal rule.

8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen: The proposed rule is based on the federal rule changes. Information on the federal rule changes can be obtained from federal registers published on October 27, 2009 (74 FR 55292), October 30, 2009 (74 FR 56260), and June 3, 2010 (75 FR 31514).

9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact report: The Department did not conduct an independent analysis of the effect on small business, but is relying on the analysis performed by the US EPA. This analysis can be found in US EPA's rule docket for Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule [EPA-HQ-OAR-2009-0517; FRL-8966-7], October 27, 2009 (74 FR 55292).

10. Effect on small business: This proposal will prevent unintended impacts to small businesses resulting from promulgation by U.S. EPA of emission standards for GHG, by limiting the number that may become subject to the Title V and PSD permitting programs.

11. Agency contact person: Andrew Stewart, 608-266-6876, andrew.stewart@wisconsin.gov

12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, fax, or email to:
Andrew M. Stewart
Department of Natural Resources
Bureau of Air Management

PO Box 7921
Madison WI 53707
Fax: (608) 267-0560

Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

Hearing dates and the comment submission deadline are to be determined.

SECTION 1. NR 400.02 (74m) is created to read:

NR 400.02 (74m) "Greenhouse gases" or "GHG" means an air pollutant that is the aggregate of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

SECTION 2. NR 400.03(3) (om) and (4) (go) and (ki) are created to read:

NR 400.03 (3) (om) "SF₆" – sulfur hexafluoride

(4) (go) "GHG" – greenhouse gases

(ki) "PFC" – perfluorocarbon

SECTION 3. NR 405.02 (28m) is created to read:

NR 405.02 (28m) "Subject to regulation under the Act" means, for any air contaminant, that the contaminant is subject to either a provision of the Act, or a nationally applicable regulation codified by the administrator in title 40, Chapter I, subchapter C of the CFR, that requires actual control of the quantity of air emissions of the contaminant, and that the control requirement has taken effect and is operative to control, limit, or restrict the quantity of emissions of the contaminant released from the regulated activity.

SECTION 4. NR 405.07 (9) is created to read:

NR 405.07 (9) (a) Emissions of greenhouse gases at a stationary source shall only be subject to regulation under the Act as follows:

1. Beginning January 2, 2011, if the stationary source is any of the following:

a. A new major stationary source for a regulated NSR contaminant other than GHG, which will emit or will have the potential to emit 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

b. An existing major stationary source for a regulated NSR contaminant other than GHG, which will have an emissions increase of a regulated NSR contaminant other than GHG, and an emissions increase of 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

2. Beginning July 1, 2011, in addition to the provisions in par. (a), if the stationary source is any of the following:

a. A new stationary source that will emit or have the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis.

b. An existing stationary source that emits or has the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis, and the source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy or more of GHG on a carbon dioxide equivalent basis.

Note: The Department intends to regulate GHG consistent with the 40 CFR 51.166 (June 3, 2010). In the event of litigation or congressional action which impacts the federal regulations, the Department will commence rulemaking to remain consistent with the resulting federal regulations.

(b) For purposes of this subsection, emissions of GHG on a carbon dioxide equivalent basis shall be determined by multiplying the mass amount of emissions, in tons per year, for each of the constituent gases in the pollutant GHG by the associated global warming potential for the gas in Table B, and then summing the products obtained.

Table B
Global Warming Potentials (GWP)

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
1.	Carbon dioxide	124-38-9	CO ₂	1
2.	Methane	74-82-8	CH ₄	21
3.	Nitrous oxide	10024-97-2	N ₂ O	310
4.	HFC-23	75-46-7	CHF ₃	11,700
5.	HFC-32	75-10-5	CH ₂ F ₂	650
6.	HFC-41	593-53-3	CH ₃ F	150

Table B
Global Warming Potentials (GWP)

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
7.	HFC-125	354-33-6	C ₂ HF ₅	2,800
8.	HFC-134	359-35-3	C ₂ H ₂ F ₄	1,000
9.	HFC-134a	811-97-2	CH ₂ FCF ₃	1,300
10.	HFC-143	430-66-0	C ₂ H ₃ F ₃	300
11.	HFC-143a	420-46-2	C ₂ H ₃ F ₃	3,800
12.	HFC-152	624-72-6	CH ₂ FCH ₂ F	53
13.	HFC-152a	75-37-6	CH ₃ CHF ₂	140
14.	HFC-161	353-36-6	CH ₃ CH ₂ F	12
15.	HFC-227ea	431-89-0	C ₃ HF ₇	2,900
16.	HFC-236cb	677-56-5	CH ₂ FCF ₂ CF ₃	1,340
17.	HFC-236ea	431-63-0	CHF ₂ CHFCF ₃	1,370
18.	HFC-236fa	690-39-1	C ₃ H ₂ F ₆	6,300
19.	HFC-245ca	679-86-7	C ₃ H ₃ F ₅	560
20.	HFC-245fa	460-73-1	CHF ₂ CH ₂ CF ₃	1,030
21.	HFC-365mfc	406-58-6	CH ₃ CF ₂ CH ₂ CF ₃	794
22.	HFC-43-10mcc	138495-42-8	CF ₃ CFHCFHCF ₂ CF ₃	1,300
23.	Sulfur hexafluoride	2551-62-4	SF ₆	23,900
24.	Trifluoromethyl sulphur pentafluoride	373-80-8	SF ₅ CF ₃	17,700
25.	Nitrogen trifluoride	7783-54-2	NF ₃	17,200
26.	PFC-14 (Perfluoromethane)	75-73-0	CF ₄	6,500
27.	PFC-116 (Perfluoroethane)	76-16-4	C ₂ F ₆	9,200
28.	PFC-218 (Perfluoropropane)	76-19-7	C ₃ F ₈	7,000
29.	Perfluorocyclopropane	931-91-9	C-C ₃ F ₆	17,340
30.	PFC-3-1-10 (Perfluorobutane)	355-25-9	C ₄ F ₁₀	7,000
31.	Perfluorocyclobutane	115-25-3	C-C ₄ F ₈	8,700
32.	PFC-4-1-12 (Perfluoropentane)	678-26-2	C ₅ F ₁₂	7,500
33.	PFC-5-1-14 (Perfluorohexane)	355-42-0	C ₆ F ₁₄	7,400
34.	PFC-9-1-18	306-94-5	C ₁₀ F ₁₈	7,500
35.	HCFE-235da2 (Isoflurane)	26675-46-7	CHF ₂ OCHClCF ₃	350
36.	HFE-43-10pccc (H-Galden 1040x)	E1730133	CHF ₂ OCF ₂ OC ₂ F ₄ OCHF ₂	1,870
37.	HFE-125	3822-68-2	CHF ₂ OCF ₃	14,900
38.	HFE-134	1691-17-4	CHF ₂ OCHF ₂	6,320
39.	HFE-143a	421-14-7	CH ₃ OCF ₃	756
40.	HFE-227ea	2356-62-9	CF ₃ CHFOCF ₃	1,540
41.	HFE-236ca12 (HG-10)	78522-47-1	CHF ₂ OCF ₂ OCHF ₂	2,800
42.	HFE-236ea2 (Desflurane)	57041-67-5	CHF ₂ OCHFCF ₃	989
43.	HFE-236fa	20193-67-3	CF ₃ CH ₂ OCF ₃	487
44.	HFE-245cb2	22410-44-2	CH ₃ OCF ₂ CF ₃	708
45.	HFE-245fa1	84011-15-4	CHF ₂ CH ₂ OCF ₃	286
46.	HFE-245fa2	1885-48-9	CHF ₂ OCH ₂ CF ₃	659
47.	HFE-254cb2	425-88-7	CH ₃ OCF ₂ CHF ₂	359
48.	HFE-263fb2	460-43-5	CF ₃ CH ₂ OCH ₃	11
49.	HFE-329mcc2	67490-36-2	CF ₃ CF ₂ OCF ₂ CHF ₂	919

Table B
Global Warming Potentials (GWP)

	Greenhouse Gas	Chemical Abstract Service Number ¹	Chemical Formula	GWP
	(a)	(b)	(c)	(d)
50.	HFE-338mcf2	156053-88-2	CF ₃ CF ₂ OCH ₂ CF ₃	552
51.	HFE-338pcc13 (HG-01)	188690-78-0	CHF ₂ OCF ₂ CF ₂ OCHF ₂	1,500
52.	HFE-347mcc3	28523-86-6	CH ₃ OCF ₂ CF ₂ CF ₃	575
53.	HFE-347mcf2	E1730135	CF ₃ CF ₂ OCH ₂ CHF ₂	374
54.	HFE-347pcf2	406-78-0	CHF ₂ CF ₂ OCH ₂ CF ₃	580
55.	HFE-356mec3	382-34-3	CH ₃ OCF ₂ CHF ₂ CF ₃	101
56.	HFE-356pcc3	160620-20-2	CH ₃ OCF ₂ CF ₂ CHF ₂	110
57.	HFE-356pcf2	E1730137	CHF ₂ CH ₂ OCF ₂ CHF ₂	265
58.	HFE-356pcf3	35042-99-0	CHF ₂ OCH ₂ CF ₂ CHF ₂	502
59.	HFE-365mcf3	378-16-5	CF ₃ CF ₂ CH ₂ OCH ₃	11
60.	HFE-374pc2	512-51-6	CH ₃ CH ₂ OCF ₂ CHF ₂	557
61.	HFE-449sl (HFE-7100)	163702-07-6	C ₄ F ₉ OCH ₃	297
	Chemical blend	163702-08-7	(CF ₃) ₂ CF ₂ OCF ₂ OCH ₃	
62.	HFE-569sf2 (HFE-7200)	163702-05-4	C ₄ F ₉ OC ₂ H ₅	59
	Chemical blend	163702-06-5	(CF ₃) ₂ CF ₂ OC ₂ H ₅	
63.	Sevoflurane	28523-86-6	CH ₂ FOCH(CF ₃) ₂	345
64.	HFE-356mm1	13171-18-1	(CF ₃) ₂ CHOCH ₃	27
65.	HFE-338mmz1	26103-08-2	CHF ₂ OCH(CF ₃) ₂	380
66.	(Octafluorotetramethylene) hydroxymethyl group	NA	X-(CF ₂) ₄ CH(OH)-X	73
67.	HFE-347mmyl	22052-84-2	CH ₃ OCF(CF ₃) ₂	343
68.	Bis (trifluoromethyl)-methanol	920-66-1	(CF ₃) ₂ CHOH	195
69.	2,2,3,3,3-pentafluoropropanol	422-05-9	CF ₃ CF ₂ CH ₂ OH	42
70.	PFPMIE	NA	CF ₃ OCF(CF ₃)CF ₂ OCF ₂ OCF ₃	10,300

¹ The Chemical Abstract Service or CAS numbers refer to the unique chemical abstracts service registry number assigned to a specific chemical, isomer or mixture of chemicals or isomers and recorded in the CAS chemical registry system by the Chemical Abstracts Service, PO Box 3012, Columbus OH 42310, phone: 1-614-447-3600.

Note: The GWPs in Table B are based upon the GWPs codified by the EPA at 40 CFR part 98, Subpart A, Table A-1, as of October 22, 2010.

SECTION 5. NR 407.02 (4) (b) (intro.) is amended to read:

NR 407.02 (4) (b) (intro.) A stationary source that directly emits, or has the potential to emit, 100 tpy or more of any air contaminant subject to regulation under the Act other than particulate matter emissions. For particulate matter emissions, a stationary source is a major source if it has emits, or has the potential to emit, 100 tpy of PM₁₀ emissions. The fugitive emissions of a stationary source may not be considered in determining whether it is a major source for the purposes of this definition, unless the source belongs to one of the following categories of stationary sources:

SECTION 6. NR 407.02 (8m) is created to read:

NR 407.02(8m) "Subject to regulation under the Act" has the meaning given in s. NR 405.02 (28m).

SECTION 7. A column heading in Table 3 of NR 407.05 is amended, a new table entry added in alphabetical order, and footnotes added to read:

NR 407.05 (5) Table 3

Air Contaminant Name	Sources of Regulation (See Footnotes Below)	Chemical Abstract Service Number ⁷	Inclusion Level (lbs/yr <u>unless otherwise noted</u>)
Greenhouse gases	10	*	10,000 tpy on a carbon dioxide equivalent basis ⁹

⁹ Emissions of GHG on a carbon dioxide equivalent basis shall be determined according to s. NR 405.07 (9) (b).

¹⁰Federal greenhouse gases listed under 40 CFR Part 70.

SECTION 8. NR 407.075 is created to read:

NR 407.075 **Greenhouse gases.** Emissions of greenhouse gases at a stationary source shall only be subject to regulation under the Act if, on or after July 1, 2011, the source emits or has the potential to emit 100,000 tpy or more of GHG on a carbon dioxide equivalent basis. For purposes of this section, emissions of GHG on a carbon dioxide equivalent basis shall be determined according to s. NR 405.07 (9) (b).

SECTION 9. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin
Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 30 2010

REPLY TO THE ATTENTION OF:

WQ-16J

Bruce J. Baker, Administrator
Division of Water
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Baker:

On December 14, 2010, U.S. Environmental Protection Agency received a submittal by the Wisconsin Department of Natural Resources (WDNR) for new water quality standards for phosphorus for review and approval under section 303(c) of the Clean Water Act (CWA). On December 29, 2010, EPA received a certification statement of the new standards by the Wisconsin Attorney General, thereby completing the submittal package. The new standards submitted by WDNR that fall under the purview of section 303(c) are at NR 102, Water Quality Standards for Wisconsin Surface Waters (specifically at NR 102.06, Phosphorus), and NR 217.19, Variances for Stabilization Ponds and Lagoon Systems. The following text from s. NR 217.17(1)(a) also falls under the purview of section 303(c): "... the department may provide a schedule of compliance for a water quality-based phosphorus effluent limitation ..."

Consistent with section 303(c) of the CWA and federal regulations at 40 CFR 131.21, EPA is required to review and approve, or disapprove, new or revised state water quality standards. EPA has reviewed the new water quality standards identified above and the information submitted by WDNR in support of these standards and hereby approves the new and revised standards pursuant to section 303(c) of the CWA and federal regulations at 40 CFR 131.21.

WDNR's submittal includes numeric phosphorus water quality criteria for flowing waters (rivers and streams) and lakes and reservoirs, including criteria for the portion of the Great Lakes in Wisconsin. The rivers and streams criteria apply to all flowing waters except for ephemeral streams or streams identified in ch. NR 104 as limited aquatic life waters. The lakes and reservoirs criteria apply to all lakes and reservoirs except for marsh lakes and other wetlands. The Great Lakes criteria consist of criteria for the open waters of Lake Superior, the open waters of Lake Michigan, and the nearshore waters of Lake Michigan and Green Bay in Lake Michigan, which is covered by a separate narrative criterion at NR 102.06(5)(c). WDNR adopted a companion NPDES rule under s. NR 217, Subchapter III, "Water Quality Based Effluent Limits for Phosphorus," for determining when a water quality based effluent limitation (WQBEL) is needed in a WPDES permit and how such a WQBEL is to be calculated. EPA intends to review

that rule as a possible revision to Wisconsin's approved NPDES program under 40 C.F.R. § 123.62. We will contact you when we have completed that review.

Consistent with section 7 of the Endangered Species Act (ESA) and federal regulations at 50 CFR Part 402, EPA is required to consult with U.S. Fish and Wildlife Service (FWS) on any action that may affect federally-listed threatened and endangered species. To date, EPA has initiated, but not completed, consultation with FWS on the new or revised rules approved above. EPA has determined that this approval action does not violate section 7(d) of the ESA, which prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives.

Congratulations on this significant environmental accomplishment in helping to protect Wisconsin's waters. If your staff has any questions regarding this approval, please have them contact Brian Thompson of my staff at (312) 353-6066 or via email at thompson.brian@epa.gov.

Sincerely,




Tinka G. Hyde
Director, Water Division

cc: Jim Baumann, WDNR
Joel Trick, USFWS

DATE: March 30, 2010

TO: Natural Resources Board Members

FROM: Matthew J. Frank, Secretary 

SUBJECT: Scope Statement Relating to Revisions to NR 211, General Pretreatment Requirements

Description of the Objective of the Proposed Rule

NR 211 General Pretreatment Requirements will be amended to conform with federal rules found at 40 CFR 403. Changes to other rule chapters that are germane to the proposed revisions may be proposed.

Description of Relevant Existing and New Policies and Analysis of Policy Alternatives

The purpose of this action is to revise NR 211 to conform to changes in federal pretreatment standards. NR 211 establishes wastewater pretreatment standards and requirements for industrial users of publicly owned treatment works (POTWs). The proposed revisions will reflect recent modifications to the federal General Pretreatment Regulations at 40 CFR 403. This action will revise Wisconsin Administrative Code with no changes in the existing policy of maintaining consistency with federal regulations.

The majority of revisions will be based on EPA's "Pretreatment Streamlining Rule," (70 FR 60134 (10/14/2005).) and are intended to reduce the regulatory burden for EPA, WDNR, the delegated POTWs, and the regulated industries without adversely affecting environmental protection. The proposed revisions will allow for reductions in sampling and inspection frequencies at certain smaller industries with good compliance records, waive monitoring requirements for pollutants that are not present, allow for greater flexibility in sampling procedures as well as other minor miscellaneous changes.

Statutory Authority

The work is authorized by Wis. Stat. ss. 283.11 and 283.21(2), and is expected to take place during spring of 2010. This action will bring NR 211 into compliance with federal rules which have been codified in 40 CFR 403.

Estimate of Time and Other Resources Necessary to Develop the Rule

The department estimates that approximately 200 hours of existing staff time will be needed to develop these recommended rule changes.

Description of All Entities Affected by the Rule

Affected groups include: POTWs, and industries that discharge wastewater into POTWs.

Summary and Preliminary Comparison With Existing or Proposed Federal Regulations

The Department intends to make our rules consistent with federal regulations.

Name, Address, Telephone Number and E-mail Address of the Agency Contact

Charles Schuler
Bureau of Watershed Management WT/3
Wisconsin Dept. of Natural Resources
101 S. Webster Street
P.O. Box 7921
Madison, WI 53707-7921
Phone: 608-267-7631

Charles.Schuler@wisconsin.gov

cc: Todd Ambs – AD/8
Linda Haddix – LS/8
Russ Rasmussen – WT/3
Julia Riley – WT/3
Charles Schuler – WT/3

Natural Resources Board Order Number (If Applicable) <i>WT-28-10</i>	Bureau <i>Watershed Management</i>
<input checked="" type="checkbox"/> Original <input type="checkbox"/> Amended	Date <i>02/26/2010</i>

1. Subject of the administrative code action/nature of board action.
 Revisions to ch. NR 211 General Pretreatment Requirements to conform to changes in federal General Pretreatment Regulations, 40 CFR 403. Changes to other rule chapters that are germane to the proposed revisions may be proposed.

2. Description of policy issues to be resolved, include groups likely to be impacted or interested in the issue.
 NR 211 establishes wastewater pretreatment standards and requirements for industrial users of publicly owned treatment works (POTWs). The proposed revisions will reflect recent modifications to the federal General Pretreatment Regulations at 40 CFR 403. Affected groups include: POTWs, and industries that discharge wastewater into POTWs.

The majority of revisions will be based on EPA's "Pretreatment Streamlining Rule," and are intended to reduce the regulatory burden for EPA, WDNR, the delegated POTWs, and the regulated industries without adversely affecting environmental protection.

3. Does rule/board action represent a change from past policy? Yes No Explain the facts that necessitate the proposed change.

Wis. Stat. s. 283.11 requires the adoption of state wastewater codes that parallel the federal rules. This revision will bring NR 211 into compliance with federal rules that have been codified at 40 CFR 403 since the last update of NR 211.

4. Does rule/board action represent an opportunity for pollution prevention and/or waste minimization?

- Yes
- Unsure. Will consult with the Bureau's pollution prevention expert(s) and/or the Bureau of Cooperative Environmental Assistance.
- No. Adoption of federal requirements that do not include or allow for pollution prevention.
- No. Other reason (explain):

5. Who will participate in board action/rule development, and what is the anticipated time commitment?

	Name of Person Responsible	Time Before Hearing	Time After Hearing	Acknowledgement
a. Drafting bureau	Charles Schuler/Anna Short	160	20	<i>ATS</i>
b. Legal Services	Marney Hoefler	10	5	<i>MH</i>
c. Env. Analysis/Liaison (SS)	Jim Pardee	2	2	<i>JPB</i>
d. Management & Budget	Joe Polasek	2	2	<i>JP</i>
e. Other Department staff				
f. Recommended Public Participation				



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

JUL 18 2011

REPLY TO THE ATTENTION OF:

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Stepp:

I am writing with regard to the legal authority under which Wisconsin administers its National Pollutant Discharge Elimination System (NPDES) approved program. The U.S. Environmental Protection Agency has completed a review to determine if the State has the minimum legal authority needed to properly administer the program. In general, the provisions in 40 C.F.R. §§ 123.25, 123.27, and 123.30 formed the basis for the review. EPA promulgated these provisions under section 304(i) of the Clean Water Act, 33 U.S.C. § 1314(i). We conducted the review as part of EPA's Permitting for Environmental Results (PER) initiative, a national partnership with states to strengthen the NPDES program. Under PER, EPA reviews the integrity of state NPDES programs and works together with states to make improvements as needed.

EPA approved Wisconsin's NPDES base program in 1974. EPA subsequently approved the State to regulate discharges from federal facilities, administer the pretreatment program, issue general permits, and implement the biosolids program.

During the review of Wisconsin's legal authorities, EPA coordinated closely with your staff to understand the State's authority and identify and resolve questions. We thank you and your staff for the time and effort spent during this lengthy process, which included six meetings or calls with the State beginning September 2009.

The enclosure to this letter identifies concerns with or questions about the State's authority. Omissions or deviations from federal requirements are specifically identified. As noted in the enclosure, certain of the concerns remain the subject of prior disapprovals by EPA under 40 C.F.R. § 123.62. These require immediate corrective action by the State.

Recently, the Wisconsin Supreme Court issued an opinion in *Andersen v. Department of Natural Resources*, 332 Wis. 2d 41, 796 N.W. 2d 1 (2011), which, among other things, stated:

When the EPA approved the WPDES permit program, the EPA deemed Wisconsin's statutory and regulatory authority adequate to issue permits that comply with the requirements of the Clean Water Act and of 40 C.F.R. pt. 123. See 33 U.S.C. § 1342(b)(1)(A), (2)(A); § 1342(c)(1); 40 C.F.R. § 123.61(b). 40 C.F.R.

§ 123.25 sets forth the permitting requirements that a proposed permit program must meet. Significantly, both 40 C.F.R. §§ 122.44 and 122.45 are included among those permitting requirements. See 40 C.F.R. § 123.25(a)(15), (16). Thus, when the EPA approved the WPDES permit program, the EPA necessarily determined that the program complies with 40 C.F.R. §§ 122.44 and 122.45. Similarly, any substantial revisions to the WPDES permit program have been, and will continue to be, subject to the EPA's approval. See 40 C.F.R. § 123.62(a).

Id. at 72-3, 796 N.W. 2d at 17. Our comments in the enclosure indicate numerous apparent omissions and deviations between Wisconsin's current statute and regulations and federal requirements. In light of the *Andersen* case, we are requesting that the omissions and deviations in State authority be corrected quickly. Further, we emphasize that EPA has not approved those elements of the State's program that are less stringent or comprehensive than federally required.

Please provide a written response to this letter. With the reply, please provide a detailed statement from the Wisconsin Attorney General, with specific citations, demonstrating that the State has adequate authority on the topics identified in the enclosure. If the State lacks explicit authority, please provide the State's plan, including a schedule with milestones, for establishing the required authority. Please ensure that required administrative rules will be promulgated not later than one year after the reply letter, and that required statutory provisions are promulgated within no more than two years. Please provide the reply letter and any Attorney General's statement by October 15, 2011.

Again, thank you for cooperating with EPA to review Wisconsin's NPDES authority. Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Hedman', with a long horizontal flourish extending to the right.

Susan Hedman
Regional Administrator

Enclosure

Enclosure¹

1. The federal rule at 40 C.F.R. § 122.41(m) pertains to intentional diversions around a portion of a treatment facility. Wisconsin amended its analog in January 2011. The analog now appears at Wis. Admin. Code NR §§ 205.07(1)(v) and (2)(d). The Wisconsin rule appears inconsistent with the federal rule for the following reasons. First, the state regulation includes overflows from collection systems. The federal provision at 40 C.F.R. § 122.41(m)(1) limits bypass to mean the intentional diversion around any *portion of a treatment facility* (emphasis added). Second, the Wisconsin rule allows the State to authorize scheduled bypasses whereas the federal rule provides that a permittee may allow a bypass only if it is for essential maintenance and the bypass does not cause effluent limits to be exceeded. Third, the federal regulation provides that the Director may approve an anticipated bypass if the Director determines that the conditions in 40 C.F.R. §§ 122.41(m)(4)(A) - (C) are met. The state regulation does not appear to include these as necessary conditions for authorizing scheduled bypasses. Fourth, some of the reporting requirements under the state regulation appear less rigorous than those in 40 C.F.R. § 122.41(m). The federal regulation requires oral reporting of bypass within 24 hours; the state regulation allows for fax or e-mail reporting. The federal regulation requires written reporting within 5 days of the time the permittee becomes aware of the bypass; the state regulation requires reporting within 5 days of the *cessation* of the bypass. The federal regulation requires reporting of the date and time of bypass; the state regulation requires only that the date be reported. Wisconsin must modify the State rule to be consistent with federal requirements, or document the specific basis of the State's authority to implement the provisions above consistent with federal program requirements and in a manner that addresses the concerns raised above.

2. The federal rule at 40 C.F.R. § 122.45 addresses a variety of topics, such as the duration over which effluent limitations are to be expressed, pollutants in intake water, internal waste streams, and mass limitations. EPA did not find Wisconsin statutory or code provisions that implement 40 C.F.R. § 122.45. The State needs to promulgate rules to include a provision equivalent to 40 C.F.R. § 122.45, or document the specific basis on which the State has the necessary authority to implement the federal regulatory provision as described.

3. The federal rule at 40 C.F.R. §§ 124.5 (a), (c) and (d) provides a process for the modification, revocation and reissuance, or termination of permits. § 124.5(a) allows "interested persons" to request these actions in writing; § 124.5(c) provides a process for issuance of a modified permit; and § 124.5(d) provides a process for permit termination. Wisconsin's provisions at Wis. Stat. §§ 283.53(2) and 283.63, and in Wis. Admin. Code NR § 203, do not allow an "interested person" to request modification, revocation and reissuance, or termination of permits, and therefore the State's rules appear to functionally restrict the class of individuals that may seek review of a permit. Additionally, Wisconsin's regulations do not appear to provide a mechanism for the termination of a permit (further discussed below). The State must modify its statute

¹ EPA's legal authority review considered Wisconsin's governing statute and rules generally as they existed in 2005. Subsequent changes to Wisconsin's NPDES legal authorities need to be submitted to EPA for possible program revision and approval under 40 C.F.R. § 123.62. Changes that have not been submitted to and approved by EPA are not part of the state's federally approved NPDES program and cannot supersede or revise the previously approved provisions without specific EPA approval.

and/or rule to include a provision equivalent to 40 C.F.R. § 124.5, or document the specific basis on which the State has the necessary authority to implement the regulatory provision as described.

4. 40 C.F.R. part 125, Subpart I, includes requirements for cooling water intake structures at new facilities, under § 316(b) of the Clean Water Act (CWA), 33 U.S.C. §1326(b). While Wis. Stat. § 283.31 provides authority for Wisconsin to require that the location, design, construction and capacity of water intake structures reflect the best technology available for minimizing adverse environmental impacts, EPA did not find code provisions prescribing the manner in which Wisconsin will carry out its statutory authority relative to new facilities. The State must modify its rules to include a provision equivalent to 40 C.F.R. part 125, Subpart I, and the related provisions of the CWA, or document the specific basis on which the State has the necessary authority to implement the regulatory provision as described.

5. The federal rule at 40 C.F.R. § 123.30 provides that all states shall provide an opportunity for judicial review in state court of the final approval or denial of permits, without limitations based on financial interest or proximate property ownership. Wisconsin's requirement at Wis. Stat. § 227.52 that an administrative decision "adversely affect the substantial interests of any person," does not define "adversely affect" and "substantial interests." It appears that § 227.52 restricts the class of persons entitled to seek judicial review as set out in 40 C.F.R. § 123.30 and CWA § 509, 33 U.S.C. § 1369. The State must document how its provisions for judicial review provide as expansive an opportunity for judicial review as do the federal requirements, or modify its statute and/or promulgate a rule to be consistent with federal requirements.

6. Wisconsin law at Wis. Stat. § 283.17(2) provides a 10-year period of protection from the requirement to meet more stringent effluent limitations when modifications have been made to a facility to meet thermal effluent limits established on the basis of water quality standards or Wis. Stat. § 283.17(1). This provision is similar to CWA § 316(c), 33 U.S.C. § 1326(c). However, the Wisconsin provision appears broader in scope than the federal equivalent in that it includes in this exemption facilities with alternate thermal limitations (established under Wis. Stat. § 283.17(1)), not just facilities with water quality-based effluent limitations (WQBELs).

The basis for a period of protection in the Clean Water Act is a modification to a facility to meet thermal limitations. A facility to which an alternative thermal limit has been granted generally is not similarly situated to a facility which has made modifications to meet thermal effluent limits established on the basis of water quality standards. Alternative thermal limitations are premised on a demonstration that the current discharge is protective of the balanced and indigenous population (BIP) of shellfish, fish, and wildlife. See CWA § 316(a), 33 U.S.C. § 1326(a), and 40 C.F.R. part 125, Subpart H. Pursuant to this statutory provision, alternate thermal limitations require ongoing assessment, including data collection, to be able to demonstrate that a BIP is being protected. If studies indicate that a BIP is not being protected, then modifications to the facility may be required to meet protective limitations. Thus, the period of protection in CWA § 316(c) is not applicable to facilities with alternative thermal limitations. Under Wis. Stat. § 283.17(2), however, a facility with such alternative thermal limitations could claim an entitlement to a period of protection. The State must amend Wis. Stat. § 283.17(2) to eliminate

coverage of dischargers with alternate thermal limitations, or explain the basis on which the State will limit the period of protection consistent with the scope of the federal provision as described.

7. Wis. Stat § 283.19 requires the Wisconsin Department of Natural Resources (WDNR) to establish New Source Performance Standards (NSPS) by rule. EPA's review found that Wisconsin has not consistently updated Wis. Admin. Code NR §§ 221 through 299 to incorporate new or revised federal NSPS. Accordingly, please explain:

(a) Under what authority does Wisconsin incorporate federal NSPS into permits where Wisconsin omits a federal NSPS from Wis. Admin. Code NR §§ 221 through 299?

(b) Under what authority does Wisconsin incorporate the federal NSPS into permits where a NSPS in Wis. Admin. Code NR §§ 221 through 229 is less stringent than the federal NSPS?

Additionally, EPA reviewed Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13. These provisions appear to authorize the establishment of effluent limitations based on federal effluent limitations guidelines (ELG) even when Wisconsin omits a federal ELG from Wis. Admin. Code NR §§ 221 to 299, or includes in those chapters an ELG that is less stringent than the federal counterpart.

(c) To the extent that Wisconsin cites to Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13 in answering either question (7)(a) or 7(b) above, please explain how the provision operates for NSPS in light of the specificity provided in Wis. Admin. Code NR §§ 221 to 299. For issues 7 (a) – (c), if Wisconsin does not have authority to implement federal NSPS and ELG into permits, then the response to this letter must include the State's plan, with a schedule and milestones, for establishing the necessary authority.

8. The Wisconsin rule at Wis. Admin. Code NR §§ 106.145 pertains to the establishment of WQBELs for mercury discharges. By letter of February 17, 2009, EPA disapproved certain aspects of this rule. Wisconsin must amend the rule to cure the disapproval.

9. The Wisconsin rules at Wis. Admin. Code NR § 219 pertain to analytical methods.

(a) Wis. Admin. Code NR § 219 allows use of solid waste methods in the WPDES and Wisconsin pretreatment programs. EPA has not approved solid waste methods for use in the NPDES or federal pretreatment programs. Wisconsin must amend Wis. Admin. Code NR § 219 to exclude solid waste methods from use in the Wisconsin programs, except when such methods have been approved by EPA as alternative test procedures under 40 C.F.R. § 136.5.

(b) Wis. Admin. Code NR § 219 incorporates some of the methods that EPA has promulgated under 40 C.F.R. part 136. Does the chapter incorporate an EPA method only as of the date Wisconsin incorporated each such method into the chapter or are revisions to EPA methods prospectively incorporated?

(c) Has Wisconsin amended the chapter to include new EPA methods? Please see the attached list of changes to 40 C.F.R. part 136 since 2000.

The response to this letter needs to include the State's plan, with a schedule and milestone, for correcting Wis. Admin. Code NR § 219 to address the deficiency in number 9 (a) and any deficiency identified through the State's analysis of 9(b) and (c) above.

10. The federal rule at 40 C.F.R. § 132.6 identifies provisions of 40 C.F.R. part 132, Appendix F, which apply to the Great Lakes States, including Wisconsin. These specifically include: Procedure 3 (pertaining to total maximum daily loads (TMDL), wasteload allocations (WLA) in the absence of a TMDL, and preliminary WLAs for purposes of determining the need for WQBELs); Procedure 5, paragraphs D and E (pertaining to consideration of intake pollutants in determining “reasonable potential” and establishing WQBELs); and Procedure 6, paragraph D (pertaining to whole effluent toxicity). In 2000, EPA disapproved the corresponding Wisconsin rules and promulgated 40 C.F.R. § 132.6 for Wisconsin (see 65 *Federal Register* 66511 (November 6, 2000)). Wisconsin must amend the State rules as required to cure the disapproval.

11. The federal rule at 40 C.F.R. § 122.44(d) pertains to the establishment of effluent limitations based on water quality standards, including water quality criteria expressed in either a numeric or narrative fashion. Except for the general statement in Wis. Stat. § 283.31(5) (providing that the Department shall establish more stringent limitations if necessary to meet water quality standards), and the specific provisions in Wis. Admin. Code NR § 106 (pertaining to toxic and organoleptic substances) and Wis. Admin. Code NR § 217, Subchapter III (2010) (pertaining to phosphorus), EPA did not find equivalent State provisions that implement 40 C.F.R. § 122.44(d). The response to this letter must include the State’s plan, with a schedule and milestones, to establish rules (in addition to those in NR 106 and 217) that conform to 40 C.F.R. § 122.44(d).

12. Federal regulations prohibit permit issuance when permit conditions do not ensure compliance with the applicable water quality requirements of all affected states. 40 C.F.R. § 122.4(d). Wisconsin appears to lack an equivalent provision. We note that Wis. Stat. § 283.31(3) provides that a permit may issue only when discharges will meet all effluent limitations, standards of performance for new sources, effluent standards, and any more stringent limitations necessary to comply with any applicable federal law or regulation, but this provision is silent as to how the State prohibits discharges that would violate applicable water quality standards of affected states. Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment or corrective rulemaking, including a schedule and milestones for completion, or by citing existing, specific authority in a written explanation from the State’s Attorney General.

13. The federal rule at 40 C.F.R. § 122.44(k) identifies circumstances in which best management practices (BMP) must be included as conditions in permits. Except for the practices in Wis. Admin. Code NR §§ 216 and 243 pertaining to storm water and concentrated animal feeding operations, respectively, EPA did not find that Wisconsin has a statutory or rule provision requiring incorporation of BMPs into permits as provided in 40 CFR § 122.44(k). The response to this letter needs to include the State’s plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(k).

14. The federal rule at 40 C.F.R. § 122.44(l) generally provides that the interim effluent limitations, standards, and conditions in a reissued or renewed permit must be at least as stringent as the final limitations, standards, and conditions in the previous permit. EPA did not find an equivalent Wisconsin statutory or rule provision. The response to this letter needs to

include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(l).

15. The federal rule at 40 C.F.R. § 122.47 pertains to compliance schedules in permits. Except for problematic provisions noted elsewhere in this enclosure, EPA did not find an equivalent Wisconsin statutory or rule provision to implement this federal requirement. EPA reviewed Wis. Admin. Code NR § 106.117, but this rule is inconsistent with the federal requirement for several reasons, including that it: (a) only applies to WQBELs for toxic and organoleptic substances, (b) allows time to be added to a schedule so a permittee can perform work intended to justify a change in an effluent limitation, (c) does not include an "appropriateness" standard for the granting of a schedule, (d) does not require reports on progress toward meeting the final limitation, (e) does not mandate interim requirements, and (f) does not restrict schedules to statutory deadlines. In addition to establishing a compliance schedule rule with program-wide applicability, Wisconsin must amend Wis. Admin. Code NR § 106.117 to resolve the inconsistencies noted here. The response to this letter must include the State's plan for promulgating a rule equivalent to 40 C.F.R. § 122.47, and for correcting issues outlined in number 15 (a) – (f) above.

16. The federal rule at 40 C.F.R. Part 403 establishes requirements for pretreatment of nondomestic discharges to publicly-owned treatment works (POTWs). EPA revised this rule and related NPDES provisions at 40 C.F.R. §§ 122.21(j)(6)(ii), 122.44(j)(1), and 122.62(a)(7), in 2005. Some of the revisions make the federal program less stringent than it used to be. Wisconsin can choose to incorporate these revisions into its pretreatment program. However, some of the revisions make the federal program more stringent than the predecessor rule. EPA described the more stringent provisions at: http://www.epa.gov/npdes/pubs/pretreatment_streamlining_required_changes.pdf. Under 40 C.F.R. § 123.62, Wisconsin was required to adopt the more stringent provisions by November 2006, but the State has not done this. Wisconsin must adopt the more stringent provisions into its code. The response to this letter needs to include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. Part 403.

17. The Wisconsin rule at Wis. Admin. Code NR § 106.10 excludes noncontact cooling water from WQBELs, except to the extent that the limitations are for water treatment additives. Under the rule, water treatment additives do not include those compounds added at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances similar in type and amount to those typically added to a public drinking water supply. The relevant federal rule at 40 C.F.R. § 122.44(d)(1)(i) requires WQBELs for all pollutants that are or will be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria. Accordingly, Wisconsin must revise Wis. Admin. Code NR § 106.10 so it conforms to 40 C.F.R. § 122.44(d). To the extent that Wisconsin wants to consider intake pollutants when determining reasonable potential and setting WQBELs for discharges within the Great Lakes basin, the revised rules must conform to 40 C.F.R. part 132, Appendix F, Procedure 5, paragraphs D. and E. The response to this letter must include the State's plans, with a schedule and milestones, for revising Wis. Admin. Code NR § 106.10 so it conforms to 40 C.F.R. § 122.44(d).

18. The federal rule at 40 C.F.R. § 122.22 (d) requires that anyone signing a permit application or a report required under 40 C.F.R. § 122.22(a) or (b) certify that the information: is accurate and complete, was gathered by qualified persons, and was properly gathered and evaluated.²

Wisconsin's rule at Wis. Admin. Code NR § 205.07(1)(g), while including that signatories make a certification that the information they are submitting is "true, accurate, and complete," does not require inclusion of the information quality certification language set out in § 122.22 (d). The response to this letter must include the State's plans with a schedule for promulgating a rule equivalent to 40 C.F.R. § 122.22(d).

19. The federal rule at 40 C.F.R. § 122.24 pertains to concentrated aquatic animal production facilities. EPA did not find an equivalent Wisconsin statutory or code provision. The response to this letter must include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.24.

20. The federal rule at 40 C.F.R. § 122.50 provides for an adjustment to effluent limitations when part of a discharger's process wastewater is disposed into wells or POTWs or by land application. EPA did not find an equivalent Wisconsin statutory or code provision. The response to this letter must include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.50 if Wisconsin permits or wants to permit part of a discharger's process wastewater to be disposed into wells or POTWs or by land application.

21. The federal rule at 40 C.F.R. § 124.56 contains a description of elements to be included in fact sheets, including where explanations of specific permit conditions are required. Wisconsin's rules do not appear to have an equivalent provision. The response to this letter must identify the required rule provisions or include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 124.56.

22. The federal rule at 40 C.F.R. § 124.10 requires that draft permits be sent to a variety of agencies as well as the applicant. We understand that Wisconsin provides electronic access to information regarding a permit application. Wisconsin's response to this letter must explain how its practice of providing notice is equivalent to the public notice requirement found at § 124.10(c) or what steps, taken on what timetable, the State will take to cure deficiencies in the State analog.

23. Wisconsin law at Wis. Stat. § 30.2022(1) provides that "activities affecting waters of the state, as defined in s. 281.01 (18), that are carried out under the direction and supervision of the department of transportation in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, and repair are not subject to the prohibitions or permit or approval requirements specified under ... chs. 281 to 285 or 289 to 299." This provision does not conform to 40 C.F.R. §§ 123.1(g)(1) (requiring approved states to

² The certification provided at 40 C.F.R. § 122.22(d) states: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

prohibit point source discharges including, but not limited to, storm water discharges as provided in 40 C.F.R. § 122.26, unless such discharges are in compliance with a permit issued under the federally approved state program) and 123.25(a)(4) (providing that approved states shall require any person who discharges or proposes to discharge to apply for a permit).

Wis. Admin. Code § NR 216.42(5) (which appears to implement Wis. Stat. § 30.2022(1) and (2) with respect to storm water discharges from Department of Transportation (DOT) construction sites) exempts DOT project from NPDES permit coverage by providing that such discharges “shall be deemed to be in compliance with s. 283.33, Stats., and the requirements of ch. NR 216, Subchapter III, if the project from which the discharges originate is in compliance with Trans 401 Wis. Admin. Code and the liaison cooperative agreement between WDNR and DOT. . Unless EPA formally approves the division of NPDES permitting responsibility between WDNR and DOT (or any other state agency), and DOT prohibits discharges without a permit, Wisconsin cannot simply exempt DOT projects from NPDES permitting requirements. If the State has divided permitting authority for various categories of projects, the State’s response to this letter must describe the division of permitting authority. EPA must review and approve any agreement to divide permitting authority before any permits issued by DOT or any other agency of the State will be considered equivalent to NPDES permits. Such a review, if it occurs, is intended to ensure that the implementing agencies have legal authority and are acting consistent with federal program requirements including permit issuance; sufficiency of public notice, hearing, and judicial review requirements; compliance evaluation; and enforcement authority. If the State has divided permitting authority, then Wisconsin must include the State’s plan, with a schedule and milestones, for correcting the deficiency with Wis. Admin. Code § NR 216.42(5).

EPA has additional concerns if Wisconsin purports that Wis. Admin. Code § NR 216.42(5) establishes an NPDES “permit-by-rule.” For example, the authorities cited in that administrative code provision (Wis. Admin. Code § Trans 401 and the “liaison cooperative agreement”): (1) are not subject to EPA review and potential objection under 40 C.F.R. § 123.44, (2) are likely not subject to reissuance proceedings (including notice and the opportunity for the public to comment) once every five years, (3) likely do not require terms and conditions that are standard to all NPDES permits, and (4) may not be subject to judicial review as required for NPDES permits by 40 C.F.R. § 123.30. Furthermore, the text of the rule is not written to provide, consistent with Wis. Admin. Code § NR 205.08(5), that WDNR may require any point source covered by a general permit to obtain an individual permit, and that any person may petition WDNR to require an individual permit for a source covered by a general permit.

Wisconsin’s response to this letter must provide a plan with appropriate milestones for amending Wis. Stat. § 30.2022(1) and Wis. Admin. Code § NR 216.42(5) to conform to federal NPDES requirements.

24. The Wisconsin rules at Wis. Admin. Code §§ NR 216.42(4), (6), and (9) provide that certain dischargers of storm water “shall be deemed to hold a NPDES permit” or may be “determine[d] to be in compliance with permit coverage required under s. 283.33 Stats.” where such projects are regulated by the Wisconsin Department of Commerce or environmental programs other than the WPDES program. EPA has virtually identical concerns about these provisions as those

communicated in the second and third paragraphs of comment 23, above.³ In addition, we are concerned that Wis. Admin. Code § NR 216.42(6) may not conform to 40 C.F.R. 123.1(g)(1) and 123.25(a)(4). Wisconsin's response to this letter must provide a plan with appropriate milestones for amending all of these provisions to conform to federal NPDES requirements.

25. The Wisconsin rule at Wis. Admin. Code § NR 216.415(4) provides that a landowner of a construction site that is regulated by an authorized local municipal program is deemed to be covered under a department construction site storm water permit issued pursuant to Wis. Admin. Code § NR 216, Subchapter III. EPA has three concerns about this provision.

First, because the CWA does not provide for authorizing local governments to implement NPDES authorities, we are concerned about the apparent division of NPDES program responsibilities between WDNR and authorized municipalities. While the State's rule provides that authorized programs will grant permit coverage under WDNR's construction stormwater general permit, the rule also allows authorized municipalities to issue "equivalent" notice of intent forms, and appears to allow municipalities to take the lead for inspections and enforcement. While we encourage states to find supplemental resources to improve NPDES program implementation, the state's primary responsibility for NPDES program implementation, including compliance evaluation and enforcement, cannot be subdivided with local governments. We are concerned that although WDNR retains the ability to take enforcement actions for dischargers under authorized municipal programs, the provision lacks a mechanism to allow the timely notification of WDNR and consequently places the primary responsibility for compliance and enforcement with the authorized municipality, which is required to report to WDNR only an annual "estimate" of "the number of construction site inspections performed and citations issued." Wis. Admin. Code NR § 215.415(8)(b)(3). Wisconsin's response to this letter must provide an updated program description that explains, pursuant to 40 C.F.R. § 123.22, how Wisconsin's authorized municipality program is consistent with the State's retention of primary NPDES permitting and compliance evaluation responsibility under 40 C.F.R. §§ 123.25 – 123.27. If the State has not retained primary NPDES program responsibility where municipalities have become authorized, then the response to this letter must provide a plan with appropriate milestones for amending the existing state provisions to conform to federal NPDES requirements.

Second, Wis. Admin. Code § 216.415(4) appears to preclude the State from requiring a landowner who seeks coverage under the general permit to obtain, where appropriate, an individual permit under Wis. Admin. Code s. NR 205.08(5). While Wis. Admin. Code § 216.415(6) provides that an authorized municipality may deny coverage under the general permit, there appears to be no provision for an applicant to seek individual permit coverage (see 40 C.F.R. § 122.28(b)(3)).⁴ In its response to this letter, Wisconsin must provide a plan with

³ We understand that Wisconsin recently re-established a role for the Department of Commerce (now the Department of Safety and Professional Services) with respect to erosion control during the construction of commercial buildings. 2011 Wis. Act 32, § 2896 – 2905, 9135 (June 26, 2011).

⁴ We note that there is such a provision directing landowners to contact WDNR to resolve issues and seek permit coverage where projects involve wetlands, endangered species, and historic properties. Wis. Admin. Code § NR 216.415(7)(b).

appropriate milestones for amending Wis. Admin. Code § 216.415 to conform to federal NPDES requirements.

Third, while the federal rules governing general permits allow for the possibility that a state may choose not to require notice of intent forms be filed for general permit coverage for certain categories of dischargers (see 40 C.F.R. § 122.28(b)(2)(v)), this exemption does not apply to sites where five acres of land or more will be disturbed (see 40 C.F.R. § 122.28 (b)(2)(v) (made applicable to states by 40 C.F.R. § 123.25(a)(11))). Wisconsin's response to this letter must provide a plan with appropriate milestones for amending Wis. Admin. Code § NR 216.415(4) to conform to federal NPDES requirements.

26. The State's regulations at Wis. Admin. Code s. NR § 216.022 appear to create an exclusion for those Municipal Separate Stormwater System (MS4) dischargers which are in compliance with an Memorandum of Understanding with another agency of the State. Unless EPA formally approves the bifurcation of NPDES responsibilities between WDNR and other State agencies, and the other agencies prohibit discharges without a permit, WDNR cannot exclude these MS4s from NPDES permitting requirements. As stated in comment 22 above, EPA must review and approve any such arrangements regarding the divisibility of permitting authority to ensure that federal program requirements are met. The State's response to this letter must identify any MS4s that are the subject of such an arrangement, including a description of the authorities and responsibilities covered. It must also include the State's plan, with a schedule and milestones, for correcting the problem identified with Wis. Admin. Code NR NR § 216.022.

27. Wisconsin law at Wis. Stat. § 283.19(2)(b) defines the term "new source" to mean "any source, the construction of which commenced after the adoption of the standard of performance applicable to the category of sources of which it is a member." The definition appears in a section that requires WDNR to promulgate, by rule, standards of performance for classes and categories of point sources. Given its placement, the definition appears to have the effect of establishing that a source is a new source if construction commenced after WDNR promulgated applicable standards of performance by rule. The federal regulation at 40 C.F.R. § 122.2 defining "new source" defines such sources as those constructed after the adoption of standards of performance applicable to such source under CWA § 306, 33 U.S.C. § 1316. The State definition of new source, therefore, appears to provide an exemption from new source performance standards between the date of federal promulgation and the date of State adoption. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through an amendment to the statute or corrective rulemaking (and associated milestones and timetables).

28. To ensure that substances are not present in amounts that are acutely harmful to aquatic life in all surface waters, including those portions of mixing zones normally inhabitable by aquatic life, Wis. Admin. Code NR NR §§ 106.06(3)(b), 106.32(2)(b), and 106.87(1) provide that effluent limitations shall be set equal to the final acute value (FAV). The State rule as written appears to deviate from the federal requirement at 40 C.F.R. § 122.44(d)(1)(vii)(A), which provides that WQBELs must be derived from and comply with water quality standards, in the following three instances:

- (a) Acute water quality criteria will be exceeded in a stream or river when the effluent

limit is equal to the FAV and the effluent flow rate is one-half or more of the flow rate in the receiving waters;

(b) Limitations set equal to the FAV may not meet the requirements for mixing zones in Wis. Admin. Code NR § 102.05(3)(b); and

(c) A discharge equal to the FAV may cause chronic toxicity absent companion limits based on chronic water quality criteria.

In its response to this letter, Wisconsin must explain how it will address the deficiencies noted in this comment. If Wisconsin asserts that it has the authority necessary to address these deficiencies, the State must provide a written opinion from the Attorney General specifically identifying what authority the State will use to set effluent limits less than the FAV in the situations identified in comment 25 (a) – (c). If the State lacks the authority to implement 40 C.F.R. § 122.44(d)(1)(vii)(A), then Wisconsin must include the State’s plan, with a schedule and milestones, for correcting the deficiencies noted above.

29. The Wisconsin rule at Wis. Admin. Code NR § 106.13 provides, in part, that WNDR “shall, within its capabilities, ... establish an appropriate compliance schedule” where leachate from a solid waste facility affects the ability of a POTW to meet WQBELs for toxic or organoleptic substances. The text of the rule leaves ambiguous whether the State is mandating the establishment of a compliance schedule or whether establishing such a schedule is discretionary. If the rule mandates a compliance schedule, the rule must be revised to be consistent with 40 C.F.R. § 122.47. In its response to this letter, Wisconsin must explain how the rule operates and how it will address any deficiency through corrective rulemaking.

30. The Wisconsin rule at Wis. Admin. Code NR § 106.32(2)(a) provides that ammonia limits based on acute water quality criteria shall be expressed as daily maxima. For continuous discharges, 40 C.F.R. § 122.45(d) provides that effluent limits must be expressed as seven-day average and average monthly limits for POTWs,⁵ and maximum daily and average monthly limits for other discharges. Please identify in your response to this letter the basis for the State’s authority to supplement daily maximum limits with average monthly limits based on acute criteria for ammonia. If such authority does not exist, the response must include the State’s plan, with a schedule and milestones, for amending the rule so it is consistent with 40 C.F.R. § 122.45(d).

31. Wisconsin rules at Wis. Admin. Code NR §§ 106.32(2)(b)2, 106.32(3)(a)4.a, and 106.37(2) provide that Wisconsin shall or may add time to a compliance schedule so a permittee can gather data or perform demonstrations to justify a change in effluent limits. Section 502(17) of the CWA, 33 U.S.C. § 1362(17), defines a compliance schedule as an “enforceable sequence of actions or operations leading to compliance with an effluent limitation.” A demonstration or data collection that is intended to justify a change in an effluent limitation is not an action leading to compliance with a final effluent limitation under the CWA, and a schedule based solely on time needed to perform such a demonstration or collect such data is not appropriate under 40 C.F.R. § 122.47. Wisconsin must revise these provisions to make them consistent with

⁵ Section 5.2.3 of the *Technical Support Document for Water Quality-based Toxics Control*, EPA/505/2-90-001, recommends maximum daily and monthly average limits for toxic pollutants in POTW permits.

federal requirements. The response to this letter needs to include the State's plan, with a schedule and milestones, for amending these rules so they conform to 40 C.F.R. § 122.47.

32. Wis. Admin. Code NR § 106.07(8) provides that a permittee may ask for time to be added to compliance schedule to complete work with the intent of modifying limitations based on "secondary" (e.g., Tier II) values. While 40 C.F.R. Part 132, Appx. F, procedure 9, allows time to be added to a compliance schedule for this purpose within the Great Lakes basin, 40 C.F.R. § 122.47 does not allow time to be added outside the basin. The State provision must be modified to clarify that this exception applies only to dischargers within the Great Lakes basin.

33. Wisconsin rules at Wis. Admin. Code NR §§ 106.32(3)(c)(2) and 106.32(4)(d) provide that certain effluent limitations may be based on real time conditions. Does Wisconsin have current or administratively continued permits that implement either of these provisions? If so, how does the State receive and manage discharge monitoring reports and other data to evaluate compliance?

34. The Wisconsin rule at Wis. Admin. Code NR § 106.32(5)(c) provides that effluent limitations based on acute, four-day average chronic, and 30-day average chronic criteria must be expressed as daily maxima, weekly averages, and 30-day averages, respectively. For continuous dischargers, 40 C.F.R. § 122.45(d) provides that effluent limitations shall be expressed as seven-day average and average monthly limits for POTWs and maximum daily and average monthly limits for other dischargers. Under what authority can Wisconsin supplement limits that are expressed in accordance with Wis. Admin. Code NR § 106.32(5)(c) such that permits comply with the requirements of 40 C.F.R. § 122.45(d)? If such authority does not exist, the response must include the State's plan, with a schedule and milestones, for amending the rule so it conforms to 40 C.F.R. § 122.45(d).

35. The federal rule at 40 C.F.R. § 122.44(d) requires a permit issuing agency to determine whether pollutants are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an in-stream excursion beyond a water quality criterion, including a criterion for ammonia. To the extent that an NPDES authority makes a determination in the affirmative, the federal rule requires the permit to include effluent limits which are derived from and comply with water quality standards. Wis. Admin. Code NR § 106.33(2) provides that the State may not include ammonia limitations in a permit when a calculated WQBEL is greater than 20 mg/L in the summer or 40 mg/L in winter. EPA is concerned that the word "may" prevents Wisconsin from setting WQBEL despite a finding that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion. Additionally, EPA is concerned that, as written, the State's provision provides discretion to refrain from setting limits when the State finds that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion. In its response to this letter, Wisconsin must explain how it will address the concern noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the Attorney General.

36. The Wisconsin rule at Wis. Admin. Code NR § 106.34(2) provides that, except for discharges to outstanding and exceptional resource waters, "if the department determines that a water quality based ammonia effluent limitation in effect in a permit as of March 1, 2004 may be

increased in the next reissuance of that permit based solely on the application of the procedures in this subchapter, then the inclusion of the increased ammonia effluent limitation in the reissued permit is not subject to the provisions of ch. NR 207.” For discharges to waters other than outstanding and exceptional resource waters, the rule does not appear to conform to § 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.44(d). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

37. Wis. Admin. Code NR § 106.37(1) allows compliance schedules greater than five years when an ammonia variance has been granted. 40 C.F.R. § 122.47 provides that a permit may include a compliance schedule when appropriate. It is not appropriate to provide a compliance schedule to meet an effluent limitation based on a variance from water quality standards. Therefore, the State provision needs to be modified to remove the possibility that a compliance schedule can be used to meet an effluent limitation that is based on a variance from water quality standards.

38. Wis. Admin. Code NR § 106.38 contains a process through which the owner or operator of a stabilization pond or lagoon system can obtain a variance from ammonia water quality criteria. Variances require EPA approval. Therefore, the State provision should, but does not have to, explain or reference Wisconsin’s process to seek EPA approval of proposed variances.

39. Wis. Admin. Code NR § 106.83(2) contains a process through which a discharger can obtain a variance from chloride water quality criteria. Variances require EPA approval. Therefore, the State provision should, but does not have to, explain or reference Wisconsin’s process to seek EPA approval of proposed variances.

40. Wis. Admin. Code NR § 106.88(1) provides, in part, that Wisconsin may include a WQBEL for chloride in a permit if such a limitation is deemed necessary in accordance with Wis. Admin. Code NR § 106.85. Use of the word “may” in this provision appears to make the establishment of a WQBEL discretionary. 40 C.F.R. § 122.44(d) mandates WQBELs whenever the permit issuing agency determines that a pollutant is present in a discharge at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond a water quality criterion. Wisconsin must revise the rule to provide that a WQBEL shall be established when such a limit is deemed necessary.

The same rule allows Wisconsin to include a compliance schedule in a permit even when a discharger can meet a chloride WQBEL. 40 C.F.R. § 122.47 allows compliance schedules in permits when appropriate. It is not appropriate to include a compliance schedule in a permit when a discharger can meet an effluent limitation upon issuance of the permit. Therefore, the State provision must be modified to remove the possibility that a compliance schedule can be used when a discharger can meet an effluent limitation upon issuance of the permit, or the State should explain how its implementation of this provision is consistent with the described limitation set out in the federal program requirement.

41. Wis. Admin. Code NR § 106.88(4) provides that effluent limitations based on acute criteria shall be expressed as daily maxima and limitations based on chronic criteria shall be expressed

as weekly averages. For continuous dischargers, 40 C.F.R. § 122.45(d) provides that effluent limitations shall be expressed as seven-day average and average monthly limits for POTWs; and maximum daily and average monthly limits for other dischargers. Under what authority can Wisconsin supplement limits that are expressed in accordance with Wis. Admin. Code NR § 106.88(4) such that permits comply with the requirement of 40 C.F.R. § 122.45(d)? If such authority does not exist, the response to this letter must include the State's plan, with a schedule and milestones, to bring its regulation into conformity with the federal rule.

42. The Wisconsin rules at Wis. Admin. Code NR §§106.89(2) and (3), provide that where WQBELs for chloride are deemed necessary pursuant to Wis. Admin. Code NR § 106.87(1), whole effluent toxicity limitations (WET) may be held in abeyance during a source reduction period if chloride exceeds a threshold of 2,500 mg/L, or if the effluent concentration is less than 2,500 mg/L but exceeds the calculated acute WQBEL, where chloride is the sole source of acute toxicity. 40 C.F.R. § 122.44(d)(1)(v) provides, in part, that limitations on WET are not necessary when the permit-issuing agency demonstrates in the fact sheet or statement of basis for the permit, using the procedures in 40 C.F.R. § 122.44(d)(1)(ii), that chemical-specific limitations are sufficient to attain and maintain the applicable numeric and narrative water quality standards. During discussions between EPA and WDNR, Wisconsin explained that it implements Wis. Admin. Code NR §§ 106.89(2) and (3) in accordance with 40 C.F.R. § 122.44(d)(1)(v) with respect to permits that contain a chemical-specific WQBEL for chloride. Please confirm that this is the State's approach. If corrective rulemaking is required to address a deficiency in the rule, the State must explain in its response to this letter what timetable the State will follow to address the deficiency.

EPA's review suggests that Wis. Admin. Code NR §§ 106.89(2) and (3) do not conform to the CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d) (requiring a WQBEL when a discharge will cause, have a reasonable potential to cause, or contribute to an excursion beyond an applicable water quality criterion expressed in terms of toxicity) when Wisconsin holds a WET limit in abeyance because chloride exceeds a threshold but the permit does not contain a chemical-specific WQBEL for chloride. Another interpretation would be that the State could implement "held in abeyance" such that the permit includes the WET limit but compliance with the limit is not required until the end of a compliance schedule. Therefore, in response to this letter, please explain how Wisconsin implements Wis. Admin. Code NR §§ 106.89(2) and (3) when chloride exceeds one or more of the specified thresholds, and provide the State's explanation of how these provisions are consistent with the federal requirement, or provide the State's plan to correct these provisions to make them consistent with the federal requirement.

43. The Wisconsin regulation at Wis. Admin. Code NR § 106.91 allows Wisconsin to set a chloride limit, other than the WQBEL, when a POTW is not able to meet a WQBEL due to indirect discharges from a public water system treating water to meet the primary maximum contaminant levels specified in Wis. Admin. Code NR § 809. This rule does not conform to CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d). Therefore, the State provision must be modified to be consistent with the federal requirement. To the extent that Wisconsin implements the rule as a variance, such variances are subject to EPA approval.

44. (a) Wisconsin's definition of "point source" in Wis. Admin. Code NR § 205.03(27) does not

specify landfill leachate collection systems even though such systems are expressly included in the federal definition in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.2]. During discussions, WDNR explained that the agency has issued WPDES permits for discharges from landfill leachate collection systems. In response to this letter, please provide an explanation of Wisconsin's authority to issue WPDES permits for landfill leachate collection systems and provide the permit numbers for such permits and the names of the permittees.

(b) Wisconsin's definition of "pollutant" in Wis. Admin. Code NR § 205.03(28) does not specify filter backwash as a pollutant even though filter backwash is expressly enumerated as a pollutant in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.2]. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

45. The federal regulation at 40 C.F.R. § 122.5 explains the effect of a permit. It includes permit as a shield, use of a permit as an affirmative defense, prohibition of the use of a permit as a property interest, and prohibition of the use of a permit as an authorization to injure persons or property. This provision appears to have no equivalent in Wisconsin's rules. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

46. The federal regulation at 40 C.F.R. § 122.21(o) contains a provision for expedited variance procedures or time extensions for filing requests for variances. The Wisconsin rules do not contain this provision. Is this an instance where Wisconsin wishes to implement a more stringent authorized program, or is this an oversight? In its response to this letter, Wisconsin should explain that it implements a more stringent program or how it will address this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

47. Wisconsin's regulations at Wis. Admin. Code NR § 205.07(1)(g) provide that the signatory to a permit can be a "person authorized by one of those officers or officials and who has responsibility for the overall operation of the facility or activity regulated by the permit." However, there is no requirement for how the authorization will be documented or any requirements that apply. While EPA's regulations at 40 C.F.R. § 122.22 do not require a demonstration that a corporate officer has the requisite authority to sign permit documents, Wisconsin's regulations appear to allow non-corporate officers to sign such documents without providing an accountable process for such delegation of authority. In its response to this letter, Wisconsin should explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

48. Wisconsin's regulations do not include permit "termination" as a consequence of violating the permit, as provided by the federal regulations at 40 C.F.R. § 122.41(a). Wisconsin should explain whether and how its rules are consistent with this federal requirement, even if the specific terminology used in the State's rules differ. If corrective rulemaking is required to

address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this potential deficiency.

49. The federal regulations at 40 C.F.R. § 122.41(l)(1)(i) require that a permitted facility must provide notice where, because of an alteration or addition to a permitted facility, the facility may meet one of the criteria for defining a new source (40 C.F.R. § 122.29(b)). Wisconsin should explain how its provision at Wis. Admin. Code NR § 205.07(1)(q)(1) is equivalent to this federal requirement. If corrective rulemaking is required to address this potential deficiency, the State must explain in its response to this letter what timetable the State will follow.

50. Federal regulations at 40 C.F.R. § 124.5 (a) – (d) provide for termination of permits. Wisconsin regulations do not appear to provide for permit termination. Specifically, the Wisconsin regulations lack an equivalent provision for “notice of intent to terminate,” as specified in 40 C.F.R. § 124.5(d). The State must explain how its regulations are consistent with the federal requirement. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow.

51. Federal regulations at 40 C.F.R. § 124.11 provide that “any interested person . . . may request a public hearing, if no hearing has already been scheduled,” as long as the request is in writing and states the nature of the issues proposed to be raised in the hearing. The regulation at 40 C.F.R. § 124.12 provides that a hearing shall be held if the Director finds on the basis of requests that there is significant public interest in the draft permit. The Wisconsin rules governing public hearings appear to be set out in Wis. Admin. Code NR § 203.10(5) and Wis. Stat. 283.49 (public hearing), and limit hearing requests to those made by groups of five or more petitioners. Wisconsin must explain how its provisions for allowing requests for hearing are consistent with federal requirements. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this potential deficiency.

52. Wis. Admin. Code NR § 216.21(2)(b) excludes access roads and rail lines from tier 2 category industries. They are included within the federal analog at 40 C.F.R. § 122.26(b)(14). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

53. Wis. Admin. Code NR § 216.21(3)(e)(2) does not require that the facility submit its latitude and longitude when certifying ‘no exposure.’ This information is required under 40 C.F.R. § 122.26(g)(4)(ii). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

54. Wis. Admin. Code NR § 216.42(1) requires a permit for discharges from construction sites that are one or more acre in size. However, Wisconsin does not include the requirement found in 40 C.F.R. § 122.26(b)(15)(i) that disturbances less than one acre, when part of a common plan of development that disturbs more than one acre, also require permit coverage for discharges. Wisconsin’s definition of “construction site” at Wis. Admin. Code NR § 216.002(2) includes

common plan language but does not explicitly include areas less than one acre. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in by citing existing, specific authority in a written explanation from the State's Attorney General.

55. Under 40 C.F.R. § 122.26(b)(2), illicit dischargers to an MS4 are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit. . . and discharges resulting from fire fighting activities." The State definition of illicit discharges appears to exempt many more classes of activities from the definition. As a result, the requirement that MS4s identify illicit discharges pursuant to Wis. Admin. Code NR § 216.07(3), appears less comprehensive, and therefore less stringent, than the federal requirement found at 40 C.F.R. § 122.34(b)(iii), which requires MS4s to address all illicit discharges ". . . which are [] found to be a significant contributor of pollutants to the [MS4]." In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

56. Wis. Admin. Code NR § 216.07(8) provides for an annual report. The rule does not include the requirements of 40 C.F.R. § 122.34(g)(3)(v) pertaining to notice that the permittee is relying on another government entity to satisfy some of the permit obligations. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General.

57. The annual report required by Wis. Admin. Code NR § 216.07 lacks provisions equivalent to 40 C.F.R. § 122.42(c)(2) (proposed changes to the storm water management programs that are established as permit condition). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

58. Wisconsin's definition of "waters of the state" in Wis. Admin. Code NR §205.03(44) does not refer to mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, or playa lakes. These categories are included in the definition of "waters of the United States" as set out at 40 C.F.R. § 122.2, which includes these categories where "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters." Are the more specific categories in the federal definition included under the umbrella language of Wis. Admin. Code NR § 205.03(44) which states "and other surface or groundwater, natural or artificial, public or private within the state or under its jurisdiction. . . ." In its response to this letter, Wisconsin must explain how it will address the potential deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General citing existing, specific authority

59. Wisconsin appears to exempt from NPDES permitting "the disposal of solid wastes, including wet or semi-liquid wastes, at a site or operation licensed pursuant to chs. NR 500 to 536, except as required for municipal sludge in ch. NR 204 or where storm water permit coverage is required under ch. NR 216." (Wis. Admin. Code NR § 200.02.) This exclusion goes beyond those exclusions enumerated at 40 C.F.R. § 122.3. Wisconsin must explain whether the

State prohibits discharge of such materials and whether Wisconsin requires permits for such discharges when they occur. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

60. Wisconsin appears to exempt from NPDES permitting “discharges from private alcohol fuel production systems as exempted in s. 283.61, Stats.” Wis. Admin. Code NR § 200.03(3)(f), and Wis. Stat. § 283.61 provide that the exemption applies where the waste product “discharge or disposal is confined to the property of the owner.” (Wis. Stat. § 283.61(2).) Does Wisconsin allow the discharge exemption where waters of the United States are located within, or traverse through, privately-owned property? In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment, corrective rulemaking, or by citing existing, specific authority in a written explanation from the State’s Attorney General.

61. Wisconsin appears to lack rules that establish permit application requirements for the following categories of dischargers: existing manufacturing, commercial, mining, and silvicultural dischargers (40 C.F.R. § 122.21(g)); aquatic animal production facilities (40 C.F.R. § 122.21(i)); new sources and new discharges (40 C.F.R. § 122.21(k)); and facilities with cooling water intake structures (40 C.F.R. § 122.21(r)). Wisconsin must document where permit application requirements for these categories of discharges are set out. If corrective rulemaking is required to address a deficiency, the State must explain in its response to this letter what timetable the State will follow.

62. Wisconsin regulations allow a permit to be “suspended,” an action that is not included in the federal regulations (federal regulations provide for permit revocation and reissuance or permit termination (40 C.F.R. § 122.41(f)). The federal regulations contemplate “revocation and reissuance” as a separate action from termination for cause. Revocation and reissuance is generally used if transfer of a permit (because of ownership change) is not appropriate or if there has been a significant change in the nature of a discharge to warrant a new permit. The federal regulations provide that a permit may be terminated for cause, as set out in 40 C.F.R. § 122.64. It is unclear whether Wisconsin (which does not use the term “termination”) is able to exercise equivalent authorities to those permit actions identified in 40 C.F.R. § 122.41(f). The State must document the scope and basis of its authorities to cover the requirements in 40 C.F.R. § 122.41(f). If corrective rulemaking is required to address a deficiency, the State must explain in its response to this letter what timetable the State will follow.

63. Wisconsin rules appear to lack a provision which allows the State to assess multiple penalties for multiple instances of knowingly making false statements. This requirement is found in the federal regulations at 40 C.F.R. § 123.27. Wisconsin must document where it has the equivalent authority required to address cases involving multiple false statements. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the state will follow to address this deficiency.

64. Wisconsin does not appear to have a provision equivalent to 40 C.F.R. § 123.27(d), which provides for public participation in the enforcement process (including provisions to allow

intervention as of right in any civil or administrative action; or assurance that the State will provide written responses to requests to investigate and respond to citizen complaints, provide for permissive intervention, and provide public notice and comment on proposed settlements). Wisconsin must document where it has the equivalent authority required by 40 C.F.R. § 123.27(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

65. Federal regulations require the preparation of a draft permit where a state determines to proceed to permit issuance following receipt of a complete permit application. Wisconsin appears to lack provisions equivalent to 40 C.F.R. § 124.6, which provides the informational and procedural requirements for preparation of a draft permit. The State must document where it has the equivalent authority required by 40 C.F.R. § 124.6. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

66. Federal regulations require the preparation of a fact sheet for every NPDES facility or activity, with fact sheet contents and processes outlined in 40 C.F.R. §§ 124.8 and 124.56. Wisconsin appears to require fact sheets only for discharges having a volume of more than 500,000 gallons/day (and no fact sheets are required for storm water dischargers). Wisconsin must explain whether and how it has the authority to meet the requirements of 40 C.F.R. §§ 124.8 and 124.56. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

67. The Wisconsin rules for small MS4s do not contain provisions equivalent to 40 C.F.R. § 122.34(g)(1) (required storm water management program evaluation) and (2) (records must be available to the public). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

68. The CWA requires that effluent limitations will be established "in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989." 33 U.S.C. § 1311(b)(2)(F). Wisconsin law requires effluent limitations to be established "not later than 3 years after the date effluent limitations are established, but in no case before July 1, 1984 or after July 1, 1987. Wis. Stat. § 283.13(2)(f). The State must explain the basis for the discrepancy of dates given in the State provision. If a statutory amendment is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

69. Wisconsin law appears to allow the State to waive compliance with any requirement in Wis. Stat. § 283 to prevent an emergency threatening public health, safety, or welfare. This exemption is not provided for in the federal program. State staff explained that they do not believe this provision has ever been implemented. The State must explain the intent of the provision and how this exemption is consistent with the federal program. If statutory amendment is required to address this deficiency, the State must explain in its response to this letter what timetable the

State will follow to address this deficiency.

70. Wis. Admin. Code NR §106.05(8) provides that a permittee may request “alternative limits” when an analytical test method is not sufficiently sensitive, despite a determination by the State that the discharge may cause or contribute to an excursion beyond the applicable water quality standards. Any permit that included such limits would not conform to § 301(b)(1)(C) of the Clean Water Act and 40 C.F.R. § 122.44(d). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

71. Wis. Admin. Code NR § 106.06(2) contains a note expressing the State’s intent to develop a rule to phase-out mixing zones for existing dischargers of bioaccumulative chemicals of concern (BCC). Wisconsin must establish such a rule for discharges within the Great Lakes basin. Under 40 C.F.R. Part 132, such mixing zones for Great Lakes dischargers are being phased out beginning in November 2010. In its response to this letter, Wisconsin needs to provide a plan, with a schedule and milestones, for revising the rule to phase out mixing zones for BCCs.

72. When calculating effluent limitations, Wis. Admin. Code NR §§ 106.06(4)(c)(5), (8), and (10) mandate that the State allow the discharge to be diluted with a defined quantity of the receiving water. These provisions appear to allow continued violations of water quality standards when the receiving waters are impaired for a pollutant that is present in a discharge. In addition, it is unclear whether the dilution mandate is subject to, and constrained by, the mixing zone provisions in Wis. Admin. Code NR § 102.05(3). In its response to this letter, Wisconsin needs to explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State’s Attorney General. A written opinion of the State Attorney General must include an identification of the authority under which the State will set effluent limitation which are derived from and comply with water quality standards, as required by § 301(b)(1)(C) of the CWA and 40 C.F.R. § 122.44(d), the provisions of §§ 106.06(4)(c), (5), and (8) notwithstanding.

73. Wis. Admin. Code NR §§ 106.06(4)(c) 5 and 10 mandate that the State provide time for a discharger to complete mixing demonstrations. These provisions are contrary to the federal regulation at 40 C.F.R. § 122.47 to the extent that they require the time to be included in a compliance schedule in a permit. Please clarify whether the rules require the State to provide time before permit issuance or as a compliance schedule. If corrective rulemaking is required, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

74. Wis. Admin. Code NR §§ 106.08 and 106.09 mandate that the State include effluent limitations for whole effluent toxicity (WET) when it determines that such limits are necessary based on an evaluation of five or more samples. The rule includes a procedure for assessing effluent variability in this circumstance. The rule allows limitations for WET when fewer than five samples are available, but it does not include procedures that the State will use to assess variability in this circumstance. Wisconsin needs to revise the rule to mandate limitations when it determines, based on four or fewer samples, that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion above a WET criterion. In addition, the State

needs procedures for assessing effluent variability when four or fewer samples exist. See 40 C.F.R. § 122.44(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

75. Wisconsin law at Wis. Stat. § 227.10(2m) was recently amended to provide that “No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter.”⁶ The response to this letter must include a statement from the Attorney General explaining the relationship between the limitation in Wis. Stat. § 227.10(2m), the permitting and enforcement provisions set forth in Wis. Stat. § 283 and the applicable administrative code provisions, and the federal requirements for permitting and enforcement authority for state NPDES permit programs set out in 40 C.F.R. §§ 123.25 and 123.27. If corrective legislation or rulemaking is required to ensure that the State has permitting and enforcement authority commensurate with 40 C.F.R. §§ 123.25 and 123.27, the State must explain in its response to this letter the timetable and milestones the State will follow to address this potential deficiency.

⁶ 2011 Wis. Act 21, § 1r (May 23, 2011).

New Chemical Test Methods

ASTM D6508, Dissolved Inorganic Anions by Capillary Ion Electrophoresis.
QuikChem Method 10-204-00-1-X, Cyanide using MICRO DIST and flow injection analysis.
Kelada-01, Automated Methods for Total Cyanide, Acid Dissociable Cyanide, and Thiocyanate.
Method CP-86.07, Chlorinated Phenolics by In situ Acetylation and GC/MS.
EPA Method 245.7, Mercury by Cold Vapor Atomic Fluorescence Spectrometry.
Standard Methods 4500-Cl, Chlorine by Low Level Amperometry.
ASTM D6888-04 Available Cyanide by Ligand Exchange-FIA.
ASTM D 6919-03, Cations and Ammonium in by Ion Chromatography.
Standard Method 4500-Cl-D. Chloride by Potentiometry.
ASTM D512-89 Chloride by Ion Selective Electrode.
Standard Method 4500-CN-F, Cyanide by Ion Selective Electrode.
ASTM D2036-98 A, Cyanide by Ion Selective Electrode.
Standard Method 4500-S2-G, Sulfide by Ion Selective Electrode.
ASTM D4658-92, Sulfide by Ion Selective Electrode.
Standard Method 4500-NO3-D, Nitrate by Ion Selective Electrode.
Method D99-003, Free Chlorine by Color Comparison Test Strip.
Method OIA-1677, DW Available Cyanide by Ligand Exchange_FIA.
Radium-226 and 228 by Gamma Spectrometry.
EPA Method 327.0, Chlorine Dioxide by Colorimetry.
EPA Method 300.1 for Anions.
EPA Method 552.3 for Dalapon.
Determination of Radium-226 and Radium-228 in Drinking Water by Gamma-ray Spectrometry Using HPGE or Ge(Li) Detectors.

Updated Chemical Test Methods

Method 200.2, Total Recoverable Elements Digestion.
Method 200.8, Metals by Inductively Coupled Plasma-Mass Spectrometry.
Method 200.9, Metals by Stabilized Temperature Graphite Furnace Atomic Absorption.
Method 218.6, Hexavalent Chromium by Ion Chromatography.
Method 300.0, Inorganic Anions by Ion Chromatography.
Method 353.2, Nitrate and Nitrite by Colorimetry.
Revisions to Methods 180.1, 200.7, 245.1, 335.3, 350.1, 351.2, 353.2, 365.1, 375.2, 410.4, and 420.4

Updated Versions of Currently Approved Methods

This rule approved about 200 updated methods, including:
An errata sheet for the whole effluent toxicity manuals.
74 newer versions of ASTM methods.
88 newer versions of Standard Methods from the 18th, 19th and 20th editions, but not the 21st.
19 methods published in the 16th edition of Official Methods of Analysis of AOAC International, 1995

Method Modifications, Analytical Requirements, and Reporting Requirements

The final rule includes a new section to introduce greater flexibility in the use of approved methods

The section describes the circumstances in which approved methods may be modified and the requirements that analysts must meet to use these modified methods in required measurements without prior EPA

approval

Sample Collection, Preservation, and Holding Time Requirements,

The rule includes many detailed changes to Table II, including:

The general sample preservation temperature from has changed 4 C to < 6.00 C.

For metals other than boron, hexavalent chromium, and mercury, the EPA will allow sample preservation with nitric acid 24 hours prior to analysis. In other words, acid preservation in the field for metals is not required.

Clarification that the start of a holding time for a grab sample would start at the time of sample collection. The holding time for a composite sample would start at the time the last grab sample component is collected

Withdrawal of Methods

The rule deletes Methods 612 and 625 as approved procedures for 1,2-dichlorobenzene, 1,3-dichlorobenzene, and 1,4-dichlorobenzene, and withdraws approval for all oil and grease methods that use Freon-113 as an extraction solvent.. In addition, the rule withdraws 105 methods contained in the EPA's Methods for the Chemical Analysis of Water and Wastes for which approved alternatives published by voluntary consensus standards bodies (i.e., ASTM and Standard Methods) are available. The methods that are deleted are listed below:

110.1	208.2	236.1	272.1	330.3
110.2	210.1	236.2	272.2	330.4
110.3	210.2	239.1	273.1	330.5
130.2	212.3	239.2	279.1	335.1
150.1	213.1	242.1	282.1	335.2
160.1	213.2	243.1	282.2	335.3
160.2	215.1	243.2	283.1	340.1
160.3	215.2	246.1	286.1	340.2
160.5	218.1	246.2	286.2	340.3
170.1	218.2	249.1	289.1	350.2
202.1	218.3	249.2	305.1	350.2
202.2	218.4	252.1	310.1	350.3
204.1	219.1	253.1	320.1	351.3
204.2	219.2	255.1	325.1	351.4
206.2	220.1	258.1	325.2	353.1
206.3	220.2	265.1	325.3	353.3
206.4	231.1	267.1	330.1	354.1
208.1	235.1	270.2	330.2	360.1
360.2	375.3	377.1	413.1	
365.2	375.4	405.1	415.1	
370.1	376.1	410.1	425.1	
375.1	376.2	410.2		

Midwest Environmental ADVOCATES

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purposes only.)*

Kimberlee Wright
Executive Director

May 2, 2011 Via email: robert.masnado@wisconsin.gov
Amanda.boyce@wisconsin.gov

Mr. Bob Masnado/Ms. Amanda Boyce
Wisconsin Department of Natural Resources
101 S. Webster Street
Madison, WI 53703

Re: Triennial Standards Review

Dear Mr. Masnado and Ms. Boyce:

Thank you for the opportunity to provide input on the DNR's 2011 Triennial Standards Review. It is with considerable regret that Midwest Environmental Advocates submits essentially the same set of water quality concerns we asked DNR to prioritize almost 3 years ago (see attached August 22, 2008 letter to Ms. Kristi Minahan, Water Resources Management Specialist), with the exception of thermal water quality standards.¹ While we commend DNR's ultimate adoption of thermal water quality criteria in 2010, the Department's list of Topics Included in TSR 2011 from Previous TSR Cycle demonstrates that DNR sorely lacks the resources necessary to comply with its obligations under the Clean Water Act, including triennial review requirements. A brief synopsis of the water quality issues that DNR must renew its commitment to resolving follows.

Antidegradation: As outlined in our August 2008 letter to Ms. Kristi Minahan, MEA has several ongoing concerns with Wisconsin's antidegradation regulation because that regulation fails to protect water quality in Wisconsin and altogether fails to comply with Clean Water Act requirements. We recognize that DNR issued a statement of scope proposing limited revisions to NR 207 in March 2008, and later revised that statement of scope to more fully address US EPA's ongoing concerns with the rule in December 2009. But we are disappointed to see that as of July 21, 2010 DNR had "Not Begun" any further progress in bringing Wisconsin's antidegradation regulations into compliance with the Clean Water Act due to other rulemaking priorities. In

¹ And, while Wisconsin did adopt thermal regulations in 2010, the DNR significantly delayed publishing them in the Administrative Code, and has failed to issue new permits including thermal limitations as previous permits have expired, with the result that permittees are continuing to discharge harmfully hot water into the state's waterways, despite the adopted rules.

short we renew our 2008 request for DNR to commit to a clear timeline for rule revision. If DNR cannot commit to adopt Antidegradation revisions by the end of 2011, we encourage EPA to promulgate Clean Water Act compliance antidegradation implementing procedures for Wisconsin.

Removal of Rules US EPA Has Determined Fail to Meet Clean Water Act Requirements:

- NR 106.10 Exemption: DNR agrees that this rule is problematic and needs to be changed, yet it appears that as of July 21, 2010, removal of this exemption from the Wisconsin Administrative Code was "On Hold" and "not actively being worked on at this time due to other program priorities and limited resources." We believe its status is currently unchanged. EPA has previously pointed out this problem in Wisconsin's water program and has issued a letter stating it would object to WPDES permits issued in reliance on this exemption where water quality based limits are necessary. Moreover, EPA specifically disapproved use of this exemption in the Great Lakes System in November 2000.² This leaves DNR in the awkward position of having to issue NPDES permits that comply with the federal Clean Water Act only to have those permits challenged by regulated facilities as violating state requirements. Rather than defend its permitting decision DNR, in at least one instance, simply put the challenge on hold, which has the practical effect of allowing the discharger to continue to avoid Clean Water act compliance and operate pursuant to the unlawful exemption. DNR must remove this exemption from Wisconsin regulations.
- Mercury: Similarly, EPA has disapproved certain permit implementing provisions of the Mercury Rule. However, DNR has indicated that as of July 21, 2010, removal of these provisions that violate the Clean Water Act is "On Hold" and "not actively being worked on at this time due to other program priorities and limited resources." We believe that this status is currently unchanged. DNR must remove these regulations that violate the Clean Water Act from the Wisconsin Administrative Code.

Blue-Green Algae Criteria: Toxic blue-green algae blooms are wreaking havoc on Wisconsin's waters, residents, and tourism industry. Each summer, beaches must be closed to prevent recreational exposure to potentially harmful toxic blue-green algae. While DNR has suggested that the recently adopted phosphorus water quality criteria address concerns related to negative health impacts because of blue-green algae, we are concerned that the DNR's proposal to suspend the phosphorus water quality criteria for the next two years will only exacerbate the already devastating impacts of blue-green algae on human health and tourism. Until or unless DNR promulgates blue-green algae water quality criteria, we fear that neither DNR nor local governments will propose or implement clean-up plans necessary to reduce the frequency and duration of blue-green algae in a manner that ensures protection of human health.

² Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule, 65 Fed. Reg. 66,507 (2000) (to be codified at 40 C.F.R. pt. 132).

Nitrogen Criteria: US EPA noted in a letter dated April 30, 2010 that Wisconsin is expected to begin work on nitrogen criteria in the Summer/Fall of 2010 with a planned adoption date of 2012-2013. DNR has already performed a statewide analysis of the effects of excessive nitrogen concentration on Wisconsin waters. It must make nitrogen water quality standards a priority in this triennial review process and initiate the necessary rule-making procedures. We urge EPA to promulgate its recommended nitrogen criteria for Wisconsin if Wisconsin fails to do so.

Implementation of Narrative Standards: Wisconsin DNR has refused to derive water quality based effluent limits in WPDES permits to implement the state's narrative standards. EPA has made clear that the Clean Water Act requires states to determine whether there is a reasonable potential to violate **ALL** water quality standards, **both narrative and numeric**, prior to issuing a NPDES permit. Given the variety of pollutants that are lacking numeric water quality standards Wisconsin waters cannot be adequately protected without implementation of all of its narrative standards.

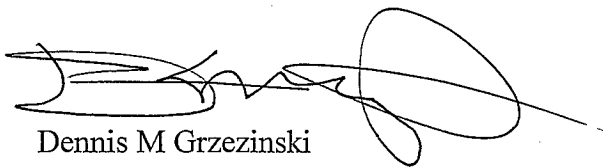
Toxics: Section 303(c)(2)(B) of the Clean Water Act requires that every state compare its toxic water quality criteria to that of EPA's, and when necessary, promulgate water quality standards for toxic substances for which the EPA has issued criteria guidance but the State has not. DNR must review and assess the need for numeric criteria for toxics for which EPA has published criteria under section 304(a) of the Clean Water Act.

NR 104 Variances: As explained more fully in our August 2008 letter, DNR may not designate a use that does not meet the fishable/swimmable goals of the Clean Water Act without first performing a scientific assessment of factors called a use attainability analysis. That analysis must show that meeting the fishable/swimmable goals is not attainable for 1 of 6 listed reasons.

Wisconsin has designated a long list of nonfishable/nonswimmable waters in NR 104 and independently during the WPDES permitting process. Every three years each state must re-examine these so-called "variance" waters to determine whether new information indicates the fishable/swimmable goals are achievable. In our 2008 letter, we also established a bare bones list of waters that must be reviewed, including waters that citizens recreate in but that are not protected for recreation. DNR must prioritize this review for the 2011 triennial review.

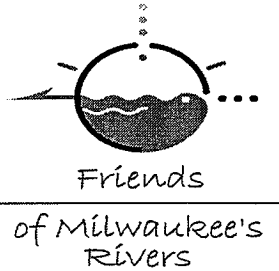
In summary, these gaps and deficiencies in the state's water program standards are serious and long-standing. If the state's water program is to achieve compliance with federal law requirements, addressing them must be made a priority now.

Very truly yours,



Dennis M Grzezinski
Senior Counsel

Betsy Lawton
Staff Counsel



August 22, 2008

Ms. Kristi Minahan
Water Resources Management Specialist
Wisconsin Department of Natural Resources
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Dear Ms. Minahan,

Thank you for the opportunity to comment on Wisconsin's Surface Water Quality Triennial Standards Review 2008-2011 – Draft Prioritized Topic List. We commend Wisconsin Department of Natural Resources' ("DNR") efforts to undertake a much overdue comprehensive review of its water quality standards program as part of its upcoming required triennial review. We very much look forward to the continued discussion that will hopefully emerge from these and other comments the DNR receives regarding these important water quality concerns.

The Clean Water Act ("CWA") requires states to hold public hearing to review applicable water quality standards once every three years, and where appropriate modify and/or adopt standards. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20(a). This so called "triennial review" is an opportunity for states to update their water quality standards to comply with changes in the CWA and its corresponding regulations, environmental changes, and technical and scientific data. States utilize this review to revise and adopt standards necessary to comply with the legal requirements of the CWA. The United States Environmental Protection Agency ("EPA") must review and approve the results of the review, supporting analysis for any use attainability analysis ("UAA"), methodologies for state specific criteria development, general policies applicable to water quality standards, and any revisions of the standards within 30 days of the final state action to adopt and certify the revised standards, or if no revisions are made as a result of the review, within 30 days of the completion of the review. 40 C.F.R. § 131.20(c). Because Wisconsin has never undertaken such a comprehensive review, EPA's involvement is imperative to assist Wisconsin with identification of standards that fail to comply with the federal CWA. Moreover, because many of Wisconsin's standards have not been reviewed or revised since adopted up to 30 years ago, many standards need updating. We

commend DNR's commitment to tackling the hefty task of reviewing and updating water quality standards, but considering the number of revisions necessary, DNR must ensure adequate resources are devoted to expeditiously reviewing and revising these much outdated regulations that often fail to ensure compliance with the federal CWA.

Clean Wisconsin, Friends of Milwaukee Rivers, Midwest Environmental Advocates, and the River Alliance of Wisconsin work to preserve the integrity of Wisconsin's many waters. These groups work closely with environmental organizations and individuals that are concerned with Wisconsin's implementation and enforcement of the CWA, have a great deal of expertise and are closely involved with each of the topics addressed below.

1. Group A - Currently in Process

Thermal and Phosphorus Criteria

We encourage DNR to adopt the proposed Thermal Water Quality Standards and Point Source Implementation Procedures and Phosphorus Water Quality Criteria without delay. Wisconsin has lacked thermal water quality criteria for over 30 years, leaving detrimental discharges of heat to Wisconsin's waters largely unregulated. In addition, every summer nutrient-fueled algae devastate Wisconsin's waters, impeding recreation, diminishing land values, and hurting Wisconsin's expansive tourism industry and economy. If DNR fails to adopt these standards by Summer 2009, we encourage EPA to promulgate these standards for Wisconsin.

2. Group B- Automatic High Priority

Antidegradation

The CWA requires each state to adopt an antidegradation policy and implementing regulations that at a minimum 1) maintain and protect the level of water quality necessary to protect existing uses (Tier 1); 2) maintain and protect water quality in high quality waters, unless after public participation the state determines that the lowering of water quality is both necessary and will accommodate important economic or social development in the area in which the waters are located (Tier 2); and 3) prohibit any lowering of water quality in outstanding resource waters with exceptional recreational or ecological significance (Tier 3). 40 C.F.R. § 131.12.

As currently drafted, Wisconsin's antidegradation implementation regulations, found at NR 207, Wis. Adm. Code, fail to comply with CWA requirements. Specifically, NR 207, Wis. Adm. Code:

- Exempts new or increased discharges that have the potential to lower water quality from antidegradation review, where:
 - i. Wisconsin has not established numeric water quality criteria specific to that pollutant;
 - ii. The sole permit limit for a given pollutant is a concentration limit or management practice and;

iii. Wisconsin DNR has adopted a new or revised water quality criterion.

- Fails to require full antidegradation review for new or increased discharges that consume up to 1/3 of the remaining assimilative capacity as not a “significant lowering of water quality”. *See also Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732 (S.D. W. Va. 2003).
- Fails to impose a cumulative cap on de minimis exemptions to ensure the entire assimilative capacity is not consumed on a piecemeal basis without antidegradation review. *Id.*
- Fails to require “Tier 1” antidegradation review for all lowering of water quality that threatens existing uses and fails to ensure that the existing uses and level of water quality necessary to protect the existing uses be maintained and protected.
- Is not applied to general permits.
- Does not require all reasonable alternatives to additional pollution be considered before that pollution is deemed to be necessary and permitted.
- Fails to require public participation regarding the necessity and importance of lowering water quality prior to the State’s final antidegradation determination.
- Fails to require DNR to consider important economic and social benefits in the “area in which the waters are located” such as lost recreational and tourism opportunities to the area.

DNR has acknowledged that it rarely, if ever, actually performs a tier 2 review because most facilities are permitted to discharge at a level that will consume exactly 1/3 of the remaining assimilative capacity of the receiving stream. According to DNR’s assessment NR 207 rarely, if ever, prevents either consumption of the full assimilative capacity of a receiving stream or is used to require advanced treatment technology for new or increased discharges.

Earlier this year, DNR issued a statement of scope proposing limited revisions to NR 207. According to this statement of scope DNR only proposes to “establish implementation procedures and to add or revise certain definitions to allow for application of the state antidegradation policy to municipal storm water discharges” and to “add a section to clarify when and how the public may have input into the antidegradation process.” DNR does not propose to make all revisions necessary to bring Wisconsin’s antidegradation regulations into compliance with CWA requirements.

It remains unclear whether DNR intends to remedy these deficiencies during the upcoming triennial review. While DNR has identified antidegradation review as a “high priority” for the 2008-2011 triennial review, WDNR has not clarified *what* high priority revisions it intends to review and revise. It is equally unclear whether antidegradation revisions are truly a “high priority,” or merely a reiteration of current discussions: “The Department is considering its options regarding this issue and will proceed once a decision is made and resources are available.”

Rather than pursuing, as currently suggested, a time consuming and resource intensive piecemeal approach to bringing Wisconsin's antidegradation regulations into compliance with CWA requirements, we request DNR amend the current statement of scope to include all technical changes necessary to bring Wisconsin's antidegradation implementation procedures into compliance with federal law. Given the many deficiencies in Wisconsin's current antidegradation regulations, it is easier, less time consuming, and more effective to rewrite the entire rule once. We further request that DNR commit to a clear timeline for rule revision.

Without further clarification regarding the scope of antidegradation rule revision DNR proposes for the 2008-2011 triennial review, the public and EPA are unable to provide informed comments on DNR's proposed Draft Triennial Standards Review Draft Prioritized Topic List.

3. Group E – Topics Not Currently Priority for Addressing in 2008-2011 Cycle

A. Blue-Green Algae Criteria

High concentrations of blue-green algae often limit recreation in and on Wisconsin waters, diminish waterfront property values, and negatively impact businesses situated along, or reliant upon, these waterways. Skin contact with blue-green algae toxins can cause a host of unpleasant reactions, including skin rashes, hives and itchy eyes and throat. Ingestion of blue-green algae toxins is associated with many more unpleasant and severe health problems in humans, including diarrhea, vomiting, stomach cramps, headache, fever, extreme muscle or joint pain, and seizures or convulsions. Family pets and livestock that ingest blue green algae may experience severe illness or die.

Toxic blue-green algae blooms are wreaking havoc on Wisconsin's waters, residents, and tourism industry. Each summer beaches must be closed to prevent recreational exposure to potentially harmful toxic blue-green algae. Many communities test for and respond to blue-green algae blooms. However, despite the health threats, resource management agencies often do not conduct any routine monitoring for blue-green algae or blue-green algal toxins. Until or unless DNR promulgates blue-green algae water quality criteria, we fear that neither DNR nor local government will propose or implement clean up plans necessary to reduce the frequency and duration of blue-green algae in a manner that ensures protection of human health.

We encourage DNR to prioritize development of blue-green algae criteria during this triennial standards review.

B. NR 106.10 Exemption

Wisconsin regulations at Wis. Adm. Code § NR 106.10 prohibit the imposition of water quality based effluent limits on discharges of additives, including chlorine, in non-contact cooling water if the addition is similar in amount as is typically added to a public drinking water supply. DNR agrees that this rule is problematic and needs to be changed,

but no clear timelines have been set to remedy the problem. EPA has acknowledged this problem with Wisconsin's water program and has issued a letter stating it would object to WPDES permits issued in reliance on this exemption where water quality based limits are necessary. Moreover, EPA specifically disapproved use of this exemption in the Great Lakes System in November 2000.¹ Therefore, those facilities discharging into waters of the Great Lakes Basin are required to comply with water quality based effluent limits on discharges of additives in non-contact cooling water where the discharge has a reasonable potential to cause or contribute to an exceedence of water quality standards, but discharges to waters of the Mississippi River Basin are not.

When EPA objects to DNR's use of this exemption, in violation of the CWA, DNR simply opts not to issue the proposed permit, and the facilities are left to operate under expired, often less protective, permits that rely on the same exemption to allow discharges of pollutants at levels which have the reasonable potential to cause or contribute to exceedences of water quality standards. DNR, believing it is between a rock and a hard place, expressed concern that regulated facilities will challenge a permit that fails to rely on this state law exemption, but that it cannot issue a permit which EPA will object to. The solution is simple: DNR must remove this exemption from Wisconsin law.

Finally, despite acknowledging that EPA has identified NR 106.10, Wis. Adm. Code as a problem, DNR does not propose modification or removal of this exemption in the 2008 – 2011 triennial review cycle. We request DNR prioritize removal of this exemption for the upcoming triennial review. In the alternative, we request EPA review and disapprove this rule as it applies to the Mississippi River basin.

C. NR 104 Variances

Every surface water must meet the designated uses established by the CWA, namely that the water provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation . . .," commonly referred to as the fishable/swimmable goals of the CWA. 33 USC § 101(a)(2). A state is prohibited from removing or designating a use that does not meet these fishable/swimmable goals unless the state conducts a structured scientific assessment of the factors affecting the attainment of that use, called a "use attainability analysis" ("UAA"). 40 CFR § 131.10(j) –(g). Before designating a use less stringent than the fishable/swimmable goals, DNR must demonstrate that meeting the more stringent fishable/swimmable use is not feasible because of the existence of one of the following factors:

- (1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
- (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use . . . ;

¹ Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule, 65 Fed. Reg. 66,507 (2000) (to be codified at 40 C.F.R. pt. 132).

- (3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- (4) Dams, diversions . . . preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
- (5) Physical conditions related to the natural features of the water body . . . preclude the attainment of aquatic life protection uses; or
- (6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact. 40 CFR § 131.10(g).

Moreover, the DNR cannot designate a use that is less stringent than the existing use of a water. 40 CFR § 131.10(h)(1). An “existing use” is a use that was actually attained “on or after November 28, 1975 . . .” 40 CFR § 131.3(e). Nor can the DNR remove a designated use if that use could be attained by implementing effluent limits and by implementing “cost effective and reasonable best management practices” for nonpoint sources. 40 CFR § 131.10(h)(2). A state must revise its water quality standards to reflect uses actually being attained where designated uses specify uses less than presently being attained. 40 CFR § 131.10(i).

DNR has designated so called “variance categories,” namely “limited forage fish communities” (“LFF”) and “limited aquatic life” (“LAL”). Wis. Adm. Code §§ NR 102.04(3), 104.02(2). LFF waters are limited capacity surface waters that are only capable of supporting a limited community of forage fish and aquatic life, whereas LAL waters are considered to be severely limited and only capable of supporting a limited aquatic life community. Wis. Adm. Code § NR 102.04(3)(d)-(e). Both variance categories have naturally poor water quality or habitat, and neither category is considered to meet the fishable/swimmable goals of the CWA. Wis. Adm. Code § NR 102.04(3). DNR requires all waterbodies to meet the criteria for fish and aquatic life, except those waters listed in Sections NR 104.05 – 104.10, Wis. Adm. Code.

Every three years each state must re-examine any water body segment with water quality standards that do not meet the fishable/swimmable goals and revise its standards where new information indicates that the fishable/swimmable goals are attainable. 40 CFR § 131.20(a). Procedures for identifying and reviewing water bodies should be incorporated in the State’s continuing planning process. *Id.*

In its 2008-2011 Triennial Standards Review Cycle Draft Prioritized Topics List, the DNR has classified a general review of the variances in NR 104 as “GROUP E: Topics that are not a priority for addressing in the 2008-2011 cycle.” The law is clear, DNR simply cannot disregard its CWA obligations by refusing to review and revise its water quality standards to ensure waters that attain the fishable/swimmable goals are adequately protected. It is our position that every water for which DNR has not performed a valid UAA in the past three years must be removed from the NR 104 variance lists. At a minimum DNR must remove the following waters from the NR 104 variance lists.

1. Citizens recreate in variance waters.

DNR has established bacteriological guidelines that limit the membrane filter fecal coliform in Wisconsin waters so as not to exceed 200 per 100 ml as a geometric mean based on not less than 5 samples per month, and not to exceed 400 per 100 ml in greater than 10% of samples in any single month. Wis. Adm. Code § NR 102.04(5). Section NR 104.06(2), Wis. Adm. Code contains variances from fecal coliform and dissolved oxygen standards in eleven waters in Southeast Wisconsin, meaning those waters do not meet the fishable/ swimmable goals of the CWA.

Friends of Milwaukee's Rivers has observed adults and children recreate, swim, paddle, and even fish in eight of those eleven waters, including Underwood Creek (kids fish and play in this creek); Indian Creek (kids for generations have played and fished here); Honey Creek (widely used for recreation, especially in Hart Park, City of Wauwatosa); Menomonee River below the confluence with Honey Creek (kids and adults paddle, play and fish here); Kinnickinnic River (widely used for paddling and fishing); Lincoln Creek (kids play and citizens recreate along the creek in Havenwoods State Forest); Milwaukee River (used for paddling, fishing and occasional swimming); and South Menomonee Canal and Burnham Canal (very popular fishing spot, as well as paddling).

The excess bacteria in these waters can potentially sicken individuals recreating in or on these waters and DNR should remove the fecal coliform variances applicable to these waters as a matter of public health and welfare. Moreover, the dissolved oxygen variances threaten the fish community in these waters and inhibit fishing along these waterways. Organizations party to this letter spend considerable time and resources encouraging and developing recreational resources along these southeastern Wisconsin waters and are legitimately concerned for the health and welfare of their volunteer water quality monitors, their staff and the general public if these bacteria variances continue.

Ultimately, because existing uses (i.e., fishing, paddling, wading) cannot be removed, DNR is legally obligated to remove these waters from the NR 104 variances list immediately. At a minimum, DNR must commit to review all eleven of these variance waters during this triennial review and revise standards to reflect existing and attained uses of those waters, including recreation and fishing. This is further important because DNR is not required to develop a total maximum daily load and cleanup plan for these waters unless DNR revises the water quality standards that reflect the existing and attainable uses of these waters.

2. DNR has already determined that many of the NR 104 Listed Variance Waters are attaining the fishable/swimmable goals.

Of the 217 waters designated as LFF or LAL waters in Chapter NR 104, Tables 3 – 8, 91 are classified as continuous, meaning they are “watercourses which have a natural 7-day Q flow of greater than 0.1 cfs or which exhibit characteristics of a perpetually wet environment.” Wis. Adm. Code § NR 104.02(1)(f). We recently reviewed DNR's

records for the 91 waters listed as “Continuous” in Chapter NR 104, to determine which of those waters must be designated as meeting the fishable/swimmable goals.

According to our review, DNR has reassessed 28 surface waters listed as NR 104 Variance Waters and found those waters meet the fishable/swimmable goals. See Attachment A. There is no evidence that DNR has reviewed 15 of the listed waters in over twenty years, and no files were available for another 16 of the listed waterways. See Attachments B and C. Of the remaining 32 streams, none have been assessed within the last three years.

The CWA requires DNR to review the NR 104 Variance Waters every three years. All waters listed in Chapter NR 104, Tables 3 – 8, must be reassessed. Those 28 waters that DNR has determined meet the fishable/swimmable goals must be removed from the NR 104 tables immediately and designated to reflect the uses actually attained. Furthermore, DNR must make preparations and set firm timelines for assessing those waters that have not been reviewed in the past three years. Given DNR’s many priorities, and its limited resources, we urge DNR to, at the very least, initiate a simple technical fix to address these concerns by implementing the changes that DNR already has on file (deleting from NR 104 tables the 28 waters that meet fishable/swimmable goals).

3. NR 104 Waters Associated with Wastewater Discharges

LFF and LAL use designations are intended to recognize the natural limitations of certain waterbodies and the “naturally poor water quality or habitat” of those waters. Wis. Adm. Code § NR 102.04(3). Where the fishable/swimmable goals cannot be met due to the presence of in-place pollutants, low natural streamflow, natural background conditions, and irretrievable cultural alterations, variances from water quality standards should be provided. Wis. Adm. Code §§ NR 104.01 and 104.02(2)(a). Yet it appears that several waters listed as LFF or LAL communities are directly associated with a point source discharge. For example, the West Branch of the Sugar River is listed in Section NR 104.05, Table 3 as a LFF from the Mt. Horeb STP downstream to CTH “JG.” Designation as a LFF or LAL due to the discharge from a municipal or industrial facility is unacceptable. Listing a water as having naturally poor water quality or habitat simply because it is associated with a point source discharge perpetuates the degradation of that water, despite whatever natural regeneration or improvements might occur. Also, DNR must recognize that where a NR 104 listed variance is noncontinuous, but associated with a point source discharge, the point source discharge may make that water flow continuously.

4. Wetland and Diffused Surface Waters

DNR has not provided a scientific basis or performed a UAA to support the assignment of all wetlands and diffused surface water as LAL. Wis. Adm. Code § NR 104.02(3)(b). There is no indication that these types of waters are severely limited in capacity or have naturally poor water quality or habitat. To the contrary, many wetlands are high quality wetlands that provide habitat for several aquatic life species and are capable of

supporting a balanced and diverse aquatic community. Given the importance of Wisconsin's wetlands, along with their continuing losses across the state, the DNR must take decisive action to protect these ecosystems from further harm.

EPA Region 5 has recognized this problem and has indicated its desire to see the automatic assignment of all wetlands and diffused surface waters as LAL waters eliminated and the LAL use only be designated to wetlands and diffused surface waters after a UAA is performed.

DNR must prioritize revision of Chapter NR 104 to remove the blanket designation of wetlands and diffused surface waters as LAL and perform the necessary UAA prior to individually listing these waters as "variance waters".

D. Implementation of Narrative Standards

Wisconsin DNR refuses to derive water quality based effluent limits for nutrients in WPDES permits to implement its narrative standard, and has issued guidance directing permit writers not to do so:

Until there is guidance or a rule that establishes a general or site-specific methodology for determining reasonable potential to attain narrative water quality standards as applied to nutrients, WPDES permits should not be issued with nutrient limits based on narrative water quality standards.²

The DNR does not consider development of numeric nitrogen water quality criteria a priority for the 2008 to 2011 triennial review, meaning WDNR does not expect to begin promulgation of these standards until at least 2012.

Wisconsin waters cannot be adequately protected without implementation of its important narrative standards. WDNR must prioritize this issue during the upcoming triennial review.

E. Nitrogen Surface Water Quality Criteria

We urge the DNR to develop and adopt Nitrogen Surface Water Quality Criteria in the same manner and with the same importance that the Phosphorus Water Quality Criteria was pursued. Phosphorus and nitrogen are both nutrients that promote algae growth and threaten drinking water sources in Wisconsin. DNR has already performed a statewide analysis on the effects of excessive nitrogen concentrations on Wisconsin's waters. DNR must make nitrogen water quality standards a priority in this triennial review process and initiate the necessary rule-making procedures. We urge EPA to promulgate its recommended nitrogen criteria for Wisconsin if Wisconsin fails to do so.

F. Adoption of Toxic Criteria.

² Russ Rasmussen, State of Wisconsin, *Correspondence/Memorandum: Determining Reasonable Potential for Narrative Standards*, 3, December 14, 2006.

In 1987, Congress made significant revisions to the CWA regulation of toxic pollutants. Section 303(c)(2)(B) requires States to adopt numeric criteria for all priority toxic pollutants contained in CWA § 307(a), for which EPA has issued section 304(a) criteria guidance, the discharge or presence of which could reasonably be expected to interfere with the designated uses of state waters. 33 U.S.C. § 1313(c)(2)(B). “The statutory directive was clear: all State standards triennial reviews initiated after passage of the Act [1987 amendments to CWA] must include a consideration [or reexamination] of numeric toxic criteria.”³ Given the strong likelihood that the release of any toxic substance listed by EPA under 33 U.S.C. § 1317(a), would interfere with a water’s designated use, a State must always conduct a review for any toxic pollutants for which they do not already have standards. Section 303(c)(2)(B) of the CWA requires that every state compare its toxic water quality criteria to that of EPA’s, and when necessary, promulgate water quality standards for toxic substances the EPA has issued criteria guidance but the State has not adopted.

Wisconsin’s list of toxic pollutants must correspond to EPA’s 33 U.S.C. § 1313(a) list, complete with numeric criteria for toxic pollutants in which EPA has previously set criteria. If EPA has yet to promulgate recommended numeric criteria for a toxic pollutant, then the State must “adopt criteria based on biological monitoring or assessment methods consistent with methods in 304(a)(8).” 33 U.S.C. § 303(c)(2)(B). Wisconsin must, during this triennial review period, review current water quality standards and promulgate water quality standards for toxic substances which EPA has issued criteria guidance but the state has not adopted.

4. Conclusion

Again, we would like to thank the DNR for the opportunity to comment on these important topics and are happy with DNR efforts to prioritize some of the more important surface water quality standard issues. While we appreciate the time and financial limitations that the DNR faces, we hope that all topics raised on the Draft Prioritized Topic List get their due consideration and look forward to each of these problems being addressed as triennial reviews become a priority for the Wisconsin DNR.

Sincerely,

Betsy Lawton
Staff Attorney
Midwest Environmental Advocates

Cheryl Nenn
Milwaukee Riverkeeper
Friends of Milwaukee’s Rivers

Denny Caneff
Executive Director
River Alliance of Wisconsin

Keith Reopelle
Policy Director
Clean Wisconsin

³ EPA Handbook, *supra* note 6, at History of Water Quality Standards Program p. 4.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711



October 14, 2011

Susan Hedman, Region V Administrator
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago Illinois 60604-3590

Subject: EPA's Permitting for Environmental Results (PER) Initiative

Dear Dr. Hedman:

On July 18, 2011, the Department of Natural Resources ("Department") received a letter from your office identifying seventy five questions or concerns with Wisconsin's authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program. The purpose of this letter is to respond to your letter and identify the state's plan for establishing the requisite authority.

I would first like to state that Wisconsin has always been at the forefront in administering the NPDES permit program, and was one of the first 8 states to receive approval for its program. Despite the number of comments from your agency, we believe Wisconsin continues to have one of the top programs in the nation with regard to water quality protection and we intend to maintain a top quality program. Some of the issues raised in your letter are minor technical discrepancies which will have little bearing on administration of the program and no impact on water resources in the state. For some of the other issues, the Department has already initiated the rule making process and will continue to work on those issues.

In response to your concerns and questions, the Department plans to implement the following broad-based approach:

Rulemaking: For some of the issues raised, the Department has already initiated the rulemaking process. Specifically, the Department has already started rules for issue 1 (sanitary sewer overflows), issue 8 (mercury reasonable potential), issue 16 (pretreatment), issue 17 (noncontact cooling water exemption), and issue 71 (mixing zone phase out in Great Lakes). For other issues, the Department may request permission to initiate rule changes. The Department may also seek legislative changes for some of these concerns. Please see the attached chart for details of the Department's proposed actions (see *Attachment A*).

Due to recent statutory changes governing Wisconsin's rulemaking process, it is unlikely that rule changes can be completed in less than two years. The Department will initiate rulemaking as soon as possible and work diligently to move the rules forward, but we estimate that rules will now routinely take two to four years to become law, given the additional steps added to the rulemaking process. The initiation of rule making requires approval from both the Governor's office and Natural Resources Board as well as preparation of an economic impact analysis.

Statutory Changes: For some of the issues raised, the Department will submit a request for statutory changes. The Department believes it has adequate statutory authority for many of these issues and may also initiate rule changes or seek a statement from the Attorney General's office. Nevertheless, the Department is seeking some legislative changes for clarification purposes and as a direct approach for less complex issues.

Obviously, the Department cannot guarantee that these requested statutory changes will be enacted. The legislature has a number of competing policy issues to address each session, and we anticipate that statutory changes will take at least a year to be completed. If the legislature does not enact the requested changes, the Department may either proceed with rule making based on existing statutory authority or will forward the issue to the Attorney General's office for a statement on the adequacy of existing authority.

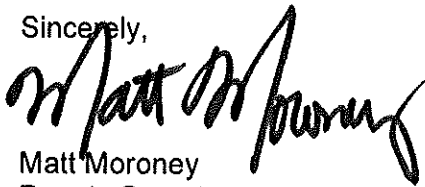
Attorney General's Certification Statement: The Department has requested a statement from the Attorney General's office regarding the Department's existing authority for some of the issues. The request is attached to this letter (see *Attachment B*). The Department has requested a statement by December 15, 2011. The Department may choose to add issues to this request if necessary, as detailed above. If we request additional statements from the Attorney General's office, we will notify you in writing.

Technical Supporting Information and Issues Requiring Further Discussion: For some of the issues, EPA simply requested information from the Department. The Department has provided some technical supporting information in *Attachment C*. For other issues, the Department believes further discussions are required, and Department staff need clarification from EPA staff on those issues (see *Attachments A and C*). This is especially true for storm water program issues because there has been very little discussion on the storm water program during meetings with EPA over the past two years.

Addendum to Memorandum of Agreement (MOA): The Department believes that several issues may be resolved through an addendum to the MOA between EPA Region V and the Department to administer the NPDES program. Potential issues for an addendum are specified in *Attachment C*, along with technical supporting information. If you believe the listed issues are appropriate for an addendum, Department staff would like to work with your staff to draft language for the addendum.

The Department looks forward to continuing to work through all of the issues with your staff in an expedient manner.

Sincerely,



Matt Moroney
Deputy Secretary

Attachments



RECEIVED
DEC 21 2011

December 20, 2011

James N. Saul
McGillivray Westerberg & Bender, LLC
211 S. Paterson St., Suite 320
Madison, WI 53703

Re: Petition for Review and Request for a Contested Case Hearing by the Midwest Environmental Defense Center, et al., under s. 283.63, Wis. Stat. (General WPDES Permits for Industrial Stormwater)

Dear Attorney Saul:

The purpose of this letter is to deny Petitioners' request for a contested case hearing pursuant to s. 283.63, Wis. Stat., challenging the terms and conditions of the Wisconsin Pollution Discharge Elimination System ("WPDES") General Permits to Discharge Storm Water Associated with Industrial Activity, (Industrial Storm Water Permit No. WI-S067849-3 and WI-S067857-3.

Section 283.63, Wis. Stat. sets out a specialized review procedure. Under s. 283.63(1), Wis. Stat., five or more persons may secure a review by the Department of "the reasonableness of or necessity for any term or condition of any issued....permit."

The statute is narrow in the scope of review that it affords. Only the reasonableness of or the necessity for a term or condition contained in the general permit may be reviewed. The statute does not allow for a review of administrative rules or to collaterally attack the statutory scheme under which the permits are authorized.

I. Petitioners have raised seven issues in which they seek review of the **Tier I Industrial Storm Water Permit No. WI-S067849-3** as follows:

Issue 1: Petitioners challenge the reasonableness of and necessity of Sections 2.1 and 2.2 on the grounds that those sections collectively authorize discharges of pollutants associated with industrial activity from certain facilities that are subject to nationally applicable, EPA promulgated effluent limitation guidelines ("ELGs") without including those ELGs in the permit, in violation of ss. 283.11(2) and 283.31(3), Wis. Stat.

Issue 2: The reasonableness or necessity of section 2.2, which authorizes discharges of pollutants associated with industrial activity without imposing effluent limitations that reflect the best available technology (BAT) economically achievable and the best conventional pollutant control technology (BCT).

Issue 3: Sections 2.2 and 2.5.2, which collectively allow the discharge of stormwater that "will cause, or have the reasonable potential to cause or contribute to an excursion above" applicable water quality standards, which petitioners allege to be in violation of s. 283.31(3)(d), Wis. Stat..

Issue 4: Sections 2.2 and 2.7, which collectively authorize the discharge of pollutants that are causing or contributing to impairment of surface waters, which the petition claims to be in violation of s. 283.31(3)(d) Wis. Stat.

Issue 5: Section 3, which the Petitioners claim fails to include those additional conditions and limitations necessary to comply with state water quality standards, which the petition claims are in violation of ss. 283.13(5) and 283.31(3)(d)(1) Wis. Stat.

Issue 6: Section 4.3, which the petition claims fails to include sufficient monitoring and reporting requirements necessary to ensure compliance with applicable effluent limitations and water quality standards, in violation of, inter alia, ss. 283.31(4); 283.55(1) Wis. Stat.; and s. NR 205.07(p) Wis. Admin Code.

Issue 7: Section 5.1, which the petition characterizes as failing to require covered facilities to submit to the WDNR a copy of their Storm Water Pollution Prevention Plan for review and approval, or to make SWPPPs available for public review.

II. Petitioners have raised seven issues in which they seek review of the **Tier II Storm Water Permit No. WI-SO67857-3** General Permit as follows:

Issue 8: Sections 2.2 and 2.1.4, which collectively authorize discharges of pollutants associated with industrial activity from certain facilities that are subject to nationally applicable, EPA promulgated effluent limitation guidelines (“ELGs”) without including those ELGs in the permit, which petitioners characterize as a violation of ss. 283.11(2) and 283.31(3) Wis. Stat.

Issue 9: Section 2.2, which authorizes discharges of pollutants associated with industrial activity without imposing effluent limitations that reflect the best available technology economically achievable (BAT) and the best conventional pollutant control technology (BCT), which petitioners claim to be in violation of s. 283.31(3)(d), Wis. Stat.

Issue 10: Sections 2.2 and 2.6.2, which collectively, absent a WDNR “determination,” allow the discharge of stormwater that “will cause, or have the reasonable potential to cause or contribute to an excursion above” applicable water quality standards, which the petition claims to be in violation of s. 283.31(3)(d), Wis. Stat.

Issue 11: Sections 2.2 and 2.8 which collectively authorize the discharge of pollutants that are causing or contributing to the impairment of surface waters, which the petition claims to be in violation of s. 283.31(3)(d), Wis. Stat.

Issue 12: Section 3, which Petitioners claim fails to include those additional conditions or limitations necessary to comply with state water quality standards, in violation of ss. 283.13(5) and 283.31(3)(d)(1) Wis. Stat.

Issue 13: Section 4.3, which Petitioners claim fails of ss. 283.31(4); 283.55(1) Wis. Stat.; and s. NR 205.07(p) Wis. Admin Code.

Issue 14: Section 5.1 which fails to require covered facilities to submit to the WDNR a copy of their Storm Water Pollution Prevention Plan for review and approval, or to make the same available for public review.

Denial of Issues 1 (in part), 3, 4, 5 (in part), 6 (in part), 8 (in part), 10, 11, 12 (in part), 13 (in part)

Petitioners set out several reasons why they believe the WDNR has fallen short of compliance with s. 283.31, Stats. In fact, Petitioners’ issues 1 (in part), 3, 4, 5 (in part), 6 (in part), 8 (in part), 10, 11, 12 (in part), 13 (in part) all seek review for the WDNR’s noncompliance with s. 283.31, Stats. However, these allegations appear to be based on a misunderstanding of the difference between s. 283.31, Stats., permits and s. 283.33 Stats., permits and the streamlined procedures under ch. NR 216, Wis. Adm. Code, that govern the industrial site storm water

discharge general permit process, or are a collateral attack on those streamlined permitting rules. Statutes and rules governing the issuance and administration of WPDES permits recognize important substantive and procedural differences between storm water discharge permits issued under s. 283.33, Stats. and other WPDES discharge permits. The Industrial Storm Water Permits are issued under s. 283.33, Stats., and reflect that difference. Any noncompliance with s. 283.31, Stats. is therefore moot and an insufficient ground for review.

Denial of Issues 1 (in part) and 8 (in part)

Section 283.11(2), Stats. sets forth a minimum standard for all rules promulgated under that chapter except for storm water. For rules concerning storm water, the statute creates a maximum standard, providing that rules concerning storm water discharges may be no more stringent than the requirements under the federal requirements. The Petitioners' claim that ELGs must be included in the permits is contrary to the specific language in s. 283.11(2)(b), Stats., creating a maximum standard for storm water rules. Insofar as Petitioners may intend to challenge s. 283.11(2)(b), Stats., that challenge is beyond the scope of a s. 283.63, Stats. hearing.

Denial of Issues 2 and 9

Petitioners cite ss. 283.13(2)(b)-(f), Stats., to support their claim that additional permit terms are necessary that would impose effluent limitations that reflect BAT and BCT. But that claim is not supported by statute. Section 283.13(2), Stats., specifically excludes the discharge of storm water permitted under s. 283.33, Stats. Because Tier I and Tier II Storm Water General Permits are indeed permitted under s. 283.33, Stats., those general permits are excluded from the standards set forth in s. 283.13(2), Stats. Petitioners do not cite any additional authority for their claim that BAT and BCT must apply; indeed, none exists. Without any applicable support in rule or statute, Petitioners' claim falls outside the scope of the s. 283.63, Stats. review process.

Denial of Issues 5 (in part) and 12 (in part)

Petitioners challenge the Industrial Storm Water Permits on the basis that the permits' Section 3 fails to include those additional conditions and limitations necessary to comply with state water quality standards. The applicable state water quality standards language is not found in Section 3, but rather in Section 2.5 of the Tier I Industrial Storm Water Permit and 2.6 of the Tier II Industrial Storm Water Permit.

Denial of Issues 6 (in part) and 13 (in part)

Petitioners indicate that the Industrial Storm Water Permits fail to comply with s. 283.55(1), Stats. But that section specifically limits its applicability to point sources required to obtain a permit under s. 283.31, Stats. Again, an important distinction exists between permits issued under s. 283.31, Stats. and the Tier I and Tier II Industrial Storm Water Permits issued under s. 283.33, Stats.

Denial of Issues 6 (in part) and 13 (in part)

Petitioners also assert that the Industrial Storm Water Permits fail to comply with s. NR 205.07(p) Wis. Admin. Code. Since no such citation exists, that citation was presumably a typographical error and was likely meant to refer to s. NR 205.07(1)(p) Wis. Admin. Code, which deals with sampling procedures. If that is the case, Petitioners appear to be suggesting that additional sampling procedures as set forth in s. NR 205.07(1)(p), Wis. Admin. Code, must be added in the Industrial Storm Water Permits.

But the permit language is clear. Those very procedures referring to ch. NR 205 Wis. Admin. Code are incorporated by reference in Section 6 of the Industrial Storm Water Permits. The rule language that Petitioners seek to apply to these permits simply sets forth direction on how sampling procedures are conducted. Petitioners do not cite the existence of a requirement that the procedures be conducted. Petitioners have not presented the absence of required language in the permits that would require such sampling procedures for storm water permits; indeed no such requirement exists. Without applicable support in rule or statute, Petitioners' claim falls outside the scope of the s. 283.63, Stats. review process.

Denial of Issues 7 and 14

Petitioners have not cited any rule or statute violations in Issues 7 and 14. The submittal requirements in the Tier I and Tier II Storm Water General Permits for a facility's Storm Water Pollution Prevention Plan are consistent with the requirements set forth in NR 216 Wis. Admin. Code. Section 283.63, Wis. Stat. does not allow for a review of administrative rules or to collaterally attack the statutory scheme under which the permits are authorized. Absent Petitioners' allegation of a violation of an existing rule or statute, the issues raised here are beyond the scope of a s. 283.63, Stat. review process.

Determination

For the foregoing reasons, the Petitioners' review is denied. Insofar as Petitioners' have broadened the scope of their appeal beyond what they have articulated with their use of inter alia, such review is denied. The Department need not speculate to create challenges that were not specifically raised.

A number of Petitioners' claims seek to challenge the validity of the rules themselves and accordingly have been found by the Department to exceed the scope of a s. 283.63, Stat. review. Petitioners are afforded a forum for challenges to the validity of rules in declaratory judgment proceedings set forth in s. 227.40, Wis. Stat.

If you have any questions regarding this decision, please direct them to Attorney Jane Landretti of the Department's Bureau of Legal Services at (608) 267-7456.

Sincerely,



Matt Moroney
Deputy Secretary

cc: James Bertolacini -- WT/3

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.



October 14, 2011

The Honorable J.B. Van Hollen
Attorney General
Department of Justice
Room 114 East State Capitol
Madison Wisconsin 53702

Subject: Attorney General's Statement Regarding Authority to Administer NPDES Permit program

Dear Attorney General Van Hollen:

Over the past several years the U.S. Environmental Protection Agency (EPA) has been reviewing the statutory and regulatory authority of state agencies that have approved National Pollutant Discharge Elimination System (NPDES) programs. EPA has conducted this review as part of its Permitting for Environmental Results (PER) initiative to determine whether each state has adequate statutory and regulatory authority to administer the program.

Recently, EPA completed its review of Wisconsin's program and sent the Department of Natural Resources ("Department") a letter identifying seventy five questions or concerns with Wisconsin's authority to administer the program (See Attachment). In the letter, EPA has asked the Department to either seek statutory or regulatory changes that will establish the requisite authority, or provide a statement from the Attorney General's office that specifically identifies existing authority for the listed question or concern. Pursuant to 40 CFR s. 123.23 and 123.62, a statement from the Attorney General's office is required for program administration and for significant revisions to state programs.

Department staff have conducted a preliminary review of the issues and recommended several different courses of action. For some of the issues, the rule promulgation process has already started and EPA's concerns can be addressed through those efforts. For other issues, staff have either suggested revisions to existing rules or statutes, or staff have proposed to address the concern through supporting data or explanation. For some of the issues, the Department believes it is appropriate to seek an Attorney General's statement at this time. Those issues are as follows:

Issue # 5 Right to Judicial Review. Is the opportunity to seek judicial review (pursuant to Wis. Stat. s. 227.52) of the final approval or denial of a WPDES permit equivalent to the opportunity to seek judicial review under 40 CFR s. 123.30 and CWA s. 509, 33 USC s. 1369? EPA has identified specific questions with regard to the ability to seek judicial review under state law, including whether Wisconsin's statute, which provides that judicial review is available to persons whose "substantial interests" are "adversely affected" by the decision, is consistent with the federal requirements for judicial review. In your response, please also address the issue of whether any individual person may directly seek judicial review of the state's permit decision, or whether seeking review under s. 283.63, Stats., is a prerequisite for an individual (other than the applicant) to seek review of the decision. [Note: Please consider the following case: *Sewerage Commission vs. DNR* 102 Wis.2d 613, 424 N.W. 2d 685 (1988) in your statement.]

Issue # 7 NSPS. Pursuant to Wis. Stat. § 283.31(3)(d) 2. and s. NR 220.13, Wis. Adm. Code, the Department believes it has existing authority to include limitations based on federal NSPS in permits even if the Department has not yet promulgated new or revised rules for the NSPS in the administrative code. Please provide a statement regarding the Department's authority as requested in issue 7.

Issue # 10 GLI Procedures. For one of the procedures (intake credits in determining reasonable potential) identified in issue 10, the Department has already initiated rule making. For the other two procedures (TMDLs and WLAs in absence of TMDLs and Whole Effluent Toxicity (WET) reasonable potential), the state may submit a request to initiate the rule making process. Although the state already has initiated or may initiate rule changes to implement these procedures, the Department believes that the state already has statutory authority to administer these procedures in WPDES permits. Based on the authority in Wis. Stat. § 283.31, the state is required to comply with these requirements because they are applicable to Wisconsin waters. EPA disapproved the Department's rules and specifically promulgated these procedures for Wisconsin for discharges of toxic substances to the Great Lakes Basin (see 40 CFR s. 132.6). The Department's opinion is that its interpretation is consistent with the Wisconsin Supreme Court's decision in the *Andersen* case (see request for statement on *Andersen* case below). Please provide a statement as to whether you concur with this interpretation.

Issue # 12 Downstream Waters. Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (includes tribes) pursuant to Wis. Stats. ss. 283.13(5) and 283.31? See also subchapter II of ch. NR 104, ss. NR 203.03(4)(c) and (g), 203.13(3), 106.06(1)(b), 106.32(1)(b), 106.55(9), 106.56(9), 210.05(3)(f) and (4) and 210.06(3)(g), Wis. Adm. Code, as well as Wis. Stats. s. 283.41(1) and (2). The Department believes it has the authority to impose limitations to include conditions based on affected downstream waters of other states, including tribes.

Issue # 19 and #44 Concentrated Aquatic Animal Production facilities and the definitions of point source and pollutant. The Department has issued WPDES permits to fish hatcheries that meet the definition of a concentrated aquatic animal production facility in the state. The Department believes it has the authority to issue permits to concentrated aquatic animal production facilities pursuant to Wis. Stat. ss. 283.01(12) and (13) and 283.31. Also, section NR 220.02(20), Wis. Adm. Code, includes fish hatcheries as a category of point sources. The Department also believes that the definitions of "discharge" and "point source" in Wis. Stat. s. 283.01 (5) and (12) are broad enough to require permits for discharges from landfill leachate collection systems to waters of the state, and the definition of pollutant in Wis. Stat. s. 283.01(13) is broad enough to cover discharges of filter backwash from a point source. Please provide a statement to address EPA's concerns.

Issue # 51 Request for an Informational Hearing 40 CFR 124.11 and 124.12 provide that a public informational hearing must be held if the agency finds there is significant public interest in the draft permit. Wisconsin law, in s. NR 203.10(5) and Wis. Stat., s. 283.49, similarly provides that the Department shall hold a public hearing on a permit application if the Department deems that there is a significant public interest in holding such a hearing. Wisconsin law also provides that the Department shall hold a public hearing on the petition of 5 or more persons. Please provide your opinion as to whether Wisconsin law is consistent with these federal requirements.

Issue # 58 Waters of the State Definition. Is Wisconsin's definition of "waters of the state" in s. NR 205.03(44), Wis. Adm. Code, and ch. 283, Stats., which includes all lakes, bays, streams, water courses and other surface or groundwater, natural or artificial, public or private, broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes, as included in the definition of "waters of the United States" in 40 CFR s. 122.2?

Issue # 59 Exemption for Disposal of Solid Waste to a Landfill – s. NR 200.03(3)(f), Wis. Adm. Code. EPA has raised the issue of whether the exemption from a permit application for disposal of solid waste into a solid waste facility regulated under chs. NR 500 to 536 is consistent with federal law. The Department believes the exemption is consistent with federal law because the placement of pollutants into a licensed landfill does not

require an NPDES permit under federal law because it is not a discharge to surface waters. Note, however, that the definition of "solid waste" in Wis. Stat. s. 289.01(33) states that the term "solid waste" does not include the disposal or discharge of materials which are considered "point sources" under chapter 283. So if there was a discharge of landfill material to surface waters, the discharge of materials from the landfill to the surface water would require a WPDES permit.

Issue # 60 Exemption for Discharges from Private Alcohol Fuel Production Systems in Wis. Stat. s. 283.61, Stats. EPA has asked for clarification regarding the scope of the exemption in Wis. Stat. s. 283.61. The exemption only applies if the discharge or disposal is confined to the owner's property and is disposed using an environmentally safe land spreading technique. The Department's opinion is that the exemption does not apply to discharges from private alcohol fuel production systems that reach waters of the United States because those discharges would not be completely confined to the owner's property and would travel offsite. Does your Office agree with this interpretation?

Issue # 63 False Statements. Does the state under either state statutes or rules have the authority to assess multiple penalties for multiple instances of knowingly making false statements? In other words, can the state seek a penalty for each false statement made? Note that s. 281.98(1), Wis. Stats., provides that any violation is subject to penalties and each day of continued violation is a separate offense. Please advise whether this is consistent with the federal rule, 40 CFR 123.27.

Issue # 64 Public Participation in Enforcement Process. Does the state provide for public participation in the state enforcement process consistent with 40 CFR 123.27(d)?

Issue # 75 Wis. Stat. s. 227.10(2m). EPA has requested a statement from your office explaining the relationship between the limitation in s. 227.10(2m), and the enforcement provisions set forth in Wis. Stat. ch. 283. Taking into account the recent enactment of s. 227.10(2m), Stats., does the state still have adequate permitting and enforcement authority required pursuant to 40 CFR 123.25 and 123.27?

Andersen v. Department of Natural Resources, 332 Wis. 2d 41, 796 N.W. 2d 1 (2011) EPA referred to the *Andersen* decision in its letter and stated that, in light of the *Andersen* decision, it is requesting that Wisconsin quickly seek corrections to its state authority. The Department believes the holding in the *Andersen* decision was fairly narrow. The case upheld the Department's interpretation of one specific statutory provision in chapter 283, Stats, and limited the scope of issues for contested case hearings. A statement from your office regarding the primary holdings in the case would be helpful.

The Department requests a written statement by December 15, 2011. Please be advised that this is the Department's initial request for a statement from your office in response to EPA's request. The Department may request an additional statement from your office on additional issues if the Department is unable to resolve other issues through discussions with EPA or through clarifying statutory or rule changes.

If you have any questions regarding the issues listed above or if you have questions regarding the Department's WPDES permit program, please contact the lead program attorney, Robin Nyffeler, at (608)266-0024.

Sincerely,



Matt Moroney
Deputy Secretary

CC: Robin Nyffeler, Judy Ohm, Jane Landretti – LS/8
Ken Johnson – AD/8; Russ Rasmussen – AD/8; Tom Mugan – WT/3



Industrial WPDES Permit Drafting Information Sheet

Make entries to sheet in a font color other than black; revisions should be in yet another color.

Date: 9/23/2014

Author: Mark Stanek

Revision date & revisor name:

CC:

1 General Information

Permit Number	Current WI-0050521-08-0 Effective Date: January 01, 2012 Expiration Date: December 31, 2016 Draft WI-0050521-09 Proposed Effective Date: Proposed Expiration Date:	
Permittee Name	Baker Cheese Inc	
Flow(s)	MGD	Change during current permit term?
• Daily Maximum		
• Weekly Maximum		
• Monthly Maximum		
• Annual Average	0.35	New surface water discharge outfall.

2 Facility Description

Baker Cheese currently produces natural cheese products, and process wastewater is hauled to large municipal wastewater facilities for treatment. Baker Cheese will be increasing its cheese production, condensing whey, and will build a wastewater treatment facility on-site. The treated wastewater will be discharged to surface water located 1/3 mile to the north. The estimated discharge flow will eventually reach 350,000 gallons per day. There is also a cooling water and boiler blowdown outfall that discharges to an absorption pond behind the facility. Baker Cheese is also authorized to land apply wastewater and an outfall for land applying wastewater biosolids will be included in the permit.

Describe any facility upgrades/revisions/changes that have occurred during the current permit term, and proposed permit content changes

Due to the production changes listed above, the WPDES permit will include an additional surface water discharge outfall, with associated monitoring requirements and effluent limitations along with an outfall for land applying biosolids. The Department may calculate categorical limitations based on the production changes, but the water quality based effluent limitations are so stringent that the categorical limits won't be necessary because they will be less protective of the environment.

Sample Point Information

Add new sample points if necessary or indicate NA. If new, verify what the next available sample point number would be with permit drafter.

Are there any changes that should be made to the sample point description(s) that are in the current permit?

Source	Sample Point Number	Average Flow/Amount/Volume, Units, and Averaging Period (during current permit term)
Influent	NA	
In-Plant	NA - TBD	TBD
In - Stream	601	Sample point for temperature monitoring prior to wetland complex.
Surface Water	003	Treated Process Wastewater = 350,000 gpd (estimated)
Land Treatment	002	NCCW & BB = 11,000 gpd
Land Application	004	Unknown volume. Wastewater biosolids resulting from treatment process.
Groundwater Monitoring/Wells	NA	
Land Application	001	Have not land applied in many years.
Compliance Schedule(s)	NA	A management plan will be required, but it is expected to be submitted before this permit is resissued.

Describe any new sample points or changes in sample point descriptions here:

Outfall 001 is a land application outfall for process wastewater. I would like to keep this outfall in the permit.

Outfall 003 will be added, as this is the new surface water discharge outfall. Samples shall be taken at the point of discharge from the wastewater treatment plant for most parameters. Samples for temperature shall be taken just prior to the receiving water.

We need to add a new outfall 004 to cover the biosolids that will be generated by the wastewater treatment system. We should require monitoring for nutrients and chloride and be consistent with what is required of other dairy wastewater treatment systems. We also need to see a management plan and do a review of land application sites.

Sample point 601 will be utilized to monitor the temperature of the receiving water just prior to discharge to the wetland complex.

3 Influent

Summarize proposed Influent Monitoring Changes from Current Permit

NA

4 In-Plant

Summarize proposed In-Plant Monitoring Changes from Current Permit

NA – Do we want to track influent loading like we do at Saputo-Alto? Check with consultant.

5 Surface Water

Summarize proposed Surface Water Monitoring and/or Limits Changes from Current Permit

Will need to see if current permit has appropriate requirements for outfall 002....The current permit treats Outfall 002 as if the absorption pond has a cell that is loaded and rested, also has annual report requirements. We can delete these last requirements. Daily log and Annual Reporting requirements have been deleted.

Outfall 003 is the new surface water discharge outfall. So, the limits and monitoring requirements are all new. Please refer to the Facility Planning Effluent Limits memo dated 12/2/2013 that provides the limits for BOD, TSS, Ammonia Nitrogen, Total Phosphorus, Chloride, Temperature, Dissolved Oxygen and p.H.

Requested Variances in the Next Permit Term

Chloride? ___ Yes ___ **X** No ___ NA

- If so, provide the following items from negotiations with the permittee
 - Target Value or Target Limit (Specify):
 - Source Reduction Measures:
- Does the current permit include a chloride variance? ___ Yes ___ **X** No
 - If so, has the permittee submitted the required annual progress reports?

Mercury? ___ Yes ___ No ___ **X** NA

- Has the permittee submitted a Mercury Pollutant Minimization Program (PMP) Plan?
 - If so, when?
- Does the current permit include a mercury variance?
 - If so, has the permittee submitted the required annual PMP Progress Reports?

Phosphorus (Pond/Lagoon Systems Only)? ___ Yes ___ No ___ **X** NA

- Does the current permit include a phosphorus variance?

Other Variance(s)? ___ Yes ___ **X** No

- Identify the requested variance.
- Does the current permit include such a variance?

Thermal Rule Related Items

Is the permittee required to conduct effluent temperature monitoring? **Yes**

- If so, has the permittee started that monitoring prior to permit reissuance?
- Is there enough data accumulated?

We don't have any real data because this is a new discharge. However, it is expected that the discharge temperature will be moderate because the wastewater treatment process itself cannot function at high temperatures. The effluent limit memo recommends including weekly average and daily maximum limits. The Department needs to decide where to take these temperature measurements because this is a unique discharge situation involving a long outfall pipe, a receiving water that disperses through a marshy area before ultimately ending up in the Mullet Creek Wetland.

Phosphorus Rule Related Items

Has the permittee submitted a request for an alternative phosphorus limit (APL)?

- If so, does the current permit include an APL? **The permit will have an interim limit of 1.0 mg/L.**

Has the permittee submitted a Watershed Adaptive Management Request Form? **No.**

Has permittee conducted P monitoring of the receiving water? **No.**

The permittee will be pursuing a pollutant trade in order to provide phosphorus credits, that will better enable them to comply with the very stringent phosphorus limits recommended. Such as the rolling average limit of 0.075 mg/L. The pollutant trade would involve converting a farm field to a prairie.

6 Land Treatment (specify which type(s) - spray irrigation, ridge & furrow, absorption pond)

There is an absorption pond behind the facility that receives approximately 11,000 gpd of NCCW and Boiler Blowdown, both of which are relatively free of contamination. This discharge is continuous.

Is a new, or revised Land Treatment Management Plan required?

Land TREATMENT Management Plan differs from a Land APPLICATION Management Plan when it comes to compliance schedules in permits.

If so, specify submittal date for a compliance schedule item.

Summarize proposed Land Treatment Monitoring and/or Limits Changes from Current Permit **We should look at the current permit requirements and see if these are no longer appropriate for this type of continuous discharge.**

7 Groundwater

GROUNDWATER MONITORING - NA

8 Land Application (if new, indicate if it is liquid, sludge or by-product solids)

Outfall 004 will be added to allow land application of wastewater treatment biosolids.

Is a new, or revised Land Application Management Plan required?

Yes, we need a Management Plan for this new outfall. Need it before new treatment system is started up. The permittee has indicated that this will be submitted prior to permit reissuance.

If so, specify submittal date for a compliance schedule item.

Summarize proposed Land Application Monitoring and/or Limits Changes from Current Permit

The Department will require that the biosolids be monitored for what is typically required of wastewater biosolids for dairies. These parameters would be chloride, p.H., TKN, Nitrogen Ammonium and Total Phosphorus. Standard limits for chloride and nitrogen application rates will apply.

9 Compliance Schedules

Current Permit

Does the current permit include any compliance schedules? No.

- If so, have all requirements in the compliance schedule(s) been met?
 - If not, identify which action(s) have not been met, and provisions that have been agreed to with the permittee for meeting such action(s).
 - What should be continued to be included in the proposed permit as relics from the current permit?

New Permit

Compliance Schedule(s) Anticipated to be Incorporated in the New Permit

The compliance schedule(s) shown below is/are anticipated to be included in the new permit.

The permit will contain standard compliance schedules for both phosphorus and thermal standards.

Other Compliance Schedules

Will the permit need to include any other compliance schedule not shown above?

- If so, for what purpose?
 - List the requirements and due dates that should be included in compliance schedule.

Summarize proposed Compliance Schedule Changes from Current Permit

10 Substantial Compliance

Is the facility in substantial compliance?

Yes.

Has the Substantial Compliance Determination been completed and saved in SWAMP Permit Documents associated with the DRAFT permit? **Yes**

11 Other Comments

Provide any other comments pertinent to permit issuance, including any potentially controversial issues about the permit or the permittee

Given that this permit involves the installation of a new surface water discharge outfall to the Mullet Creek Wildlife Area, the Department will be working through the Environmental Analysis requirements of Chapter NR 150, and will likely hold a public hearing to meet with the public and answer questions about the project. Department staff from Wildlife, Water Regulation, Water Resources, and Wastewater programs have had several site visits and meetings to discuss the environmental concerns as a result of this project.

12 Attachments & Location *(attach to this document or indicate archived location)*

Facility Planning Effluent Limits for Baker Cheese, Inc. Dated 12/2/2013

Stanek saved this document in SWAMP under the Draft Permit section. This document may get updated as we gather more information and work through the permitting and plan approval process.


Prepared By: **Mark Stanek**

Wastewater Engineer

Date: **9/23/2014**

Revised:

Industrial Permit Drafting Information Sheet aka Fact Sheet blank template by Nan Jameson, revised 4-17-13

DATE: 9/26/2014
TO: Baker Cheese WPDES Permit File
FROM: Mark Stanek – WDNR Oshkosh 
SUBJECT: Baker Cheese Project - Compliance with Chapter NR 150

Below is a list of actions that Department has taken to make sure that this project is in compliance with all environmental regulations. Through these actions, the Department has determined that Chapter NR 150 is complied with in accordance with the equivalent analysis action under s.NR 150.20(2) Wis. Adm. Code. The actions below are considered to be equivalent actions under s.NR 150.20(2)(a) Wis. Adm. Code.

1. The new surface water discharge will be regulated by WPDES Permit # WI-0050521-09.
2. Facility Planning Effluent Limits are documented in a letter dated 12/2/2013 and the effluent limit recommendations will be implemented in the above mentioned WPDES Permit. The limits were calculated to be protective of the wetland complex and the Mullet River. This document considered the antidegradation rules in Chapter NR 207.
3. Plans and Specifications for the wastewater treatment system and outfall will be submitted to the Department for plan review. This is considered a minor action under NR 150.20(1m)(k).
4. Approval of land application sites for wastewater biosolids is a minor action under NR 150.20(1m)(k).
5. A Chapter 30 Permit will be issued for the surface water discharge outfall structure. Water Regulation staff will be reviewing plans and specifications for the structure.
6. A hydraulic analysis of the discharge impacts to the Mullet Creek Wildlife Area was performed by Brent Binder, P.E. of the Department's Bureau of Facilities and Lands, and documented in a memo dated 9/25/2014.

DATE: September 25, 2014
TO: Mark Stanek, PE
FROM: Brent Binder, PE
SUBJECT: Baker Cheese/Mullet Marsh Dams

Please accept the following documentation as my assessment of the impact of additional discharge on the dams within Mullet Marsh.

I looked at the upstream sub-impoundment first and made the assumption that no water is being lost from the system thru evaporation, transpiration, or infiltration. According to the project information, the maximum discharge of 300,000 gpd (0.464 cfs) could raise the flow depth over the spillway by 1.25". This scenario assumes a base flow at or near zero (summer/dry). It is reasonable to assume that the impoundment area would not significantly increase with this added depth and only minor impacts to emergent vegetation would occur. However, the top stop log could be reduced by 3/4" to account for the increase...since I expect water will leave the system by the other means listed above. That same discharge during a flood (pool surcharged 2 feet) would only result in 0.25" of additional surcharge. This is certainly not a problem. Obviously the impacts at 60,000 gpd (0.093 cfs) are much lower. Based on my assessment, the spillway has more than enough capacity to handle the discharge without flooding the area or impacting the integrity of the embankment.

Impacts to the main impoundment d/s are too small to measure realistically. I'd also state that between the two impoundments the flow will be retained by the wetland complex enough that the receiving water in the channel d/s will not sustain an impact either.

If you need additional documentation from me, please ask.
Brent

CORRESPONDENCE/MEMORANDUM

DATE: August 19, 2014
 TO: Nan Jameson, DNR - NER
 FROM: Lynn Morrison, DNR - SER *LM*
 SUBJECT: Baker Cheese Production Based Limits

I have evaluated the Production Based Categorical Limits for Baker Cheese in St. Cloud, WI. Outfall 003 will be a new outfall in the proposed permit for surface water. This surface water outfall will include mass limits based on production at the facility in addition to Water Quality Based Effluent Limitations.

Proposed Permit:

In the permit application for reissuance -09 in 2014, milk intake is 3,150,000 pounds per day for cheese processing. This results in 2,898,000 pounds per day of raw whey which they then condense. The table below calculates the BOD and TSS monthly average discharge limit in pounds per day.

Product	Raw Material	Mass Raw Material [lbs]	BOD Factor	BOD Input	Allowance Factor		Discharge Limit [lb/day]	
					BOD ₅	TSS	BOD ₅	TSS
Natural & Processed Cheese	Raw Milk	3,150,000	10.39	327,285	0.08	0.1	26.18	32.73
Cond. Whey	Raw Whey	2,898,000	4.72	136786	0.11	0.14	15.05	19.15
Total Limit:							41.23	51.88

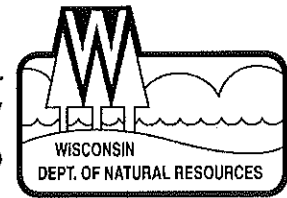
The daily maximum discharge limit is two times the monthly average. The following permit limits should be included for reissuance -09:

Parameter	Limit Type	Limit & Units
BOD ₅ , Total	Monthly Avg	41.2 lbs/day
BOD ₅ , Total	Daily Max	82.4 lbs/day
Suspended Solids, Total	Monthly Avg	51.9 lbs/day
Suspended Solids, Total	Daily Max	103.8 lbs/day

Based on proposed flows for Outfall 003 of 350,000 gallons per day, the concentration limits will be more restrictive than these proposed mass limits.

Substantial Compliance Determination

Permittee Name: Baker Cheese Factory Inc.		Permit Number: 0050521-09-0
	Compliance?	Comments
Discharge Limits	Yes	The discharge to the absorption pond is low volume and clean water.
Sampling/testing requirements	Yes	
Groundwater standards	NA	
Reporting requirements	Yes	
Compliance schedules	NA	
Management plan	NA	
Other:	NA	
Enforcement Considerations	No.	
In substantial compliance?	<p>Yes</p> <p>Comments: This facility has been hauling all of its process wastewater to large POTW's for treatment.</p> <p>Signature: Mark Stanek Date: 8/6/2014</p> <p>Concurrence: _____ Date: _____</p>	



December 2, 2013

Mr. Thomas H. Probst, P.E.
 The Probst Group
 17035 W. Wisconsin Ave., Suite 120
 Brookfield, WI 53005

Subject: Facility Planning Effluent Limits for Baker Cheese, Inc. in Fond du Lac County
 (WPDES Permit # WI-0050521)

Dear Mr. Probst:

This letter is prepared in response to the request letter from Mark Pronley for an evaluation of water quality-based effluent limitations using chs. NR 102, 105, 106, 207, and 217 of the Wisconsin Administrative Code (where applicable), for a proposed surface water discharge from Baker Cheese, Inc. to a wetland area alongside the Mullet River in eastern Fond du Lac County (southwest of the Village of Greenbush, which is in Sheboygan County). This facility has an existing permitted discharge to groundwater via land application and an absorption pond and is considering surface water discharge due in part to potential increased flow. The facility is located in the Sheboygan River Watershed (SH03) of the Sheboygan River basin. The evaluation of the permit recommendations is discussed in more detail in the attached report. Based on our review, the following preliminary effluent limit recommendations are made on a chemical-specific basis for the proposed surface water discharge of 0.25 MGD:

<u>Substance</u>	<u>Effluent Limitations</u>															
BOD5 *	20 mg/L monthly average, 40 mg/L daily maximum															
Total Suspended Solids *	20 mg/L monthly average, 40 mg/L daily maximum															
Ammonia:																
Year-round	Daily maximum pH-related limits available, see Attachment															
	<table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th></th> <th>Weekly average</th> <th>Monthly average</th> </tr> </thead> <tbody> <tr> <td>December – March</td> <td>11 mg/L and 22 lbs/day</td> <td>4.5 mg/L and 9.5 lbs/day</td> </tr> <tr> <td>April – May</td> <td>6.8 mg/L and 14 lbs/day</td> <td>3.1 mg/L and 6.5 lbs/day</td> </tr> <tr> <td>June – September</td> <td>4.4 mg/L and 9.1 lbs/day</td> <td>2.2 mg/L and 4.6 lbs/day</td> </tr> <tr> <td>October – November</td> <td>5.5 mg/L and 12 lbs/day</td> <td>2.6 mg/L and 5.3 lbs/day</td> </tr> </tbody> </table>		Weekly average	Monthly average	December – March	11 mg/L and 22 lbs/day	4.5 mg/L and 9.5 lbs/day	April – May	6.8 mg/L and 14 lbs/day	3.1 mg/L and 6.5 lbs/day	June – September	4.4 mg/L and 9.1 lbs/day	2.2 mg/L and 4.6 lbs/day	October – November	5.5 mg/L and 12 lbs/day	2.6 mg/L and 5.3 lbs/day
	Weekly average	Monthly average														
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October – November	5.5 mg/L and 12 lbs/day	2.6 mg/L and 5.3 lbs/day														
Total Phosphorus	0.075 mg/L as a six-month average (November – April, May – October), 0.225 mg/L monthly average, 0.16 lbs/day annual average															
Chloride	1,500 mg/L daily maximum, 400 mg/L weekly average															
Temperature	See summary table in Attachment															
pH	6.0 – 9.0 s.u. daily range															
Dissolved Oxygen	4.0 mg/L daily minimum															

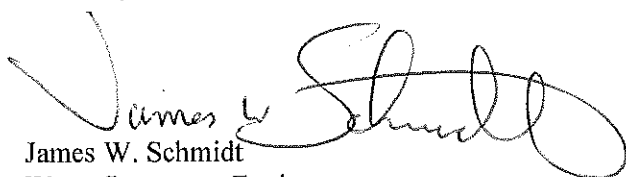
* - Technology-based BOD5 and TSS limits will also need to be calculated using projected production and the procedures in ch. NR 240. Those limits are typically expressed in units of mass, so most likely the NR 240-based limits will be given in addition to the water quality-based limits listed above.

One-third of the weekly and monthly ammonia limits represent prevention of significant lowering of water quality in the Mullet River below the wetland. Proposed discharges above those one-third levels would require additional evaluation of cost-effective alternatives under s. NR 207.04(1)(d). The remaining limits are believed to be protective of both the wetland and the river and do not require additional limits based on antidegradation in NR 207.

Along with the chemical-specific recommendations mentioned above, acute and chronic whole effluent toxicity testing may be recommended in the future for this permittee. The need for this testing will depend on the projected effluent quality, the discharge site, and the potential for effluent toxicity.

If there are any questions or comments, please contact me at (608) 267-7658 or via e-mail at jamesw.schmidt@wisconsin.gov.

Sincerely,



James W. Schmidt
Water Resources Engineer
Wisconsin Department of Natural Resources
Bureau of Water Quality

Attachment

cc: Nan Jameson – East District / Green Bay
Mark Stanek – East District / Oshkosh
Rick Reichardt – WQ/3 (electronic copy only)
Lynn Singletary – WQ/3
Jackie Fratrack – East District / Waukesha (electronic copy only)

ATTACHMENT
Water Quality-Based Effluent Limitations for
Baker Cheese, Inc.
WPDES Permit # WI-0050521
Prepared by:
Jim Schmidt - WQ/3

Existing Permit Limitations (WPDES Permit #0050521-08, issued January 1, 2012 and expiring December 31, 2016):

Currently, there are no limitations on a surface water discharge, because it is not authorized under the current WPDES permit. The permit addresses discharge to groundwater via land application (absorption pond) and contains limits on pH and chloride along with BOD5 and TSS monitoring. Those conditions aren't relevant for this evaluation, as this will be treated as a new discharge to surface water.

Information for Permit Reissuance Evaluation:

Receiving Water Information

Name: Wetland tributary to Mullet River (may also be referred to as Mullet Creek)

Classification: Wetland is classified as a Limited Aquatic Life waterbody, while the Mullet River is a warmwater sportfish community. Neither waterbody is a public water supply. For bioaccumulative chemicals of concern (BCCs), criteria are based on a classification as a coldwater community and public water supply since this permittee is located in the Great Lakes basin. However, BCCs are not anticipated in the proposed discharge. Flows)

Wetland: Flows are set equal to zero.

Mullet River: Low flow information is not available at the proposed discharge point, but approximately seven river miles downstream in the Village of Greenbush, the following low flows have been estimated:

7Q10 = 0.19 cfs

7Q2 = 0.62 cfs

Harmonic mean = 2.2 cfs (estimated based on 7Q10 and drainage area)

Based on the drainage area of the Mullet River at the Fond du Lac / Sheboygan county line, the drainage area of the Mullet River at the proposed discharge site is approximately 60% of the area at Greenbush. Based on default USGS formulas for low flow calculations, the estimated flows at the proposed site are about 40% of the Greenbush flows listed above. If a more precise flow estimate is needed, the permittee may work with USGS directly to have such an estimate made.

It is also noted that the receiving water location is within the Mullet Creek State Wildlife Area. There is a flow control structure on the creek. The wetland area extends for a distance up to a mile from the creek to County Highways G and T. The exact outfall location has yet to be determined, so this means a discharge outfall near the roadway would flow through a maximum of one mile of wetland before reaching the creek if on a direct line. In fact, there exists a ditch that runs along the roadway, and then disperses into a wooded area that lies between the roadway and the wetland. There is actually not a clear or obvious stream channel through the marsh. Instead, the water has historically formed several ponds and depending on the proposed discharge site that trend will likely continue in the future.

Effluent Information

Baker Cheese produces mozzarella cheese. According to the public notice for the current discharge permit, this activity currently results in the discharge of 6,000 to 10,000 gallons per day of noncontact cooling water and boiler blowdown to an absorption pond via outfall 002. Process wastewater, at an average volume of 70,000 gallons per day on weekdays (20,000 gallons per day on weekends) is hauled to municipal wastewater treatment plants for disposal and treatment. A land application outfall (001) has been written into the draft permit in the

event the facility chooses to commence landspreading that process wastewater. That outfall includes monitoring requirements which are the same as the Department's general permit for Land Application of Liquid Industrial Wastes. All whey is hauled to another facility for processing, but a much greater discharge rate is proposed under the assumption whey processing would take place at Baker Cheese in the future.

The proposed surface water discharge rate is 250,000 gallons per day or 0.250 MGD. To cover worst-case dilution considerations, the 0.250 MGD flow shall be used for limit calculations where appropriate because limits are typically calculated based on average discharge rates.

Based on permits for other dairy facilities around the state, the need for surface water quality-based effluent limits shall be evaluated for the following parameters:

BOD5	Total Suspended Solids
pH	Chloride
Dissolved Oxygen	Ammonia
Temperature	Total Phosphorus

Effluent Limit Evaluation

Typically, this process will involve evaluation of limits based on protection of the wetland and protection of the Mullet River (or Mullet Creek, this resource is typically referred to as "the creek" for the remainder of this evaluation)). Providing limits that are the most stringent of those applicable to each water body insures that both resources are protected. Since the proposal represents what is considered a new discharge (because no surface water discharge is currently allowed under WPDES Permit # WI-0050521-08), this proposal is considered to be subject to the antidegradation provisions of ch. NR 207. Although the wetland is handled as a Limited Aquatic Life water body, it is not currently listed in Tables 3 through 8 in ch. NR 104. This is important because waters listed in those tables are exempt from antidegradation under s. NR 207.03(7).

The antidegradation provisions are important because typically, two sets of limits are provided in many situations. Where limits are calculated based on assimilative capacity (the difference between the water quality criterion for a substance and the existing level of that substance in the surface water) and where some assimilative capacity exists, those limits shall be based on both the full assimilative capacity and one-third of that capacity, the latter of which is referred to as those needed to prevent significant lowering of water quality (or SLOWQ) under s. NR 207.05.

One of the other situations that could very well come up at Baker Cheese involves changes in level of pollutants between the point of discharge to the wetland and the point that water reaches the creek. Obviously, two sets of limits could be calculated, but for parameters that are not considered "persistent" or "conservative" there could be changes in the amount of the pollutant between the two locations. There could be some treatment or removal going on within the wetland such that there may be some reductions in pollutant levels within that area. Unfortunately, the only way that sort of thing can be determined or verified is through the collection of actual data, and that's something that's difficult to do for a discharge that does not exist. As a result, there may be situations in which no removal can be assumed at this time, but future data could be used to modify limits. For now, the limits are calculated or estimated based on no removal. If an on-site evaluation allows for increased limits in the future, those increases would only be subject to antidegradation evaluations if the limits are effective in the current WPDES permit. For a substance such as chloride, the same water quality criteria apply to all water bodies regardless of classification, so removal of chloride through the wetland won't affect the limits because they will be based on the wetland with its background flow of zero because limits there will be tighter than those related to the creek which has a non-zero flow.

BOD5:

For discharges to Limited Aquatic Life waters, the limits in ch. NR 104 are 20 mg/L monthly average and 30 mg/L weekly average, although the latter is typically replaced by a 40 mg/L daily maximum limit for industrial discharges because technology-based limits for industries are normally expressed as daily maximum and monthly averages.

For discharges to the creek classified as a warmwater sport fish community, BOD5 limits are calculated based on 26 pounds per day per cfs of total flow (effluent plus stream) with adjustments based on stream temperature. Since total flow is a factor here, the limits will be significantly different depending on the proposed discharge rate. A discharge rate of 0.250 MGD is proposed here, and since that equals 0.39 cfs, that flow actually exceeds the estimated 7Q10 of Mullet Creek, which is 0.4×0.19 cfs, or 0.076 cfs. Because the discharge rate exceeds the applicable streamflow, the effluent limits will be very tight. Based on the 26 pounds per day per cfs and the temperature normally associated with this type of designated use (see Warm – Small waters in Table 2 of ch. NR 102), the calculated limits are 6.4 mg/L and 13 lbs/day in May – October and 12.6 mg/L and 26 lbs/day in November - April, both expressed as weekly averages. Those limits actually represent full assimilative capacity, so 1/3 of those limits represent prevention of SLOWQ. Being weekly averages, they would be included in permits along with the appropriate technology-based limits. As the creek-based limits are more stringent than the wetland-based limits, the creek-based limits would be the controlling factor at Baker Cheese and would apply to a direct discharge to the creek downstream of the marsh.

As for the marsh itself, the 20/40 limits mentioned above should be adequate. Given the long travel time expected within the marsh, it is likely that a discharge to the marsh at the 20/40 limits would adequately protect the creek below the marsh.

Recommended Limits = 20 mg/L monthly average, 40 mg/L daily maximum for marsh discharge.

TSS:

Normally the TSS limits are set equal to BOD5, but in this case the limits are specified in NR 104.

Recommended Limits = 20 mg/L monthly average, 40 mg/L daily maximum for marsh discharge.

pH:

Chapters NR 102, NR 104, and NR 240 contain pH limits of 6.0 – 9.0 standard units as a daily range. Those limits apply to either receiving water body.

Recommended Limits = 6.0 s.u. daily minimum, 9.0 s.u. daily maximum.

Chloride:

There are acute and chronic toxicity criteria for chloride in ch. NR 105 based on short- and long-term impacts on aquatic life. The same criteria apply to all surface waters in Wisconsin, namely 757 mg/L as an acute criterion and 395 mg/L as a chronic criterion. Since the background flow in the wetland is assumed to be zero, the limits applicable to Baker Cheese are 1,500 mg/L daily maximum (twice the acute criterion, then rounded to two significant digits) and 400 mg/L weekly average (equals the chronic criterion, then rounded to two significant digits). No assimilative capacity is available in the wetland due to the lack of flow, so there is no SLOWQ limit. Because the discharge rate is fairly high compared to the creek flow, it's likely that the limits will be about the same whether discharge is to the marsh or directly to the creek below the marsh.

Recommended Limits – 1,500 mg/L daily maximum, 400 mg/L weekly average.

Dissolved Oxygen:

Under ch. NR 104, a daily minimum DO limit of 4.0 mg/L would apply for discharges to Limited Aquatic Life waters and wetlands, while the BOD5 limits on the creek discharge are calculated assuming background and effluent values of 7 mg/L at the outfall. Given the distance that's involved here, the 4 mg/L limit should be sufficient unless the pipeline extended all the way to the creek.

Recommended Limit = 4.0 mg/L daily minimum.

Ammonia:

Ammonia hasn't often been an issue in dairy discharges, but limits can be calculated for informational purposes to see if the new discharge poses a concern. Three sets of criteria are available in ch. NR 105, acute criteria and both 4-day and 30-day chronic criteria, all of which are based on aquatic life protection. The chronic criteria for Limited Aquatic Life waters are about three-and-a-half times less restrictive than similar criteria for warmwater sport fish communities, so it is assumed the latter will control here based on protection of the creek.

Chronic ammonia toxicity criteria are related to both stream pH and temperature; ammonia is more toxic in warmer water and/or higher pH waters. The thermal data used to calculate ammonia criteria are the same as referenced earlier for BOD5 limits. Not much information is available on ambient pH for the Sheboygan River basin near headwaters in Fond du Lac County, but what information there is suggests results around 8.0 s.u. That actually is representative of hard water streams in Wisconsin, so the default values will be used since they are obviously from a much larger database. The following table lists the information used to estimate ammonia limits for Baker Cheese based on the Mullet Creek classification (warmwater sport fish community), the wetland classification (Limited Aquatic Life), and the procedures in Subchapter IV of ch. NR 106.

CREEK DISCHARGE:

	<i>spring</i>	<i>summer</i>	<i>fall</i>	<i>winter</i>
	<i>Apr –</i>	<i>June –</i>	<i>Oct –</i>	<i>Dec -</i>
	<i>May</i>	<i>Sept</i>	<i>Nov</i>	<i>March</i>
7Q10 (cfs)	0.076	0.076	0.076	0.076
7Q2 (cfs)	0.25	0.25	0.25	0.25
Ammonia (mg/L)	0.1	0.1	0.1	0.1
Temperature (deg F)	58	69	60	35
Temperature (deg C)	14.4	20.6	15.6	1.7
pH (std. units)	7.99	8.08	8.08	7.99
% of river flow used:	50	100	50	25
Reference weekly flow (cfs):	0.095	0.19	0.095	0.0475
Reference monthly flow (cfs):	0.2635	0.527	0.2635	0.13175

CRITERIA (in mg/L):

4-day Chronic (@ backgrd.

pH):

early life stages present

early life stages absent

6.20

3.66

5.06

10.02

30-day Chronic (@ backgrd.

pH)

early life stages present

early life stages absent

2.48

1.46

2.02

4.01

	<i>spring</i> <i>Apr –</i> <i>May</i>	<i>summer</i> <i>June –</i> <i>Sept</i>	<i>fall</i> <i>Oct –</i> <i>Nov</i>	<i>winter</i> <i>Dec -</i> <i>March</i>
EFFLUENT LIMITS (in mg/L):				
Weekly average				
early life stages present		4.36	5.54	
early life stages absent	6.80			10.51
Monthly average				
early life stages present		2.21	2.55	
early life stages absent	3.13			4.54
EFFLUENT LIMITS (in mg/L after rounding):				
Weekly average	6.8	4.4	5.5	11
Monthly average	3.1	2.2	2.6	4.5

“Early life stage absent” criteria are assumed for the fall and winter months because it is unlikely that a burbot population resides in this area based on evaluations of other downstream permittees in the basin.

Mass limits may also be necessary based on the effluent concentration limits and the proposed flow of 0.25 MGD, but the concentration limits should be sufficient for planning purposes at this time.

For a discharge to the marsh, different criteria apply based upon zero dilution and ammonia criteria for Limited Aquatic Life waters (which include wetlands for ammonia assessments). The limits applicable to a marsh discharge are as follows. Note that background ammonia isn’t needed because there is no assimilative capacity and therefore no need to calculate mass-balance limits, so limits are equal to the criteria:

MARSH DISCHARGE:

	<i>spring</i> <i>Apr –</i> <i>May</i>	<i>summer</i> <i>June –</i> <i>Sept</i>	<i>fall</i> <i>Oct –</i> <i>Nov</i>	<i>winter</i> <i>Dec -</i> <i>March</i>
7Q10 and 7Q2 (cfs)	0	0	0	0
Temperature (deg F)	58	69	60	35
Temperature (deg C)	14.4	20.6	15.6	1.7
pH (std. units)	7.99	8.08	8.08	7.99
CRITERIA (in mg/L):				
4-day Chronic (@ backgrd. pH):	40.52	23.93	33.03	92.34
30-day Chronic (@ backgrd. pH)	16.21	9.57	13.21	36.94

The weekly average limits are set equal to the 4-day chronic criteria, while monthly average limits are set equal to the 30-day chronic criteria, since the background “flow” in the marsh is zero.

	<i>spring</i> <i>Apr –</i> <i>May</i>	<i>summer</i> <i>June –</i> <i>Sept</i>	<i>fall</i> <i>Oct –</i> <i>Nov</i>	<i>winter</i> <i>Dec -</i> <i>March</i>
EFFLUENT LIMITS (in mg/L after rounding):				
Weekly average	41	24	33	92
Monthly average	16	9.6	13	37

Limits are also available based on acute toxicity criteria; those are expressed as daily maximum limits in addition to the weekly and monthly averages shown above. Limits are provided both for discharge to the wetland and discharge to the creek for informational purposes. Acute criteria are only related to pH, no temperature factor is built in. At an effluent pH of 8.0, for instance, the daily maximum limits will be twice the acute toxicity criteria, so the limits will be 16.8 mg/L for discharge to the creek and 25.9 mg/L for discharge to the wetland. Some facilities have variable daily maximum limits, though, which are applied when effluent pH is highly variable. The following table summarizes daily maximum ammonia limits at other example pH values based on the criteria at those pH levels:

Effluent pH	Daily maximum limit for:	
	Wetland	Mullet Creek
7.0	111 mg/L	72 mg/L
7.5	61.3 mg/L	39.8 mg/L
8.0	25.9 mg/L	16.8 mg/L
8.5	9.9 mg/L	6.4 mg/L
9.0	4.1 mg/L	2.6 mg/L

Obviously, unless effluent pH is very high, the weekly and monthly average limits will be controlling for ammonia. If needed, a table of limits based on variable pH values can be provided and included in the permit if necessary. The daily maximum limits are not based on assimilative capacity, so SLOWQ limits only are potentially applicable to weekly and monthly average limits.

It is noted that the weekly and monthly average limits for the marsh discharge are significantly greater (less restrictive) than the limits on the creek discharge. Unlike BOD5 where the limits for the two waterbodies are fairly similar, that is not the case for ammonia. It isn't certain whether a discharge at the marsh limits will be protective of the creek, especially during colder weather when decay and recovery of ammonia concentrations are inhibited or even non-existent. The need to include limits in the permit will be dependent upon projected effluent concentrations, since industrial ammonia discharges may be assessed in terms of the need to have limits included in permits (unlike municipal discharges, for example). The concentrations listed above may be used for planning purposes, though, but an additional evaluation of permit recommendations will likely be needed in the future.

Recommended Limits = Seasonal weekly and monthly average limits based on the creek discharge pursuant to the tables above, daily maximum limits dependent upon effluent pH (single values or a table are available based on predicted effluent pH range and variability).

Temperature:

New thermal water quality standards became effective in October of 2010. Based on those new standards, criteria were published in ch. NR 102 which would apply to wetlands as well as to warmwater sport fish communities, and those two sets of criteria are very different from each other. No specific criteria for wetlands are listed in s. NR 102.245(3)(a), with there being only a reference to ch. NR 103. NR 103 contains no numerical criteria. Instead, it contains references such as s. NR 103.03(2)(e) which includes protection to prevent significant adverse impacts. There is a note in s. NR 102.245, though, which suggests that criteria are to be re-evaluated for wetlands

to determine if and when fish and aquatic life conditions should be applied. This is especially relevant to the wetland situation here because of the flow control structure on the creek. Because of that, there is potential for ponded water within the wetland that comprises the Mullet Creek State Wildlife Area. Given the diverse aquatic populations expected within the marsh, especially in ponded waters, thermal limits may be calculated based on criteria implemented for “lake” discharges. Although this technically isn’t a lake, the same implementation procedures could be applied to ponds or impoundments, essentially any water body with a non-unidirectional flow.

The following table summarizes the applicable thermal water quality criteria for a “Southern Inland Lake” in Table 4 of ch. NR 102, basically any inland lake south of highway 10. The table also calculates limits based on a discharge of 0.25 MGD to a waterbody with a mixing zone area of 15,708 square feet (default value for a shoreline inland lake, pond or impoundment) as authorized in s. NR 106.54(7).

Month	Default Ambient Temperature (°F)	Sub-Lethal Thermal Criterion (°F)	Acute Thermal Criterion (°F)	Weekly Average Limit (°F)	Daily Maximum Limit (°F)
JAN	35	49	77	68	120
FEB	39	52	78	70	120
MAR	41	55	78	74	120
APR	49	60	80	75	120
MAY	58	68	82	82	115
JUN	70	75	86	86	120
JUL	77	80	87	87	109
AUG	76	80	87	89	111
SEP	67	73	85	84	118
OCT	54	61	81	71	118
NOV	42	50	78	61	120
DEC	35	49	77	68	120

It is unclear at this time the extent of that ponded area and especially how it may be affected by a new discharge of water ranging up to 0.25 MGD. For that reason, a regional wildlife biologist (Dan Weidert) from the Department’s Plymouth office was consulted on this new discharge proposal. His concerns relate more to the operation of the flow control structure and its ability to handle the increased flow, rather than any thermal concerns relating to this discharge.

It should also be noted that the criteria in the above table would apply to the creek itself below the marsh. Although dilution with the creek flow may be considered in the development of limits, it isn’t clear how relevant thermal limits would be because whether the discharge is to the wetland tributary or if the creek’s water is ponded, there are likely to be significant changes in water temperature over the distance from Baker Cheese to the outlet of the marsh into the creek. This may be an issue which affects the location of the actual discharge point, but it is believed that since a discharge to the marsh will get limits based on the same criteria applicable to the creek, meeting the limits within the marsh guarantees the criteria downstream of the marsh will be met as well. The recommended limits are in the right-hand two columns in the above table.

Phosphorus:

New water quality standards for phosphorus also became effective in late 2010. No criteria were developed for wetlands and Limited Aquatic Life waters at this time under s. NR 102.06(3), but criteria are available for the creek. The phosphorus criterion applicable to Mullet Creek is 0.075 mg/L, according to s. NR 102.06(3)(b). That criterion also applies further downstream in the Mullet River, while the criterion for the Sheboygan River is 0.1 mg/L. These various criteria are important because although no ambient phosphorus data are available in Mullet Creek, other streams in the Sheboygan River basin contain data to suggest ambient values exceed the 0.075 mg/L criterion. This situation is also representative of nearby basins such as the Milwaukee River, Manitowoc River, and waters draining into Lake Winnebago. Information available on the DNR website indicate potential Impaired

Waters status for phosphorus in the Mullet River below Glenbeulah, some 20 miles below the proposed Baker Cheese discharge site, although the stream has not been formally included on the list. This stream may be re-evaluated in the future. The potential phosphorus impairment fits in with downstream tributary data in excess of the 0.075 mg/L criterion. Based on overall ambient phosphorus levels in this basin as well as nearby basins, along with the potential impairment, the proposed phosphorus limit for Baker cheese is 0.075 mg/L. That limit would be expressed as a six-month average covering the periods of November – April and May – October, along with a monthly average limit of 0.225 mg/L, or three times the six-month average. An annual average mass limit of 0.16 lbs/day would also be recommended under s. NR 217.14(3) based on the 0.075 mg/L concentration and the 0.25 MGD projected discharge rate.

Recommended limits = 0.075 mg/L six-month average (November – April, May – October), 0.225 mg/L monthly average, 0.16 pounds per day annual average.

Other Toxic Substances:

Water quality criteria are available in ch. NR 105 for metals and some organic compounds, besides chloride and ammonia which were addressed earlier. These other metals and organics are not normally expected to be present in a discharge from a dairy, based on information from similar facilities around the state. Limits are not proposed at this time for these other substances.

Whole Effluent Toxicity:

Along with the chemical-specific recommendations mentioned above, acute and chronic whole effluent toxicity testing may be recommended for this permittee. The need for this testing will depend on the projected effluent quality, the discharge site, and the potential for effluent toxicity.

Other Issues:

As noted earlier, Department personnel have indicated potential concern with water quantity issues in the area, beyond the water quality issues addressed here. Those concerns are related more to issues such as ponding issues associated with additional flows to the wetland and wildlife area, and issues more related to pipe layout and construction. Although these issues are not exactly relevant to the water quality-based effluent evaluation, they may still need to be addressed with respect to any overall reviews and approvals.

Antidegradation:

Antidegradation may need to be addressed under ch. NR 207 on a pollutant-specific basis since this represents a new discharge to surface waters. For a direct discharge to the creek, one-third of the calculated limits would represent significant lowering of water quality (SLOWQ) as defined in s. NR 207.05 based on the determination of one-third of the available assimilative capacity in the creek. This issue is important because a proposed discharge in excess of SLOWQ limits would need to be evaluated to determine whether any cost-effective alternatives exist that would prevent SLOWQ.

For a discharge to the marsh, though, there is no assimilative capacity available, meaning SLOWQ would not need to be assessed (basically, one-third of zero is still zero). To be consistent with s. NR 207.03(7), antidegradation would not be evaluated in the marsh discharge unless there was a concern over meeting the standards in the creek below the marsh. That does not appear to be an issue here because of the size of the marsh and the potential ponding of the discharged water. As noted above, it is basically expected or assumed that a discharge to the marsh at the limits applicable to the marsh would eventually meet the creek standards because of travel time and dispersion, at least for BOD5 and temperature. For chloride and phosphorus, the limits are essentially the same. For ammonia, though, SLOWQ limits may need to be evaluated based on the creek discharge because an assimilative capacity calculation can be made. The ammonia recommendations will be dependent on a comparison of the limits and effluent concentrations, however. If projected ammonia concentrations are low compared to the limits, there will be no need to include limits in the permit and therefore no SLOWQ evaluation is needed.



STATE OF WISCONSIN
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July 2, 2012

Attorney Robin Nyffeler
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Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: Attorney General's Statement Regarding Authority to Administer NPDES
Permit Program

Dear Ms. Nyffeler:

In your June 19, 2012, email (enclosed) you write:

EPA had a follow-up question on the January 19th AG's Statement that addressed some of the 75 issues with Wisconsin's NPDES permit program. Specifically, EPA had a follow-up question on issue # 64 - public participation in the enforcement process. They asked if you could provide additional information on the following question:

If the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is an adversely affected person's right to intervene (or challenge a settlement) subject to a higher burden or standard compared to a adversely affected person's right to intervene in enforcement cases prior to settlement (e.g. where a complaint was filed, but no settlement yet reached)? Put another way, if the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is the right to intervene after entry of judgment (which is only granted upon a strong showing of entitlement & of justification for failure to request intervention sooner) equal to the right to intervene under . . . 40 CFR 123.27(d)[.]

I believe the answer to both of the above questions is yes.

As stated in the Attorney General's January 19, 2012, letter to DNR Deputy Secretary Matt Moroney on Issue #64 at 13:

40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

See also, State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983).

I assume EPA's questions are prompted by the Attorney General's January 19, 2012, letter to DNR Deputy Secretary Matt Moroney on Issue #64 at 13, which states in part:

The Wisconsin Court of Appeals stated that "[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewerage Commission*, 104 Wis. 2d at 188.

At the outset, we suggest the question posed is not germane to determining whether Wisconsin state law is consistent with the federal requirement. As stated, 40 CFR § 123.27(d)

requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing" an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program. On its face, Wis. Stat. § 803.09(1) provides such a right and meets this requirement.

The fact that reasonable statutory requirements must be met in order to invoke the right of intervention is not fatal to the consistency requirement. Again, those requirements for intervention as of right are: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

In *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988), plaintiffs claimed "that 33 U.S.C. § 1251(e) requires states to provide for citizen suits and intervention rights just as the CWA does at the federal level." *Id.* at 173. In that case plaintiff challenged the rule at issue in your inquiry [40 C.F.R. § 123.27(d)] on the basis that it did not afford the same intervention rights as under federal law. The court upheld the rule observing that "in promulgating the regulations and again in its brief before this court, the agency indicated that the first option-provision of intervention as of right-called for state intervention rights *similar to* those accorded by the federal rules." *Id.* at 177 (emphasis added). The court "conclude[d] that the regulations, as interpreted, provide meaningful and adequate opportunity for public participation consistent with the statutory mandate. The regulations reasonably accommodate conflicting statutory prescriptions by 'establish[ing] requirements which ensure the benefits of public participation, while intruding less into the States' management of their judicial and administrative systems.'" *Id.* at 178, citing Consolidated Permit Regulations, 45 Fed.Reg. 33,290, 33,382 (footnotes omitted). To impose a more liberal intervention requirement would intrude more, not less, into the States' management of their judicial and administrative systems. Cf., *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d at 178.

Applying these principles, the court in *Paper, Allied-Industrial, Chemical And Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1296-1297 (10th Cir. 2005), held that the Arkansas intervention statute that was more restrictive than the federal rule complies with the applicable federal requirement for public participation in enforcement proceedings. There the court held, "Oklahoma's public-participation provisions are *comparable enough* to permit a delegation of CWA enforcement authority" *Id.* at 1297 (emphasis added).

Thus, even if the Wisconsin intervention rule were viewed as more restrictive than the federal intervention rule, it would not be so divergent as to call into question its consistency with the federal Clean Water Act public participation requirement.

As for the question posed, even though the courts allow for an EPA or state rule to diverge from federal intervention standards, not even this issue is presented here. This is because Wis. Stat. § 803.09(1) is based on Fed. R. Civ. P. 24(a)(2) and the courts look to cases and commentary relating to Rule 24(a)(2) for guidance in interpreting § 803.09(1). *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d at 547; *see also State v. Evans*, 2000 WI App 178, ¶ 8 n. 2, 238 Wis. 2d 411, 617 N.W.2d 220 ("[W]here a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.").

As was made clear in our January 19, 2012 letter, the quotation at issue in *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), is based on the federal intervention rule and federal case law interpreting the rule. Thus, Wisconsin intervention law is not more restrictive than federal intervention law.

A review of Wisconsin case law reveals that an adversely affected person's right to intervene (to challenge a settlement) is subject to no higher burden or standard than compared to an adversely affected person's right to intervene in enforcement cases under federal law, and the right to intervene prior to or after settlement turns on all the circumstances, with timeliness being just one factor in context with many others, some of which carry more weight than timeliness alone.

For example, in *C.L. v. Edson*, 140 Wis. 2d 168, 178-179, 409 N.W.2d 417 (Ct. App. 1987) intervention was held to be timely and the burden was met even though intervention was requested nine months after judgment where a party requested access to documents four months after judgment and brought a mandamus action before moving to intervene. Significant in meeting the *Sewerage Commission* test (cited at 140 Wis. 2d at 178), were several factors bearing on timeliness *under the circumstances*. First, the court observed, "the newspaper could not have known its interests in disclosure until it discovered the judgment approving settlements that called for secrecy." *C.L. v. Edson*, 140 Wis. 2d at 178. Second, the court found "this is not a case where the newspaper delayed for nine months after it knew of the judgment. The newspaper's attempts to view the documents began a reasonable time after it knew the judgment had been entered." *Id.* at 178-179. Thus, "We conclude that, under the unique facts of this case, the newspaper's intervention was prompt." *Id.* at 179. Also bearing on the timeliness issue the court observed, "From the context of the hearing, it is clear that the court's reference to 'previous matters' included a finding that the intervention would not affect the terms of the settlement between the parties. Moreover, the parties have not shown any prejudice resulting from having to defend a postjudgment intervention nine months after judgment." *Id.* at 179.

In *First Wisconsin National Bank v. Jagers*, No. 88-0077, unpublished slip op. ¶ 2 (WI App. Dec. 21, 1988), 1988 WL 148302, the court distinguished the *Sewerage Commission* case by observing:

In denying intervention, the trial court also relied on the standard adopted in *Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 311 N.W. 2d 677 (Ct. App. 1981), that intervention motions after entry of final judgment will be granted "only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Id.* at 188, 311 N.W.2d at 680. This test is inapplicable to the circumstances here, where there was no reason for intervention prior to ITT's motion to set aside the judgment, the intervention was sought to validate the judgment, not to overturn it, and the motion to intervene was brought one month prior to the scheduled hearing on the motion to set aside the foreclosure judgment. This is not a case where the proposed intervenors knew about the action affecting their interests but failed to act until after the action was resolved. *See id.* at 186, 311 N.W.2d at 679. Even applying the *Milwaukee Sewerage* test to the circumstances here can result in only one reasonable conclusion: there was a strong showing of entitlement and justification. Intervention is the "only way to protect the movant's rights." *Id.* at 188, 311 N.W.2d at 680.

In *Olivarez v. Unitrin Property & Cas. Ins. Co.*, 2006 WI App 189, 296 Wis. 2d 337, 723 N.W.2d 131, after citing to the applicable case law, including the *Sewerage Commission* case, the court affirmed the denial of intervention by applying the applicable law as follows. "We take no issue with these cases in general, inasmuch as they illustrate that timeliness turns on whether, *under all the circumstances*, a proposed intervenor acted promptly and whether intervention will prejudice the original parties." 296 Wis. 2d 337, ¶ 20 (emphasis added). The court recognized that while some case holdings supported late-stage intervention, *id.* at ¶ 23, the facts of this particular case, as in *Sewerage Commission*, favored denial of intervention as untimely. 296 Wis. 2d 337, ¶ 24. Tellingly, the court found that prejudice would have been occasioned on the other parties by late intervention.

The bottom line of the cases in Wisconsin is that timeliness alone was not determining, and that the requirement for "a strong showing of entitlement and of justification for failure to request intervention sooner," *Sewerage Commission*, 104 Wis. 2d at 188, is not only consistent with federal intervention case law, but is a showing that can be met if the movant makes the requisite showing that the motion seeking intervention is timely under the circumstances, including under those that go to whether his or her rights will be adversely affected, and whether intervention will or will not prejudice the rights of the parties. Any suggestion that 40 C.F.R. §

Attorney Robin Nyffeler
July 2, 2012
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123.27(d) permits an intervention that is untimely because it would prejudice the parties is inconsistent with the law and common sense.

For the above reasons, the Wisconsin intervention rule is consistent with the federal Clean Water Act public participation rule.

Sincerely,



Thomas J. Dawson
Assistant Attorney General
Environmental Protection Unit Director

TJD:drm

Enclosure

Dawson, Thomas J.

From: Nyffeler, Robin T - DNR [Robin.Nyffeler@Wisconsin.gov]
Sent: Tuesday, June 19, 2012 3:53 PM
To: Dawson, Thomas J.
Cc: Barbara Wester
Subject: January 19th 2012 AG's Statement

Hi Tom,

EPA had a follow-up question on the January 19th AG's Statement that addressed some of the 75 issues with Wisconsin's NPDES permit program. Specifically, EPA had a follow-up question on issue # 64 - public participation in the enforcement process. They asked if you could provide additional information on the following question:

If the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is an adversely affected person's right to intervene (or challenge a settlement) subject to a higher burden or standard compared to a adversely affected person's right to intervene in enforcement cases prior to settlement (e.g. where a complaint was filed, but no settlement yet reached)? Put another way, if the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is the right to intervene after entry of judgment (which is only granted upon a strong showing of entitlement & of justification for failure to request intervention sooner) equal to the right to intervene under 40 CFR 40 CFR 123.27(d)

I think an e-mail response should be sufficient. Thank you.

Robin Note to Barbara: If I did not correctly state the issue, please provide clarification.

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December 17, 2012

VIA HAND DELIVERY

Honorable Frank D. Remington
Dane County Courthouse – Room 4103
215 South Hamilton Street
Madison, Wisconsin 53703

Re: *Midwest Environmental Defense Center v.*
Wisconsin Department of Natural Resources
Dane County Case No. 12-CV-3352

Dear Judge Remington:

I represent the respondent Wisconsin Department of Natural Resources (WDNR) in the above-referenced matter. I have received the Motion to Dismiss and brief of the intervenor Foremost Farms USA. This letter is the WDNR's response to the motion and brief.

The WDNR agrees with section III.A. of Foremost Farms' brief, in which it argues that the motion should be dismissed because the WQBELs are not a final agency action. As shown in the WDNR letter attached to the brief of Foremost Farms, the agency had reached a similar conclusion in the Village of Roberts situation. The WDNR has not changed its position, and therefore joins with Foremost Farms to request that the petition be dismissed because the action that is challenged is not a final agency action.

Secondly, the WDNR agrees with section III.C. of Foremost Farms' brief, in which it argues that MEDC has not demonstrated that it has standing to bring this action for judicial review. Accordingly, the WDNR joins with Foremost Farms to request that the petition be dismissed for that reason as well.

Finally, with respect to section III.B. of Foremost Farms' brief, the WDNR does not necessarily agree with the argument of Foremost Farms that petitioner MEDC does not have a right to seek judicial review, but must first exhaust its administrative remedies by requesting an administrative review. However, we do not think that the Court needs to address this issue at all, because the first two issues listed above are dispositive and the petition may and should be dismissed on those grounds alone.

Honorable Frank D. Remington
December 17, 2012
Page 2

If the Court nevertheless chooses to make a determination on whether MEDC has a right to directly seek judicial review without first requesting an administrative review, WDNR proffers for the Court's consideration the attached letter from Attorney General J.B. Van Hollen to WDNR Deputy Secretary Matt Moroney, dated January 19, 2012, in which this issue is discussed at pages 2 to 3. The Attorney General stated that individuals may directly seek judicial review of permit decisions rather than first requesting an administrative review under Wis. Stat. § 283.63, because that statute requires that the review must be requested by "5 or more persons." Therefore, unless an individual has the right to directly seek judicial review, he/she would be without a remedy. However, as stated above, the WDNR strongly believes that this issue does not need to be reached by the Court because the other two issues are dispositive.

In sum, the WDNR joins with Foremost Farms to request that the petition be dismissed because the action that is challenged is not a final agency action and because MEDC has not demonstrated that it has standing to bring this action for judicial review.

Thank you for your consideration of the WDNR's position.

Sincerely,



Lorraine C. Stoltzfus
Assistant Attorney General

LCS:jph
Enclosure

cc: Attorneys Dennis Grzezinski and Elizabeth Lawton
Attorney Donald Schott
Attorney Robin Nyffeler (WDNR)



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 17, 2012

VIA HAND DELIVERY

Honorable Frank D. Remington
Dane County Courthouse – Room 4103
215 South Hamilton Street
Madison, Wisconsin 53703

Re: *Midwest Environmental Defense Center v.*
Wisconsin Department of Natural Resources
Dane County Case No. 12-CV-3352

Dear Judge Remington:

I represent the respondent Wisconsin Department of Natural Resources (WDNR) in the above-referenced matter. I have received the Motion to Dismiss and brief of the intervenor Foremost Farms USA. This letter is the WDNR's response to the motion and brief.

The WDNR agrees with section III.A. of Foremost Farms' brief, in which it argues that the motion should be dismissed because the WQBELs are not a final agency action. As shown in the WDNR letter attached to the brief of Foremost Farms, the agency had reached a similar conclusion in the Village of Roberts situation. The WDNR has not changed its position, and therefore joins with Foremost Farms to request that the petition be dismissed because the action that is challenged is not a final agency action.

Secondly, the WDNR agrees with section III.C. of Foremost Farms' brief, in which it argues that MEDC has not demonstrated that it has standing to bring this action for judicial review. Accordingly, the WDNR joins with Foremost Farms to request that the petition be dismissed for that reason as well.

Finally, with respect to section III.B. of Foremost Farms' brief, the WDNR does not necessarily agree with the argument of Foremost Farms that petitioner MEDC does not have a right to seek judicial review, but must first exhaust its administrative remedies by requesting an administrative review. However, we do not think that the Court needs to address this issue at all, because the first two issues listed above are dispositive and the petition may and should be dismissed on those grounds alone.

Honorable Frank D. Remington
December 17, 2012
Page 2

If the Court nevertheless chooses to make a determination on whether MEDC has a right to directly seek judicial review without first requesting an administrative review, WDNR proffers for the Court's consideration the attached letter from Attorney General J.B. Van Hollen to WDNR Deputy Secretary Matt Moroney, dated January 19, 2012, in which this issue is discussed at pages 2 to 3. The Attorney General stated that individuals may directly seek judicial review of permit decisions rather than first requesting an administrative review under Wis. Stat. § 283.63, because that statute requires that the review must be requested by "5 or more persons." Therefore, unless an individual has the right to directly seek judicial review, he/she would be without a remedy. However, as stated above, the WDNR strongly believes that this issue does not need to be reached by the Court because the other two issues are dispositive.

In sum, the WDNR joins with Foremost Farms to request that the petition be dismissed because the action that is challenged is not a final agency action and because MEDC has not demonstrated that it has standing to bring this action for judicial review.

Thank you for your consideration of the WDNR's position.

Sincerely,



Lorraine C. Stoltzfus
Assistant Attorney General

LCS:jph
Enclosure

cc: Attorneys Dennis Grzezinski and Elizabeth Lawton
Attorney Donald Schott
Attorney Robin Nyffeler (WDNR)

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.,

Plaintiff,

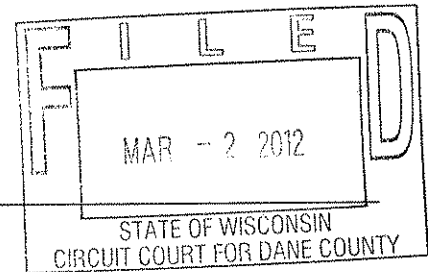
v.

Case No. 12-CV-0569

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,
NATURAL RESOURCES
BOARD, and CATHY STEPP,

Declaratory Judgment: 30701
Admin. Agency Review: 30607

Defendants.



STIPULATION AND ORDER

The plaintiff brought this action challenging the validity and reliance on a portion of Wis. Admin. Code § NR 106.10(1), which contains an exclusion to certain compounds subject to water quality based effluent limitations in WPDES permits. The parties wish to resolve this matter without additional litigation and believe this stipulation to be in the public interest and consistent with the requirements of the Clean Water Act and state laws and regulations implementing the Clean Water Act, and AGREE and STIPULATE as follows:

1. The part of the rule that reads, "but do not include the addition of compounds at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply," does not comply with the requirements of the federal Clean Water Act, 33 U.S.C. §§

1251 to 1387, and regulations adopted under that act and is therefore declared to be invalid, and the Department of Natural Resources shall continue not to rely on that part of the rule.

2. As required by Wis. Stat. § 227.40(6), by copy of this Stipulation and Order, the legislative reference bureau is ordered to publish a notice of the Court's determination as to the invalidity of those portions of Wis. Admin. Code § NR 106.10(1) identified in this Stipulation and Order in the Wisconsin Administrative Register under Wis. Stat. § 35.93(4), and it shall insert an annotation of the Court's determination in the Wisconsin Administrative Code under Wis. Stat. § 13.92(4)(a).

3. The Department of Natural Resources shall grant or deny the four pending Wis. Stat. § 283.63 petitions identified in the complaint by no later than thirty days following the date of the Court's entry of this Order, and if any of the petitions for hearing is granted, shall refer the matter to the Division of Hearings and Appeals within thirty days of the Department's granting of the petition.

4. This action may be dismissed.

Dated: 28 February 2012
J.B. VAN HOLLEN
Attorney General

Joanne F. Kloppenburg
JOANNE F. KLOPPENBURG
Assistant Attorney General
State Bar No. 1012239
Attorneys for Defendant
Wisconsin Department of Justice
Post Office Box 7857
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(608) 266-9227

Dated: 2/27/12
MCGILLIVRAY WESTERBERG
& BENDER LLC

James N. Saul
JAMES N. SAUL
State Bar No. 1067236
DAVID C. BENDER
State Bar No. 1046102
Attorneys for Plaintiff
211 S. Patterson St., Suite 320
Madison, Wisconsin 53703
(608) 310-3560

ORDER

The terms of the foregoing stipulation are approved by and made the order of the Court, and this action is dismissed, this 2nd day of MARCH, 2012. This is a Final Order under Wis. Stat. § 808.03(1).

BY THE COURT:

Maryann Sumi
MARYANN SUMI
Circuit Judge, Branch 2



United States Environmental Protection Agency
Regional Administrator
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590
JUL 25 2012

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Stepp:

I am pleased to inform you that the U.S. Environmental Protection Agency has approved the *Wisconsin Administrative Code* Chapter NR 217, Subchapter III, "Water Quality Based Effluent Limitations for Phosphorus." This Subchapter, which Wisconsin adopted in 2010, pertains to the development of Wisconsin Pollutant Discharge Elimination System permits to implement the State's approved water quality criteria for phosphorus.

EPA reviewed Subchapter III as a revision to Wisconsin's National Pollutant Discharge Elimination System (NPDES) program and conducted the review under 40 C.F.R. §§ 123.25(a) and 123.62. As Regional Administrator, I have the authority to approve revisions to Wisconsin's NPDES program. An enclosure to this letter explains the basis for approval of the Subchapter.

During its review of Subchapter III, EPA recommended that WDNR and EPA create a new addendum to the NPDES Memorandum of Agreement between our agencies through which WDNR would commit itself to certain conditions as it implements Sections NR 217.14(2) Concentration Based Limits and 217.18 Watershed Adaptive Management Option. The conditions will ensure that permits issued consistent with the Sections also meet the requirements of 40 C.F.R. §§ 122.44, 122.45(d), 122.47, 122.62, 124.8, and 124.56. WDNR signed the addendum in April. Enclosed is a copy of the addendum with both WDNR and EPA's signatures.

Tribal Consultation

EPA consulted with Wisconsin tribes on EPA's review of Subchapter III. The Bad River Band of Lake Superior Tribe of Chippewa Indians (the Bad River Tribe) provided comments to EPA that we want to share with you.

The Bad River Tribe asks whether under Section NR 217.14(1) a mass limit will be included in permits for phosphorus discharges when the receiving water or downstream water is designated as an Exceptional Resource Water (ERW) or Outstanding Resource Water (ORW) by the Tribe. Section NR 217.14(1) states that a mass limit shall be

Exhibit A

included in a permit for discharges of phosphorus to receiving or downstream waters that are an ORW or ERW. In a January 19, 2012 letter to WDNR, Wisconsin's Attorney General wrote that in Wisconsin provisions allowing WDNR to establish water quality-based effluent limitations necessary to protect downstream waters, "downstream waters" includes navigable waters of the U.S. that are protected by state and tribal water quality standards. Accordingly, we understand Section NR 217.14(1) to require that mass limits be included in permits for sources that discharge phosphorus into receiving or downstream waters on tribal land that a Tribe has designated as an ORW or ERW. However, we ask that WDNR confirm this in its implementing guidance.

Secondly, the Bad River Tribe asks to be involved in the watershed adaptive management option described in Section NR 217.18 if and when Wisconsin approves this approach for a watershed affecting or having the potential to affect the waters flowing within the boundaries of its Reservation. We ask that WDNR encourage parties developing adaptive management plans to involve tribes during development of such plans if the plans will cover a watershed which affects tribal waters. Although tribes will be able to comment on draft NPDES permits that are based on adaptive management plans under the public notice and comment provisions of Wisconsin Statutes Chapter 283, we encourage you to involve tribes during plan development. The Bad River Tribe also requests that WDNR define the scale of a watershed to which the adaptive management option may apply.

Finally the Bad River Tribe asks that WDNR clarify the method it will use to determine an appropriate "similar location" under Section NR 217.13(2)(d). This provision, which addresses calculation of water quality-based effluent limits, states that "the representative upstream concentration shall be either a concentration derived by the Department based on data from the specific stream or from a similar location." The provision does not explain how WDNR will determine what is an appropriate "similar location" when data are not available from the specific stream. WDNR should be able to clarify the method in its guidance.

Reservation of Rights

EPA reserves the right to initiate a subsequent revision to the Wisconsin program under 40 C.F.R. § 123.62 if, among other things, a Wisconsin court strikes down or limits the State's authority to administer the NPDES program including, but not limited to, the legal authority on which our approval of the present revision is based. Moreover, EPA retains authority to review and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c), even if Wisconsin developed the permit in accordance with State law or our Memorandum of Agreement, including any aspects of State law that EPA has approved as part of Wisconsin's NPDES program. EPA also retains authority to take action as appropriate under 40 C.F.R. §§ 123.63 and 123.64.

Nutrients, including phosphorus, are among the most significant remaining causes of water pollution in Wisconsin and the nation. EPA commends Wisconsin for being the first state in the Region to establish numeric water quality criteria for phosphorus in all of the State's surface waters. We also commend Wisconsin for the significant innovation in the watershed adaptive management section of Subchapter III.

If you have any questions about this approval or the Bad River Tribe's comments, please do not hesitate to contact me at (312) 886-3000.

Sincerely,

A handwritten signature in black ink, appearing to read "S H A", written in a cursive style.

Susan Hedman
Regional Administrator

Enclosures

cc: Kenneth Johnson, WDNR

Enclosure

Revision to the Wisconsin NPDES Program for Effluent Standards and Limitations for Phosphorus

Wisconsin amended its Chapter NR 217 "Effluent Standards and Limitations for Phosphorus" by adding Subchapter III, NR ss. 217.10-217.19 "Water Quality-Based Effluent Limitations for Phosphorus" in 2010. Except for s. NR 217.19, the U.S. Environmental Protection Agency reviewed these regulations for consistency with 40 C.F.R. § 123.25(a). In addition, EPA reviewed the compliance schedule authorizing provisions in ss. NR 217.17 and 217.18 under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313.

EPA review of NR 217, Subchapter III, Wisconsin Administrative Code

Wisconsin added the following provisions in Chapter NR 217, Subchapter III:

217.10	Applicability
217.11	Definitions
217.12	General
217.13	Calculation of water quality based effluent limitations for phosphorus
217.14	Expression of limitations
217.15	Determination of necessity for water quality based effluent limitations for phosphorus
217.16	Relationship of WQBELs and TMDL based limitations
217.17	Schedules of compliance
217.18	Watershed adaptive management option
217.19	Variations for stabilization ponds and lagoon systems

EPA addressed s. NR 217.19 and the compliance schedule authorizing provision in s. 217.17 on December 30, 2010 as part of its approval of the phosphorus water quality criteria. EPA approves ss. NR 217.10, 217.11, 217.12, 217.13, 217.14, 217.15, 217.16, 217.17, and 217.18 as discussed below. EPA is approving ss. NR 217.14(2) and 217.18 based, in part, on an addendum to the National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement ("MOA") between the Wisconsin Department of Natural Resources ("WDNR" or "the Department") and EPA concerning implementation of these provisions, as discussed below. Finally, EPA approves the compliance schedule authorizing provisions in s. NR 217.18(3) under CWA § 303(c) based on the fact that compliance schedules, including those established under s. NR 217.18(3), are subject to s. NR 217.17, 40 C.F.R. § 122.47, and the signed MOA Addendum.

Prior to this approval, EPA consulted with the Wisconsin tribes on the draft MOA and WDNR's NPDES rules. On May 4, 2011, EPA issued its Policy on Consultation and Coordination with Indian Tribes. While EPA is in a transition period of determining when it is appropriate to consult under this Policy, and working with tribes as part of this process, EPA Region 5 decided in this instance to consult with tribes on its pending decision concerning

Wisconsin's NPDES rules for the new phosphorus water quality criteria, rather than wait until the process for implementing the policy is more developed. EPA participated in conference calls with the tribes and provided an opportunity for the tribes to comment. The tribes were overall supportive of the NPDES rules implementing the phosphorus water quality standards. The Bad River Band of Lake Superior Tribe of Chippewa Indians had comments which are included in the cover letter.

EPA Approval

1. s. NR 217.10 Wis. Adm. Code: Applicability. This section contains the applicability statement for Chapter NR 217, Subchapter III. It specifies that the Subchapter is applicable to four specified categories of point sources, including, but not limited to, publicly and privately owned wastewater facilities or treatment works. EPA asked WDNR to clarify that point sources not covered under s. NR 217.10 may still be subject to a requirement for a water quality-based effluent limitation (WQBEL) for phosphorus under Wis. Stat. section 283.13(5), which provides that WDNR shall establish more stringent effluent limitations if these limitations are necessary to meet applicable water quality standards, or any other state or federal law or regulations. WDNR added a footnote to clarify this point. Thus, this provision makes clear that other point sources may need phosphorus WQBELs in permits to meet the criteria in s. NR 102.06, even if they are not subject to Subchapter III, Chapter NR 217.

EPA approves s. NR 217.10 Wis. Adm. Code.

2. s. NR 217.11 Wis. Adm. Code: Definitions. This section contains definitions that apply solely for carrying out Subchapter III. WDNR added a definition of "new discharger" which, unlike EPA's definition of new discharger in 40 C.F.R. § 122.2, does not exclude new sources from the definition. However, the lack of an exclusion for new sources is not consequential given the narrow applicability of the term "new discharger" as well as its use in Subchapter III.

In addition, WDNR added a definition of "privately owned treatment works" to address EPA's concern that this term, as used in s. 217.10, could be interpreted to exclude commercial and industrial sources which discharge process wastewater. WDNR's definition makes clear that the term as used in Subchapter III includes industrial and commercial sources which discharge process wastewater.

EPA approves s. NR 217.11 Wis. Adm. Code.

3. s. NR 217.12 Wis. Adm. Code: General. This section contains the Department's authority to establish WQBELs for phosphorus. WDNR revised its proposed regulation to address EPA's comments that, to match the language in EPA's regulations at 40 C.F.R. § 122.44(d)(1)(i) and (ii), Wisconsin should revise ss. NR 217.12(1)(a), 217.15(1)(a) and 217.15(1)(c) to provide that WQBELs for phosphorus shall be included in a permit whenever

WDNR determines that the discharge from a point source contains phosphorus at concentrations which will cause, have a reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion. WDNR did this. Section NR 217.12(a) states that the Department shall set WQBELs for discharges that will cause, have the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters.

Regarding downstream waters, 40 C.F.R. § 122.4(d) prohibits issuance of permits when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.¹ Section NR 217.12(a) is not clear on its face that it means downstream waters in other states, as well as Wisconsin waters. However, Wisconsin has authority to take downstream impacts in affected states into account in calculating effluent limits. Wis. Stats. sections 283.31(3) and (5) provide WDNR authority for applying 40 C.F.R. § 122.4(d) if necessary to ensure compliance with water quality requirements of all affected states. Wisconsin has confirmed it has this authority. In a January 19, 2012 letter to WDNR, Wisconsin's Attorney General stated that in Wisconsin provisions allowing the Department to establish WQBELs necessary to protect downstream waters, "downstream waters" includes navigable waters of the U.S. that are protected by state and tribal water quality standards. EPA expects WDNR to take the potential for downstream impacts into account and retains the authority to object to a permit if the permit does not ensure compliance with applicable water quality requirements of affected states and tribes.

Based on the foregoing discussion, EPA approves s. NR 217.12 Wis. Adm. Code.

4. s. NR 217.13 Wis. Adm. Code: Calculation of water quality-based effluent limitations for phosphorus. This provision provides procedures for calculating a WQBEL for phosphorus for discharges to streams and rivers, inland lakes and reservoirs, and the Great Lakes. Several paragraphs are discussed below.

Section NR 217.13(4) provides that WDNR will establish WQBELs for discharges directly to the Great Lakes consistent with near shore or whole lake model results approved by WDNR. Sections NR 217.12 and 217.15 make clear that WDNR must determine whether a discharger will cause, have a reasonable potential to cause, or contribute to an excursion beyond the applicable phosphorus water quality criterion. These sections also make clear that WDNR is required to set a WQBEL when the Department determines that a discharge will cause, have the reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion. Thus, Wisconsin is required by ss. 217.12 and 217.15 to identify a model with which it will calculate WQBELs for discharges into the Great Lakes, and actually establish such limits when required under ss. NR 217.12 and 217.15.

¹ 40 C.F.R. § 122.2 defines the term "state" to include Indian Tribes.

Section NR 217.13(8) provides that a new discharger will not be able to discharge phosphorus in a phosphorus impaired water unless, among other things, the discharge will “improve water quality in the phosphorus impaired segment.” In response to comments on this provision, WDNR said that “New dischargers could improve water quality in a receiving water in a number of ways. For example, a large effluent volume with a very low phosphorus concentration--well below the applicable criterion--would improve water quality. The department will make this determination on a case-by-case basis.” To show an “improvement” in water quality, EPA expects that the permittee will demonstrate that its discharge will result in a decrease in the phosphorus concentration or loading in the receiving water.

Section NR 217.13(8) also provides an exception for a new discharger if it can demonstrate that the new phosphorus load will be offset through a phosphorus trade. Section NR 217.17(3)(f) also addresses pollutant trading. EPA has developed guidance on pollutant trading that sets out necessary terms and conditions of a trade. See “The Water Quality Trading Policy” and “The Water Quality Trading Toolkit for Permit Writers” (2007, EPA-833-R-07-004, and <http://water.epa.gov/type/watersheds/trading/WQTToolkit.cfm>). Generally, EPA recommends that trade programs include several elements to ensure credibility and compliance with water quality standards. These elements include:

- Applying CWA regulations and established state law provisions to provide legal authority for administration of water quality trade programs.
- Clearly defining a common unit of trade.
- Generating credits before or during the same time period they are to be used to comply with permit limits.
- Including methods for managing uncertainty such as using trading ratios, modeling, and best management practice efficacy estimates.
- Ambient water quality monitoring, in addition to effluent monitoring requirements in NPDES permits. Samples should be collected at strategic locations to ensure progress in meeting water quality standards.
- Compliance and enforcement mechanisms, including a combination of record-keeping, certifications, inspections, and reporting.
- Provisions for adequate public notice through, for example, the TMDL and permit process and a public website.
- Trade programs should be evaluated in order to modify and make improvements to the program.

Sections 217.13(8) and 217.17(3)(f) do not include anything that is inconsistent with EPA’s trading policy. In particular, s. NR 217.13(8) says that the offset through a phosphorus trade must be implemented prior to the new discharge, and the note to s. NR 217.14 states that trades must be incorporated into the permit and approved by the Department prior to

implementation.² EPA understands that WDNR is currently working on promulgating trading provisions.

EPA approves s. NR 217.13 Wis. Adm. Code.

5. s. NR 217.14 Wis. Adm. Code: Expression of limitations. Section NR 217.14(1) requires that limits be expressed as a concentration, and as a mass limit for certain identified waters, including outstanding resource waters (ORWs) and exceptional resource waters (ERWs). WDNR may establish mass limitations in permits for any other discharges of phosphorus where an increase in phosphorus load is likely to result in adverse effects on water quality in the receiving water or downstream water. Under 40 C.F.R. §122.45(f) mass limits must be included in permits except when the applicable standard is expressed in other units of measurement. Here, the phosphorus water quality criteria in s. NR 102.06 are expressed in terms of concentration, so EPA's regulations do not mandate mass limitations. The Bad River Tribe, in its comments to EPA, asked for confirmation that WDNR will include a mass limit in permits for phosphorus discharges when the receiving water or downstream water is designated as an ERW or ORW by the Tribe. As noted earlier, Wisconsin concludes that its provisions allowing the Department to establish WQBELs necessary to protect downstream waters includes authority to protect waters protected by other state and tribal water quality standards. EPA asks WDNR to confirm in guidance or by letter to EPA that the Section 217.14(1) requirement concerning mass limits applies to receiving and downstream waters on tribal lands designated by a tribe as ORW or ERW. If the confirmation is included in guidance, please provide EPA a copy of the revised guidance.

Section NR 217.14(2) and (3) provides that the Department will express effluent limits as a monthly average in permits, except for concentrations of less than or equal to 0.3 milligrams per liter (mg/L) where limitations may be expressed as annual averages. The CWA section 402(c)(2) specifically requires NPDES permits to include all the conditions that are required under 40 C.F.R. § 122.45 (made applicable to state NPDES programs by 40 C.F.R. §123.25(a)(16)). Section § 122.45(d) provides that for continuous dischargers, all effluent limitations necessary to achieve water quality standards shall, unless impracticable, be stated as maximum daily and average monthly discharge limitations for all dischargers other than publicly-owned treatment works (POTWs) and average weekly and average monthly discharge limitations for POTWs.

Based on discussions with EPA, WDNR developed a Justification Paper for use of averaging periods for expression of WQBELs for phosphorus other than the averaging periods in 40 C.F.R. § 122.45(d). WDNR set out the basis for impracticability of weekly and daily limits,

² In approving Subchapter III, EPA's approval does not extend to the notes to s. NR 217.14 or to notes in any other section.

and also, when the phosphorus wasteload allocation (WLA) is 0.3 mg/L or less, that monthly limits may be impracticable. WDNR explains that its phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices, and that this is consistent with EPA guidance for nutrient criteria development. WDNR evaluated several studies on the response of fresh waters to phosphorus. Further, WDNR relied on a March 3, 2004 memorandum from James Hanlon, Director of EPA's Office of Wastewater Management, "Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its Tidal Tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System." In this 2004 memorandum, EPA concluded that annual average limits were appropriate for nitrogen and phosphorus in the Chesapeake Bay and that it was impracticable in that case to express such limits as daily/weekly/monthly average values. WDNR noted that the EPA memo indicates that the nature of the water quality problem can be used to determine impracticability.

WDNR then relied on the information above to support its conclusion that due to the nature of phosphorus loadings and the manner in which its phosphorus water quality standards were derived, daily and weekly limits were impracticable. Further, that monthly limits may be impracticable when the WLA is 0.3 mg/L or less, as is recognized in Wisconsin s. NR 217.14(2). For rivers, streams, reservoirs and lakes with residence time of less than one year, where the WLA is 0.3 mg/L or less, the Justification Paper provides that WDNR may establish a monthly average or six-month average limit. When it sets a six-month average limit, the Justification Paper provides that WDNR will also set a monthly limit of 3 times the WLA. For lakes and reservoirs with a residence time of one year or more, where the WLA is 0.3 mg/L or less, the Justification Paper provides that WDNR may establish a six-month average or annual average limit along with a monthly limit of 3 times the WLA. WDNR signed an addendum to the EPA-WDNR NPDES MOA confirming that WDNR will implement 217.14(2) in this manner. EPA expects the State will have to modify its Enforcement Management System to describe the way in which it will manage seasonal and annual average phosphorus limits in its compliance evaluation and enforcement program.

EPA approves s. NR 217.14 Wis. Adm. Code.

6. s. NR 217.15 Wis. Adm. Code: Determination of necessity for water quality-based effluent limitations for phosphorus. This section requires WDNR to determine when WQBELs are required for phosphorus. Sections 301 and 402 of the CWA require NPDES permits to include effluent limitations as needed for discharges to meet water quality standards. The regulation at 40 C.F.R. § 122.44(d) requires the permit-issuing agency to: (1) determine whether point source discharges will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria; and (2) when the agency makes an affirmative determination, set WQBELs that are derived from and comply with water quality standards. Section NR 217.15 requires a WQBEL where the Department makes an affirmative

determination on reasonable potential. It establishes procedures for the Department to make this determination.

In response to a comment from EPA to address the situation where phosphorus data are not available, WDNR revised its rule to provide that where phosphorus data are not available, it may require phosphorus sampling as part of a permit application or use effluent data from similar point sources to make a determination as to whether the point source discharge will cause, have a reasonable potential to cause, or contribute to an excursion beyond the phosphorus water quality criterion. This addressed the concern raised by EPA on the proposed rule.

EPA approves s. NR 217.15 Wis. Adm. Code.

7. s. NR 217.16 Wis. Adm. Code: Relationship of WQBELs and TMDL based limitations. Section NR 217.16 provides WDNR authority to establish a WQBEL consistent with the waste load allocation and assumptions of an EPA approved TMDL that is designed to achieve water quality standards for the waterbody. EPA expects that a limit based on a TMDL will be derived from, and comply with, the applicable phosphorus criteria in NR 102 Wis. Adm. Code in order to be in conformance with 40 C.F.R. § 122.44(d)(1)(vii)(A). Additionally, pursuant to s. NR 217.16(4) if the WQBEL based on an approved TMDL is more stringent than the WQBEL calculated under s. NR 217.13, the Department must include the more stringent TMDL based limitation in the permit. Thus, Wisconsin has the authority to issue permits consistent with the assumptions and requirements of a TMDL's wasteload allocation and is required to do so by s. NR 217.16(4).

EPA expressed a concern that the proposed rule at NR 217.16(3) appeared to allow the state to modify or reissue the permit to include a less stringent limit based on an approved TMDL. WDNR revised its rule to clarify that if a phosphorus WQBEL calculated under s. NR 217.13 has already taken effect in a permit, the Department may replace the limit with a less stringent TMDL-based limit only if allowed pursuant to antidegradation procedures in ch. NR 207. In a July 2011 letter, EPA told WDNR that Wisconsin's NPDES program does not have a provision that conforms to 40 C.F.R. § 122.44(l) (antibacksliding). This regulation is applicable to states under 40 C.F.R. § 123.25(a)(15). In an October 2011 reply letter, WDNR said that it will amend the Wisconsin Administrative Code or seek a statutory amendment to establish antibacksliding provisions for the Wisconsin NPDES program. Until Wisconsin establishes antibacksliding provisions, the Department cannot replace a limit calculated under s. NR 217.13 with a less stringent TMDL-based limit unless the replacement conforms to 40 C.F.R. § 122.44(l). EPA retains its authority to review and object to a permit that contains a limit which is less stringent than contained in the prior permit.³

³ EPA's approval does not extend to the note inserted at the end of s. NR 217.16(3).

Section NR 217.16 (2) provides that WDNR may include a schedule of compliance to achieve a TMDL-based limit, if the department determines a schedule of compliance is necessary. All of the compliance schedule provisions set out in s. NR 217.17, including the required findings that a schedule of compliance will lead to compliance with the WQBEL as soon as possible and that a compliance schedule is appropriate and necessary, apply to any compliance schedule developed under s. NR 217.16. EPA retains its authority to review and object to a permit if it contains a compliance schedule that is not in conformance with 40 C.F.R. § 122.47.

Based on the foregoing discussion, EPA approves s. NR 217.16 Wis. Adm. Code.

8. s. 217.17 Wis. Adm. Code: Schedules of compliance. This section sets out the conditions under which WDNR may provide a schedule of compliance for a WQBEL, and the criteria for WDNR making a determination as to whether a compliance schedule is appropriate. It also provides the terms and conditions for schedules of compliance. EPA reviewed this provision, within the context of current Wisconsin law, for consistency with the CWA section 502(17) and 40 C.F.R. § 122.47. Section 502(17) defines a schedule of compliance as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” Wisconsin defines the term using identical language. *See* Wis. Stat. section 283.01(15) and s. NR 205.03(32) Wis. Adm. Code. Under 40 C.F.R. § 122.47, permits can include compliance schedules when appropriate, and must require compliance with the WQBEL as soon as possible. In granting a compliance schedule in a permit, WDNR must make a finding, supported by the administrative record and described in the fact sheet that a compliance schedule is appropriate and that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. Such finding should set out the basis for its determination that a compliance schedule is appropriate and that the discharger cannot immediately comply with the WQBEL. WDNR should not presume that a compliance schedule be based on the maximum time period allowed in s. NR 217.17(2). The permittee must establish the need for a compliance schedule and for how much time is necessary to achieve compliance. Where such schedules exceed one year, permits must set forth interim requirements and the dates for achievement of the interim requirements. 40 CFR § 122.47(a)(3).

Wis. Stats. section 283.01(15) and ss. NR 205.03(32) and 217.17 Wis. Adm. Code include provisions that conform to the CWA section 502(17) and 40 C.F.R. § 122.47. If a NPDES permit is issued with a compliance schedule that extends past the expiration date of a permit, then the permit must include the final effluent limitations and any interim or final requirements that apply after permit expiration must be enforceable. Interim and final requirements must be expressed in terms of actions or operations leading to compliance with the WQBEL. To the extent WDNR writes guidance implementing s. NR 217.17, WDNR should

ensure such guidance conforms to Wis. Stats. section 283.01(15), ss. NR 205.03(32) and 217.17, and 40 C.F.R. § 122.47.

Section NR 217.17(3)(f) provides that if a permittee chooses to use pollutant trading to achieve compliance with a WQBEL, then the terms and conditions related to the trade shall be incorporated into the permit. This section seems misplaced in s. NR 217.17. As previously noted, this provision does not contain any statements inconsistent with EPA's "Water Quality Trading Policy" (2003). Pollutant trading is allowed to meet a WQBEL. However, the details of the trade must be established prior to permit issuance and incorporated into the permit. If a permittee engages in pollutant trading to comply with a limit, it is not appropriate to allow a compliance schedule to give a discharger time to establish the terms of a trade. Trades must be established at the time of permit issuance or modification.

Based on the foregoing discussion, EPA approves s. NR 217.17 Wis. Adm. Code.

9. s. NR 217.18 Wis. Adm. Code: Watershed adaptive management option. Section NR 217.18 provides an option for permittees to request the issuance of an Adaptive Management NPDES permit as a means to achieve compliance with the water quality standard for the waterbody and the WQBEL. This option is based on the permittee implementing point source and nonpoint source net watershed-scale pollutant reductions that will result in certain Wisconsin waters achieving phosphorus water quality standards in s. NR 102.06 Wis. Adm. Code.

There are several key provisions to this option. Section NR 217.18(3)(e)(1) requires that the permit contain a final and enforceable WQBEL. Section NR 217.18(2)(d) requires the permittee to submit an adaptive management plan with the application for permit re-issuance, with said plan identifying specific actions to achieve the applicable phosphorus criteria through verifiable reductions of phosphorus from point and nonpoint sources. Such adaptive management actions with goals and measures must be included in the permit (s. NR 217.18(3)(b)) and the permit must include a statement that failure to implement any of the terms and conditions established under s. NR 217.18(3) is a violation of the permit. EPA will be reviewing permits issued under this option carefully.

Given that nonpoint sources may be significant contributors of phosphorus in surface water, the adaptive management approach with its focus on reducing nonpoint sources as well as point source loadings to meet the water quality criteria may be a workable solution for phosphorus pollution. This approach could result in achieving the phosphorus water quality criteria for the waterbody where the more traditional approach of relying solely on the permittee meeting its WQBEL may not.

EPA is approving s. NR 217.18 based on WDNR signing an addendum to the MOA with EPA, on April 30, 2012, agreeing to implement this provision in a manner that conforms to 40 C.F.R. §§ 122.44(d), 122.44(l), 122.47, and 122.62. More specifically, the initial permit issued

and all reissued or modified permits under the adaptive management provision will include the final WQBEL and identify the subset of adaptive management actions that offset the mass of phosphorus which corresponds to the difference between the interim effluent limitation and the WQBEL. Secondly, the initial adaptive management permits will include a complete compliance schedule that sets out all the actions in the approved adaptive management plan to achieve the phosphorus water quality criterion. The schedule can contain the interim effluent limitations, and must identify adaptive management actions that will result in verifiable pollution reductions that equate to the increment between the interim limit and the WQBEL. For all compliance schedules, WDNR needs to meet the requirements in Wis. Stats. section 283.01(15) and ss. 205.03(32) and NR 217.17 Wis. Adm. Code. In particular the record should support a determination that a compliance schedule is appropriate and necessary and will lead to compliance with the WQBEL and water quality standard as soon as possible.

**Addendum to the
National Pollutant Discharge Elimination System
Memorandum of Agreement between the
U.S. Environmental Protection Agency, Region 5
and the
Wisconsin Department of Natural Resources**

The U.S. Environmental Protection Agency (EPA), Region 5, and the Wisconsin Department of Natural Resources (WDNR) enter into this Addendum to their National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement to ensure that Wisconsin permits which implement ss. NR 217.14(2) and 217.18 *Wisconsin Administrative Code (Wis. Adm. Code)*, and the fact sheets that accompany such permits, are prepared in conformance with all NPDES requirements including 40 C.F.R. §§ 122.44(d), 122.45(d), 122.47, 124.8, and 124.56. EPA retains its authority to review and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c).

I. Section NR 217.14(2) *Wis. Adm. Code* provides that: (a) concentration effluent limitations calculated under s. NR 217.13 shall be expressed as a monthly average in permits, except for concentrations of less than or equal to 0.3 milligrams per liter (mg/L) where limitations may be expressed as annual averages; and (b) if a concentration limitation expressed as an annual average is included in a permit, a monthly average concentration limitation equal to three times the water quality based effluent limitation calculated under s. NR 217.13 shall also be included in the permit. For continuous discharges, 40 C.F.R. § 122.45(d) provides that effluent limitations shall, unless impracticable, be expressed as average weekly and average monthly limitations for publicly-owned treatment works (POTWs) and maximum daily and average monthly limitations for other than POTWs. 40 C.F.R. § 122.44(d)(1)(vii) provides that water quality-based effluent limitations (WQBELs) shall be derived from, and comply with, water quality standards and shall be consistent with the assumptions and requirements of any wasteload allocation (WLA) approved by EPA under 40 C.F.R. § 130.7.

A. For the reasons explained in the attached April 30, 2012, paper entitled *Justification for Use of Monthly, Growing Season and Annual Averaging Periods for Expression of NPDES Permits Limits for Phosphorus Discharges in Wisconsin* (Justification Paper), EPA and WDNR agree that it is impracticable to express phosphorus WQBELs as maximum daily or average weekly values and, when the magnitude of the limit calculated in accordance with s. NR 217.13 *Wis. Adm. Code* is 0.3 mg/L or less, EPA and WDNR agree that it may be impracticable to express phosphorus WQBELs as average monthly values.

B. When the magnitude of the limit calculated in accordance with s. NR 217.13 *Wis. Adm. Code* is 0.3 mg/L or less, WDNR agrees to express the WQBEL over an applicable duration provided in the table on the first page of the Justification Paper provided, however, that the duration shall be consistent with the assumptions and requirements of any applicable EPA-approved WLA. In the atypical or uncommon situations contemplated in the Justification Paper, (e.g. discharges to small inland lakes) on a case-by-case basis WDNR may express a WQBEL over a duration other than a monthly average provided that the fact sheet for the draft permit sets

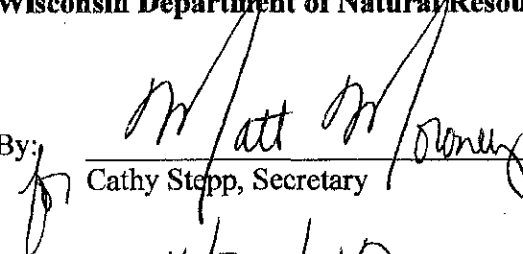
forth the facts which justify conclusions that: (1) it is impracticable to set the limit as a monthly average and (2) the draft limit was derived from and complies with the applicable phosphorus water quality criterion and is consistent with the assumptions and requirements of any applicable EPA-approved WLA.

II. Section NR 217.18(3) *Wis. Adm. Code* provides minimum terms and conditions for permits that include watershed adaptive management actions.

A. To conform to 40 C.F.R. § 122.44(d), WDNR agrees that the initial and any subsequent reissued, modified, or revoked and reissued permit issued to each point source under s. NR 217.18(3) will include the final water quality-based effluent limitation and identify the subset of adaptive management actions that offset the mass of phosphorus which corresponds to the difference between the interim effluent limitation under s. NR 217.18(3)(e) 2. or 3., as the case may be, and the water quality-based effluent limitation.

B. To conform to 40 C.F.R. § 122.47, WDNR agrees that the initial permit issued to each point source under s. NR 217.18(3) will include the s. NR 217.18(3)(b) and (e) 2., 3., and 4. compliance schedule in its entirety. 40 C.F.R. § 122.62(a) and (b) identify the causes for permit modification or revocation and reissuance, respectively. 40 C.F.R. § 122.44(l)(1) provides that interim effluent limitations, standards or conditions in a reissued permit must be at least as stringent as the previous permit unless the circumstances have changed and would constitute cause for permit modification or revocation and reissuance. Subject to 40 C.F.R. §§ 122.62, 122.44(l)(1), and s. 283.53 (2), Wis. Stats., as applicable, WDNR agrees that any reissued, modified, or revoked and reissued permit will include a continuation of the compliance schedule to meet the requirements established in the initial permit.

Wisconsin Department of Natural Resources

By:  _____
Cathy Stepp, Secretary

Date: 4/30/12

U.S. Environmental Protection Agency, Region 5

By:  _____
Susan Hedman, Regional Administrator

Date: July 12, 2012



**Justification for
 Use of Monthly, Growing Season and Annual Averaging Periods
 for Expression of WPDES Permit Limits for Phosphorus in Wisconsin**

Averaging Periods by Receiving Waterbody Type and Range of WQBEL Concentrations		
WQBEL	Rivers, streams, impoundments and lakes/reservoirs with average water residence times of less than one year	Lakes with average water residence times of greater than or equal to one year
Greater than 0.3 mg/L	Monthly average	Monthly average
Less than or equal to 0.3 mg/L	Monthly* or six month average (May 1 to October 31 and November 1 to April 30). When the WQBEL as a six-month average is included in the permit, a monthly average limit of 3 times the calculated concentration limit in ss. NR 217.13 and NR 217.14, shall also be included in the permit.	Monthly* or six month average (May 1 to October 31 and November 1 to April 30) or annual average. When the WQBEL as a six-month average or annual average is included in the permit, a monthly average limit of 3 times the calculated concentration limit in ss. NR 217.13 and NR 217.14, shall also be included in the permit.
For approved TMDLs, the expression of limits must be consistent with the assumptions and requirements of the TMDL, but not greater than the periods expressed above.		
* Atypical or uncommon situations will be addressed on a case-by-case basis. These include discharges to small inland lakes with water residence times of less than one year where it is possible that a six month averaging period may not be appropriate and a monthly average limit calculated under ss. NR 217.13 and NR 217.14 may instead be necessary.		

Pertinent Federal Regulation

Section 40 CFR 122.45 (d) of Federal Regulations, requires NPDES permits, including delegated state permits, to express water quality based effluent limits for continuous dischargers, including those for phosphorus, as average weekly and average monthly limitations for POTWs and maximum daily and average monthly limitations for other than POTWs, unless impracticable. Federal regulations do not describe criteria for determining when limits are impracticable, nor does EPA provide guidance on how to make a determination of impracticability.

EPA has made a finding for Chesapeake Bay that impracticability can be based on the nature of the water quality problems. For Chesapeake Bay, EPA determined that daily maximum, weekly average and monthly average effluent limits are impracticable due to the nature of nutrient related water quality problems in the bay. In making this determination, EPA concluded that annual averaging periods were practicable for Chesapeake Bay. This does not automatically infer that annual averaging periods are practicable elsewhere. It merely states that the nature of the water quality problem can be used to determine impracticability.

Principles

- Averaging periods should be consistent with the technical analysis and rationale supporting the adopted phosphorus water quality standards criteria. The Wisconsin phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices.
- Averaging periods should be consistent with EPA guidance for nutrient criteria development.
- The averaging period must take into account critical conditions in the receiving water or downstream water.
- Averaging periods should be compatible with tools, such as models, used to manage the lake, reservoir, stream or river.
- Shorter averaging periods should be used where the frequency, duration or magnitude of the difference between the limit and water quality standards criterion is greater. Longer averaging periods may be used where the difference is less, especially as the discharge limit is the same as the water quality criterion.

Technical Justification

A. Streams and Rivers

Conclusions:

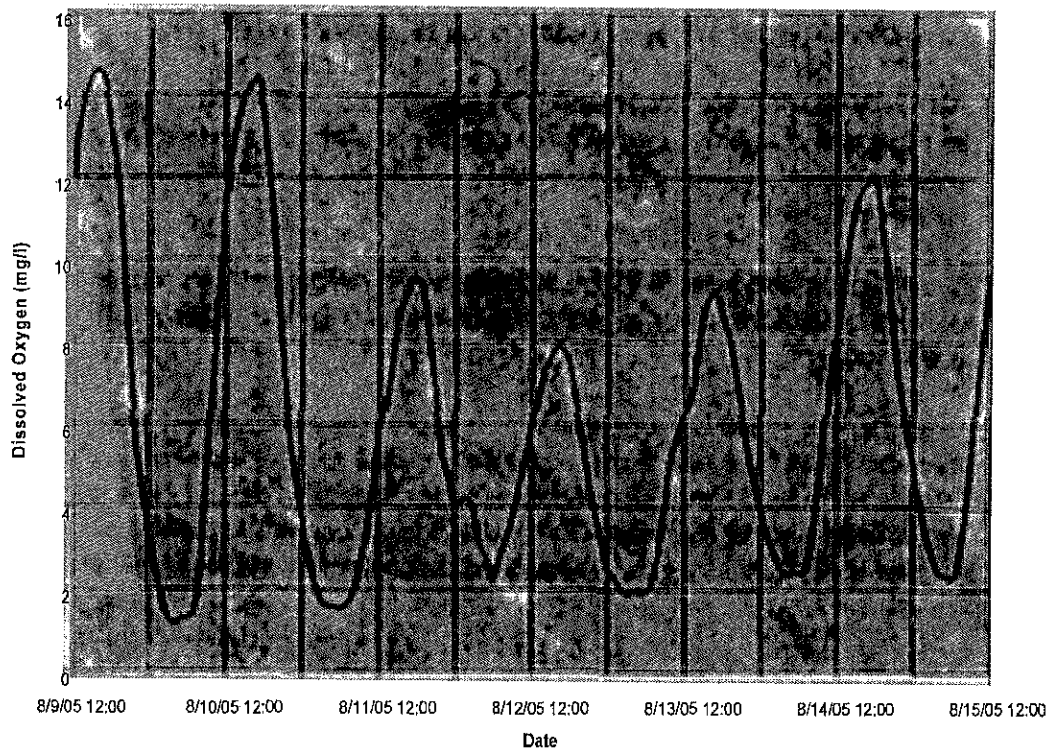
1. It is impracticable to establish maximum daily and average weekly phosphorus limits under 40 CFR 122.45(d) due to the way waterbodies respond to phosphorus loading and due to the manner in which phosphorus water quality standards criteria for Wisconsin were derived.
2. Due to the manner in which the Wisconsin phosphorus criteria were derived, it may be impracticable to establish average monthly limits under 40 CFR 122.45(d) when the magnitude of the calculated water quality based effluent limit is 0.3 mg/L or less.
3. Based on available literature and the judgment of national experts, EPA criteria development guidance clearly calls for states to use seasonal or annual mean or median values in development of nutrient criteria.
4. Wisconsin's wadeable streams exhibit conditions similar to those described in EPA guidance.
5. Wisconsin's approved criteria for both wadeable streams and nonwadeable rivers were derived using correlations between growing season median phosphorus concentrations and community biotic indicators.
6. Although nonwadeable streams exhibit higher concentrations of suspended algae and suspended algae may be more responsive to changes in phosphorus concentrations, acute conditions, such as low dissolved oxygen concentrations, are not exhibited.
7. If averaging periods for WPDES permits should reflect methods and data used to develop phosphorus criteria, generally a growing season averaging period is warranted.
8. Since the risk of impact increases with nutrient concentrations (as well as frequency and duration), it is prudent that permits with higher concentration limits should have shorter averaging periods. Similarly, discharges with lower limits that are set at the water quality criterion concentration could have longer averaging periods taking the background concentration and available dilution into account.

EPA Guidance

EPA's "Nutrient Criteria Technical Guidance Manual: Rivers and Streams" (EPA, July 2000) based on the knowledge and experience of many experts and reviews of the scientific literature, makes numerous references and suggestions to use of seasonal or annual mean or median values in deriving nutrient criteria. For example, in Chapter 6 of the guidance manual, explicitly identifies use of annual mean nutrient concentrations in developing relationships with the 75th percentile of mean algal biomass (page 60). EPA cites work by Biggs (1995 and 2000) as justification for use of this approach and the use of the annual mean values. Also, EPA guidance suggests water quality sampling procedures and data analysis approaches based on seasonal monitoring.

For macrophyte dominated streams the EPA guidance and scientific literature infer that seasonal or even annual analyses may be appropriate. In section 3.3, EPA discusses impacts of large diurnal dissolved oxygen fluctuations due to photosynthesis/respiration by dense macrophyte masses. Later in the guidance EPA describes rooted macrophytes taking up phosphorus from interstitial waters of bottom sediments; largely uncoupling macrophyte growth with short-term fluctuations of phosphorus concentrations in water columns. Mace et. al, Wisconsin DNR researchers, found a high correlation between late-summer biomass and mean summer phosphorus concentrations in macrophyte dominated streams (WDNR 1984).

Turtle Creek at Pounder Rd. , Walworth Co. -- Dissolved Oxygen in Low Flow Conditions



The methods and processes used by benthic algae to take up phosphorus vary with the type of benthic algae. Filamentous algae with greater exposure to the water column may be more responsive to short-term changes in phosphorus concentrations than the more prostrate forms. Regardless of the type or processes for uptake, the primary impact relates to the mass of the accumulated algae and the factors of scour and grazing relate to time and rate of accrual (growth minus scour and grazing). High flow velocities associated with rainfall scour benthic algae and reduce the accumulated biomass.

Biggs (2000) empirically expresses the mean monthly biomass as a function of the days of accrual and the nutrient supply. This, of course, takes a very complex set of interactions involving a number of factors, including light, temperature, periodic sloughing losses, grazing by invertebrates and fish, and presents a simplified relationship. Specifically, Biggs' relationship is as follows:

$$B^* = k_1 d_a + k_2 n + c,$$

Where:

B^* is the mean monthly biomass of benthic algae;

d_a is days available for biomass accrual;

n is a measure of nutrient supply;

k_1 and k_2 are coefficients; and

c is a constant.

A consequence of the Biggs relationship is that to achieve the same biomass, streams with lower concentrations of nutrients will have a shorter accrual period of time and vice versa. Biggs concludes that the frequency of high biomass events sufficient to create eutrophic conditions (200 mg/m^2) increases greatly when the days of accrual exceed 50 days. Again, the number of days varies with the nutrient concentration. Biggs' conclusions were based on unshaded streams. Streams with partial shading will have a longer number of accrual days. Biggs also did his research on streams with gravel or cobble substrata. His model will overestimate benthic algae mass for streams with silt or sand substrata. Thus, longer accrual periods may be pertinent to streams with silty or sandy substrata.

Wisconsin Situation and Phosphorus Criteria Development

The waterbody types and common nutrient related situations for Wisconsin rivers and streams are summarized on the attached table. Wisconsin wadeable streams with high phosphorus concentrations – at least those not shaded or very turbid – tend to exhibit a

phosphorus response similar to the conditions and assumptions contained in EPA's technical guidance. That is, they tend to exhibit a nutrient response as rooted macrophytes, benthic algae or a mix of the two. Generally light will penetrate through much of the water column or even to the bed of the stream to provide conditions suitable for rooted macrophyte or benthic algae growth. Relatively few of Wisconsin's wadeable streams have high suspended algae concentrations.

This situation is best documented by the study of more than 240 Wisconsin streams used to develop nutrient criteria, "Nutrient Concentrations and Their Relations to Biotic Integrity of Wadeable Streams in Wisconsin" (USGS Professional Paper 1722). Appendix 2 of this report shows the extent of benthic algae and rooted macrophyte growth in the study streams. Not unexpectedly, this study also found relatively low suspended chlorophyll a concentrations. The median growing season suspended chlorophyll-a concentrations were 1.0 to 1.7 ug/L and the upper 95-percent confidence limit were 1.6 to 2.2 ug/L, depending on the phosphorus zone within the state. (USGS Professional Paper 1722, Table 22). Only nine of 240 wadeable streams had chlorophyll a concentrations exceeding 10 ug/L, and of those nine, two had sample sites immediately downstream of eutrophic impoundments and one is more appropriately considered as a non-wadeable stream.

Given the recommendations contained in EPA's guidance and a review of the available response information, the Wisconsin phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices. The statistical analysis of the nutrient concentrations and their correlation with selected biotic indices is discussed at great length in the USGS Professional Paper 1722.

The companion study of 42 sites on Wisconsin non-wadeable streams and rivers found greater concentrations of suspended algae and a strong correlation between the median growing season total phosphorus and suspended chlorophyll-a concentrations. For much of these rivers, the water depth is great enough to prevent sufficient light penetration to the bed of the river and benthic algae samples were not taken. Eighteen of these 42 sites had suspended chlorophyll-a concentrations of greater than 10 ug/L. Of these 18 sites, 11 had median concentrations of more than 20 ug/L. While these higher algae concentrations may raise a concern, in these larger river systems we tend not to see the minimum dissolved oxygen concentrations that tend to be seen in wadeable streams. For example, diurnal swings in smaller streams may have a minimum dissolved concentration of 2 mg/L as shown for Turtle Creek in the figure below. For rivers, it is believed that the minimum dissolved oxygen concentrations tend to be 4 mg/L or higher, similar to what was found in Minnesota. In a study of 34 rivers, MPCA found only one site where the minimum diurnal concentration of dissolved oxygen fell below 4.0 mg/L (Figure 10, MPCA 2010).

B. Lakes and Reservoirs

Conclusions:

1. It is impracticable to establish maximum daily and average weekly phosphorus limits under 40 CFR 122.45(d) due to the way waterbodies respond to phosphorus loading and due to the manner in which phosphorus water quality standards criteria for Wisconsin were derived.
2. Due to the manner in which the Wisconsin phosphorus criteria were derived, it may be impracticable to establish average monthly limits under 40 CFR 122.45(d) when the magnitude of the calculated water quality based effluent limit is 0.3 mg/L or less.
3. Based on available literature and the judgment of national experts, EPA criteria development guidance clearly calls for states to use seasonal mean concentrations to assess in-lake conditions.
4. Some measure of water residence time, water retention time, flushing rate or some similar factor are used in all or nearly all lake models used in Wisconsin and those described in EPA guidance to relate phosphorus loading to in-lake conditions.
5. For lakes with long water residence times, the impact of phosphorus loads from the entire year will be exhibited in the growing season.
6. Wisconsin's approved criteria were derived using correlations between growing season mean phosphorus concentrations and a variety of growing season response indicators.

EPA Guidance

Chapters 5, 6 and 7 of EPA's "Nutrient Criteria Technical Guidance Manual: Lake and Reservoirs" (EPA, 2000) clearly suggests to states that in-lake response conditions should be assessed using mean seasonal concentrations. Generally, this is viewed as a "growing" season and in northern states, such as Wisconsin, the growing season of May through September is typically used.

As described in Chapter 9 of EPA's guidance, various models may be used to quantitatively relate the timing and amount of phosphorus loading to in-lake conditions. Many, if not all, use some measure of water residence time, flushing rate or similar parameter to account for mixing of phosphorus inputs within the lake, and, more importantly, settling of phosphorus. That is, the longer the residence time, the less variability of in-lake responses to phosphorus loadings and the greater the settling of phosphorus within the lake. For deeper, seasonal stratified lakes, the in-lake response

relates to annual or multi-year loadings. At the other extreme, conditions within lakes or reservoirs with short residence times may relate to seasonal loadings. For example, early spring loadings may flush through a reservoir with a relatively short residence time and have relatively limit impact on growing season in-lake response conditons.

Wisconsin Situation

Wisconsin's phosphorus criteria for lakes are based primarily on:

- Minimizing nuisance (less than 5% risk) and severe nuisance (less than 1% risk) algal conditions;
- Minimizing the shift of aquatic plant communities in shallow lakes from macrophyte dominated to algae dominated;
- Maintaining balanced fish communities.

In addition, there is a stated intent to prevent harmful aquatic bloom conditions. However, this was a lack of quantitative information to derive numerical criteria.

Critical Condition. Generally, the mid-growing season, July and August, is considered the critical period for nuisance algae conditions in most Wisconsin lakes and reservoirs. The presence of phosphorus, warm water temperatures and abundant light combine to favor the mid-to-late growing season as the critical period. This doesn't mean that discharges prior to or after this critical condition are unimportant. On the contrary, there is a lag time between the time phosphorus reaches the lake or reservoir and when the nuisance conditions are exhibited. For lakes with very long water residence times, such as more than one year, there is substantial mixing within the lake water column resulting in relatively little difference in response between phosphorus loads entering the lake in January verses those entering in June. For lakes with short residence times, the time of the year may be very important. Some form of water residence time or lake flushing rate is an important factor in nearly all lake models used in Wisconsin.

Technical Basis. Wisconsin's phosphorus water quality standards criteria for all lake types were developed using the mean or average condition is the growing season. Water quality samples are routinely collected in June through September or June or June through August depending on the parameter. The sample results are averaged over the growing season and, where possible, averaged over a number of growing seasons. Thus, both the basis for the criteria and routine use of tools for management programs base conditions on what responses will likely occur for given phosphorus conditions, but not the statistical outlier condition that is likely to occur very infrequently.

References

“Nutrient Criteria Technical Guidance Manual: Lakes and Reservoirs”, EPA, April 2000.

“Nutrient Criteria Technical Guidance Manual: Rivers and Streams”, EPA, July 2000.

Robertson et. al. “Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin”, USGS Professional Paper 1722, 2006

Robertson et. al. “Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin”, USGS Professional Paper 1754, 2008

“Impacts of Phosphorus on Streams”, WDNR, April 1984.

Biggs, Barry, J. F., “Eutrophication of Streams and Rivers: Dissolved Nutrient-Chlorophyll Relationships for Benthic Algae”, Journal of North American Benthological Society, 2000.

Heiskary et. al., “Minnesota River Nutrient Criteria Development”, Minnesota Pollution Control Agency, November 2010.

Summary of Waterbody Types, primary nutrient related impacts, extent found in Wisconsin and comments related to averaging period.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Streams and Rivers			
Stream – rooted macrophyte dominated	Low diurnal dissolved oxygen levels (e.g. 2 mg/L) near dawn in mid summer (generally non-lethal) habitat degradation due to sediment capture	Very common; may be most common situation in wadeable streams Focus of Wisconsin DNR study report “Impacts of Phosphorus on Streams”, 1984	Since rooted macrophytes receive phosphorus from interstitial waters of bottom sediments, not responsive to short-term fluctuations in water column phosphorus Growing season means or medians generally used to assess rooted macrophyte dominated streams
Stream – benthic algae, including filamentous algae and attached algae	Low diurnal dissolved oxygen in mid summer; loss of habitat for certain aquatic insects; loss of visibility for sight-feeding fish	Common throughout state Focus of Wisconsin DNR study report “Impacts of Phosphorus on Streams”, 1984	Subject to scour during periods of high velocities; periods of accrual before critical conditions occur; Biggs (2000) suggests 50 day accrual period. Growing season means of median generally used to assess
Stream – floating macrophytes (duckweed)	Floating algae restricts surface water re-aeration	Found, but uncommon in wadeable streams	Not well understood; no accepted sampling protocol

¹ Many Wisconsin wadeable streams do not exhibit responses to phosphorus due to shading from trees or grasses or due to lack of light penetration due to turbid conditions. Downstream waters, however, may exhibit responses to phosphorus.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Stream – suspended algae	May result in low dissolved oxygen	Uncommon in wadeable streams. 9 of 240 streams in Wisconsin wadeable stream study had median suspended chlorophyll a concentrations exceeding 10 ug/L. ²	May see response to change in nutrient concentrations.
Rivers (non-wadeable) -- suspended algae ³	May result in low dissolved oxygen; generally considered to have minimum dissolved oxygen concentrations of more than 4 mg/L (MPCA 2010) ⁴ .	Common in 46 “rivers” listed in s. NR 102.06, Wis. Adm. Code. 18 of 42 study sites had median growing season suspended chlorophyll a concentrations of greater than 10 ug/L. Suspended algae contributes to turbid conditions	May see response to change in nutrient concentrations, however, response tempered by volume of water and surface area reaeration.

² At least two of the nine wadeable streams were sampled downstream from eutrophic impoundments. One of the nine is generally considered as a non-wadeable stream and classified as a river in s. NR 102.06, Wis. Adm. Code.

³ Generally have great enough water depths such that adequate light does not penetrate to bottom. Bed surveys for macrophytes and benthic algae were not anticipated and, therefore, not included in the study.

⁴ Conditions considered similar to those in Minnesota rivers where in nearly all study rivers minimum dissolved oxygen conditions were above 5 mg/L.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Lakes and Reservoirs			
Great Lakes, excluding Lower Green Bay ⁵	Accumulation of filamentous algae mats on shores inhibiting recreational uses	Common on Lake Michigan and Green Bay shores; not common along Lake Superior likely due to colder water temperatures.	<p>Not considered responsive to short duration changes in water column concentrations due to very long water residence times.</p> <p>Conditions in nearshore waters likely the response to mixing of tributary waters and the upwelling of open waters.</p> <p>Cladophora associated with zebra and quagga mussel accumulation of phosphorus and excretion of phosphorus.</p>
Deep stratified drainage lakes, including two-story fishery lakes	<p>Growth of algae in epilimnion and loss of dissolved oxygen in hypolimnion.</p> <p>Inhibits recreational uses, may result in change in aquatic community, and may result in loss of cold water species</p>	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁶	<p>These lakes tend to have long water residence times, some may exceed a year.</p> <p>Modeling of lakes generally based on annual phosphorus inputs.</p>

⁵ Lower Green Bay exhibits conditions similar to the large lakes and reservoirs. The water residence time for Lower Green Bay is less than one year.

⁶ Big Green Lake is an example. Ripon POTW discharges to Silver Creek which flows to Big Green Lake.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Deep stratified seepage lakes	Similar to deep stratified drainage lakes	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁷	These lakes tend to have long water residence times that may or may not exceed a year. Modeling of lakes based on annual phosphorus or growing season inputs.
Shallow drainage and seepage lakes	Aquatic community shift from macrophytes to algae; inhibits recreational uses	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁸	Generally have water residence times of less than a growing season.
Large shallow lakes and reservoirs	Growth of nuisance algae inhibits recreational uses, may result in change in aquatic community.	Common, including Winnebago Pool lakes and reservoirs along the Wisconsin River	Water residence times vary, but generally less than one year. For some, phosphorus loads during spring runoff events may rapidly pass through the body of water emphasizing growing season contributions. Modeling of these lakes and reservoirs may be based on either annual phosphorus loads or growing seasonal phosphorus loads.
Impoundments as defined in s. NR 102.06	Respond similar to flowing streams or rivers	Common	See streams and rivers above

⁷ Silver Lake in Manitowoc County is an example. Silver Lake receives direct discharge from the Silver Lake Convent and College wastewater treatment plant.

⁸ Goose Lake in Columbia County is an example. Goose Lake, a very shallow pond that supports a large goose population, received discharge from Arlington's POTW.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 05 2012

REPLY TO THE ATTENTION OF:
WN-16J

Kenneth G. Johnson, Administrator
Division of Water
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Johnson:

I am writing to provide a summary of the efforts to resolve issues initially identified in the U.S. Environmental Protection Agency's letter to Secretary Stepp of July 18, 2011. Ms. Stepp's October 17, 2011 reply letter committed the State to resolving the issues through four parallel processes, including rulemaking, statutory amendments, clarification of Wisconsin's Attorney General's statement supporting the State's approved National Pollutant Discharge Elimination System Permit (NPDES) program, and potential amendments to the Wisconsin-EPA memorandum of agreement (MOA) for the NPDES program. In the past several months, EPA and the Wisconsin Department of Natural Resources (WDNR) have made significant progress toward bringing the issues to closure. A description of each issue identified in EPA's 2011 letter and the manner in which EPA and WDNR have agreed to resolve these issues is found in Enclosure 1.

Rulemaking and Statutory Changes

EPA requested that the WDNR establish a schedule to complete regulatory and statutory changes by October 2012 and October 2013, respectively. In Secretary Stepp's May 18, 2012 letter to EPA, WDNR provided the estimated timeframe for eight proposed rulemaking packages and explained that, while it would not be possible to meet EPA's dates under the State's rulemaking process, WDNR is committed to moving these rulemaking packages as quickly as possible. EPA understands that the eight rule packages need to go through each step in the State's rulemaking process.

Attorney General Statement

During the last several months, WDNR, EPA, and the Wisconsin Department of Justice have exchanged information on each issue identified for further clarification in WDNR's October 14, 2011 letter to Attorney General Van Hollen. A review of the information, including that provided in the Attorney General's January 19, 2012 reply letter to WDNR, leads EPA to conclude that issues 5, 7, 10, 12, 19, 44, 51, 58, 59, 63, 64, and 75 in EPA's 2011 letter are resolved. Resolution notwithstanding, EPA appreciates and supports the commitment WDNR

made in its May 2012 letter to amend rules pertaining to issues 7, 10, and 51. All of the issues assigned for resolution by the Attorney General's office are further described in Enclosure 2.

Amending the Wisconsin-EPA NPDES MOA

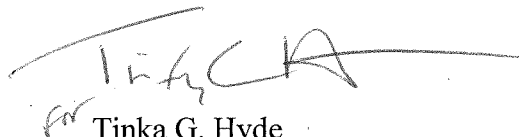
Attachment A to Secretary Stepp's letter of October 14, 2011 included a list of issues proposed for resolution through an amendment of the Wisconsin-EPA NPDES MOA. Following subsequent discussions between our respective staffs, EPA agrees that issues 18, 21, 22, 38, 39, and 66 are amendable to resolution through an addendum to this MOA. These issues are noted in Enclosure 1. We anticipate providing a draft MOA Addendum to WDNR for review in the near future.

Additional Issues

As noted in Enclosure 1, EPA now considers issues 54, 68, and 72 closed. EPA understands that Wisconsin will revise the rule that gives rise to issue 55. EPA erroneously omitted a comment on Wis. Admin. Code NR § 216.21(4) in our July 2011 letter. Resolution for this issue, as well as issues 24, 25, and 69, await further discussion between EPA and WDNR.

We appreciate the dedicated efforts of WDNR to cooperate with EPA to accomplish the work described in this letter and to resolve the remaining issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Tinka G. Hyde", with a long horizontal line extending to the right.

for Tinka G. Hyde
Director, Water Division

Enclosures

Enclosure 1

Overview of Issues to be resolved through rulemaking, statutory amendment, an MOA Addendum, or Attorney General clarifications relating to the State's Approved NPDES Program

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
1	#1				
2	#4, 5				
3	#6				
4	#5				
5				yes	
6		Yes - Other statutory NPDES program changes			
7	#5			yes	

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
8	#3				
9	#7				
10	#3, #4			yes	
11	#5				
12				yes	
13	#5				
14	#5				
15	#5				
16	#2				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
17	#3				
18	#6				yes
19				yes	
20	#5				
21	#6				yes
22					yes
23	#8	Yes - Statutory changes relating to storm water			
24	#8 ¹	Yes - Statutory changes relating to storm water			
25	#8 ²				

¹ Wisconsin proposed a “manual code change” to resolve the issue with Wis. Admin. Code NR § 216.42(6). This proposal requires further discussion.

² Wisconsin proposed a “manual code change” to resolve the issue with Wis. Admin. Code NR § 216.415(4). This proposal requires further discussion.

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
26	#8	Yes - Statutory changes relating to storm water			
27		Yes - Other statutory NPDES program changes			
28	#4				
29	#5				
30	#4				
31	#4				
32	#4				
33			Resolved by Attachment C – letter of 10/17/2011		
34	#4				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
35	#4				
36	#4				
37	#4				
38	#4				yes
39	#4				yes
40	#4				
41	#4				
42	#4				
43	#4				
44				yes	
45	#6				
46	#5				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
47	#6				
48	#6	Yes - Other statutory NPDES program changes			
49	#6				
50	#6	Yes - WDNR reported that the State has enacted an amendment to address this issue, in part.			
51	#6			yes	
52	#8				
53	#8				
54	Resolved via review of s. NR 216.002(2) and recognition				

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
	by EPA that the quarter mile separation provided in s. NR 216.42(11) mirrors Part III of the fact sheet for EPA's 2003 construction general permit.				
55	EPA understands that Wisconsin will revise the rule that gives rise to this issue.				
56			Wisconsin will revise the required content of annual		

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
			reports		
57	#8		Wisconsin will revise the required content of annual reports		
58				yes	
59				yes	
60				yes	
61	#5				
62	#6				
63				yes	
64				yes	
65	#6				
66	#6				yes

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
67	#8				
68	EPA's re-evaluation of the issue indicates that the issue is closed.				
69	Awaiting further discussion				
70	#4				
71	#3				
72			Resolved by Attachment C – letter of 10/17/2011.		

Issue as identified in EPA's July 18, 2011 letter to WDNR	Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012)	Statutory Changes Projected	Other Resolution Mechanism	Clarified through Attorney General Statement	MOA Change Projected
73			Resolved by Attachment C to WDNR's letter of 10/17/2011.		
74	#4				
75				yes	

Issues to be resolved through clarification of the Wisconsin Attorney General’s Statement for the State’s Approved NPDES Program

Issue as identified in EPA’s July 18, 2011 letter to WDNR	Status of Issue	Discussion
<p>5</p> <p>Right to Judicial Review</p>	<p>Resolved</p>	<p>The letter from J.B. Van Hollen, Attorney General, to Matt Moroney, Deputy Secretary, Wisconsin Department of Natural Resources, January 19, 2012 [hereafter AG Letter] explains that standing for purposes of judicial review under Wis. Stat. § 227.52-58 [judicial review] includes (1) whether a decision of an agency directly causes injury to interest of petitioner, and (2) whether the interest asserted is recognized by law. The AG Letter states that this meets applicable case law requiring a causal link between a petitioner and the action challenged. The AG Letter notes that state law provides 30 days to seek judicial review (AG Letter at 2).</p> <p>The AG Letter explains that the State provides for individual petitions for judicial review pursuant to Wis. Stat. §§ 227.52-227.58 (AG Letter at 3). <i>Pulera v. WDNR</i>, No. 2011AP001894 (Wis. Ct. App. Oct. 17, 2011), voluntary dismissal (unpublished decision), is a recent example of an individual petition for judicial review of a WPDES permit.</p>
<p>7</p> <p>New Source Performance Standards, Effluent Limitation Guidelines</p>	<p>Resolved</p>	<p>The AG Letter explains that pursuant to <i>Andersen v. Department of Natural Resources</i>, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1., Wis. Stat. § 283.31(3)(d)(2) is read to allow WDNR to apply new or revised federal standards or limitations that are “promulgated over a state rule” that already exists and is included in those categories of rules enumerated in 283.31(3)(a)-(c), which include new source performance standards, effluent limitations, effluent standards. (AG Letter at 6-7).</p> <p>A May 24, 2012 email from Robin Nyffeler to Barbara Wester, explains WDNR’s authority, post <i>Andersen</i>, rests on Wis. Stat. § 283.31(3)(d)(2) which allows WDNR to</p>

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
		include more stringent federal provisions in permits where (1) EPA has overpromulgated a limitation or requirement that is more stringent than that found in the State's rules and (2) where EPA has promulgated a limitation or requirement not already found in the State's rules. Additionally, the email explains that WDNR has interpreted Wis. Stat. § 283.31(2)(c), (3) and (4) as providing authority to include more stringent limitations where EPA has specifically objected to a permit limitation (or absence of one). The email also explains that the State has other authorities to include more stringent federal requirements in permits, including effluent limitations guidelines and sludge management standards.
10 GLI Procedures	Resolved	The AG Letter explains that WDNR does have authority to administer the more stringent limitations in 40 C.F.R. § 132.6 (discharges of toxic substance to the Great Lakes basin) because § 132.6 limitations were promulgated "over a state rule."
12 Downstream waters	Resolved	The AG Letter states that the use of term 'downstream waters' is not limited to intra-state waters, and includes downstream federally approved state and tribal standards (AG Letter at 8). The AG Letter states that WDNR has authority to issue WPDES permits necessary to meet downstream water quality standards (AG letter at 8).
19 Point source/Fish hatcheries,	Resolved	The AG Letter states that DNR has sufficient authority because the hatcheries use conveyances regulated by Wis. Stat. § 283.01(12) and the wastes from the hatcheries fall under Wis. Stat. § 283.01(13) as a pollutant. Therefore, the AG Letter concludes that fish hatcheries are included in Wis. Admin. Code NR § 220.02(20) (AG Letter at 8-9).
44 Point source/landfill leachate collection	Resolved	The AG Letter states that landfill leachate would contain substances deemed pollutants under Wis. Stat. § 283.01(13), and if leachate is discharging to waters of the state, it is subject to permitting (AG Letter at 9).

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
Point source/Filter Backwash	Resolved	The AG Letter states that filter backwash includes pollutants and as such is subject to permitting (AG letter at 10).
51 Request for informational hearing	Resolved	The AG Letter states that the interest necessary to demonstrate to the state that an individual has met the standard to request a hearing; and/or that WDNR has correctly assessed that there is sufficient public interest to hold a hearing, are the same as the standard in 40 CFR § 124.11 that 'any interested person' can requested a hearing and that the Director should schedule a hearing where there is a "significant degree of public interest" (AG Letter at 10).
58 Waters of the State	Resolved	The AG Letter states that the definition of waters of the state, specifically the inclusion of wetlands and places where water is near the surface, together with the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(2) is enough to include mudflats, sandflats, sloughs, prairie potholes, etc. (AG Letter at 10-11).
59 Exemption for solid waste disposal to landfill	Resolved	The AG Letter states that if a solid waste landfill discharges solid waste into ground or surface waters of the state, then it would need WPDES permit because it would be a point source (AG Letter at 11).
60 Exemption for discharges from private alcohol fuel production systems	Resolved	The AG Letter states that if wastes are spread on land and there is a resulting discharge to surface water, then a WPDES permit would be required (AG letter at 12). The AG Letter states that if the waste were to enter surface water, then it would no longer be confined to an owner's land (AG letter at 12).
63	Resolved	The AG Letter states that WDNR has the authority to collect fines for multiple instances of violation and that this has been WDNR's and the State's general practice (AG Letter

Issue as identified in EPA's July 18, 2011 letter to WDNR	Status of Issue	Discussion
False statements		at 12-13).
64 Public Participation in Enforcement Process	Resolved	<p>The AG Letter explains that the public participation requirement is provided by a process for intervention, as contemplated in 40 C.F.R. § 123.27(d). However, Wisconsin generally enters an order for judgment simultaneously with a complaint, which results in the right of intervention being exercised only after entry of the final judgment. (AG letter at 13-14).</p> <p>In response to EPA's request for clarification regarding the burden on plaintiffs to intervene, in a supplemental letter from Thomas Dawson, Assistant Attorney General, to Robin Nyffeler, July 2, 2012, the WI Department of Justice stated that while the burden on plaintiffs to intervene post-judgment may be higher than such intervention pre-judgment, this higher threshold (1) has generally not penalized plaintiffs with regard to timeliness where processes outside their control are at issue; and (2) any dissimilarity between the federal requirement and the State's provision is within the latitude allowed to the states in interpreting the regulatory provision, as set forth in <i>NRDC v. EPA</i>, 859 F.2d 156 (DC Cir. 1988), in which state regulations for public participation in the enforcement process need only be "similar," and may be more stringent (the latter, under <i>Allied-Industrial, Chemical and Energy Workers Int'l union v. Continental Carbon Co.</i>, 428 F.3d 1285 (10th Cir. 2005).</p>
75 Wis. Stat 227.10(2m)	Resolved	The AG Letter states that the enactment of Wis. Stat. § 227.10(2m) has not altered WDNR's authority to issue permits pursuant to the authority stated in Wis. Stat. 283.31(1), which allows WDNR to issue permits "based on whether the discharge will meet certain limitations and standards, including any more stringent limitation 'necessary to comply with any applicable federal law or regulation.'" (AG Letter at 14).

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Informational update on the Department's schedule for responding to the US EPA letter dated July 18, 2011 regarding water program inconsistencies.

FOR: JUNE 2012 BOARD MEETING

TO BE PRESENTED BY / TITLE: Russ Rasmussen, Deputy Director, Water Division

SUMMARY:

An information update was made at the January 2012 NRB meeting and this update will provide specific schedules for Administrative Rules, statutory changes, and other.

RECOMMENDATION: Informational only

LIST OF ATTACHED MATERIALS:

No Fiscal Estimate Required

Yes Attached

No Environmental Assessment or Impact Statement Required

Yes Attached

No Background Memo

Yes Attached

APPROVED:

Susan L. Sylvester

05/15/2012

Bureau Director, Susan L. Sylvester

Date

Ken Johnson

5/17/12

Administrator,

Date

Matt Moroney

6/8/12

Secretary, Cathy Stepp

Date

cc: NRB Liaison
DNR Rules Coordinator

In January 2012, we presented an Informational Update to the NRB on the Department's response to the EPA on water program inconsistencies. Today, we will bring you up to date on the schedule of addressing these issues through administrative rule processes, proposed statutory changes, or other.

There are eight Administrative Rule packages being proposed, four of which are before the NRB at the June 2012 meeting. The following outlines the status of each package:

I. RULE MAKING SCHEDULES:

Rule Package 1 - Sanitary Sewer Overflows (SSOs) & Bypassing

Federal Issue: Issue # 1 (SSOs)

Rulemaking Schedule for RP 1:

- **Rule Draft Completed** – December 2011
- **NRB Authorization for Hearing** – January 2012
- **EIA Process Completed** – May 2012
- **Public Hearings** – August 2012
- **NRB Adoption** – October 2012
- **Submit Rule for Legislative Review** – January 2013
- **Effective** – After completion of Legislative review

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 2 – Pretreatment

Federal Issues: Issue # 16 (Pretreatment)

Rulemaking Schedule for RP 2:

- **Rule Draft Completed and EIA Process Completed** – October 2012
- **NRB Authorization for Hearing** – December 2012
- **Public Hearings** – March 2013
- **NRB Adoption** – May 2013
- **Submit Rule to Legislature** – July 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 3 – NR 106 Issues and Some Great Lakes Initiative (GLI) Issues

Federal Issues:

- Issue # 8 Mercury Reasonable Potential

- Issue # 10 (Intake Pollutants)
- Issue # 17 Noncontact Cooling Water Exemption Issue # 71
- Mixing Zone Phase out for Bioaccumulative Chemicals of Concern (BCCs)

Rulemaking Schedule for RP 3:

- **Rule Draft Completed and EIA Process Completed** – November 2012
- **NRB Authorization for Hearing** – January 2013
- **Public Hearings** – May 2013
- **NRB Adoption** – September 2013
- **Submit Rule to Legislature** – November 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 4 – Additional NR 106 Issue:

Federal Issues:

- Issue # 28 (Acute limits = FAV)
- Issue # 32 Tier II Value Compliance Schedule Provision
- Issues #31, 35, 36, 37 and 38 (Ammonia)
- Issues # 2, 30, 34, 41 (Expression of Limits)
- Issues #39 - 43 (Chloride)
- Issue # 70 (Alternative Limit When Results Cannot Be Quantified)
- Issue # 10 and #74 Regarding Whole Effluent Toxicity Reasonable Potential (WET R.P.) and Other WET issues and
- Issue # 10 TMDL Procedures for Discharges in the Great Lakes Basin

Rulemaking Schedule for RP 4:

- **Scoping Statement to Governor** – May 2012
- **Approval from Governor to proceed** – May 2012
- **Scope Statement Submitted to NRB for Approval** – June 2012
- **Rule Draft Completed and EIA Process Completed** – December 2013
- **NRB Authorization for Hearing** – February 2014
- **Public Hearings** – April 2014
- **NRB Adoption** – August 2014
- **Submit Rule to Governor** – September 2014
- **Written Approval from Governor** – November 2014
- **Submit Rule to Legislature for review**– January 2015
- **Effective Date** – After completion of legislative review process

Rule Package 5 – NR 200, NR 205, NR 220 - Technology Based Limit Issues, New Source Performance Standards (NSPS), Expression of Limits Generally, Mass

limits, Generic Reasonable Potential, Pollutants in the Intake for Technology Based Limits, BMP limits, General Compliance Schedule provisions, Waters of the State (note to definition), Permit application requirements for Industrial groups, Intake requirements for new facilities (316(b)):

Federal Issues:

- Issue # 2 (122.45 (a) and (h), (b)(1), (c), (d), (f) and (g), (i))
- Issue # 7 (NSPS)
- Issue #11 (Generic RP)
- Issue #13 (Best Management Practice (BMP) authority)
- Issue # 14 (Antibacksliding)
- Issue #15 (General Compliance Schedule language)
- Issue # 20 (Adjustment to Technology Limits)
- Issue # 29 (Solid Waste Leachate Provision in Compliance Schedules)
- Issue # 46 (Expedited Variance for Technology Based Limits))
- Issue # 61 (Application Requirements for Certain Classified Groups)
- Issue 14 (Antibacksliding)

Rulemaking Schedule for RP 5:

- **Scoping Statement to Governor – May 2012**
 - **Approval from Governor to proceed – May 2012**
 - **Scope Statement Submitted to NRB for Approval – June 2012**
 - **Rule Draft Completed and EIA Process Completed – April 2014**
 - **NRB Authorization for Hearing – July 2014**
 - **Public Hearings – October 2014**
 - **NRB Adoption – January 2015**
 - **Submit Rule to Governor – February 2015**
 - **Written Approval from Governor – April 2015**
 - **Rule to Legislature for review – June 2015**
 - **Effective Date – After completion of legislative review process**
-

Rule Package 6 – Permit Processing Issues and other Permit Issuance Procedural Matters

Federal Issues:

- Issue 3 (Process for citizens to request permit modifications)
- Issue 18 (Signatures of Permit Applications)
- Issue 21 and 66 (Fact Sheets)
- Issue 22 (Sending Draft Permits to Agencies)
- Issue 45 (Permits Not a Property Interest, Permit Shield Provisions)
- Issues 47 (Signatory to Permit)
- Issue 48 and 50 (Termination of Permit Procedures)
- Issue 49 (Notification of Permit Changes)
- Issue 51(Public Info Hearing Procedures Requests)
- Issue 62 (Suspension of Permits)
- Issue 65 (Preparation of Draft Permit Required)

Rulemaking Schedule for RP 6:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – January 2014
 - **Public Hearings** – March 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor** – September 2014
 - **Submit Rule to Legislature for review** – January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 7 – Analytical Test Methods

Federal Issues: Issue 9 (Analytical Test Methods)

Rulemaking Schedule for RP 7:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – February 2014
 - **Public Hearings** – April 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor**- September 2014
 - **Submit Rule to Legislature for review**- January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 8 – Storm water Rule Revisions

Federal Issues: Issues # 23, 24, 25, 26, 52, 53, 57 and 67 (see notes below)

Rulemaking Schedule for RP 8:

- **Rule Draft Completed and EIA Process Completed** – December 2013
- **NRB Authorization for Hearing** – January 2014
- **Public Hearings** – August 2014
- **NRB Adoption** – October 2014
- **Submit Rule to Legislature** – January 2015
- **Effective Date** – After completion of legislative review process

Note # 1: The scope statement for RP 8 was published prior to June 8, 2011 so Governor approval is not required and is therefore not included in the schedule. This scope statement included changes to ch. NR 216 for consistency with federal regulations, and will address low priority or minor storm water issues raised in EPA's letter

Note# 2: For issue # 24 regarding construction site storm water permit coverage of commercial building sites and one and two family dwellings, the Department will seek removal of the note in NR 216.42(9) by January 2013 and will no longer deem the DSPTS program as equivalent. In addition, DNR will continue to act as permitting authority for commercial building construction sites and will not deem the DSPTS program as equivalent under s. NR 216.42(4). In January 2013, the state will seek a legislative change to clarify permitting authority, and in January 2014, submit proposed manual code changes for EPA approval - see II and III below.

The second set of information is the status of the statutory changes requested:

II. STATUTORY CHANGES:

Statutory Changes Regarding Storm water– WisDOT permitting exemption

Federal Issue: Issue # 23 & 26 (DOT)

Proposed Schedule:

- **Begin administrative and transitional measures** – March 2012
- **Submit legislative change recommendation**– January 2013

Statutory Change Regarding Storm water – Commercial building regulation

Federal Issue: Issue # 24 (DSPTS)

Proposed Schedule:

- **DNR will continue permitting** – Continuously
- **Submit legislative change recommendation**– January 2013

Other Statutory Change Regarding NPDES Program Issues

Federal Issues: Issues # 6, 27, 48 and 50

Statutory changes were already enacted to establish terminology consistent with federal regulations (e.g. "termination, revocation and reissuance and modification"). This addresses part of issues 48 and 50.

Statutory changes will again be requested by January 2013 to address EPA's comments on Issues 6 and 27. As part of this statutory request, the Department may also request additional statutory changes that were already covered by the Attorney General's Statement simply for clarification purposes. The Department may also request that other issues included in the rule making packages above be addressed through statutory changes so they can be resolved more quickly.

The last category is the other actions proposed to address the remaining issues:

III. OTHER ACTIONS:

A. Manual Code Change Recommendation Schedules:

Manual Code Change – Other environmental programs, ss. NR 216.21(4) and NR 216.42(6)

Federal Issue: Issue # 24 Storm water

Proposed Schedule:

- **DNR to develop manual code**– December 2013
- **Seek EPA approval** – January 2014

B. Communication Change Schedules (Completed):

Approval Letter Change 1 – Authorized Local Storm water Programs

Federal Issue: Issue # 25 (ALPs)

Proposed Schedule:

- **Approvals clearly stipulating DNR as permitting authority** – March 2012 and forward

C. Memorandum Of Agreement Addendum:

Some of the issues included in rule making packages may be resolved more quickly through an Addendum to the MOA between EPA and DNR.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
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Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
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May 18, 2012

Susan Hedman, Region V Administrator
United States Environmental Agency
77 West Jackson Boulevard
Chicago IL 60604-3590

Subject: Rule Making Schedule for EPA's Permitting for Environmental Results Initiative

Dear Dr. Hedman:

My letter of October 14, 2011 provided a plan of action in response to your letter dated July 18, 2011 that identified 75 issues relating to Wisconsin's legal authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program. During subsequent discussions with the Department of Natural Resources staff, EPA requested that the Department provide a more specific timeline with milestones for the rulemaking component of our plan. The attached document provides our projected timeline and milestones for eight rule packages and includes other actions that we believe will satisfy the needs of both EPA and the Department.

We recognize that EPA would like rule changes to be completed within a two year timeframe, however, the Department's current rulemaking procedures from start to finish take a minimum of 31 months. Accordingly, Department staff will proceed with rulemaking as expediently as possible and will strive to complete rules earlier than projected, but a two year time frame simply cannot be met under existing state rulemaking procedures. The Department is, however, willing to resolve some of the issues more quickly through an Addendum to the Memorandum of Agreement to administer the WPDES Permit program if EPA would like to pursue this action. Also, EPA has already received an Attorney General's Statement from Wisconsin which resolved a number of issues.

It should be noted that rule packages #1, #2 and #3 and #8 were already in progress when DNR received EPA's July 2011 letter. Therefore those packages are projected to be completed earlier than the others. The dates for some of the other packages are staggered to provide staff sufficient time to draft rules, balance permit workloads and allow for adequate public participation and consultation from EPA.

In summary, the Department is proceeding to make rule changes as quickly as possible. We look forward to continuing to work cooperatively with EPA and will provide biannual updates on our progress.

Sincerely,

Cathy Stepp
Secretary

Attachment

STATE OF WISCONSIN DANE COUNTY BRANCH CIRCUIT COURT

AUG 17 PM 12:16

MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.
P.O. Box 260225
Madison, WI 53726

CIRCUIT COURT
DANE COUNTY, WI

Petitioners,

Case No.: **12CV3352**
Case Code: 30607
Administrative Agency Review

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES
101 S. Webster Street
Madison, Wisconsin 53703

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

Respondent.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

PETITION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

The Petitioner, Midwest Environmental Defense Center ("Petitioners"), by its attorneys Midwest Environmental Advocates, petitions this Court pursuant to Wis. Stat. § 227.52, *et seq.*, for review of the July 18th 2012 Wisconsin Department of Natural Resources ("DNR") final decision to issue Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit No. WI-0003859-08-0 to Foremost Farms USA Coop Plover ("Foremost Farms").

PETITIONER

1. Petitioner Midwest Environmental Defense Center ("MEDC") is a not forprofit membership organization incorporated under the laws of Wisconsin with a principal place of business in Madison and a mailing address of P.O. Box 260225, Madison, WI 53726. MEDC's mission is to protect and restore the environment, natural resources, and public health of the upper Midwest by ensuring that laws designed to

protect us are applied and enforced as they were intended. MEDC's members use and enjoy the waters of the State, including the Wisconsin River downstream of the Foremost Farms discharge, for aesthetic and recreational purposes. MEDC is reasonably concerned that the Foremost Farms WPDES permit authorizes a lowering of water quality in the Wisconsin River downstream of the discharge and in the Petenwell and Castle Rock Flowages. MEDC has been or is likely to be adversely affected, aggrieved, and harmed by DNR's final decision to issue the Foremost Farms WPDES permit without determining whether the Foremost Farms' discharge has the reasonable potential to cause or contribute to a violation of water quality standards in downstream waters, and if it would do so, to impose discharge limitations to prevent such a violation of water quality standards.

RESPONDENT

2. Respondent DNR is an agency of the State of Wisconsin, established by Wis. Stat. § 15.34, and having the authority under Wis. Stat. § 283.001(2) to establish and administer a pollutant discharge elimination system program "consistent with all the requirements of the federal water pollution control act amendments of 1972" and responsibility under Wis. Stat. §§ 281.11 "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." DNR's address is 101 S. Webster Street, Madison, Wisconsin 53707.

JURISDICTION AND VENUE

3. The DNR decision at issue is an administrative decision reviewable under Wis. Stat. § 227.52 *et. seq.*

4. Venue is proper in this Court pursuant to Wis. Stat. § 227.53(1)(a)3 because MEDC resides and has its principle place of business in Dane County.

LEGAL AND FACTUAL BACKGROUND

A. DNR's Implementation of the Federal Water Pollution Control Act Amendments of 1972.

5. The United States Congress enacted the Federal Water Pollution Control Act Amendments ("Clean Water Act") of 1972, 33 U.S.C. § 1251, *et seq.*, (2006) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

6. The Clean Water Act created the National Pollution Discharge Elimination System ("NPDES"), which prohibits discharges of pollutants without an NPDES permit issued by the United States Environmental Protection Agency ("USEPA") or a state, pursuant to a formal delegation of authority from USEPA to that state. 33 U.S.C. §§ 1311(a), 1342(a) (2006).

7. If they so choose, states may seek approval from the USEPA to issue NPDES permits within their borders consistent with the Clean Water Act and USEPA regulations. 33 U.S.C. §§ 1342(b). States are also required to establish, and from time to time revise, water quality standards to protect the public health and welfare and enhance the quality of water. *Id.* § 1313(c).

8. In Wisconsin, USEPA has authorized DNR to administer the NPDES permit program through Wisconsin's state permitting program, called the Wisconsin Pollution Discharge Elimination System ("WPDES"). *See* Wis. Stat. § 283.001(2).

9. Water quality standards consist of the designated use of a waterbody, such as the protection of a cold or warm water fishery, and specific numeric or narrative

criteria established to preserve and protect that use. 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.3(i) (federally defining “water quality standard”).

10. DNR must impose water quality based effluent limits (“WQBELs”) in an issued WPDES permit if necessary to meet applicable water quality standards in the receiving waters. Wis. Stat. §§ 283.13(5), 283.31(3)(d) and (4); *See also* 33 U.S.C. §§ 1311(b)(1)(C), 1313(d)(4)(B), 40 C.F.R. § 122.44(d).

11. After years of studies and stakeholder meetings, Wisconsin adopted phosphorus water quality criteria for streams, rivers, lakes and reservoirs, effective December 1, 2010, found at Wis. Admin. Code § NR 102.06, and procedures for developing phosphorus water quality based effluent limits in WPDES permits, found at Wis. Admin. Code NR 217 Subchapter III.

12. On December 30, 2010 EPA approved the phosphorus water quality criteria pursuant to its authority under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313.

13. NR 217 Subchapter III applies to discharges of phosphorus to surface waters of the state from privately owned wastewater facilities or treatment works, which are nongovernmental treatment works that discharge any combination of domestic, commercial or industrial wastewater. Wis. Admin. Code §§ NR 217.10(1), 217.11(5).

14. DNR must include phosphorus WQBELs in a WPDES permit if “the discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters.” Wis. Admin. Code §§ NR 217.12(1)(a)

15. This requirement is specifically reiterated at Wis. Admin. Code § NR 217.15(1)(a), which requires DNR, when determining the necessity for water quality based effluent limits, to “include a water quality based effluent limitation for phosphorus in a permit whenever the discharge or discharges from a point source or point sources contain phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to, an exceedance of the water quality standards in s. NR 102.06 in either the receiving water or downstream waters.”

16. The procedures for calculating phosphorus WQBELs, found at NR 217.13, direct DNR to establish phosphorus WQBELs “based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except the department may calculate the limitation to protect downstream waters.” Wis. Admin. Code § NR 217.13(1)(b).

17. On October 3, 2011, the USEPA commented on DNR’s draft guidance for implementing Wisconsin’s phosphorus water quality standards for point source discharges. The USEPA stated, “when a downstream waterbody requires a more stringent WQBEL than the immediate receiving waterbody, the more stringent limit would set the effluent limit in the NPDES permit.” On July 25, 2012, Subchapter III of NR 217, Wis. Admin. Code, became effective for Clean Water Act purposes, when EPA, pursuant to 40 C.F.R. § 123.62, finally approved the revisions to the Wisconsin WPDES permit program.

18. On July 26, 2012, in USEPA’s comment on the noticed WPDES permit for the Milwaukee Metropolitan Sewerage Commission (“MMSD”), USEPA stated, “[w]hile [the WQBEL] may be appropriate for a calculation based on the location of the discharge (mouth of the Milwaukee River), the fact sheet does not explain, consistent

with 283.13(5) Wis. Stats. ... and s. NR 217.12(1)(a) ... whether the limit will be protective of Lake Michigan.” Lake Michigan is a water downstream of MMSD’s discharge. Exhibit A.

B. Water Quality in the Receiving Waters.

19. The Foremost Farm WPDES permit authorizes Foremost Farms to discharge effluent wastewater to the Wisconsin River in the reach of river at river mile 216.5.

20. Downstream from the Foremost Farms discharge, the Wisconsin River flows into the Petenwell and Castle Rock Flowages.

21. Phosphorus is a pollutant that can cause excessive algal growth, including the growth of toxic blue-green algae, in surface waters, severely impairing aquatic habitat for fish and invertebrates, and recreational uses for swimmers and boaters.

22. Phosphorus acts primarily as a conservative material, with minimal removal or decline in concentration (“uptake”) as it travels downstream. Large rivers with multiple point sources have significantly longer uptake times than smaller, unenriched streams, such that phosphorus concentrations downstream may stay elevated and can even increase due to the release of phosphorus stored in sediments.

23. The phosphorus criterion for the Wisconsin River between the Stevens Point Dam and Petenwell Flowage is 100 ug/L. Wis. Admin. Code § NR 102.06(3)(a)44.

24. The median background stream concentration of phosphorus near the Stevens Point Dam, upstream of the Foremost Farm discharge, is 87 ug/L.

25. Downstream of the Foremost Farms discharge, the median background stream concentration of phosphorus increases to 95 ug/L near the Biron Dam.

26. Due to high phosphorus concentrations in the water, the Petenwell and Castle Rock Flowages, located downstream of the Foremost Farm discharge, have been included on Wisconsin's 303(d) list for total phosphorus impairments meaning phosphorus pollution is causing eutrophication. Eutrophication is the response of a waterbody, often through algal blooms, to excessive nutrient loadings.

27. The Petenwell and Castle Rock Flowages show visible signs of their phosphorus impairments with algal blooms that result in green waters and dried clumps of algae lining the shore. Photographs taken of algal blooms in the Petenwell Flowage are attached as Exhibit B.

28. Excessive phosphorus has long been identified as the primary factor in poor water quality on Petenwell and Castle Rock Flowages, both of which have been on Wisconsin's 303(d) list of impaired waters since 1996.

29. "The long-range goal of Wisconsin water quality standards is to protect the use of water resources for all lawful purposes." Wis. Admin. Code § NR 102.01(2).

30. To protect the fish and aquatic life uses in large rivers, NR 102.06 establishes 100 ug/L phosphorus criterion. Wis. Admin. Code § NR 102.06(3)(a).

31. NR 102.06 establishes a more restrictive criteria, 30 ug/L in stratified reservoirs and 40 ug/L in non stratified reservoirs, to protect recreational uses, as well as fish and aquatic life uses. Wis. Admin. Code § NR 102.06(4)(a).

32. The phosphorus criterion applicable to the Petenwell and Castle Rock Flowages is 40 ug/L. Wis. Admin. Code § NR 102.06(4)(a).

33. Even if the Wisconsin River meets its applicable phosphorus criterion, 100 ug/L, the more stringent criterion in the Petenwell and Castle Rock Flowages, 40 ug/L will be exceeded.

34. There are at least 13 facilities with individual WPDES permits that discharge phosphorus to the Wisconsin River between the Stevens Point dam and Petenwell Flowage.

35. In a November 29, 2011 memorandum regarding “Wisconsin River Phosphorus Limitations - Stevens Point to Biron” (“November 29 memo”), DNR identified seven facilities, including Foremost Farms, that discharge directly to the Wisconsin River between the Stevens Point Dam and Biron Dam. Because those seven facilities may be affecting the water quality of the same reach of the Wisconsin River, WQBELs are based “on allocating the allowable discharge among the various dischargers based on site-specific considerations.” Wis. Admin. Code § NR 217.13(6).

36. DNR has identified six facilities that discharge directly to the Wisconsin River between the Biron Dam and Petenwell Flowage. Because those six facilities may be affecting the water quality of the same reach of the Wisconsin River, WQBELs are based “on allocating the allowable discharge among the various dischargers based on site-specific considerations.” Wis. Admin. Code § NR 217.13(6).

37. In a September 20, 2011 memorandum regarding “Upper Wisconsin River Phosphorus Limitations”, DNR considered developing WQBELs for discharges to the Wisconsin River upstream of Castle Rock Flowage based solely on meeting the large stream criterion, but rejected this alternative, due, in part, to “the arbitrary nature of defining several individual segments based on current knowledge of spatial trends of

phosphorus in the Wisconsin River, and the wealth of empirical evidence showing that meeting the large river criteria in the Wisconsin River will result in exceedances of the reservoir criteria.”

38. Data from a study of nutrient transport and effects in the Wisconsin basin above Castle Rock Dam, as well as previous studies, demonstrate that meeting the Wisconsin River phosphorus standard of 100 ug/l is not sufficient to meet water quality criteria in the Petenwell and Castle Rock Flowages, 40 ug/L.

39. DNR is performing a study of nutrient transport and effect in the Wisconsin River basin above Castle Rock Dam, which DNR anticipates will form the basis for phosphorus Total Maximum Daily Loads (“TDMLs”) for multiple water bodies in the basin.

40. The results of the study will not be available for several years.

41. Because phosphorus pollution in Petenwell and Castle Rock Flowages are causing the waters to be impaired for total phosphorus, DNR must develop aTMDL to allocate total phosphorus loads to the point and non-point sources contributing to the phosphorus impairment.

42. There are ongoing monitoring and modeling efforts in the Wisconsin River Basin, which DNR has stated will result in WQBELs under NR 217.13(1)(b) and/or a TMDL, within the next 5 years.

43. In the meantime, DNR stated in the November 29 memo that it will develop phosphorus WQBELs for the seven facilities upstream of Biron Dam based on the criteria at the point of discharge, and based on the facilities’ combined discharge and the median background stream concentration near the Stevens Point Dam.

44. Since there is an impaired reservoir downstream, DNR is also required to impose mass phosphorus water quality based effluent limits.

45. Likewise, DNR has stated in the January 10 memo that it will develop phosphorus WQBELs for the six facilities downstream of Biron Dam based on the criteria at the point of discharge, and based on the facilities' combined discharge and the median background stream concentration near the Biron Dam.

46. Since there is an impaired reservoir downstream, DNR is also required to impose mass phosphorus water quality based effluent limits.

47. The calculated WQBELs for the 13 facilities are based only on the assimilative capacity of the specified reach of the Wisconsin River, and are neither meant to nor capable of ensuring that water quality standards downstream in the Petenwell and Castle Rock Flowages will be met.

C. DNR's Proposal to Issue the Foremost Farms WPDES Permit.

48. On May 23, 2012 DNR issued a notice of intent to issue the Foremost Farms WPDES permit.

49. On January 9, 2012, in the Water Quality-Based Effluent Limitations for Foremost Farms USA Coop Plover memorandum ("WQBEL memo"), DNR stated that the final phosphorus WQBEL recommended for Foremost Farms was to be based on the November 29 memo.

50. The Foremost Farms WPDES permit includes three phosphorus limitations and a compliance schedule outlining the actions which Foremost Farms must complete to come into compliance with those limits and the timeframes for compliance.

51. The three limits are a 3000 ug/L rolling 12 month average limit which Foremost Farms must meet upon permit reissuance, a 2000 ug/L rolling 12 month average limit which Foremost Farms must comply with as of December 31, 2014, and a final phosphorus WQBEL of 93 ug/L and 5.8 lbs/day as a monthly average.

52. The 3000 ug/L and 2000 ug/L limits are not calculated to meet water quality standards in either the receiving or downstream waters and do not ensure compliance with water quality standards of downstream waters.

53. The final phosphorus WQBEL is calculated based on the assimilative capacity of the Wisconsin River at the Stevens Point Dam and does not take into account the phosphorus impairment of the Petenwell and Castle Rock Flowages downstream.

54. On June 22, 2012, MEDC submitted comments on the proposed Foremost Farms WPDES permit to the DNR. MEDC expressed concerns about the lack of limits necessary to protect downstream waters as required by 217.12. Exhibit C.

D. DNR's Issuance of the Foremost Farms WPDES Permit.

55. The DNR provided a notice of its final determination ("NFD") to reissue the Foremost Farms WPDES permit on July 18, 2012.

56. In the NFD, DNR noted that WQBELs must be calculated based on the applicable phosphorus criteria at the point of discharge, but stated that calculating limits to protect downstream waters is "optional."

57. In the NFD, the DNR stated that,

"The Department has considered and continues to take seriously the impacts of phosphorus loading from all point sources and nonpoint sources to all reaches of the Wisconsin River including the Petenwell and Castle Rock Flowages. That is

why monitoring and modeling in the Upper Wisconsin River Basin are currently Underway with the goal of having an approved water quality management plan with total maximum daily loads within the next five years. The Department believes that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs.”

58. In the NFD DNR stated “While Department guidance recommends phosphorus WQBELs be based on downstream water quality criteria when the discharge is upstream of a reservoir or lake, the guidance does not supersede the fact that the Department has chosen to develop a water quality management plan with total maximum daily loads rather than imposing WQBELs based on downstream water quality criteria on individual point sources.”

59. The final Foremost Farms WPDES permit did not include phosphorus WQBELs to protect downstream waters.

60. In the NFD for the Village of Whiting, another one of the seven facilities that discharges to the same reach of the Wisconsin River as Foremost Farms, the DNR has also found WQBELs to protect downstream waters “optional”. Exhibit D.

ISSUES FOR REVIEW

ISSUE ONE: DNR VIOLATED STATE AND FEDERAL LAW BY FAILING TO DETERMINE WHETHER DISCHARGES HAD THE REASONABLE POTENTIAL TO VIOLATE THE NUMERIC WATER QUALITY STANDARDS OF DOWNSTREAM WATERS.

61. Petitioner realleges and incorporates herein each preceding paragraph of this petition, and further alleges as follows:

62. State and federal law requires the imposition of water quality based effluent limits in a WPDES permit that are sufficient to meet phosphorus water quality standards. Wis. Stat. §§283.13(5), 283.31(3)(d) and (4); Wis. Admin. Code § NR 217.12; 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d).

63. State law requires that the DNR include phosphorus WQBELs in a permit when, “[t]he discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or *downstream waters*.” Wis. Admin. Code § NR 217.12(1)(a) (emphasis added).

64. The DNR failed to determine whether Foremost Farms phosphorus discharge will cause, has the reasonable potential to cause or contribute to an exceedance of the phosphorus criteria in downstream waters, including the Wisconsin River below the Biron Dam and in the Petenwell and Castle Rock Flowages.

65. Because DNR has failed to comply with state law this Court should set aside or modify as an erroneous interpretation of law or remand or reverse DNR’s issuance of the Foremost Farms permit without first making a determination of whether Foremost Farm’s discharge of phosphorus will violate state phosphorus water quality standards and imposing necessary WQBELs as outside the discretion delegated to DNR and in violation of Wisconsin statutes pursuant to Section 227.57(5) and (8), Wis. Stat.

**ISSUE TWO: DNR VIOLATED STATE AND FEDERAL LAW BY
STATING THAT INCLUDING WQBELS IN A PERMIT PROTECTIVE
OF DOWNSTREAM WATERS IS OPTIONAL.**

66. Wisconsin law provides that the DNR “shall require compliance with ... water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation.” Wis. Stat. § 283.13(5).

67. USEPA has repeatedly informed the DNR that when a downstream waterbody requires a more stringent WQBEL than the receiving waterbody, the more stringent limit would set the effluent limit in the WPDES permit, and that DNR must interpret NR 217 to be consistent with this requirement. Initial USEPA comments on DNR draft guidance for phosphorus discharges dated October 3, 2011, Exhibit E. USEPA approval letter of NR 217 dated July 25, 2012, Exhibit F.

68. In spite of the clear requirements in state law, the DNR continues to insist that setting WQBELs to be protective of downstream waters when the discharge will cause, has the reasonable potential to cause or contribute to an exceedance of the phosphorus criteria in a downstream water is optional. In doing so, DNR is erroneously interpreting a provision of state law. Based on this erroneous interpretation, DNR is violating state law by issuing permits that do not comply with the requirements of Wisconsin statutes and regulations, and Wisconsin’s delegated authority under the Clean Water Act.

69. Because DNR has failed to comply with state and federal requirements this Court should set aside or modify as an erroneous interpretation of law or remand or reverse DNR’s issuance of the Foremost Farms permit without first making a determination of whether Foremost Farm’s discharge of phosphorus will violate state

water quality standards and imposing necessary WQBELs as outside the discretion delegated to DNR and in violation of Wisconsin statutes pursuant to Section 227.57(5) and (8), Wis. Stat.

WHEREFORE, Petitioners request that the Court grant the following relief pursuant to Wis. Stats. §§ 227.57:

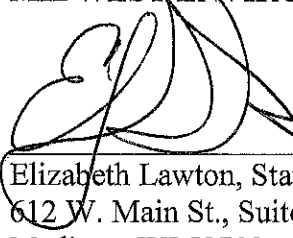
1. That the Court set aside or remand the DNR's decision to issue the Foremost Farms permit, or in the alternative remand the DNR's decision to issue the Foremost Farms permit with directions to modify the permit to consider the effect of Foremost Farms phosphorus discharge on downstream waters and require the inclusion of a phosphorus WQBEL protective of those waters if necessary.

2. That the Court declare Chapter NR 217 requires the DNR to include a WQBEL for phosphorus that is protective of downstream waters when the discharge from a permitted facility will cause, has the reasonable potential to cause, or contribute to an exceedance of the water criteria in the downstream water.

3. That the Court declare that under NR 217, including a WQBEL that is protective of downstream waters is not optional.

Dated this 17th day of August, 2012.

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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Attorneys for Petitioners Midwest Environmental
Defense Center



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 26 2012

REPLY TO THE ATTENTION OF:
WN-16J

Susan Sylvester, Director
Bureau of Watershed Management
Division of Water
Wisconsin Department of Natural Resources
101 South Webster - WT/2
P.O. Box 7921
Madison, Wisconsin 53707-7921

Re: U.S. Environmental Protection Agency Review of WPDES Permit No. WI-0036820-03-0;
Milwaukee Metropolitan Sewerage District

Dear Ms. Sylvester:

The U.S. Environmental Protection Agency has reviewed the draft Wisconsin Pollutant Discharge Elimination System Permit for the Milwaukee Metropolitan Sewerage District (MMSD) that was public noticed June 25, 2012. EPA has identified several issues which, if unaddressed, could compel EPA to object to issuance of the permit as drafted. Please address the issues described below:

1. EPA, WDNR, and MMSD have had numerous meetings and phone calls over the past 3 years to discuss the wet weather requirements in the permit. MMSD has been performing extensive post-construction monitoring and modeling to assess water quality conditions and evaluate performance of its combined sewer overflow (CSO) system. The post-construction monitoring and modeling information appears to show that:
 - Fecal coliform levels upstream of MMSD's CSO discharge points in all three of the CSO-impacted watersheds (the Kinnickinnic, Menomonee and Milwaukee Rivers) frequently exceed the criteria for the bacteria parameters set forth in Wisconsin's water quality standards when CSO discharges are occurring.
 - CSOs occur, on average, 2-3 times per year.
 - MMSD's CSO discharges contain approximately 160,000 counts per 100 milliliters (mL) of fecal coliform bacteria as a geometric mean.

Consequently, regardless of whether MMSD's CSOs would, by themselves, cause exceedances of criteria, the discharges contribute to exceedances of numeric criteria for bacteria. National Pollutant Elimination System (NPDES) regulations require that when discharges will cause, have the reasonable potential to cause, or contribute to water quality standards exceedances, water quality-based effluent limits must be included in the permit

EXHIBIT A

(see 40 CFR 122.44(d)). NPDES regulations further provide that, where reasonable potential exists, the permit must include effluent limits that are “derived from, and comply with all applicable water quality standards,” 40 CFR 122.44(d)(1)(vii)(A). In this particular case, this would mean that the water quality-based effluent limits for the CSOs would need to be set equal to the in-stream water quality criteria. It is not permissible in this particular case to apply the “Presumption Approach” described in the EPA’s CSO Policy (i.e., no more than 4-6 untreated overflows per year or 85% capture) to establish the water quality-based discharge requirements because there is ample data demonstrating that these levels of control are not sufficient to meet water quality standards.

To move forward with further wet weather control measures and continue progress toward meeting water quality standards, EPA, WDNR, and MMSD had discussed and agreed that the reissued permit would lay out the next steps of wet weather control efforts, rather like a “Phase 3” CSO control plan. This would be an alternative to establishing water quality-based effluent limits for the CSOs. The elements of the “Phase 3” program that we discussed include:

- Operational and technology-based requirements for minimizing CSOs, including CSO performance standards.
- A robust Asset Management /Capacity, Management, Operation, and Maintenance (CMOM) program.
- Facilities planning, defined capital projects, and defined capacity improvements.
- Monitoring and reporting on metersheds and municipalities where peak flow reductions are required.
- Watershed-based planning and projects (to help reduce loadings upstream of the CSOs).
- Initiatives to reduce flows into the sewer systems, including green infrastructure and infiltration/inflow (I/I) reduction.
- Flood control projects that also help improve water quality in the watersheds (such as the Kinnickinnic River Wet Weather Management project and the Western Milwaukee Flood Management project).

The draft permit contains these elements, including the green infrastructure requirements and other wet weather projects and initiatives in Section 4.10. However, there is wording in Section 4.10 that significantly weakens the requirements. The following two sentences are of concern (phrases of concern are highlighted in italics):

From the first paragraph: “Beginning in calendar year 2012 and each year thereafter for the term of this permit, the Permittee, along with its partners, *will endeavor to* implement green infrastructure projects and initiatives with the goal of annually capturing a minimum of 1 million gallons of storm water or cumulatively collecting 5 million gallons during the term of the permit.”

At the end of the second paragraph: “The following projects are currently planned to be initiated during the term of this permit *if sufficient funding is available.*”

Including the phrases "endeavor to" and "if sufficient funding is available" renders the wet weather provisions in Section 4.10 largely unenforceable. The language in this section must be revised to make the provisions enforceable.

2. With regard to the language establishing the green infrastructure performance standard in section 4.10 of the draft permit, EPA suggests the following alternative language for the third sentence: "Beginning in calendar year 2013 and each year thereafter during the permit term, the Permittee, working with collaborating partners as appropriate, will ensure that green infrastructure practices/control measures are put in place in the MMSD service area which cumulatively have a design retention capacity of at least 1 million gallons. Each calendar year an additional 1 million gallons of green infrastructure capacity must be put in place, adding additional capacity beyond what was put in place in preceding years. If more than 1 million gallons of capacity is put in place in any one year, the incremental amount over 1 million gallons may be counted toward the requirement for the following year." The purpose of this recommended wording change is to make it clear each year MMSD must put in place an additional 1 million gallons of capacity, and that if the Permittee goes beyond the 1 million gallon requirement in a year the additional amount can be "credited" toward the requirement for the next year.
3. The water quality-based effluent limits memo for the MMSD permit states the following with regard to phosphorus limits for the South Shore plant:

NR 217.15(1)(a) specifies that the department shall include a water quality based effluent limit in a permit whenever the discharge has the reasonable potential to cause or contribute to an exceedance of phosphorus standard in the receiving water. Without a model, a definitive water quality-based limit is not possible. For informational purposes, the proposed permit may include 'water quality based' limit of 0.6 mg/l, expressed as 6 month averages (for May through October and November through April). This concentration is proposed in lieu of a water quality based effluent limit until a model for determining phosphorus limits becomes available.

The permit includes narrative that states,

The 1.0 mg/l monthly average phosphorus limit is an interim limit. This limit shall be in effect October 1, 2012. **No procedure has yet been established for determining final phosphorus Water Quality Based Effluent Limits based on Lake Michigan near shore water quality.** A final monthly average limit of 0.6 mg/l is provided for informational purposes only, this limit does not take effect until the next permit cycle. The limitation will be recalculated at the next reissuance based on additional data and information.

The permit language, which states very specifically that the final effluent limit is for informational purposes only, does not meet the requirement established in NR 217.15(1)(a) or 40 CFR 122.44(d). If the Department has determined there is reasonable potential for the

South Shore phosphorus discharges to cause or contribute to an exceedance of the phosphorus water quality standard for Lake Michigan, a final limit must be established in the permit. The limit must be reflective of the in-lake water quality criteria. It may be helpful for EPA and WDNR to discuss this comment, as well as comment 4. below, in a conference call.

4. Page 25 of the fact sheet says that "a WQBEL of 0.22 mg/L ... has been calculated for the Jones Island discharge to the Milwaukee River." While this limit may be appropriate for a calculation based on the location of the discharge (mouth of the Milwaukee River), the fact sheet does not explain, consistent with 283.13(5) Wis. Stats. ("The department shall establish more stringent limitations ... if these limitations are necessary to meet applicable water quality standard") and s. NR 217.12(1)(a) ("Water quality based effluent limitations for phosphorus shall be included in a permit whenever ... the discharge will cause, has a reasonable potential to cause, or contribute to an exceedance of the criteria in s. NR 102.06 in ... downstream waters") whether the limit will be protective of Lake Michigan. Also, similar to the comment regarding South Shore, Sections 6.3.1.3 and 9.7 include language which undermines the ability to enforce the 0.22 mg/L effluent limit. ("This limit is presented for facility planning purposes"). Such language needs to be stricken from the permit.

Additionally, the following language must be stricken from Section 6.3.2.3: "The department intends to include this limit in the next permit issuance ... unless the Permittee implements the adaptive management option in NR 217.18." The State's phosphorus rule and the MOA Addendum require that the phosphorus WQBEL be included in any adaptive management permits.

5. In Section 9.9 of the permit, which lays out the compliance schedule for meeting the temperature limits applicable to Outfall 003, the first sentence of the text needs to refer to Section 6.3.3., rather than 6.3.4. In addition, following sentences must be deleted from the table in Section 9.9:

- Second Row (Notification of Options): Delete "Options may include construction or reevaluation of limits. A request for re-evaluation of limits may be based on s. NR 106.53 factors including stream flows, s. NR 102.26 site-specificity, s. NR 106.55(10)/(11) mixing/diffusers or other conditions per NR 106 as applicable (e.g., discharge to storm sewers, fluctuating flows, etc)."
- Third Row: Delete "or request for alternate temperature limits."
- Fourth Row: Delete "unless alternate temperature limits have been approved as described in 6.3.4."

The applicable regulations describe the process for determining the need for limits and for pursuing re-evaluation of limits. The options for removal or modification of limits are not appropriate milestones in a compliance schedule; Federal and Wisconsin law define a compliance schedule as "a schedule of *remedial measures* including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation,

prohibition, or standard” (emphasis added). See 33 U.S.C. § 1362(17), 283.01(15) Wis. Stats., and s. NR 205.03(32) Wis. Adm. Code.

6. Like Section 9.9, Section 9.7 (Phosphorus limits at Jones Island) contains several milestones that are not appropriate for inclusion in a compliance schedule. These include: (1) alternate limit identified in the TMDL implementation plan; (2) watershed adaptive management option; (3) water quality trading plan; and (4) water quality standards variance. These are inappropriate because they are directed at changing the effluent limit or would require a permit modification to implement. Section 9.7 needs to be revised accordingly.

Section 9.7 contemplates that MMSD may implement an adaptive management plan or water quality trade upon approval by WDNR. NR 217.18(3) Wis. Adm. Code identifies minimum terms and conditions that must be included in permits that are based on an approved adaptive management plan. NR 217.17(3)(f) Wis. Adm. Code provides that the terms and conditions related to a trade shall be incorporated into the permit. Adaptive management conditions or trades would be subject to public notice, comment, and the opportunity to appeal under Wisconsin law as well as EPA review under 33 U.S.C. § 1342(d) and 40 CFR 123.44. An approach that allows or directs MMSD to implement an adaptive management plan or trade without the applicable conditions being incorporated into the permit and without public and EPA review is inappropriate. Section 9.7 needs to be revised accordingly.

Section 9.7 does not contain interim milestones for the period between June 2017 and 2020. s. NR 217.17(3) Wis. Adm. Code and 40 CFR § 122.47 provide that the time between interim dates may not exceed one year. Reports are not measures leading to compliance, and they are separately required by s. NR 217.17(3) and 40 CFR § 122.47.

7. Section 4.8 of the permit establishes requirements for overseeing local sewer systems in the MMSD service area. The draft permit requires MMSD to “maintain oversight” of sewer systems tributary to the District, to identify metersheds and communities where peak flow reductions are required, and to report on the peak flow amounts from the metersheds and communities. This section of the permit does not specifically require MMSD to take actions where it is identified that peak flow reductions are needed. MMSD has authority and tools for requiring actions to achieve peak flow reductions. This language in this section of the permit needs to be strengthened to include follow-up actions to compel peak flow reductions in metersheds/communities where such reductions are needed.

Reducing excessive infiltration and inflow (I/I) and decreasing peak flows in communities where reductions are needed is essential to the effective functioning of MMSD’s wet weather system. Currently many of the communities in the service area have “wet” separate sanitary sewer systems, meaning significant amounts of clear water are getting into the sewer system in wet weather. The excess flows from the separate sewer communities are using up valuable capacity in the interceptors and the ISS, thereby increasing CSO discharge volumes. As part of the operation of its system MMSD must implement actions to achieve required peak flow reductions.

8. The table of effluent limitations for the South Shore in Section 6.3.1 of the draft permit includes a daily maximum ammonia limit of 27 mg/L. This limit was established by multiplying the acute criterion for ammonia by a factor of 2. An analysis needs to be conducted to confirm the discharge and the 27 mg/L limit are in conformance with the mixing conditions criteria in NR 106.06(3)(c).
9. The draft permit does not include mercury limitations for either the South Shore plant or the Jones Island plant. The fact sheet states that MMSD has requested a variance. According to our records EPA has not approved a mercury variance for MMSD. To the extent that discharges from South Shore and/or Jones Island will cause, have a reasonable potential to cause, or contribute to excursions beyond the mercury water quality criteria applicable to Lake Michigan, the permit must include mercury effluent limitations that are derived from and comply with the criterion. An exception applies only to the extent that EPA has approved a variance.
10. Section 9.5 of the draft permit addresses a mercury pollutant minimization program. Language in the section calls into question whether MMSD is required to implement the program ("The permittee shall continue a ... program whenever, after the first 24 months of mercury monitoring, a mercury effluent limit is necessary under s. NR 106.145(2) Wis. Adm. Code.") If EPA approves a mercury variance, then this language must be revised to clearly require implementation of the program.
11. Section 10 of the permit establishes NPDES standard requirements. The provisions included in the draft permit include some but not all of the standard permit conditions prescribed in 40 CFR 122.41. WDNR must review the standard conditions in the permit in light of 40 CFR 122.41, and add to or revise the conditions as needed to meet 40 CFR 122.41. Please note the Federal regulation allows that the conditions applicable to all permits can be incorporated into permits either expressly or by reference.
12. The language in Section 10.2.6 of the draft permit includes overflows from the collection system within the meaning of "bypass." The effect is to render SSOs eligible for the exceptions to the bypass prohibition in the first paragraph of the Section. This is inappropriate since sanitary sewers are included within the definition of POTW and discharges from POTWs must be subject to limits based on secondary treatment standards (and any more stringent limits needed for discharges to comply with water quality standards). WDNR must remove the reference to overflows from the collection system from Section 10.2.6.
13. The wording in the first sentence in Section 10.2.7 must be revised to say the bypasses are prohibited unless "approved" by the Department (vs. "authorized").
14. Section 10.3 of the permit addresses limits of quantification and formulas for effluent calculations. In the absence of a promulgated minimum level (ML) for total residual chlorine, EPA guidance suggests use of an interim ML. The interim ML is calculated by multiplying the method detection limit by 3.18. The MMSD permit needs to require use of

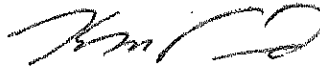
the most sensitive approved analytical methods and then identify a value not greater than 3.18 times the method detection limit as the level at which compliance will be evaluated. The permit also needs to require a pollutant minimization plan for chlorine.

EPA also recommends that you consider and address the comments provided in Enclosure A in order to improve the permit.

Under the terms of the NPDES Memorandum of Agreement (MOA) between EPA and Wisconsin, EPA has 45 days from the date it receives a public noticed permit to object to or comment on the permit, unless EPA needs additional time for review, up to the full 90 days allowed for by the Clean Water Act and 40 CFR 123.44(a). In accordance with the MOA, EPA is activating the provision allowing for the full 90 day review period (i.e., until 90 days after June 25, 2012). We request that WDNR provide us with any public comments that it receives on the public-noticed permit by August 7, 2012. Also we request that, by September 7, 2012, WDNR provide us with a letter indicating how the Department intends to revise the permit to address EPA's comments.

Thank you for WDNR's work on this permit, and for your thoughtful consideration of our comments. If you have any technical questions related to EPA's review, please contact Steve Jann or Bob Newport of the NPDES Programs Branch. Bob can be reached at (312) 886-1513, or newport.bob@epa.gov.

Sincerely,



Kevin M. Pierard, Chief
NPDES Programs Branch

Enclosure

cc: Ted Bosch, WDNR

Enclosure A

U.S. EPA Comments on Draft WPDES Permit No. WI-0036820-03-0; Milwaukee Metropolitan Sewerage District

Section 2.2.3 and Section 4.7 (first full paragraph on page 12) - The fact sheet and the permit describe how the diversion channel at the Jones Island location can be used as a way to provide disinfection for combined sewage from the in-line storage system (ISS) that would otherwise be discharged as untreated CSOs in situations where the ISS is full and the Jones Island treatment plant has reached its full capacity and cannot accept additional wet weather flows. The combined sewage flows covered under these provisions of the permit would not pass through the headworks of Jones Island treatment facility. The flows from the diversion channel that are discharged through Outfall 002 would be treated combined sewage discharges. The permit, in Section 4.4, requires an assessment of feasible alternatives for further treatment of combined flows from the ISS. This assessment should inform further decision-making regarding requirements applicable to wet weather flows for the next permit cycle.

We have the following comments and recommendations regarding the permit requirements related to use of the diversion channel:

- The BOD and TSS monitoring of flows in the diversion channel is required "per occurrence." There may be variability in the characteristics of flows pumped from the ISS over the time the diversion channel is in use. We recommend the permit require sampling of these flows every 3 or 4 hours in situations where the diversion channel is used for a prolonged period of time. This will provide valuable information on the characteristics of the flows coming out of the ISS during and after storm events. Based on an evaluation of the data obtained in this permit cycle, it may be appropriate to revise this monitoring requirement in the next permit cycle.
- When the diversion channel is in use, we recommend sampling of flows coming out of the secondary unit, before the disinfection chamber, in order to verify that secondary treatment requirements are being met. An alternative may be to require MMSD to demonstrate via calculations, using the data on flows through the plant and the diversion channel, that secondary treatment requirements were met.
- The permit should provide clarification as to if use of the diversion channel is a "CSO event" under Section 4.7 of the permit. If there are no other CSOs but the diversion channel is utilized, would that be an "event?" A determination as to how to count "events" may be to some extent informed by language in the CSO policy that indicates an overflow event is one or more overflows from a combined sewer system, resulting from a precipitation event that do not receive minimum treatment. Minimum treatment is defined as: (a) Primary clarification (Removal of floatables and settleable solids may be achieved by any combination of treatment technologies or methods that are shown to be equivalent to primary clarification); (b) Solids and floatables disposal; and (c) Disinfection.

Section 4.3 - We suggest adding clarifying language to make it clear that the CMOM and Asset Management Systems include WWTPs and the MMSD-operated conveyances and pumping facilities.

Section 4.6 - We suggest changing the first sentence in this section to "The Permittee shall comply with the following operational and technology-based requirements:"

Section 4.10 - Under the second bullet, Milwaukee County Grounds Wet Weather Management Facility, we suggest the following alternative language for the second sentence: "During the term of this permit, the Permittee will effectively operate the facility to minimize CSO pollutant discharges, and will collect water quality samples to determine the impact on TSS, phosphorus, nitrogen, and bacterial concentrations and loadings discharged to the Menomonee River watershed resulting from large wet weather events."

Section 5 - The cover page authorizes discharge from the treatment plants and CSOs. Section 5 identifies and requires inspection of SSO points. We recommend language be added to Section 5 to explicitly prohibit discharge from the SSO points.

Section 9.4 - We recommend that the facilities planning for additional measures to protect water quality near South Shore Park, a sensitive area under the CSO policy, consider treatment alternatives such as the use of high rate treatment devices at the nearby CSO outfall(s) as part of the alternatives to be evaluated.



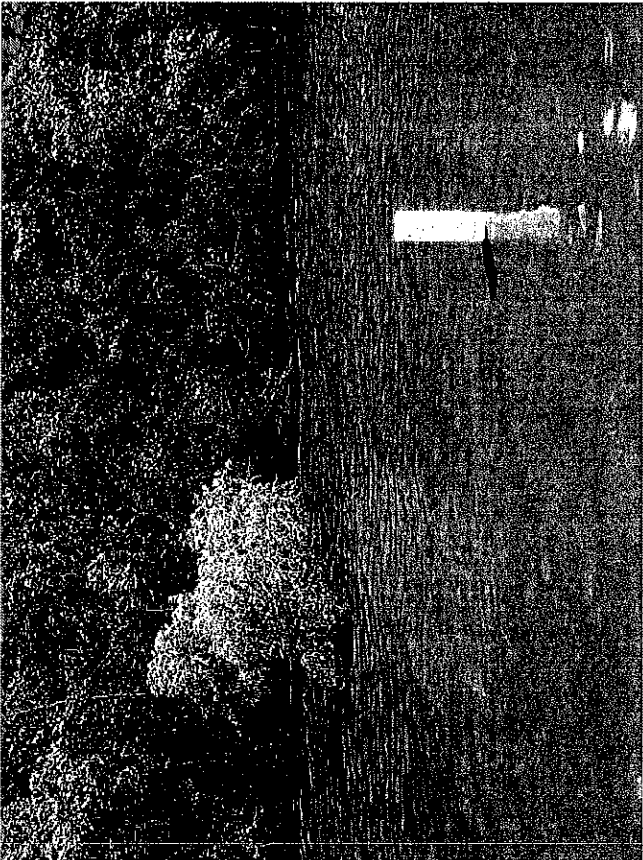
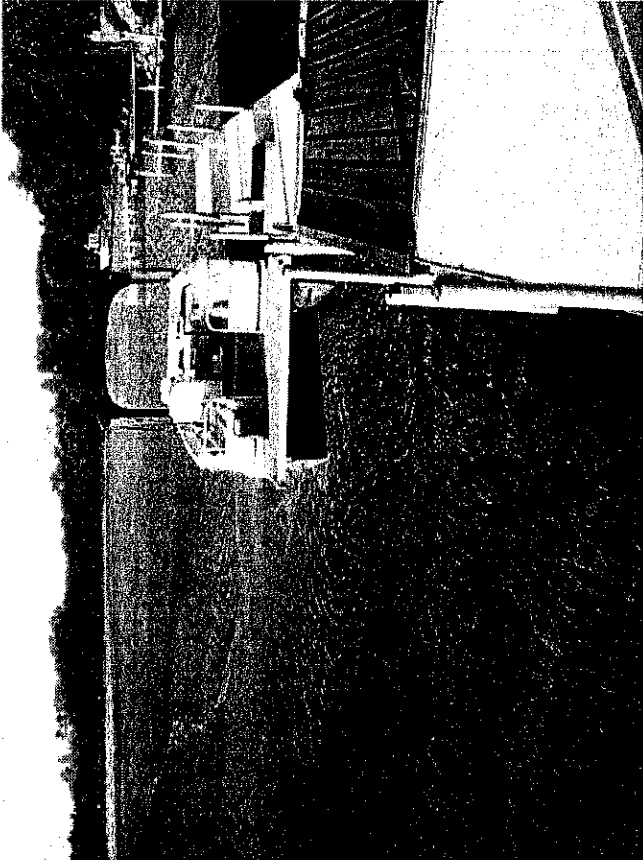
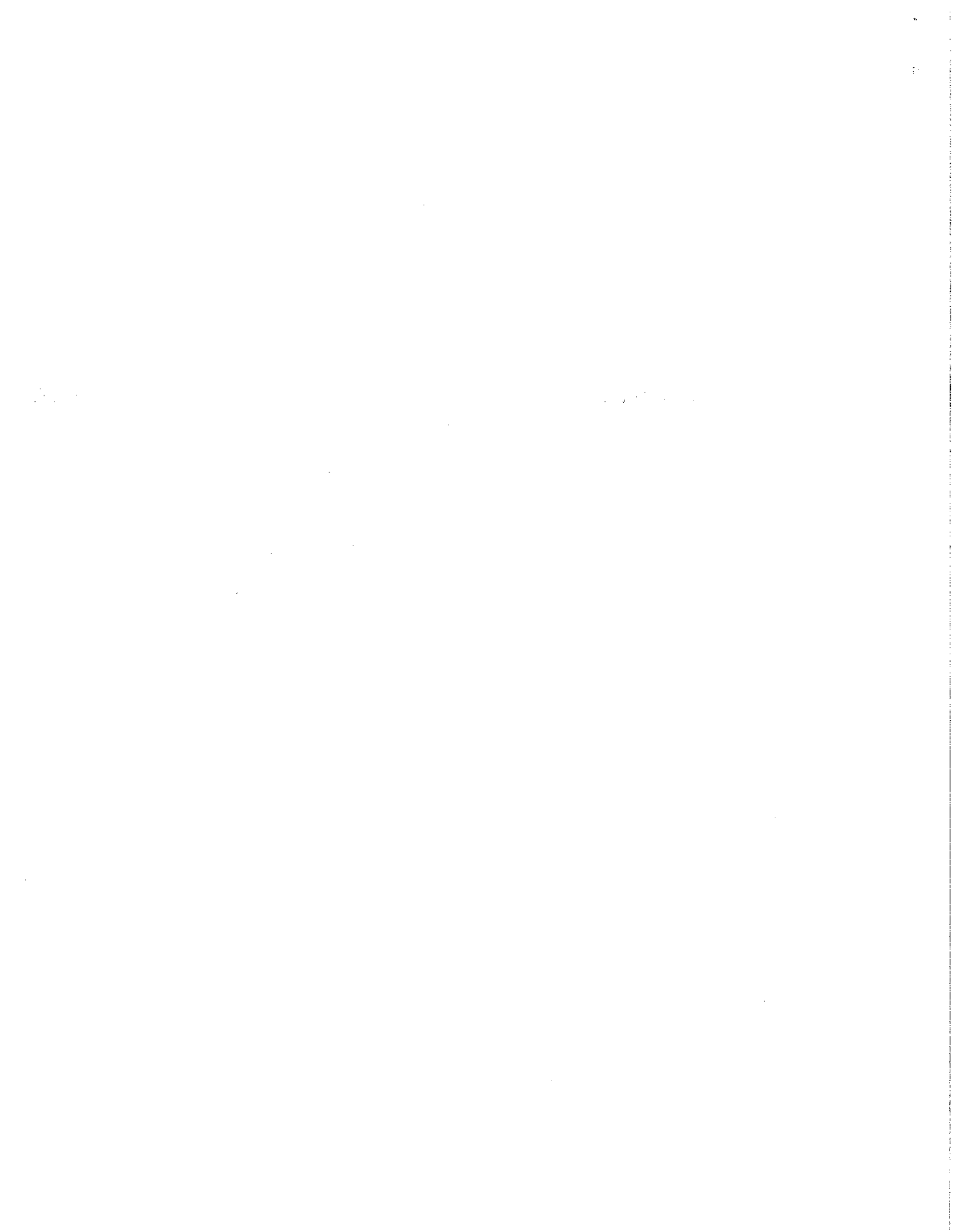


EXHIBIT B





ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

June 22, 2012

Angela Parkhurst
Wisconsin Department of Natural Resources
WCR Headquarters
1300 W. Clairemont Ave.
Eau Claire, WI 54702
angela.parkhurst@wisconsin.gov

**Re: Comments on Draft WPDES Permit No. WI-0003859-08-0, Foremost Farms USA
Coop Plover Wastewater Treatment Plant**

Dear Ms. Parkhurst:

The Environmental Law & Policy Center ("ELPC") and Midwest Environmental Defense Center ("MEDC") respectfully submit the following comments regarding the draft WPDES permit for the Foremost Farms USA Coop Plover wastewater treatment plant ("Foremost Farms Plover Facility") that was noticed for public comment on May 23, 2012. ELPC is a Midwest environmental advocacy organization working to promote clean air and water, clean energy, sound transportation, and sustainable business practices in our Midwest communities. MEDC is a Wisconsin-based nonprofit environmental organization working to protect the land, air, and water resources of the upper Midwest through legal and regulatory advocacy.

ELPC and MEDC support and adopt the comments submitted on this draft WPDES permit by Midwest Environmental Advocates ("MEA"). We are writing separately to emphasize our continued interest in addressing serious phosphorus impairments in waters downstream from the Foremost Farms Plover Facility, particularly in the Lake Petenwell and Castle Rock flowages. We previously raised such concerns in comments we submitted on the Draft WPDES Permit for Domtar LLC's Nekoosa Mill and the Draft WPDES Permit for the City of Stevens Point's Wastewater Treatment Plant. *See* Comments of Environmental Law & Policy Center and Sierra Club on Draft WPDES Permit No. WI-0003620-07-0 (Mar. 23, 2012); Comments of ELPC, Sierra Club, and MEDC on Draft WPDES Permit No. WI-0029572-08-0 (Apr. 13, 2012) (hereafter "ELPC Upper Wisconsin River Comments"). We also write to express concern over what we regard as an overly long time period prior to the effectiveness of the permit's interim and final phosphorus WQBELs.

This summer, Lake Petenwell is already suffering from occurrences of thick, pea-soupy, blue-green algae, which is caused, in part, by excess phosphorus pollution flowing into the lakes. *See* Wisconsin Rapids Tribune, *Groups hope to slow algae growth on Petenwell, Castle Rock lakes* (June 22, 2012).

35 East Wacker Drive, Suite 1600 • Chicago, Illinois 60601

(312) 673-6500 • www.ELPC.org

Nancy Loeb, Chairperson • Howard A. Learner, Executive Director

Columbus, OH • Des Moines, IA • Jamestown, ND • Madison, WI • Minneapolis, MN • Sioux Falls, SD • Washington, D.C.

EXHIBIT C

(<http://www.wisconsinrapidtribune.com/article/20120622/WRT0101/206220496/Groups-hope-slow-algae-growth-Petenwell-Castle-Rock-lakes?odyssey=nav%7Chead>). Blue-green algae can cause illness in children and pets and it results in lost revenue for the numerous businesses that rely on Lake Petenwell recreational visitors.

Pictures of this green slime are available on the website of the Petenwell and Castle Rock Stewards, a local group that is concerned about water quality in the lakes. See ELPC Upper Wisconsin River Comments (reproducing photos and satellite images of significant Petenwell algae blooms).

Downstream Impairments

The Foremost Farms Plover Facility's draft WPDES permit, like other recent Upper Wisconsin River draft WPDES permits, does not contain water quality based phosphorus effluent limitations ("WQBELs") that adequately address downstream impairments as required by state and federal law. In the previous ELPC Upper Wisconsin River Comments, we laid out our concerns as to DNR's proper incorporation of the downstream impairment requirement into its WQBEL-setting process. We wrote:

State and federal law prohibits the issuance of a permit where the imposition of conditions in the permit cannot "ensure compliance" with the applicable water quality standards in the receiving water or downstream waters. See Wis. Stat. § 283.13(5) (requiring DNR to include in all WPDES permits any "more stringent effluent limitations" if such limitations are "necessary to meet applicable water quality standards[.]"); see also 40 C.F.R. § 122.4(d). Water quality based effluent limitations must protect both the receiving water and downstream waters. Wis. Admin. Code NR § 217.12(1)(a) (2011).

Lake Petenwell Flowage is listed on the 2012 Wisconsin Impaired Waters list, meaning the phosphorus Water Quality Criterion is exceeded in that flowage and the flowage is not meeting its designated uses. See WI DNR, 2012 Proposed Impaired Waters List, available at <http://dnr.wi.gov/org/water/condition/impaired/>. Castle Rock Flowage, another downstream reservoir, is also listed as impaired for total phosphorus on the 2012 Wisconsin Impaired Waters List. *Id.* The Criterion for non-stratified reservoirs like Petenwell and Castle Rock is 0.040 mg/L. DNR must ensure that the WQBELs in upstream point source permits issued to dischargers like the City of Stevens Point Facility are stringent enough to ensure compliance with this standard. Wis. Stat. § 284.13(5).

Federal law, likewise, contains a similar provision requiring that issued permits meet underlying federal requirements to ensure compliance with water quality standards. WDNR must establish effluent limitations for all pollutants which have the "reasonable potential to cause, or contribute" to an excursion above any State water quality standard. 40 C.F.R. § 122.44(d) (stating federal "reasonable potential" standard substantively identical to Wisconsin standard in NR §

217.12)¹; see also Friends of Pinto Creek, et al. vs. EPA, 504 F.3d 1007 (9th Cir. 2007). Federal law requires WDNR to set these effluent limitations at levels necessary to “achieve water quality standards.” 40 C.F.R. § 122.44(d).

Crucially, here, WDNR has apparently set a phosphorus QBEL at Stevens Point and other upstream point source dischargers without considering the impact on at least two downstream impaired waters, Petenwell and Castle Rock Flowages. Here, by not properly factoring downstream Criteria into its QBEL calculation, the Department has calculated a QBEL that is many times higher than the Petenwell Criterion, 0.93 mg/L versus the Criterion of 0.040 mg/L. Without any substantial evidence of an analysis that took into account the Stevens Point Facility’s downstream impacts, we have minimal confidence that this QBEL meets the requirements of Wis. Stat. § 283.13(5). In addition, this QBEL would seem to violate the requirements of both the “reasonable potential” requirement (NR § 217.12) and the Department’s own Guidance on this issue. See WI DNR, Guid. No. 3800-2011-02, Guidance For Implementing Wisconsin’s Phosphorus Water Quality Standards For Point Source Discharger 24 (2012). At a minimum, the public must receive a more detailed explanation as to how this QBEL is protective of downstream waters, particularly in cases like this one where the Limit is much higher than the downstream Criterion.

In its Wisconsin River Phosphorus QBEL memo, WDNR notes that it is in the process of detailed modeling and monitoring efforts in order to set TMDLs and/or QBELS throughout the Wisconsin River Basin within five years. We are encouraged by these efforts and fully support them. However, the health of Lake Petenwell and the economic well-being of those who depend on a healthy Lake Petenwell cannot wait another five years to see meaningful phosphorus reductions. NR § 217.12 requires that QBELs “shall be included in a permit” at the time of permit renewal and not at some future date in order to “ensure compliance” with water quality criteria in the receiving and downstream waters.

We understand that wastewater treatment facilities and other “point sources” are not responsible for all of the problems in Lake Petenwell. Runoff from farm fields plays a significant role as well.² However, we are concerned that the draft WPDES permit for the Stevens Point Facility fails to adequately evaluate whether the 3 million gallons of wastewater that, on average, the Facility discharges into the Wisconsin River each day, are contributing to the phosphorus impairments downstream of the plant. This evaluation must be a part of any final WPDES permit issued to upstream point source dischargers and should be the starting

¹ A separate provision of the federal water regulations requires that state NPDES permitting programs be administered in conformance with all federal NPDES regulations, including 40 C.F.R. § 122.4 and 40 C.F.R. 122.44. See 40 C.F.R. § 123.25(a).

² The Petenwell Castle Rock Stewards website indicates that 25% of the phosphorus in Lake Petenwell is attributable to municipal and industrial wastewater discharges, 32% from nonpoint sources, and a large amount from phosphorus that is already present in sediments in the lake bottom. See PACRS, Blue-Green Algae at Petenwell, Castle Rock Lakes, available at <http://www.petenwellcastlerock.org/blue-green%20algae.pdf>.

point for a watershed-based solution to this issue, utilizing the tools contained in the Wisconsin Phosphorus Water Quality Standards.

Comments of ELPC, Sierra Club, and MEDC on Draft WPDES Permit No. WI-0029572-08-0 (Apr. 13, 2012).

Our concerns are identical in this draft permit for the Foremost Farms Plover Facility. As we noted in the Domtar permit, we believe that the various point source discharge permits on the Wisconsin River upstream of Lake Petenwell may provide an excellent opportunity to develop a watershed adaptive management option (WAMO) plan that can begin a more holistic approach. Along those lines, we are encouraged to see that the Compliance Schedule Memo associated with this draft permit suggests "pollutant trading" may be appropriate for the Foremost Farms Plover Facility. See Memo from Rick Reichardt to Angela Parkhurst (Mar. 28, 2012).

Interim and Final WQBEL Compliance Schedules

We also write today to ask that the Department provide a more detailed justification for its proposed schedules for meeting the interim and final WQBELs. While we appreciate the additional analysis that the Department has included in justifying the proposed compliance schedule, we are concerned that the compliance schedule is longer than allowed by state and federal law, based on the information presented in the draft Permit and its Permit Information Form.

We ask that DNR further explain how the schedule complies with Wis. Admin. Code § NR 106.117(2)(a). That regulation states that a "reissued or modified permit may include a schedule for compliance with new or more stringent effluent limitations" only if it is "as short as reasonably possible[.]"

Absent additional justification, we believe that the regulation would require a shorter time period for compliance with both limits, interim and final. In the case of the interim limit, DNR's analysis indicates that "adjustment of the existing WWTP" would be sufficient to meet the limit. We ask the Department to explain why the compliance schedule allows the facility approximately eighteen months to make these operational adjustments. In the case of the final WQBEL limit, we believe further explanation is necessary to understand why "something in the range of 7 years" is the shortest compliance schedule that is reasonably possible.

Ultimately, it is DNR's obligation to demonstrate that the compliance schedule is "as short as reasonably possible[.]" NR 106.117(2)(a). See also 40 C.F.R. §§ 122.2, 122.47(a) (addressing compliance schedules under the NPDES program); Memorandum from James A. Hanlon, U.S. EPA, to Alexis Strauss, U.S. EPA, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits* (May 10, 2007) ("Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to

implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.”)

We appreciate the opportunity to comment on this draft permit and look forward to working with the Department on these important issues.

Respectfully submitted,



Bradley Klein
Senior Attorney
Jared Policicchio
Staff Attorney
Environmental Law & Policy Center



Jamie Saul
Attorney for Midwest Environmental Defense Center

On behalf of ELPC and MEDC

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STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

NOTICE OF FINAL DETERMINATION TO REISSUE A WISCONSIN POLLUTANT DISCHARGE
ELIMINATION SYSTEM (WPDES) PERMIT No. WI-0021636-08-0

Permittee: Whiting, Village of, 3600 Water Street, Stevens Point, WI, 54481-5866

Facility Where Discharge Occurs: Whiting Wastewater Treatment Facility, 2500 S. Strange St, Whiting, WI

Receiving Water And Location: the Wisconsin River at river mile 219.4 in river segment C-D, located in the Plover and Little Plover River Watershed of the Upper Wisconsin River Central Sub-basin in Portage County

Brief Facility Description: The Village of Whiting operates an activated sludge treatment plant with a design flow of 0.604 million gallons per day (MGD) and had an actual annual average flow of 0.345 MGD in 2011. Preliminary treatment occurs via fine screening. Effluent is then treated via an oxidation ditch. Phosphorus removal occurs via chemical addition of alum. Effluent is disinfected seasonally with UV radiation prior to discharge to the Wisconsin River. Activated sludge is treated in an aerobic digester and thickened via a screw press and drying beds. The sludge is landspread on fields approved by the Department. The facility was upgraded in 2008. Major operational changes that occurred during the upgrade include replacement of a comminutor with fine screening, elimination of the primary clarifiers & anaerobic digestors, and installation of an oxidation ditch. Significant effluent monitoring and/or limit changes proposed in the upcoming term are as follows: 1) an increase in the phosphorus monitoring frequency and a decrease in the phosphorus limits, 2) replacement of the CBOD₅ limits with BOD₅ limits, and 3) addition of monthly ammonia monitoring. As a result of the facility upgrade, five sludge sample points/outfalls have also been removed from the permit (one remains). A compliance schedule has also been included in the permit requiring the permittee to address collection system infiltration and inflow issues.

Permit Drafter's Name, Address and Phone: Holly Heldstab, DNR, WCR Headquarters, 1300 W. Clairemont Ave, Eau Claire, WI, 54702, (715) 839-1634

Basin Engineer's Name, Address, and Phone: Eric Donaldson, 5301 Rib Mountain Drive, Wausau, WI 54401, (715) 359-5866

Date Permit Signed/Issued: 6-28-2012

Date of Effectiveness: July 1, 2012

Date of Expiration: June 30, 2017

Following the public notice the Department has made a final determination to reissue the WPDES permit for the above-named permittee for this exiting discharge. The permit application information from the WPDES permit file, comments received on the proposed permit and applicable Wis. Adm. Codes were used as a basis for this final determination.

The Department has the authority to issue, modify, suspend, or revoke WPDES permits and to establish effluent limitations and permit conditions under ch. 283, Stats.

Following is a summary of significant comments and any significant changes which have been made in the terms and conditions set forth in the draft permit:

Comments Received from the Applicant, Individuals or Groups and Any Permit Changes as Applicable

Comments were received from Midwest Environmental Advocates (MEA) via email on June 21, 2012. A summary of those comments and the DNR response is below.

MEA Comment: The Department should consider the discharge's impact on the phosphorus-impaired water directly downstream and calculate the Village of Whiting's phosphorus WQBEL to protect downstream water.

EXHIBIT D

DNR Response: The Department has considered and continues to take seriously the impacts of phosphorus loading from all point sources and nonpoint sources to all reaches of the Wisconsin River including the Petenwell and Castle Rock Flowages. That is why monitoring and modeling in the Upper Wisconsin River Basin are currently underway with the goal of having an approved water quality management plan with total maximum daily loads within the next five years. The Department believes that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs.

Note also that pursuant to s. NR 217.13 (b), Wis. Adm. Code, the Department must calculate WQBELs based on the applicable phosphorus criteria at the point of discharge, except the Department may calculate limits to protect downstream waters. The latter approach is optional.

While Department guidance recommends phosphorus WQBELs be based on downstream water quality criteria when the discharge is upstream of a reservoir or lake, the guidance does not supersede the fact that the Department has chosen to develop a water quality management plan with total maximum daily loads rather than imposing WQBELs based on downstream water quality criteria on individual point sources. No permit changes were made.

Environmental Law and Policy Center Comments

Comments were received from the Environmental Law and Policy Center via email on June 22, 2012 at 5:22pm; this time is beyond the close of business on the 30th day of the public comment period. In other words, these comments were received late. The comments however are similar in subject to the above referenced comments received from MEA on the phosphorus limit and downstream impacts. See the above response.

Comments Received from EPA or Other Government Agencies and Any Permit Changes as Applicable None

As provided by s. 283.63, Stats., and ch. 203, Wis. Adm. Code, persons desiring further adjudicative review of this final determination may request a public adjudicatory hearing. A request shall be made by filing a verified petition for review with the Secretary of the Department of Natural Resources within 60 days of the date the permit was signed (see permit signature date above). Further information regarding the conduct and nature of public adjudicatory hearings may be obtained by contacting the Department of Natural Resources, Bureau of Watershed Management, WPDES Permits, Box 7921, Madison, Wisconsin 53707 and by review of ch. NR 203, Wis. Adm. Code, s. 283.63 Stats., and applicable code law.

Information on file for this permit action may be inspected and copied at either the above named permit drafter's address or the above named basin engineer's address, Monday through Friday (except holidays), between 9:00 a.m. and 3:30 p.m. Information on this permit action may also be obtained by calling the permit drafter at (715) 839-1634 or by writing to the Department. Reasonable costs (usually 20 cents per page) will be charged for copies of information in the file other than the public notice and fact sheet. Pursuant to the Americans with Disabilities Act, reasonable accommodation, including the provision of informational material in an alternative format, will be made to qualified individuals upon request.

Initial U.S. EPA Review Comments on WDNR's Draft Guidance for Implementing Wisconsin's Phosphorus Water Quality Standards for Point Source Discharges

October 3, 2011

Region 5's initial comments are based on a rapid non-comprehensive review of the draft guidance, in order to return comments to the State by October 3. We understand the guidance will be a "living" document that will be refined as appropriate over time. We will stay in communication with WDNR as the phosphorus rule is implemented and the guidance is used; we anticipate Region 5 may have additional comments or suggestions as we work with the State on implementation of the phosphorus water quality standards.

Expression of limits, Section 2.01

This section of the draft guidance describes how permit limits will be expressed, but does not include a description of how WDNR will express them as an annual average limit. S. NR 217.14 (2) Wis. Adm. Code provides, in part, that concentration-based limits shall be expressed as an annual average limit when the effluent limit is more stringent than 0.3mg/l for phosphorus for a monthly average or where a monthly average is impracticable.

In addition, the guidance should explain that the calculated effluent limit will be used as an annual average limit and multiplied by three to set a monthly average limit in the permit when it determines the monthly limit is impracticable. The guidance should also clarify that when the effluent limit is expressed as an annual average limitation the permit fact sheet or permit record should explain the basis for the impracticability decision and conformance with 40 CFR 122.44(d)(1)(vii).

Downstream waters, Section 2.04

The draft guidance should clearly state that when a downstream waterbody requires a more stringent WQBEL than the immediate receiving waterbody, the more stringent limit would set the effluent limit in the NPDES permit.

Great Lakes

The draft guidance describes in several sections that WDNR has not finished the procedures for setting effluent limits for Great Lakes due to the lack of a model. Wisconsin is required by s. 217.12 to identify a model with which it will calculate WQBELs for discharges into the Great Lakes, and establish such limits when required under s. NR 217.12. EPA has developed the *Lake Michigan Eutrophication Model*¹ and will be updating the *Model* to provide the total phosphorus loadings to Lake Michigan. WDNR may choose to use the *Model* for the purpose of s. NR 217.13(4). Waste load allocations currently under development for two TMDLs for discharges into the Great Lakes may help inform this process. It is important that any model used conform to s. NR 102.05(3) concerning mixing zones, as applicable.

¹ http://www.epa.gov/med/grosseile_site/LMMBP/eutrophication.html.

Compliance schedules, Section 3.01

S. NR 217.17 (2) provides for a schedule of compliance that may be seven years for facilities that do not need to install wastewater treatment technology, and nine years for those that do need to install nutrient removal technologies to comply with a water quality based effluent limitation for phosphorus. The draft guidance indicates that this time is needed for dischargers to conduct studies, draft and refine facility plans, and report to WDNR whether compliance with the WQBEL can be achieved by simple changes, installation of technology, working with a third party in the watershed, or some combination of the above. It is very important that any compliance schedule include enforceable provisions and milestones. Compliance schedule must include an enforceable sequence of actions that includes compliance with the WQBEL as soon as possible. It should not be anticipated that the full seven year compliance schedule will be necessary in instances where installation of new wastewater treatment technology is not required. Wisconsin should revise this section of the guidance to provide that a compliance schedule may include implementation of one or more treatment options that apply to the permit applicant apart from studies, provided that such treatment is established and incorporated into the permit so that it is enforceable.

Adaptive management, Section 4.02

The initial adaptive management permit and all reissued or modified permits under the adaptive management provision should include the final WQBEL and identify the subset of adaptive management actions that offset the mass of phosphorus which corresponds to the difference between the interim effluent limitation and the WQBEL. The initial adaptive management permits should include a complete compliance schedule that sets out all the steps and a schedule to achieve the water quality standards. The schedule can contain the interim limits, and must contain adaptive management actions that will result in verifiable pollution reductions that equate to the increment between the interim limit and the WQBEL. The record for any adaptive management permit with a compliance schedule should support the determination that the schedule is appropriate and necessary and will lead to compliance with the WQBEL and water quality standard as soon as possible.

Water quality trading, Section 4.03

This section draft guidance briefly explains that water quality trading may be an option for a permit limit. S. NR 217.13(8) and NR 217.17(3)(f) provide, in part, that phosphorus loads may be offset through a phosphorus trade. WDNR should add EPA recommendations that trade programs include several elements to ensure credibility and compliance with water quality standards. These elements include:

- Applying Clean Water Act (CWA) regulations and established Wisconsin law provisions to provide legal authority for administration of water quality trade programs.
- Clearly defining a common unit of trade.

- Generation of credits before or during the same time period they are to be used to comply with permit limits.
- Trade programs should include methods for managing uncertainty such as using trading ratios, modeling, and BMP efficacy estimates.
- Ambient water quality monitoring, in addition to effluent monitoring requirements in NPDES permits. Samples should be collected at strategic locations to ensure progress in meeting water quality standards.
- Compliance and enforcement mechanisms, including a combination of record-keeping, certifications, inspections, and reporting.
- Provisions for adequate public notice through, for example, the TMDL and permit process and a public website.
- Trade programs should be evaluated in order to modify and make improvements to the program.
- Conditions when trading may and may not occur.

The draft guidance should indicate that WDNR may decline the request for a water quality trade permit when the Department determines that the trade will not result in net water quality improvements in the receiving water or downstream waterbody to comply with effluent limits.

Region 5 Tribal Comments

EPA recently consulted with the tribes of Wisconsin on EPA's review of Wisconsin's NPDES rules implementing the new numeric water quality criteria for phosphorus. The Bad River Band of Lake Superior Tribe of Chippewa Indians (the Bad River Tribe) provided comments to EPA and we are including their comments for WDNR to consider. The Bad River Tribe is supportive of Wisconsin's phosphorus rules, but had concerns on some of the provisions. The Tribe asks whether under Section NR 217.14(1) a mass limit will be included in permits for phosphorus discharges when the receiving water or downstream water is designated as an Exceptional Resource Water (ERW) or Outstanding Resource Water (ORW) by the Tribe. Section NR 217.14(1) says that a mass limit shall be included in a permit for discharges of phosphorus to receiving or downstream waters that are an ORW or ERW. Accordingly, we understand Section NR 217.14(1) to require that mass limits be included in permits that discharge phosphorus into receiving or downstream waters on tribal land that a Tribe has designated as an ORW or ERW.

The Bad River Tribe also asks to be involved in the watershed adaptive management option described in s. NR 217.18 if and when Wisconsin approves this approach for a watershed affecting or having the potential to affect the waters flowing within the boundaries of its Reservation. EPA asks that WDNR encourage parties developing adaptive management plans to involve tribes during development of such plan if the plan will cover a watershed which affects tribal waters. Certainly, a Tribe will be able to comment on any draft NPDES permit that is based on an adaptive management plan under the public notice and comment provisions of Wisconsin Statutes Chapter 283, but it could be in all parties interest to involve the tribe during the plan development. In addition, the Bad River Tribe requests that the scale of a watershed to which adaptive management option may apply is defined.

The Bad River Tribe also asked that WDNR clarify the method it will use to determine an appropriate "similar location" under Section NR 217.13(2)(d). This provision, which addresses calculation of WQBELs, states that "the representative upstream concentration shall be either a concentration derived by the Department based on data from the specific stream or from a similar location." The provision does not explain how WDNR will determine what is an appropriate "similar location" when data is not available from the specific stream.

We would ask that these comments be addressed in addition to the comments summarized above.

End of comments.



United States Environmental Protection Agency
Regional Administrator
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590
JUL 25 2012

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Stepp:

I am pleased to inform you that the U.S. Environmental Protection Agency has approved the *Wisconsin Administrative Code* Chapter NR 217, Subchapter III, "Water Quality Based Effluent Limitations for Phosphorus." This Subchapter, which Wisconsin adopted in 2010, pertains to the development of Wisconsin Pollutant Discharge Elimination System permits to implement the State's approved water quality criteria for phosphorus.

EPA reviewed Subchapter III as a revision to Wisconsin's National Pollutant Discharge Elimination System (NPDES) program and conducted the review under 40 C.F.R. §§ 123.25(a) and 123.62. As Regional Administrator, I have the authority to approve revisions to Wisconsin's NPDES program. An enclosure to this letter explains the basis for approval of the Subchapter.

During its review of Subchapter III, EPA recommended that WDNR and EPA create a new addendum to the NPDES Memorandum of Agreement between our agencies through which WDNR would commit itself to certain conditions as it implements Sections NR 217.14(2) Concentration Based Limits and 217.18 Watershed Adaptive Management Option. The conditions will ensure that permits issued consistent with the Sections also meet the requirements of 40 C.F.R. §§ 122.44, 122.45(d), 122.47, 122.62, 124.8, and 124.56. WDNR signed the addendum in April. Enclosed is a copy of the addendum with both WDNR and EPA's signatures.

Tribal Consultation

EPA consulted with Wisconsin tribes on EPA's review of Subchapter III. The Bad River Band of Lake Superior Tribe of Chippewa Indians (the Bad River Tribe) provided comments to EPA that we want to share with you.

The Bad River Tribe asks whether under Section NR 217.14(1) a mass limit will be included in permits for phosphorus discharges when the receiving water or downstream water is designated as an Exceptional Resource Water (ERW) or Outstanding Resource Water (ORW) by the Tribe. Section NR 217.14(1) states that a mass limit shall be

EXHIBIT F

included in a permit for discharges of phosphorus to receiving or downstream waters that are an ORW or ERW. In a January 19, 2012 letter to WDNR, Wisconsin's Attorney General wrote that in Wisconsin provisions allowing WDNR to establish water quality-based effluent limitations necessary to protect downstream waters, "downstream waters" includes navigable waters of the U.S. that are protected by state and tribal water quality standards. Accordingly, we understand Section NR 217.14(1) to require that mass limits be included in permits for sources that discharge phosphorus into receiving or downstream waters on tribal land that a Tribe has designated as an ORW or ERW. However, we ask that WDNR confirm this in its implementing guidance.

Secondly, the Bad River Tribe asks to be involved in the watershed adaptive management option described in Section NR 217.18 if and when Wisconsin approves this approach for a watershed affecting or having the potential to affect the waters flowing within the boundaries of its Reservation. We ask that WDNR encourage parties developing adaptive management plans to involve tribes during development of such plans if the plans will cover a watershed which affects tribal waters. Although tribes will be able to comment on draft NPDES permits that are based on adaptive management plans under the public notice and comment provisions of Wisconsin Statutes Chapter 283, we encourage you to involve tribes during plan development. The Bad River Tribe also requests that WDNR define the scale of a watershed to which the adaptive management option may apply.

Finally the Bad River Tribe asks that WDNR clarify the method it will use to determine an appropriate "similar location" under Section NR 217.13(2)(d). This provision, which addresses calculation of water quality-based effluent limits, states that "the representative upstream concentration shall be either a concentration derived by the Department based on data from the specific stream or from a similar location." The provision does not explain how WDNR will determine what is an appropriate "similar location" when data are not available from the specific stream. WDNR should be able to clarify the method in its guidance.

Reservation of Rights

EPA reserves the right to initiate a subsequent revision to the Wisconsin program under 40 C.F.R. § 123.62 if, among other things, a Wisconsin court strikes down or limits the State's authority to administer the NPDES program including, but not limited to, the legal authority on which our approval of the present revision is based. Moreover, EPA retains authority to review and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c), even if Wisconsin developed the permit in accordance with State law or our Memorandum of Agreement, including any aspects of State law that EPA has approved as part of Wisconsin's NPDES program. EPA also retains authority to take action as appropriate under 40 C.F.R. §§ 123.63 and 123.64.

Nutrients, including phosphorus, are among the most significant remaining causes of water pollution in Wisconsin and the nation. EPA commends Wisconsin for being the first state in the Region to establish numeric water quality criteria for phosphorus in all of the State's surface waters. We also commend Wisconsin for the significant innovation in the watershed adaptive management section of Subchapter III.

If you have any questions about this approval or the Bad River Tribe's comments, please do not hesitate to contact me at (312) 886-3000.

Sincerely,

A handwritten signature in black ink, appearing to read "S Hedman", written in a cursive style.

Susan Hedman
Regional Administrator

Enclosures

cc: Kenneth Johnson, WDNR

Enclosure

Revision to the Wisconsin NPDES Program for Effluent Standards and Limitations for Phosphorus

Wisconsin amended its Chapter NR 217 "Effluent Standards and Limitations for Phosphorus" by adding Subchapter III, NR ss. 217.10-217.19 "Water Quality-Based Effluent Limitations for Phosphorus" in 2010. Except for s. NR 217.19, the U.S. Environmental Protection Agency reviewed these regulations for consistency with 40 C.F.R. § 123.25(a). In addition, EPA reviewed the compliance schedule authorizing provisions in ss. NR 217.17 and 217.18 under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313.

EPA review of NR 217, Subchapter III, Wisconsin Administrative Code

Wisconsin added the following provisions in Chapter NR 217, Subchapter III:

217.10	Applicability
217.11	Definitions
217.12	General
217.13	Calculation of water quality based effluent limitations for phosphorus
217.14	Expression of limitations
217.15	Determination of necessity for water quality based effluent limitations for phosphorus
217.16	Relationship of WQBELs and TMDL based limitations
217.17	Schedules of compliance
217.18	Watershed adaptive management option
217.19	Variances for stabilization ponds and lagoon systems

EPA addressed s. NR 217.19 and the compliance schedule authorizing provision in s. 217.17 on December 30, 2010 as part of its approval of the phosphorus water quality criteria. EPA approves ss. NR 217.10, 217.11, 217.12, 217.13, 217.14, 217.15, 217.16, 217.17, and 217.18 as discussed below. EPA is approving ss. NR 217.14(2) and 217.18 based, in part, on an addendum to the National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement ("MOA") between the Wisconsin Department of Natural Resources ("WDNR" or "the Department") and EPA concerning implementation of these provisions, as discussed below. Finally, EPA approves the compliance schedule authorizing provisions in s. NR 217.18(3) under CWA § 303(c) based on the fact that compliance schedules, including those established under s. NR 217.18(3), are subject to s. NR 217.17, 40 C.F.R. § 122.47, and the signed MOA Addendum.

Prior to this approval, EPA consulted with the Wisconsin tribes on the draft MOA and WDNR's NPDES rules. On May 4, 2011, EPA issued its Policy on Consultation and Coordination with Indian Tribes. While EPA is in a transition period of determining when it is appropriate to consult under this Policy, and working with tribes as part of this process, EPA Region 5 decided in this instance to consult with tribes on its pending decision concerning

Wisconsin's NPDES rules for the new phosphorus water quality criteria, rather than wait until the process for implementing the policy is more developed. EPA participated in conference calls with the tribes and provided an opportunity for the tribes to comment. The tribes were overall supportive of the NPDES rules implementing the phosphorus water quality standards. The Bad River Band of Lake Superior Tribe of Chippewa Indians had comments which are included in the cover letter.

EPA Approval

1. s. NR 217.10 Wis. Adm. Code: Applicability. This section contains the applicability statement for Chapter NR 217, Subchapter III. It specifies that the Subchapter is applicable to four specified categories of point sources, including, but not limited to, publicly and privately owned wastewater facilities or treatment works. EPA asked WDNR to clarify that point sources not covered under s. NR 217.10 may still be subject to a requirement for a water quality-based effluent limitation (WQBEL) for phosphorus under Wis. Stat. section 283.13(5), which provides that WDNR shall establish more stringent effluent limitations if these limitations are necessary to meet applicable water quality standards, or any other state or federal law or regulations. WDNR added a footnote to clarify this point. Thus, this provision makes clear that other point sources may need phosphorus WQBELs in permits to meet the criteria in s. NR 102.06, even if they are not subject to Subchapter III, Chapter NR 217.

EPA approves s. NR 217.10 Wis. Adm. Code.

2. s. NR 217.11 Wis. Adm. Code: Definitions. This section contains definitions that apply solely for carrying out Subchapter III. WDNR added a definition of "new discharger" which, unlike EPA's definition of new discharger in 40 C.F.R. § 122.2, does not exclude new sources from the definition. However, the lack of an exclusion for new sources is not consequential given the narrow applicability of the term "new discharger" as well as its use in Subchapter III.

In addition, WDNR added a definition of "privately owned treatment works" to address EPA's concern that this term, as used in s. 217.10, could be interpreted to exclude commercial and industrial sources which discharge process wastewater. WDNR's definition makes clear that the term as used in Subchapter III includes industrial and commercial sources which discharge process wastewater.

EPA approves s. NR 217.11 Wis. Adm. Code.

3. s. NR 217.12 Wis. Adm. Code: General. This section contains the Department's authority to establish WQBELs for phosphorus. WDNR revised its proposed regulation to address EPA's comments that, to match the language in EPA's regulations at 40 C.F.R. § 122.44(d)(1)(i) and (ii), Wisconsin should revise ss. NR 217.12(1)(a), 217.15(1)(a) and 217.15(1)(c) to provide that WQBELs for phosphorus shall be included in a permit whenever

WDNR determines that the discharge from a point source contains phosphorus at concentrations which will cause, have a reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion. WDNR did this. Section NR 217.12(a) states that the Department shall set WQBELs for discharges that will cause, have the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters.

Regarding downstream waters, 40 C.F.R. § 122.4(d) prohibits issuance of permits when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.¹ Section NR 217.12(a) is not clear on its face that it means downstream waters in other states, as well as Wisconsin waters. However, Wisconsin has authority to take downstream impacts in affected states into account in calculating effluent limits. Wis. Stats. sections 283.31(3) and (5) provide WDNR authority for applying 40 C.F.R. § 122.4(d) if necessary to ensure compliance with water quality requirements of all affected states. Wisconsin has confirmed it has this authority. In a January 19, 2012 letter to WDNR, Wisconsin's Attorney General stated that in Wisconsin provisions allowing the Department to establish WQBELs necessary to protect downstream waters, "downstream waters" includes navigable waters of the U.S. that are protected by state and tribal water quality standards. EPA expects WDNR to take the potential for downstream impacts into account and retains the authority to object to a permit if the permit does not ensure compliance with applicable water quality requirements of affected states and tribes.

Based on the foregoing discussion, EPA approves s. NR 217.12 Wis. Adm. Code.

4. s. NR 217.13 Wis. Adm. Code: Calculation of water quality-based effluent limitations for phosphorus. This provision provides procedures for calculating a WQBEL for phosphorus for discharges to streams and rivers, inland lakes and reservoirs, and the Great Lakes. Several paragraphs are discussed below.

Section NR 217.13(4) provides that WDNR will establish WQBELs for discharges directly to the Great Lakes consistent with near shore or whole lake model results approved by WDNR. Sections NR 217.12 and 217.15 make clear that WDNR must determine whether a discharger will cause, have a reasonable potential to cause, or contribute to an excursion beyond the applicable phosphorus water quality criterion. These sections also make clear that WDNR is required to set a WQBEL when the Department determines that a discharge will cause, have the reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion. Thus, Wisconsin is required by ss. 217.12 and 217.15 to identify a model with which it will calculate WQBELs for discharges into the Great Lakes, and actually establish such limits when required under ss. NR 217.12 and 217.15.

¹ 40 C.F.R. § 122.2 defines the term "state" to include Indian Tribes.

Section NR 217.13(8) provides that a new discharger will not be able to discharge phosphorus in a phosphorus impaired water unless, among other things, the discharge will “improve water quality in the phosphorus impaired segment.” In response to comments on this provision, WDNR said that “New dischargers could improve water quality in a receiving water in a number of ways. For example, a large effluent volume with a very low phosphorus concentration--well below the applicable criterion--would improve water quality. The department will make this determination on a case-by-case basis.” To show an “improvement” in water quality, EPA expects that the permittee will demonstrate that its discharge will result in a decrease in the phosphorus concentration or loading in the receiving water.

Section NR 217.13(8) also provides an exception for a new discharger if it can demonstrate that the new phosphorus load will be offset through a phosphorus trade. Section NR 217.17(3)(f) also addresses pollutant trading. EPA has developed guidance on pollutant trading that sets out necessary terms and conditions of a trade. See “The Water Quality Trading Policy” and “The Water Quality Trading Toolkit for Permit Writers” (2007, EPA-833-R-07-004, and <http://water.epa.gov/type/watersheds/trading/WQTTToolkit.cfm>). Generally, EPA recommends that trade programs include several elements to ensure credibility and compliance with water quality standards. These elements include:

- Applying CWA regulations and established state law provisions to provide legal authority for administration of water quality trade programs.
- Clearly defining a common unit of trade.
- Generating credits before or during the same time period they are to be used to comply with permit limits.
- Including methods for managing uncertainty such as using trading ratios, modeling, and best management practice efficacy estimates.
- Ambient water quality monitoring, in addition to effluent monitoring requirements in NPDES permits. Samples should be collected at strategic locations to ensure progress in meeting water quality standards.
- Compliance and enforcement mechanisms, including a combination of record-keeping, certifications, inspections, and reporting.
- Provisions for adequate public notice through, for example, the TMDL and permit process and a public website.
- Trade programs should be evaluated in order to modify and make improvements to the program.

Sections 217.13(8) and 217.17(3)(f) do not include anything that is inconsistent with EPA’s trading policy. In particular, s. NR 217.13(8) says that the offset through a phosphorus trade must be implemented prior to the new discharge, and the note to s. NR 217.14 states that trades must be incorporated into the permit and approved by the Department prior to

implementation.² EPA understands that WDNR is currently working on promulgating trading provisions.

EPA approves s. NR 217.13 Wis. Adm. Code.

5. s. NR 217.14 Wis. Adm. Code: Expression of limitations. Section NR 217.14(1) requires that limits be expressed as a concentration, and as a mass limit for certain identified waters, including outstanding resource waters (ORWs) and exceptional resource waters (ERWs). WDNR may establish mass limitations in permits for any other discharges of phosphorus where an increase in phosphorus load is likely to result in adverse effects on water quality in the receiving water or downstream water. Under 40 C.F.R. §122.45(f) mass limits must be included in permits except when the applicable standard is expressed in other units of measurement. Here, the phosphorus water quality criteria in s. NR 102.06 are expressed in terms of concentration, so EPA's regulations do not mandate mass limitations. The Bad River Tribe, in its comments to EPA, asked for confirmation that WDNR will include a mass limit in permits for phosphorus discharges when the receiving water or downstream water is designated as an ERW or ORW by the Tribe. As noted earlier, Wisconsin concludes that its provisions allowing the Department to establish WQBELs necessary to protect downstream waters includes authority to protect waters protected by other state and tribal water quality standards. EPA asks WDNR to confirm in guidance or by letter to EPA that the Section 217.14(1) requirement concerning mass limits applies to receiving and downstream waters on tribal lands designated by a tribe as ORW or ERW. If the confirmation is included in guidance, please provide EPA a copy of the revised guidance.

Section NR 217.14(2) and (3) provides that the Department will express effluent limits as a monthly average in permits, except for concentrations of less than or equal to 0.3 milligrams per liter (mg/L) where limitations may be expressed as annual averages. The CWA section 402(c)(2) specifically requires NPDES permits to include all the conditions that are required under 40 C.F.R. § 122.45 (made applicable to state NPDES programs by 40 C.F.R. §123.25(a)(16)). Section § 122.45(d) provides that for continuous dischargers, all effluent limitations necessary to achieve water quality standards shall, unless impracticable, be stated as maximum daily and average monthly discharge limitations for all dischargers other than publicly-owned treatment works (POTWs) and average weekly and average monthly discharge limitations for POTWs.

Based on discussions with EPA, WDNR developed a Justification Paper for use of averaging periods for expression of WQBELs for phosphorus other than the averaging periods in 40 C.F.R. § 122.45(d). WDNR set out the basis for impracticability of weekly and daily limits,

² In approving Subchapter III, EPA's approval does not extend to the notes to s. NR 217.14 or to notes in any other section.

and also, when the phosphorus wasteload allocation (WLA) is 0.3 mg/L or less, that monthly limits may be impracticable. WDNR explains that its phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices, and that this is consistent with EPA guidance for nutrient criteria development. WDNR evaluated several studies on the response of fresh waters to phosphorus. Further, WDNR relied on a March 3, 2004 memorandum from James Hanlon, Director of EPA's Office of Wastewater Management, "Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its Tidal Tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System." In this 2004 memorandum, EPA concluded that annual average limits were appropriate for nitrogen and phosphorus in the Chesapeake Bay and that it was impracticable in that case to express such limits as daily/weekly/monthly average values. WDNR noted that the EPA memo indicates that the nature of the water quality problem can be used to determine impracticability.

WDNR then relied on the information above to support its conclusion that due to the nature of phosphorus loadings and the manner in which its phosphorus water quality standards were derived, daily and weekly limits were impracticable. Further, that monthly limits may be impracticable when the WLA is 0.3 mg/L or less, as is recognized in Wisconsin s. NR 217.14(2). For rivers, streams, reservoirs and lakes with residence time of less than one year, where the WLA is 0.3 mg/L or less, the Justification Paper provides that WDNR may establish a monthly average or six-month average limit. When it sets a six-month average limit, the Justification Paper provides that WDNR will also set a monthly limit of 3 times the WLA. For lakes and reservoirs with a residence time of one year or more, where the WLA is 0.3 mg/L or less, the Justification Paper provides that WDNR may establish a six-month average or annual average limit along with a monthly limit of 3 times the WLA. WDNR signed an addendum to the EPA-WDNR NPDES MOA confirming that WDNR will implement 217.14(2) in this manner. EPA expects the State will have to modify its Enforcement Management System to describe the way in which it will manage seasonal and annual average phosphorus limits in its compliance evaluation and enforcement program.

EPA approves s. NR 217.14 Wis. Adm. Code.

6. s. NR 217.15 Wis. Adm. Code: Determination of necessity for water quality-based effluent limitations for phosphorus. This section requires WDNR to determine when WQBELs are required for phosphorus. Sections 301 and 402 of the CWA require NPDES permits to include effluent limitations as needed for discharges to meet water quality standards. The regulation at 40 C.F.R. § 122.44(d) requires the permit-issuing agency to: (1) determine whether point source discharges will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria; and (2) when the agency makes an affirmative determination, set WQBELs that are derived from and comply with water quality standards. Section NR 217.15 requires a WQBEL where the Department makes an affirmative

determination on reasonable potential. It establishes procedures for the Department to make this determination.

In response to a comment from EPA to address the situation where phosphorus data are not available, WDNR revised its rule to provide that where phosphorus data are not available, it may require phosphorus sampling as part of a permit application or use effluent data from similar point sources to make a determination as to whether the point source discharge will cause, have a reasonable potential to cause, or contribute to an excursion beyond the phosphorus water quality criterion. This addressed the concern raised by EPA on the proposed rule.

EPA approves s. NR 217.15 Wis. Adm. Code.

7. s. NR 217.16 Wis. Adm. Code: Relationship of WQBELs and TMDL based limitations. Section NR 217.16 provides WDNR authority to establish a WQBEL consistent with the waste load allocation and assumptions of an EPA approved TMDL that is designed to achieve water quality standards for the waterbody. EPA expects that a limit based on a TMDL will be derived from, and comply with, the applicable phosphorus criteria in NR 102 Wis. Adm. Code in order to be in conformance with 40 C.F.R. § 122.44(d)(1)(vii)(A). Additionally, pursuant to s. NR 217.16(4) if the WQBEL based on an approved TMDL is more stringent than the WQBEL calculated under s. NR 217.13, the Department must include the more stringent TMDL based limitation in the permit. Thus, Wisconsin has the authority to issue permits consistent with the assumptions and requirements of a TMDL's wasteload allocation and is required to do so by s. NR 217.16(4).

EPA expressed a concern that the proposed rule at NR 217.16(3) appeared to allow the state to modify or reissue the permit to include a less stringent limit based on an approved TMDL. WDNR revised its rule to clarify that if a phosphorus WQBEL calculated under s. NR 217.13 has already taken effect in a permit, the Department may replace the limit with a less stringent TMDL-based limit only if allowed pursuant to antidegradation procedures in ch. NR 207. In a July 2011 letter, EPA told WDNR that Wisconsin's NPDES program does not have a provision that conforms to 40 C.F.R. § 122.44(l) (antibacksliding). This regulation is applicable to states under 40 C.F.R. § 123.25(a)(15). In an October 2011 reply letter, WDNR said that it will amend the Wisconsin Administrative Code or seek a statutory amendment to establish antibacksliding provisions for the Wisconsin NPDES program. Until Wisconsin establishes antibacksliding provisions, the Department cannot replace a limit calculated under s. NR 217.13 with a less stringent TMDL-based limit unless the replacement conforms to 40 C.F.R. § 122.44(l). EPA retains its authority to review and object to a permit that contains a limit which is less stringent than contained in the prior permit.³

³ EPA's approval does not extend to the note inserted at the end of s. NR 217.16(3).

Section NR 217.16 (2) provides that WDNR may include a schedule of compliance to achieve a TMDL-based limit, if the department determines a schedule of compliance is necessary. All of the compliance schedule provisions set out in s. NR 217.17, including the required findings that a schedule of compliance will lead to compliance with the WQBEL as soon as possible and that a compliance schedule is appropriate and necessary, apply to any compliance schedule developed under s. NR 217.16. EPA retains its authority to review and object to a permit if it contains a compliance schedule that is not in conformance with 40 C.F.R. § 122.47.

Based on the foregoing discussion, EPA approves s. NR 217.16 Wis. Adm. Code.

8. s. 217.17 Wis. Adm. Code: Schedules of compliance. This section sets out the conditions under which WDNR may provide a schedule of compliance for a WQBEL, and the criteria for WDNR making a determination as to whether a compliance schedule is appropriate. It also provides the terms and conditions for schedules of compliance. EPA reviewed this provision, within the context of current Wisconsin law, for consistency with the CWA section 502(17) and 40 C.F.R. § 122.47. Section 502(17) defines a schedule of compliance as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” Wisconsin defines the term using identical language. *See* Wis. Stat. section 283.01(15) and s. NR 205.03(32) Wis. Adm. Code. Under 40 C.F.R. § 122.47, permits can include compliance schedules when appropriate, and must require compliance with the WQBEL as soon as possible. In granting a compliance schedule in a permit, WDNR must make a finding, supported by the administrative record and described in the fact sheet that a compliance schedule is appropriate and that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. Such finding should set out the basis for its determination that a compliance schedule is appropriate and that the discharger cannot immediately comply with the WQBEL. WDNR should not presume that a compliance schedule be based on the maximum time period allowed in s. NR 217.17(2). The permittee must establish the need for a compliance schedule and for how much time is necessary to achieve compliance. Where such schedules exceed one year, permits must set forth interim requirements and the dates for achievement of the interim requirements. 40 CFR § 122.47(a)(3).

Wis. Stats. section 283.01(15) and ss. NR 205.03(32) and 217.17 Wis. Adm. Code include provisions that conform to the CWA section 502(17) and 40 C.F.R. § 122.47. If a NPDES permit is issued with a compliance schedule that extends past the expiration date of a permit, then the permit must include the final effluent limitations and any interim or final requirements that apply after permit expiration must be enforceable. Interim and final requirements must be expressed in terms of actions or operations leading to compliance with the WQBEL. To the extent WDNR writes guidance implementing s. NR 217.17, WDNR should

ensure such guidance conforms to Wis. Stats. section 283.01(15), ss. NR 205.03(32) and 217.17, and 40 C.F.R. § 122.47.

Section NR 217.17(3)(f) provides that if a permittee chooses to use pollutant trading to achieve compliance with a WQBEL, then the terms and conditions related to the trade shall be incorporated into the permit. This section seems misplaced in s. NR 217.17. As previously noted, this provision does not contain any statements inconsistent with EPA's "Water Quality Trading Policy" (2003). Pollutant trading is allowed to meet a WQBEL. However, the details of the trade must be established prior to permit issuance and incorporated into the permit. If a permittee engages in pollutant trading to comply with a limit, it is not appropriate to allow a compliance schedule to give a discharger time to establish the terms of a trade. Trades must be established at the time of permit issuance or modification.

Based on the foregoing discussion, EPA approves s. NR 217.17 Wis. Adm. Code.

9. s. NR 217.18 Wis. Adm. Code: Watershed adaptive management option. Section NR 217.18 provides an option for permittees to request the issuance of an Adaptive Management NPDES permit as a means to achieve compliance with the water quality standard for the waterbody and the WQBEL. This option is based on the permittee implementing point source and nonpoint source net watershed-scale pollutant reductions that will result in certain Wisconsin waters achieving phosphorus water quality standards in s. NR 102.06 Wis. Adm. Code.

There are several key provisions to this option. Section NR 217.18(3)(e)(1) requires that the permit contain a final and enforceable WQBEL. Section NR 217.18(2)(d) requires the permittee to submit an adaptive management plan with the application for permit re-issuance, with said plan identifying specific actions to achieve the applicable phosphorus criteria through verifiable reductions of phosphorus from point and nonpoint sources. Such adaptive management actions with goals and measures must be included in the permit (s. NR 217.18(3)(b)) and the permit must include a statement that failure to implement any of the terms and conditions established under s. NR 217.18(3) is a violation of the permit. EPA will be reviewing permits issued under this option carefully.

Given that nonpoint sources may be significant contributors of phosphorus in surface water, the adaptive management approach with its focus on reducing nonpoint sources as well as point source loadings to meet the water quality criteria may be a workable solution for phosphorus pollution. This approach could result in achieving the phosphorus water quality criteria for the waterbody where the more traditional approach of relying solely on the permittee meeting its WQBEL may not.

EPA is approving s. NR 217.18 based on WDNR signing an addendum to the MOA with EPA, on April 30, 2012, agreeing to implement this provision in a manner that conforms to 40 C.F.R. §§ 122.44(d), 122.44(l), 122.47, and 122.62. More specifically, the initial permit issued

and all reissued or modified permits under the adaptive management provision will include the final WQBEL and identify the subset of adaptive management actions that offset the mass of phosphorus which corresponds to the difference between the interim effluent limitation and the WQBEL. Secondly, the initial adaptive management permits will include a complete compliance schedule that sets out all the actions in the approved adaptive management plan to achieve the phosphorus water quality criterion. The schedule can contain the interim effluent limitations, and must identify adaptive management actions that will result in verifiable pollution reductions that equate to the increment between the interim limit and the WQBEL. For all compliance schedules, WDNR needs to meet the requirements in Wis. Stats. section 283.01(15) and ss. 205.03(32) and NR 217.17 Wis. Adm. Code. In particular the record should support a determination that a compliance schedule is appropriate and necessary and will lead to compliance with the WQBEL and water quality standard as soon as possible.

**Addendum to the
National Pollutant Discharge Elimination System
Memorandum of Agreement between the
U.S. Environmental Protection Agency, Region 5
and the
Wisconsin Department of Natural Resources**

The U.S. Environmental Protection Agency (EPA), Region 5, and the Wisconsin Department of Natural Resources (WDNR) enter into this Addendum to their National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement to ensure that Wisconsin permits which implement ss. NR 217.14(2) and 217.18 *Wisconsin Administrative Code (Wis. Adm. Code)*, and the fact sheets that accompany such permits, are prepared in conformance with all NPDES requirements including 40 C.F.R. §§ 122.44(d), 122.45(d), 122.47, 124.8, and 124.56. EPA retains its authority to review and object to specific proposed and draft permits in accordance with Section 402(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2), for any of the grounds set forth in 40 C.F.R. § 123.44(c).

I. Section NR 217.14(2) *Wis. Adm. Code* provides that: (a) concentration effluent limitations calculated under s. NR 217.13 shall be expressed as a monthly average in permits, except for concentrations of less than or equal to 0.3 milligrams per liter (mg/L) where limitations may be expressed as annual averages; and (b) if a concentration limitation expressed as an annual average is included in a permit, a monthly average concentration limitation equal to three times the water quality based effluent limitation calculated under s. NR 217.13 shall also be included in the permit. For continuous discharges, 40 C.F.R. § 122.45(d) provides that effluent limitations shall, unless impracticable, be expressed as average weekly and average monthly limitations for publicly-owned treatment works (POTWs) and maximum daily and average monthly limitations for other than POTWs. 40 C.F.R. § 122.44(d)(1)(vii) provides that water quality-based effluent limitations (WQBELs) shall be derived from, and comply with, water quality standards and shall be consistent with the assumptions and requirements of any wasteload allocation (WLA) approved by EPA under 40 C.F.R. § 130.7.

A. For the reasons explained in the attached April 30, 2012, paper entitled *Justification for Use of Monthly, Growing Season and Annual Averaging Periods for Expression of NPDES Permits Limits for Phosphorus Discharges in Wisconsin* (Justification Paper), EPA and WDNR agree that it is impracticable to express phosphorus WQBELs as maximum daily or average weekly values and, when the magnitude of the limit calculated in accordance with s. NR 217.13 *Wis. Adm. Code* is 0.3 mg/L or less, EPA and WDNR agree that it may be impracticable to express phosphorus WQBELs as average monthly values.

B. When the magnitude of the limit calculated in accordance with s. NR 217.13 *Wis. Adm. Code* is 0.3 mg/L or less, WDNR agrees to express the WQBEL over an applicable duration provided in the table on the first page of the Justification Paper provided, however, that the duration shall be consistent with the assumptions and requirements of any applicable EPA-approved WLA. In the atypical or uncommon situations contemplated in the Justification Paper, (e.g. discharges to small inland lakes) on a case-by-case basis WDNR may express a WQBEL over a duration other than a monthly average provided that the fact sheet for the draft permit sets



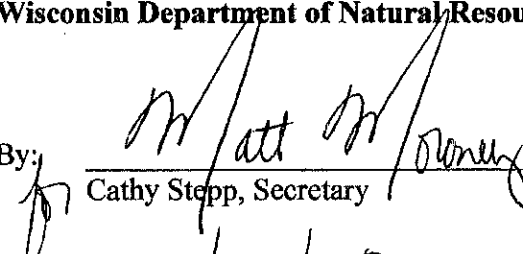
forth the facts which justify conclusions that: (1) it is impracticable to set the limit as a monthly average and (2) the draft limit was derived from and complies with the applicable phosphorus water quality criterion and is consistent with the assumptions and requirements of any applicable EPA-approved WLA.

II. Section NR 217.18(3) *Wis. Adm. Code* provides minimum terms and conditions for permits that include watershed adaptive management actions.

A. To conform to 40 C.F.R. § 122.44(d), WDNR agrees that the initial and any subsequent reissued, modified, or revoked and reissued permit issued to each point source under s. NR 217.18(3) will include the final water quality-based effluent limitation and identify the subset of adaptive management actions that offset the mass of phosphorus which corresponds to the difference between the interim effluent limitation under s. NR 217.18(3)(e) 2. or 3., as the case may be, and the water quality-based effluent limitation.

B. To conform to 40 C.F.R. § 122.47, WDNR agrees that the initial permit issued to each point source under s. NR 217.18(3) will include the s. NR 217.18(3)(b) and (e) 2., 3., and 4. compliance schedule in its entirety. 40 C.F.R. § 122.62(a) and (b) identify the causes for permit modification or revocation and reissuance, respectively. 40 C.F.R. § 122.44(l)(1) provides that interim effluent limitations, standards or conditions in a reissued permit must be at least as stringent as the previous permit unless the circumstances have changed and would constitute cause for permit modification or revocation and reissuance. Subject to 40 C.F.R. §§ 122.62, 122.44(l)(1), and s. 283.53 (2), Wis. Stats., as applicable, WDNR agrees that any reissued, modified, or revoked and reissued permit will include a continuation of the compliance schedule to meet the requirements established in the initial permit.

Wisconsin Department of Natural Resources

By:  _____
Cathy Stepp, Secretary

Date: 4/30/12

U.S. Environmental Protection Agency, Region 5

By:  _____
Susan Hedman, Regional Administrator

Date: July 12, 2012

Attachment



**Justification for
 Use of Monthly, Growing Season and Annual Averaging Periods
 for Expression of WPDES Permit Limits for Phosphorus in Wisconsin**

Averaging Periods by Receiving Waterbody Type and Range of WQBEL Concentrations		
WQBEL	Rivers, streams, impoundments and lakes/reservoirs with average water residence times of less than one year	Lakes with average water residence times of greater than or equal to one year
Greater than 0.3 mg/L	Monthly average	Monthly average
Less than or equal to 0.3 mg/L	Monthly* or six month average (May 1 to October 31 and November 1 to April 30). When the WQBEL as a six-month average is included in the permit, a monthly average limit of 3 times the calculated concentration limit in ss. NR 217.13 and NR 217.14, shall also be included in the permit.	Monthly* or six month average (May 1 to October 31 and November 1 to April 30) or annual average. When the WQBEL as a six-month average or annual average is included in the permit, a monthly average limit of 3 times the calculated concentration limit in ss. NR 217.13 and NR 217.14, shall also be included in the permit.
For approved TMDLs, the expression of limits must be consistent with the assumptions and requirements of the TMDL, but not greater than the periods expressed above.		
* Atypical or uncommon situations will be addressed on a case-by-case basis. These include discharges to small inland lakes with water residence times of less than one year where it is possible that a six month averaging period may not be appropriate and a monthly average limit calculated under ss. NR 217.13 and NR 217.14 may instead be necessary.		

Pertinent Federal Regulation

Section 40 CFR 122.45 (d) of Federal Regulations, requires NPDES permits, including delegated state permits, to express water quality based effluent limits for continuous dischargers, including those for phosphorus, as average weekly and average monthly limitations for POTWs and maximum daily and average monthly limitations for other than POTWs, unless impracticable. Federal regulations do not describe criteria for determining when limits are impracticable, nor does EPA provide guidance on how to make a determination of impracticability.

EPA has made a finding for Chesapeake Bay that impracticability can be based on the nature of the water quality problems. For Chesapeake Bay, EPA determined that daily maximum, weekly average and monthly average effluent limits are impracticable due to the nature of nutrient related water quality problems in the bay. In making this determination, EPA concluded that annual averaging periods were practicable for Chesapeake Bay. This does not automatically infer that annual averaging periods are practicable elsewhere. It merely states that the nature of the water quality problem can be used to determine impracticability.

Principles

- Averaging periods should be consistent with the technical analysis and rationale supporting the adopted phosphorus water quality standards criteria. The Wisconsin phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices.
- Averaging periods should be consistent with EPA guidance for nutrient criteria development.
- The averaging period must take into account critical conditions in the receiving water or downstream water.
- Averaging periods should be compatible with tools, such as models, used to manage the lake, reservoir, stream or river.
- Shorter averaging periods should be used where the frequency, duration or magnitude of the difference between the limit and water quality standards criterion is greater. Longer averaging periods may be used where the difference is less, especially as the discharge limit is the same as the water quality criterion.

Technical Justification

A. Streams and Rivers

Conclusions:

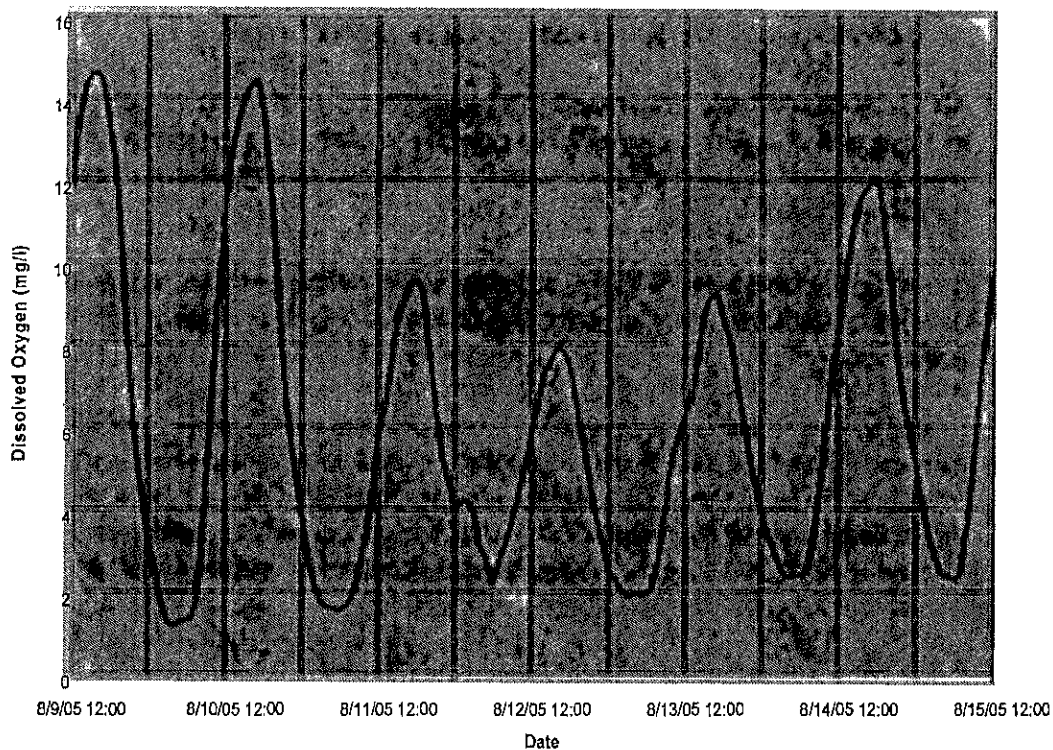
1. It is impracticable to establish maximum daily and average weekly phosphorus limits under 40 CFR 122.45(d) due to the way waterbodies respond to phosphorus loading and due to the manner in which phosphorus water quality standards criteria for Wisconsin were derived.
2. Due to the manner in which the Wisconsin phosphorus criteria were derived, it may be impracticable to establish average monthly limits under 40 CFR 122.45(d) when the magnitude of the calculated water quality based effluent limit is 0.3 mg/L or less.
3. Based on available literature and the judgment of national experts, EPA criteria development guidance clearly calls for states to use seasonal or annual mean or median values in development of nutrient criteria.
4. Wisconsin's wadeable streams exhibit conditions similar to those described in EPA guidance.
5. Wisconsin's approved criteria for both wadeable streams and nonwadeable rivers were derived using correlations between growing season median phosphorus concentrations and community biotic indicators.
6. Although nonwadeable streams exhibit higher concentrations of suspended algae and suspended algae may be more responsive to changes in phosphorus concentrations, acute conditions, such as low dissolved oxygen concentrations, are not exhibited.
7. If averaging periods for WPDES permits should reflect methods and data used to develop phosphorus criteria, generally a growing season averaging period is warranted.
8. Since the risk of impact increases with nutrient concentrations (as well as frequency and duration), it is prudent that permits with higher concentration limits should have shorter averaging periods. Similarly, discharges with lower limits that are set at the water quality criterion concentration could have longer averaging periods taking the background concentration and available dilution into account.

EPA Guidance

EPA's "Nutrient Criteria Technical Guidance Manual: Rivers and Streams" (EPA, July 2000) based on the knowledge and experience of many experts and reviews of the scientific literature, makes numerous references and suggestions to use of seasonal or annual mean or median values in deriving nutrient criteria. For example, in Chapter 6 of the guidance manual, explicitly identifies use of annual mean nutrient concentrations in developing relationships with the 75th percentile of mean algal biomass (page 60). EPA cites work by Biggs (1995 and 2000) as justification for use of this approach and the use of the annual mean values. Also, EPA guidance suggests water quality sampling procedures and data analysis approaches based on seasonal monitoring.

For macrophyte dominated streams the EPA guidance and scientific literature infer that seasonal or even annual analyses may be appropriate. In section 3.3, EPA discusses impacts of large diurnal dissolved oxygen fluctuations due to photosynthesis/respiration by dense macrophyte masses. Later in the guidance EPA describes rooted macrophytes taking up phosphorus from interstitial waters of bottom sediments; largely uncoupling macrophyte growth with short-term fluctuations of phosphorus concentrations in water columns. Mace et. al, Wisconsin DNR researchers, found a high correlation between late-summer biomass and mean summer phosphorus concentrations in macrophyte dominated streams (WDNR 1984).

Turtle Creek at Pounder Rd. , Walworth Co. -- Dissolved Oxygen in Low Flow Conditions



The methods and processes used by benthic algae to take up phosphorus vary with the type of benthic algae. Filamentous algae with greater exposure to the water column may be more responsive to short-term changes in phosphorus concentrations than the more prostrate forms. Regardless of the type or processes for uptake, the primary impact relates to the mass of the accumulated algae and the factors of scour and grazing relate to time and rate of accrual (growth minus scour and grazing). High flow velocities associated with rainfall scour benthic algae and reduce the accumulated biomass.

Biggs (2000) empirically expresses the mean monthly biomass as a function of the days of accrual and the nutrient supply. This, of course, takes a very complex set of interactions involving a number of factors, including light, temperature, periodic sloughing losses, grazing by invertebrates and fish, and presents a simplified relationship. Specifically, Biggs' relationship is as follows:

$$B^* = k_1 d_a + k_2 n + c,$$

Where:

B^* is the mean monthly biomass of benthic algae;

d_a is days available for biomass accrual;

n is a measure of nutrient supply;

k_1 and k_2 are coefficients; and

c is a constant.

A consequence of the Biggs relationship is that to achieve the same biomass, streams with lower concentrations of nutrients will have a shorter accrual period of time and vice versa. Biggs concludes that the frequency of high biomass events sufficient to create eutrophic conditions (200 mg/m^2) increases greatly when the days of accrual exceed 50 days. Again, the number of days varies with the nutrient concentration. Biggs' conclusions were based on unshaded streams. Streams with partial shading will have a longer number of accrual days. Biggs also did his research on streams with gravel or cobble substrata. His model will overestimate benthic algae mass for streams with silt or sand substrata. Thus, longer accrual periods may be pertinent to streams with silty or sandy substrata.

Wisconsin Situation and Phosphorus Criteria Development

The waterbody types and common nutrient related situations for Wisconsin rivers and streams are summarized on the attached table. Wisconsin wadeable streams with high phosphorus concentrations – at least those not shaded or very turbid – tend to exhibit a

phosphorus response similar to the conditions and assumptions contained in EPA's technical guidance. That is, they tend to exhibit a nutrient response as rooted macrophytes, benthic algae or a mix of the two. Generally light will penetrate through much of the water column or even to the bed of the stream to provide conditions suitable for rooted macrophyte or benthic algae growth. Relatively few of Wisconsin's wadeable streams have high suspended algae concentrations.

This situation is best documented by the study of more than 240 Wisconsin streams used to develop nutrient criteria, "Nutrient Concentrations and Their Relations to Biotic Integrity of Wadeable Streams in Wisconsin" (USGS Professional Paper 1722). Appendix 2 of this report shows the extent of benthic algae and rooted macrophyte growth in the study streams. Not unexpectedly, this study also found relatively low suspended chlorophyll a concentrations. The median growing season suspended chlorophyll-a concentrations were 1.0 to 1.7 ug/L and the upper 95-percent confidence limit were 1.6 to 2.2 ug/L, depending on the phosphorus zone within the state. (USGS Professional Paper 1722, Table 22). Only nine of 240 wadeable streams had chlorophyll a concentrations exceeding 10 ug/L, and of those nine, two had sample sites immediately downstream of eutrophic impoundments and one is more appropriately considered as a non-wadeable stream.

Given the recommendations contained in EPA's guidance and a review of the available response information, the Wisconsin phosphorus criteria were developed based on correlations between median growing season phosphorus concentrations and biotic indices. The statistical analysis of the nutrient concentrations and their correlation with selected biotic indices is discussed at great length in the USGS Professional Paper 1722.

The companion study of 42 sites on Wisconsin non-wadeable streams and rivers found greater concentrations of suspended algae and a strong correlation between the median growing season total phosphorus and suspended chlorophyll-a concentrations. For much of these rivers, the water depth is great enough to prevent sufficient light penetration to the bed of the river and benthic algae samples were not taken. Eighteen of these 42 sites had suspended chlorophyll-a concentrations of greater than 10 ug/L. Of these 18 sites, 11 had median concentrations of more than 20 ug/L. While these higher algae concentrations may raise a concern, in these larger river systems we tend not to see the minimum dissolved oxygen concentrations that tend to be seen in wadeable streams. For example, diurnal swings in smaller streams may have a minimum dissolved concentration of 2 mg/L as shown for Turtle Creek in the figure below. For rivers, it is believed that the minimum dissolved oxygen concentrations tend to be 4 mg/L or higher, similar to what was found in Minnesota. In a study of 34 rivers, MPCA found only one site where the minimum diurnal concentration of dissolved oxygen fell below 4.0 mg/L (Figure 10, MPCA 2010).

B. Lakes and Reservoirs

Conclusions:

1. It is impracticable to establish maximum daily and average weekly phosphorus limits under 40 CFR 122.45(d) due to the way waterbodies respond to phosphorus loading and due to the manner in which phosphorus water quality standards criteria for Wisconsin were derived.
2. Due to the manner in which the Wisconsin phosphorus criteria were derived, it may be impracticable to establish average monthly limits under 40 CFR 122.45(d) when the magnitude of the calculated water quality based effluent limit is 0.3 mg/L or less.
3. Based on available literature and the judgment of national experts, EPA criteria development guidance clearly calls for states to use seasonal mean concentrations to assess in-lake conditions.
4. Some measure of water residence time, water retention time, flushing rate or some similar factor are used in all or nearly all lake models used in Wisconsin and those described in EPA guidance to relate phosphorus loading to in-lake conditions.
5. For lakes with long water residence times, the impact of phosphorus loads from the entire year will be exhibited in the growing season.
6. Wisconsin's approved criteria were derived using correlations between growing season mean phosphorus concentrations and a variety of growing season response indicators.

EPA Guidance

Chapters 5, 6 and 7 of EPA's "Nutrient Criteria Technical Guidance Manual: Lake and Reservoirs" (EPA, 2000) clearly suggests to states that in-lake response conditions should be assessed using mean seasonal concentrations. Generally, this is viewed as a "growing" season and in northern states, such as Wisconsin, the growing season of May through September is typically used.

As described in Chapter 9 of EPA's guidance, various models may be used to quantitatively relate the timing and amount of phosphorus loading to in-lake conditions. Many, if not all, use some measure of water residence time, flushing rate or similar parameter to account for mixing of phosphorus inputs within the lake, and, more importantly, settling of phosphorus. That is, the longer the residence time, the less variability of in-lake responses to phosphorus loadings and the greater the settling of phosphorus within the lake. For deeper, seasonal stratified lakes, the in-lake response

relates to annual or multi-year loadings. At the other extreme, conditions within lakes or reservoirs with short residence times may relate to seasonal loadings. For example, early spring loadings may flush through a reservoir with a relatively short residence time and have relatively limit impact on growing season in-lake response conditons.

Wisconsin Situation

Wisconsin's phosphorus criteria for lakes are based primarily on:

- Minimizing nuisance (less than 5% risk) and severe nuisance (less than 1% risk) algal conditions;
- Minimizing the shift of aquatic plant communities in shallow lakes from macrophyte dominated to algae dominated;
- Maintaining balanced fish communities.

In addition, there is a stated intent to prevent harmful aquatic bloom conditions. However, this was a lack of quantitative information to derive numerical criteria.

Critical Condition. Generally, the mid-growing season, July and August, is considered the critical period for nuisance algae conditions in most Wisconsin lakes and reservoirs. The presence of phosphorus, warm water temperatures and abundant light combine to favor the mid-to-late growing season as the critical period. This doesn't mean that discharges prior to or after this critical condition are unimportant. On the contrary, there is a lag time between the time phosphorus reaches the lake or reservoir and when the nuisance conditions are exhibited. For lakes with very long water residence times, such as more than one year, there is substantial mixing within the lake water column resulting in relatively little difference in response between phosphorus loads entering the lake in January verses those entering in June. For lakes with short residence times, the time of the year may be very important. Some form of water residence time or lake flushing rate is an important factor in nearly all lake models used in Wisconsin.

Technical Basis. Wisconsin's phosphorus water quality standards criteria for all lake types were developed using the mean or average condition is the growing season. Water quality samples are routinely collected in June through September or June or June through August depending on the parameter. The sample results are averaged over the growing season and, where possible, averaged over a number of growing seasons. Thus, both the basis for the criteria and routine use of tools for management programs base conditions on what responses will likely occur for given phosphorus conditions, but not the statistical outlier condition that is likely to occur very infrequently.

References

“Nutrient Criteria Technical Guidance Manual: Lakes and Reservoirs”, EPA, April 2000.

“Nutrient Criteria Technical Guidance Manual: Rivers and Streams”, EPA, July 2000.

Robertson et. al. “Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin”, USGS Professional Paper 1722, 2006

Robertson et. al. “Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin”, USGS Professional Paper 1754, 2008

“Impacts of Phosphorus on Streams”, WDNR, April 1984.

Biggs, Barry, J. F., “Eutrophication of Streams and Rivers: Dissolved Nutrient-Chlorophyll Relationships for Benthic Algae”, Journal of North American Benthological Society, 2000.

Heiskary et. al., “Minnesota River Nutrient Criteria Development”, Minnesota Pollution Control Agency, November 2010.

Summary of Waterbody Types, primary nutrient related impacts, extent found in Wisconsin and comments related to averaging period.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Streams and Rivers			
Stream – rooted macrophyte dominated	Low diurnal dissolved oxygen levels (e.g. 2 mg/L) near dawn in mid summer (generally non-lethal) habitat degradation due to sediment capture	Very common; may be most common situation in wadeable streams Focus of Wisconsin DNR study report “Impacts of Phosphorus on Streams”, 1984	Since rooted macrophytes receive phosphorus from interstitial waters of bottom sediments, not responsive to short-term fluctuations in water column phosphorus Growing season means or medians generally used to assess rooted macrophyte dominated streams
Stream – benthic algae, including filamentous algae and attached algae	Low diurnal dissolved oxygen in mid summer; loss of habitat for certain aquatic insects; loss of visibility for sight-feeding fish	Common throughout state Focus of Wisconsin DNR study report “Impacts of Phosphorus on Streams”, 1984	Subject to scour during periods of high velocities; periods of accrual before critical conditions occur; Biggs (2000) suggests 50 day accrual period. Growing season means of median generally used to assess
Stream – floating macrophytes (duckweed)	Floating algae restricts surface water re-aeration	Found, but uncommon in wadeable streams	Not well understood; no accepted sampling protocol

¹ Many Wisconsin wadeable streams do not exhibit responses to phosphorus due to shading from trees or grasses or due to lack of light penetration due to turbid conditions. Downstream waters, however, may exhibit responses to phosphorus.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Stream – suspended algae	May result in low dissolved oxygen	Uncommon in Wadeable streams. 9 of 240 streams in Wisconsin Wadeable stream study had median suspended chlorophyll a concentrations exceeding 10 ug/L. ²	May see response to change in nutrient concentrations.
Rivers (non-wadeable) -- suspended algae ³	May result in low dissolved oxygen; generally considered to have minimum dissolved oxygen concentrations of more than 4 mg/L (MPCA 2010). ⁴	Common in 46 “rivers” listed in s. NR 102.06, Wis. Adm. Code. 18 of 42 study sites had median growing season suspended chlorophyll a concentrations of greater than 10 ug/L. Suspended algae contributes to turbid conditions	May see response to change in nutrient concentrations, however, response tempered by volume of water and surface area re-aeration.

² At least two of the nine Wadeable streams were sampled downstream from eutrophic impoundments. One of the nine is generally considered as a non-wadeable stream and classified as a river in s. NR 102.06, Wis. Adm. Code.

³ Generally have great enough water depths such that adequate light does not penetrate to bottom. Bed surveys for macrophytes and benthic algae were not anticipated and, therefore, not included in the study.

⁴ Conditions considered similar to those in Minnesota rivers where in nearly all study rivers minimum dissolved oxygen conditions were above 5 mg/L.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Lakes and Reservoirs			
Great Lakes, excluding Lower Green Bay ⁵	Accumulation of filamentous algae mats on shores inhibiting recreational uses	Common on Lake Michigan and Green Bay shores; not common along Lake Superior likely due to colder water temperatures.	Not considered responsive to short duration changes in water column concentrations due to very long water residence times. Conditions in nearshore waters likely the response to mixing of tributary waters and the upwelling of open waters.
Deep stratified drainage lakes, including two-story fishery lakes	Growth of algae in epilimnion and loss of dissolved oxygen in hypolimnion. Inhibits recreational uses, may result in change in aquatic community, and may result in loss of cold water species	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁶	These lakes tend to have long water residence times, some may exceed a year. Modeling of lakes generally based on annual phosphorus inputs.

⁵ Lower Green Bay exhibits conditions similar to the large lakes and reservoirs. The water residence time for Lower Green Bay is less than one year.

⁶ Big Green Lake is an example. Ripon POTW discharges to Silver Creek which flows to Big Green Lake.

Waterbody Type	Primary concerns	Extent in Wisconsin	Comments Related to Averaging Period
Deep stratified seepage lakes	Similar to deep stratified drainage lakes	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁷	These lakes tend to have long water residence times that may or may not exceed a year. Modeling of lakes based on annual phosphorus or growing season inputs.
Shallow drainage and seepage lakes	Aquatic community shift from macrophytes to algae; inhibits recreational uses	Common in Wisconsin, but few receive discharges from wastewater treatment plants ⁸	Generally have water residence times of less than a growing season.
Large shallow lakes and reservoirs	Growth of nuisance algae inhibits recreational uses, may result in change in aquatic community.	Common, including Winnebago Pool lakes and reservoirs along the Wisconsin River	Water residence times vary, but generally less than one year. For some, phosphorus loads during spring runoff events may rapidly pass through the body of water emphasizing growing season contributions. Modeling of these lakes and reservoirs may be based on either annual phosphorus loads or growing seasonal phosphorus loads.
Impoundments as defined in s. NR 102.06	Respond similar to flowing streams or rivers	Common	See streams and rivers above

⁷ Silver Lake in Manitowoc County is an example. Silver Lake receives direct discharge from the Silver Lake Convent and College wastewater treatment plant.

⁸ Goose Lake in Columbia County is an example. Goose Lake, a very shallow pond that supports a large goose population, received discharge from Arlington's POTW.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 20 2012

REPLY TO THE ATTENTION OF:

WN-16J

Mike Lemcke, Chief
Wastewater Section
Bureau of Water Quality
Division of Water
Wisconsin Department of Natural Resources
101 South Webster - WT/2
P.O. Box 7921
Madison, Wisconsin 53707-7921

**Re: U.S. Environmental Protection Agency Review of City of Oshkosh draft WPDES
Permit No. WI-0025038-08**

Dear Mr. Lemcke:

This letter is in follow-up to our June 28, 2012 comment letter concerning the draft Wisconsin Pollutant Discharge Elimination System Permit for the City of Oshkosh. In our comments on the draft permit, we raised a concern about the bypass authorization. In response, the Wisconsin Department of Natural Resources (WDNR) has agreed to revise the permit to include mutually agreed upon language with respect to bypass. WDNR will also include that language in other permits that are issued between now and the date that WDNR finalizes its rulemaking efforts regarding these issues. We appreciate WDNR's efforts in this regard. However, as described below, we have identified one issue that remains unresolved, and we have one recommendation on another issue. WDNR should not issue the Oshkosh permit until the issue described below is resolved and the U.S. Environmental Protection Agency has concurred in writing on the terms of a proposed permit.

Total Phosphorus Limitation:

EPA remains concerned that the effluent limit for phosphorus does not ensure compliance with the phosphorus water quality criterion applicable to Lake Winnebago, which is only 1.25 miles

EXHIBIT D

downstream. The documentation provided by WDNR shows that the limit is based exclusively on the Upper Fox River:

1. WQ criteria for the Fox River, in vicinity of Oshkosh, per NR 102.06(a)(14) is 100 ug/l (0.1 mg/l)
2. The median of 13 sampled P concentrations taken in the Fox River near the Oshkosh outfall = 85 ug/l (0.085 mg/l)
3. The 7_{Q2} in the Fox River = 1,350 cfs
4. The design flow of the Oshkosh WWTP is 20 MGD (31 cfs)
5. The WDNR-calculated P limit, based on the mass balanced calculations within the Upper Fox River in the vicinity of Oshkosh's outfall, using the above data, is 0.75 mg/l.
6. Based on the above, and information on the historical WWTP sampled P levels of 0.67 mg/l from the WWTP's effluent, the plant can meet the limit (proposed effluent limitation) of 0.75 mg/l.

Lake Winnebago has been on the approved Clean Water Act Section 303(d) list of phosphorus impaired waters for 1998, 2002, 2004, 2006, and 2008 and is on the draft 2010 and 2012 lists. Lake Winnebago's water quality criterion for phosphorus is 0.04 mg/l. In the review of phosphorus sampling data for Lake Winnebago provided by WDNR from the period of 2008 through 2012, from the 103 samples analyzed, the calculated average phosphorus value in Lake Winnebago for this period is 0.11 mg/l, which is significantly higher than the lake's 0.04 mg/l water quality criterion. In addition, the TMDL approved for the Lower Fox River, which includes the stretch of river from Lake Winnebago to Green Bay, assumes a 40% reduction in phosphorus and suspended solids loads coming from Lake Winnebago.

Section 283.13(5) Wis. Stats. provides that "the department shall establish more stringent effluent limitations ... if these limitations are necessary to meet applicable water quality standards". Section NR 217.15(a)(1) Wis. Adm. Code provides that the department shall include a water quality based effluent limitation for phosphorus in a permit whenever the discharge or discharges from a point source or point sources contain phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause, or contribute to, an exceedance of the water quality standards in s. NR 102.06 in either the receiving or downstream waters.

Section NR 217.13(1)(b) Wis. Adm. Code provides that WQBELs for phosphorus "shall be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except the department may calculate the limitation to protect downstream waters." Section NR 102.01(3) Wis. Adm. Code provides that water quality-based effluent limitations shall be determined to attain and maintain uses and criteria, unless more stringent effluent limitations are established to protect downstream waters.

Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), requires that NPDES permits include "any more stringent effluent limitation ... necessary to meet water quality standards ... or required to implement any applicable water quality standard established pursuant to [section 303 of the CWA]." EPA's regulations implement this statutory NPDES permitting requirement

at 40 C.F.R. §§ 122.4 and 122.44(d). 40 C.F.R. § 123.25(a) makes these regulations applicable to states. 40 C.F.R. § 122.4 prohibits issuance of a permit:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA; [or]

* * *

b) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.

40 C.F.R. § 122.44(d) requires, among other things, that NPDES permits include:

any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

It further requires in § 122.44(d)(1)(vii) that, when developing water quality-based effluent limitations, the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards.

The Oshkosh discharge indirectly enters Lake Winnebago and phosphorus levels in the lake neither meet the applicable phosphorus water quality criterion nor protect designated uses. The 0.75 mg/l effluent limitation for phosphorus in the draft permit was not derived from and does not comply with the phosphorus criterion applicable to the lake. Therefore, the limit is inconsistent with the requirements of Wisconsin and federal law cited above. WDNR must revise the limit in a manner consistent with these requirements.

Additional Recommendation - Standard Conditions:

Section 6 of the draft permit establishes standard conditions. The provisions included in the draft permit include some but not all of the standard conditions as prescribed in 40 C.F.R. § 122.41. WDNR should review the standard conditions in the permit in light of 40 C.F.R. § 122.41. Please note the federal regulation allows that the conditions applicable to all permits can be incorporated in the permits either expressly or by reference.

Conclusion:

Again we want to express our appreciation for all the work that has been done on this permit. As noted above, WDNR should not issue the Oshkosh permit until after the issue described above has been resolved, and EPA has sent WDNR a letter indicating that EPA concurs on the terms of a proposed permit. If WDNR chooses to issue the Oshkosh permit prior to receipt of such letter, then, in accordance with 40 C.F.R. § 123.44(j), WDNR must first submit the permit that it proposes to issue to EPA for formal EPA review in accordance with 40 C.F.R. § 123.44(a). If you have any questions related to EPA's review, please contact Patrick Kuefler or John Wiemhoff of the NPDES Programs Branch. John can be reached at (312) 353-8546, or wiemhoff.john@epa.gov.

Sincerely,



Kevin M. Pierard, Chief
NPDES Programs Branch

cc: Richard Sachs, WDNR
Stephen Brand, City of Oshkosh

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Informational update on the Department's schedule for responding to the US EPA letter dated July 18, 2011 regarding water program inconsistencies.

FOR: JUNE 2012 BOARD MEETING

TO BE PRESENTED BY / TITLE: Russ Rasmussen, Deputy Director, Water Division

SUMMARY:

An information update was made at the January 2012 NRB meeting and this update will provide specific schedules for Administrative Rules, statutory changes, and other.

RECOMMENDATION: Informational only

LIST OF ATTACHED MATERIALS:

No Fiscal Estimate Required

Yes Attached

No Environmental Assessment or Impact Statement Required

Yes Attached

No Background Memo

Yes Attached

APPROVED:

Susan L. Sylvester

05/15/2012

Bureau Director, Susan L. Sylvester

Date

Ken Johnson

5/17/12

Administrator,

Date

W. Matt McJannet

6/8/12

Secretary, Cathy Stepp

Date

cc: NRB Liaison
DNR Rules Coordinator

In January 2012, we presented an Informational Update to the NRB on the Department's response to the EPA on water program inconsistencies. Today, we will bring you up to date on the schedule of addressing these issues through administrative rule processes, proposed statutory changes, or other.

There are eight Administrative Rule packages being proposed, four of which are before the NRB at the June 2012 meeting. The following outlines the status of each package:

I. RULE MAKING SCHEDULES:

Rule Package 1 - Sanitary Sewer Overflows (SSOs) & Bypassing

Federal Issue: Issue # 1 (SSOs)

Rulemaking Schedule for RP 1:

- **Rule Draft Completed** – December 2011
- **NRB Authorization for Hearing** – January 2012
- **EIA Process Completed** – May 2012
- **Public Hearings** – August 2012
- **NRB Adoption** – October 2012
- **Submit Rule for Legislative Review** – January 2013
- **Effective** – After completion of Legislative review

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 2 – Pretreatment

Federal Issues: Issue # 16 (Pretreatment)

Rulemaking Schedule for RP 2:

- **Rule Draft Completed and EIA Process Completed** – October 2012
- **NRB Authorization for Hearing** – December 2012
- **Public Hearings** – March 2013
- **NRB Adoption** – May 2013
- **Submit Rule to Legislature** – July 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 3 – NR 106 Issues and Some Great Lakes Initiative (GLI) Issues

Federal Issues:

- Issue # 8 Mercury Reasonable Potential

- Issue # 10 (Intake Pollutants)
- Issue # 17 Noncontact Cooling Water Exemption Issue # 71
- Mixing Zone Phase out for Bioaccumulative Chemicals of Concern (BCCs)

Rulemaking Schedule for RP 3:

- **Rule Draft Completed and EIA Process Completed** – November 2012
- **NRB Authorization for Hearing** – January 2013
- **Public Hearings** – May 2013
- **NRB Adoption** – September 2013
- **Submit Rule to Legislature** – November 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 4 – Additional NR 106 Issue:

Federal Issues:

- Issue # 28 (Acute limits = FAV)
- Issue # 32 Tier II Value Compliance Schedule Provision
- Issues #31, 35, 36, 37 and 38 (Ammonia)
- Issues # 2, 30, 34, 41 (Expression of Limits)
- Issues #39 - 43 (Chloride)
- Issue # 70 (Alternative Limit When Results Cannot Be Quantified)
- Issue # 10 and #74 Regarding Whole Effluent Toxicity Reasonable Potential (WET R.P.) and Other WET issues and
- Issue # 10 TMDL Procedures for Discharges in the Great Lakes Basin

Rulemaking Schedule for RP 4:

- **Scoping Statement to Governor** – May 2012
- **Approval from Governor to proceed** – May 2012
- **Scope Statement Submitted to NRB for Approval** – June 2012
- **Rule Draft Completed and EIA Process Completed** – December 2013
- **NRB Authorization for Hearing** – February 2014
- **Public Hearings** – April 2014
- **NRB Adoption** – August 2014
- **Submit Rule to Governor** – September 2014
- **Written Approval from Governor** – November 2014
- **Submit Rule to Legislature for review**– January 2015
- **Effective Date** – After completion of legislative review process

Rule Package 5 – NR 200, NR 205, NR 220 - Technology Based Limit Issues, New Source Performance Standards (NSPS), Expression of Limits Generally, Mass

limits, Generic Reasonable Potential, Pollutants in the Intake for Technology Based Limits, BMP limits, General Compliance Schedule provisions, Waters of the State (note to definition), Permit application requirements for Industrial groups, Intake requirements for new facilities (316(b)):

Federal Issues:

- Issue # 2 (122.45 (a) and (h), (b)(1), (c), (d), (f) and (g), (i))
- Issue # 7 (NSPS)
- Issue #11 (Generic RP)
- Issue #13 (Best Management Practice (BMP) authority)
- Issue # 14 (Antibacksliding)
- Issue #15 (General Compliance Schedule language)
- Issue # 20 (Adjustment to Technology Limits)
- Issue # 29 (Solid Waste Leachate Provision in Compliance Schedules)
- Issue # 46 (Expedited Variance for Technology Based Limits))
- Issue # 61 (Application Requirements for Certain Classified Groups)
- Issue 14 (Antibacksliding)

Rulemaking Schedule for RP 5:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – April 2014
 - **NRB Authorization for Hearing** – July 2014
 - **Public Hearings** – October 2014
 - **NRB Adoption** – January 2015
 - **Submit Rule to Governor** – February 2015
 - **Written Approval from Governor** – April 2015
 - **Rule to Legislature for review** – June 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 6 – Permit Processing Issues and other Permit Issuance Procedural Matters

Federal Issues:

- Issue 3 (Process for citizens to request permit modifications)
- Issue 18 (Signatures of Permit Applications)
- Issue 21 and 66 (Fact Sheets)
- Issue 22 (Sending Draft Permits to Agencies)
- Issue 45 (Permits Not a Property Interest, Permit Shield Provisions)
- Issues 47 (Signatory to Permit)
- Issue 48 and 50 (Termination of Permit Procedures)
- Issue 49 (Notification of Permit Changes)
- Issue 51(Public Info Hearing Procedures Requests)
- Issue 62 (Suspension of Permits)
- Issue 65 (Preparation of Draft Permit Required)

Rulemaking Schedule for RP 6:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – January 2014
 - **Public Hearings** – March 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor** – September 2014
 - **Submit Rule to Legislature for review** – January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 7 – Analytical Test Methods

Federal Issues: Issue 9 (Analytical Test Methods)

Rulemaking Schedule or RP 7:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – February 2014
 - **Public Hearings** – April 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor**- September 2014
 - **Submit Rule to Legislature for review**- January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 8 – Storm water Rule Revisions

Federal Issues: Issues # 23, 24, 25, 26, 52, 53, 57 and 67 (see notes below)

Rulemaking Schedule for RP 8:

- **Rule Draft Completed and EIA Process Completed** – December 2013
- **NRB Authorization for Hearing** – January 2014
- **Public Hearings** – August 2014
- **NRB Adoption** – October 2014
- **Submit Rule to Legislature** – January 2015
- **Effective Date** – After completion of legislative review process

Note # 1: The scope statement for RP 8 was published prior to June 8, 2011 so Governor approval is not required and is therefore not included in the schedule. This scope statement included changes to ch. NR 216 for consistency with federal regulations, and will address low priority or minor storm water issues raised in EPA's letter

Note# 2: For issue # 24 regarding construction site storm water permit coverage of commercial building sites and one and two family dwellings, the Department will seek removal of the note in NR 216.42(9) by January 2013 and will no longer deem the DSPS program as equivalent. In addition, DNR will continue to act as permitting authority for commercial building construction sites and will not deem the DSPS program as equivalent under s. NR 216.42(4). In January 2013, the state will seek a legislative change to clarify permitting authority, and in January 2014, submit proposed manual code changes for EPA approval - see II and III below.

The second set of information is the status of the statutory changes requested:

II. STATUTORY CHANGES:

Statutory Changes Regarding Storm water– WisDOT permitting exemption

Federal Issue: Issue # 23 & 26 (DOT)

Proposed Schedule:

- **Begin administrative and transitional measures** – March 2012
- **Submit legislative change recommendation**– January 2013

Statutory Change Regarding Storm water – Commercial building regulation

Federal Issue: Issue # 24 (DSPS)

Proposed Schedule:

- **DNR will continue permitting** – Continuously
- **Submit legislative change recommendation**– January 2013

Other Statutory Change Regarding NPDES Program Issues

Federal Issues: Issues # 6, 27, 48 and 50

Statutory changes were already enacted to establish terminology consistent with federal regulations (e.g. "termination, revocation and reissuance and modification"). This addresses part of issues 48 and 50.

Statutory changes will again be requested by January 2013 to address EPA's comments on Issues 6 and 27. As part of this statutory request, the Department may also request additional statutory changes that were already covered by the Attorney General's Statement simply for clarification purposes. The Department may also request that other issues included in the rule making packages above be addressed through statutory changes so they can be resolved more quickly.

The last category is the other actions proposed to address the remaining issues:

III. OTHER ACTIONS:

A. Manual Code Change Recommendation Schedules:

Manual Code Change – Other environmental programs, ss. NR 216.21(4) and NR 216.42(6)

Federal Issue: Issue # 24 Storm water

Proposed Schedule:

- **DNR to develop manual code**– December 2013
- **Seek EPA approval** – January 2014

B. Communication Change Schedules (Completed):

Approval Letter Change 1 – Authorized Local Storm water Programs

Federal Issue: Issue # 25 (ALPs)

Proposed Schedule:

- **Approvals clearly stipulating DNR as permitting authority** – March 2012 and forward

C. Memorandum Of Agreement Addendum:

Some of the issues included in rule making packages may be resolved more quickly through an Addendum to the MOA between EPA and DNR.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
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May 18, 2012

Susan Hedman, Region V Administrator
United States Environmental Agency
77 West Jackson Boulevard
Chicago IL 60604-3590

Subject: Rule Making Schedule for EPA's Permitting for Environmental Results Initiative

Dear Dr. Hedman:

My letter of October 14, 2011 provided a plan of action in response to your letter dated July 18, 2011 that identified 75 issues relating to Wisconsin's legal authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program. During subsequent discussions with the Department of Natural Resources staff, EPA requested that the Department provide a more specific timeline with milestones for the rulemaking component of our plan. The attached document provides our projected timeline and milestones for eight rule packages and includes other actions that we believe will satisfy the needs of both EPA and the Department.

We recognize that EPA would like rule changes to be completed within a two year timeframe, however, the Department's current rulemaking procedures from start to finish take a minimum of 31 months. Accordingly, Department staff will proceed with rulemaking as expeditiously as possible and will strive to complete rules earlier than projected, but a two year time frame simply cannot be met under existing state rulemaking procedures. The Department is, however, willing to resolve some of the issues more quickly through an Addendum to the Memorandum of Agreement to administer the WPDES Permit program if EPA would like to pursue this action. Also, EPA has already received an Attorney General's Statement from Wisconsin which resolved a number of issues.

It should be noted that rule packages #1, #2 and #3 and #8 were already in progress when DNR received EPA's July 2011 letter. Therefore those packages are projected to be completed earlier than the others. The dates for some of the other packages are staggered to provide staff sufficient time to draft rules, balance permit workloads and allow for adequate public participation and consultation from EPA.

In summary, the Department is proceeding to make rule changes as quickly as possible. We look forward to continuing to work cooperatively with EPA and will provide biannual updates on our progress.

Sincerely,

Cathy Stepp
Secretary

Attachment



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
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January 19, 2012

Matt Moroney, Deputy Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street
P.O. Box 7921
Madison, Wisconsin 53707-7921

Re: Attorney General's Statement Regarding Authority to Administer NPDES
Permit Program

Dear Mr. Moroney:

In your letter of October 14, 2011, you indicate that the U.S. Environmental Protection Agency (EPA) has been reviewing the authority of state agencies for their EPA-approved National Pollutant Discharge Elimination System (NPDES) programs under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq. You state EPA recently completed its review of Wisconsin's WPDES program and sent the Department of Natural Resources ("Department" or "DNR") a letter identifying seventy-five questions or concerns with Wisconsin's authority to administer the program. You indicate that several of those issues are being addressed by DNR, but for some of the issues, the Department believes it is appropriate to seek an Attorney General's statement at this time.

The following is my response to the issues presented in your letter dated October 14, 2011.

Issue # 5 Right to Judicial Review.

1. Is the opportunity to seek judicial review of the final approval or denial of a WPDES permit equivalent to the opportunity to seek judicial review under 40 CFR § 123.30 and CWA § 509?

Response. In my view the answer is yes. CWA § 509(b)(1)(F) [33 U.S.C. § 1369(b)(1)(F)] allows any interested person to seek judicial review of an EPA permit decision. Wisconsin Stat. § 227.52 requires that the decision "adversely affect the substantial interests of any person." The federal and state case law establish that these two standards are effectively the same. The 7th Circuit Court of Appeals has stated that "[t]o qualify as an 'interested person,' at a minimum, a party must have Article III standing." *Texas Independent Producers and Royalty Owners Ass'n v. E.P.A.*, 435 F.3d 758, 764 (7th Cir. 2006) (citations omitted). Based on the

Supreme Court's decision in *Lujan v. Defenders of Wildlife* (504 U.S. 555, 560-61 (1992)), the 7th Circuit stated that, generally, Article III standing "requires a petitioner to 'demonstrate an injury in fact; a causal link between the injury and the challenged action; and redressability through a favorable court decision.'" *Texas Independent Producers*, 435 F.3d at 764 (citations omitted). An "injury in fact" entails an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560.

In Wisconsin the standing requirement for a petition for judicial review under Wis. Stat. §§ 227.52 and 227.53 encompasses a two-step analysis, which asks first "whether the decision of the agency directly causes injury to the interest of the petitioner," and second "whether the interest asserted is recognized by law." *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988), citing *Wisconsin's Environmental Decade, Inc. v. Public Service Comm.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975).

The three federal standing requirements are contained within Wisconsin's standing requirements. Wisconsin's requirement that the agency's decision directly cause the petitioner's injury is the same as the Supreme Court's "causal link" requirement. Wisconsin's requirement that an asserted interest be recognized by law is the same as the Supreme Court's "injury in fact" requirement that requires an "invasion of a legally protected interest." The federal redressability requirement is implicitly contained within the Wisconsin standard for standing. Moreover, if there is no redressability, then the case is moot. "An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy." *PRN Associates LLC v. State, Dept. of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 766 N.W.2d 559, citing *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 11, 278 Wis. 2d 24, 692 N.W.2d 219.

It should be noted that 33 U.S.C. § 1369(b)(1) allows an interested party to challenge the issuance or denial of a permit within 120 days of the determination. Wisconsin Stat. § 227.53(1)(a) requires that the petition for review of an agency decision must occur within 30 days after the service of the decision. Petitioners in Wisconsin have the same right to challenge an agency decision even though they just have a shorter time frame in which to initiate the action.

2. In conjunction with your first question above, you ask whether any individual person may directly seek judicial review of the state's permit decision, or whether seeking administrative review under Wis. Stat. § 283.63 is a prerequisite to judicial review of the decision? For this question, you ask me to consider *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981) in my statement.

Response: In my view the answer is yes – an individual person may seek judicial review of the state's permit decision. However, other entities and groups of five individuals or more

must seek administrative review of the state's permit decision under Wis. Stat. § 283.63 before seeking judicial review of the decision.

Under Wis. Stat. § 283.63(1):

Any permit applicant, permittee, affected state or 5 or more persons may secure a review by the department of any permit denial, modification, suspension or revocation, the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit, any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5). . . .

Under Wis. Stat. § 283.63(2), the decisions of the DNR under this section are subject to judicial review as provided in §§ 227.52 to 227.58. By the express terms of Wis. Stat. § 283.63(1), a lone individual who is not an applicant, permittee, or affected state cannot secure an administrative review of a permit decision before seeking judicial review under Wis. Stat. § 283.63(2). Only a permit applicant, permittee, affected state, or five or more persons may secure the administrative review, and the judicial review that follows. Only Wis. Stat. §§ 227.52 to 227.58 is available to and provides the right of judicial review of agency WPDES decisions to individual persons who are not listed in Wis. Stat. § 283.63(1).

In *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981), the Wisconsin Supreme Court held that a judicial declaratory judgment action brought by a permittee, the Sewerage Commission, under Wis. Stat. § 227.05(1) (1973) – to declare invalid a DNR rule and the permit based on the rule – had to be dismissed because the exclusive means for obtaining that remedy was provided by operation of §§ 147.20 [now Wis. Stat. § 283.63], 227.05(2) [now § 227.40(2)] and 227.15-21 [now §§ 227.52-227.58]. That more specific procedure is to challenge the validity of the permit based on the invalid rule within the administrative and judicial review process for challenging WPDES permit provision under Wis. Stat. § 147.20 (1973). *Sewerage Commission* is distinguishable in a very crucial respect from the situation in the question you pose, and clearly does not apply to it. In that case, the Commission, as a "permittee" under § 147.20(1), had the right to administrative and judicial review of the challenged rule under § 147.20, of which the court held the Commission should have availed itself. *See* 102 Wis. 2d at 633. The court observed that under § 147.20, "[a] party affected by administrative action does not lose any rights, remedies, or forums by the preclusion of a later declaratory challenge Its rights and remedies under sec. 147.20 are the same" as under § 227.05. 332 Wis. 2d at 631. This is not so with respect to individual persons. Individual "affected" persons did not then, and do not today, have the right either to challenge a decision or to challenge a rule under Wis. Stat. § 283.63. Thus, the only means of judicial review of WPDES decisions for lone individuals is through Wis. Stat. §§ 227.52-227.58.

On the other side of the coin, however, the decision in *Sewerage Commission* strongly suggests that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit. In *Sewerage Commission*, the Commission attempted to challenge the validity of the 1974 WPDES permits that contained a requirement to comply with permit limitations by January 1, 1975.¹ In that case, the Commission sought, a significant time after the permit was issued, to challenge the condition in the permit by filing an action under Wis. Stat. § 227.05(1) – the general provision in the Wisconsin Administrative Procedure Act (Wis. Stat. ch. 227) for challenging the validity of administrative rules. Although that case involved an action to declare an administrative rule invalid, the action sought to challenge the validity of the DNR permit that was based on the challenged rule. The court took note of the provision in Wis. Stat. § 227.05(2)(e) [now § 227.40(2)(e)] that states,

227.05 Declaratory judgment proceedings.

(2) The validity of a rule may be determined in any of the following judicial proceedings when material therein:

(e) Proceedings under ss. 227.15 to 227.21 . . . for review of decisions and orders of administrative agencies provided the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

102 Wis. 2d at 626 (quotation marks removed). Wisconsin Stat. §§ 227.15 to 227.21 [now §§ 227.52-227.58] provide for judicial review of agency decisions. The court observed that the Commission could have challenged the validity of the permit by challenging the validity of the rule (on which the offending permit provision was based) at the time the permit was issued, and that it could and should have done so first by seeking administrative review under § 147.20:

Under sec. 147.20(2), Stats., the DNR's ruling on a challenge by a permit holder to the reasonableness or necessity of terms or conditions of the permit is expressly characterized as a "decision" judicially reviewable under secs. 227.15 to 227.21. Therefore, a declaratory challenge to the validity of the rule (NR 210.10) underlying such decision was available under the clear and unambiguous terms of sec. 227.05(2)(e). Under that statute, the only prerequisites for such a challenge would be that the validity of the rule first be raised before the agency, and that

¹ Although not discussed in the case, the running of the 30-day statute of limitations to obtain judicial review of the permit under Wis. Stat. §§ 227.15 et seq. may be why the Commission found it necessary to collaterally attack the permit in a declaratory judgment action. However, the parties do not appear to have raised, and the court did not address, the issue whether the declaratory judgment action was precluded by the Commission's failure to seek earlier judicial review of the permit under Wis. Stat. §§ 227.15 et seq. (now §§ 227.52-227.58).

judicial review thereof be undertaken within thirty days of the DNR's decision on the permit review. . . .

In other words, a declaratory challenge to the validity of a rule on which a permit is based is available under sec. 147.20, Stats., in joint operation with ch. 227. The only requirements are that such a challenge raised pursuant to the procedural dictates of sec. 147.20 must first be sought at the agency level within sixty days of issuance of the permit; the underlying rule must be challenged at that time; and within thirty days of the department's decision thereon, judicial review may be sought, including the raising of a declaratory challenge to the rule.

Sewerage Commission, 102 Wis. 2d at 626-627 (citation and emphasis omitted).

Based on this rationale, the court enunciated several holdings:

We conclude, therefore, that sec. 147.20 authorizes a permit holder to challenge the legality, and not just the factual reasonableness, of administrative action in setting permit terms and conditions. We also conclude that sec. 227.05(2)(e), Stats., if it is invoked upon timely judicial review of a department decision on a permit-review pursuant to compliance with the procedural terms of sec. 147.20, authorizes a declaratory challenge to the validity of the rule underlying the permit.

102 Wis. 2d at 628. The court also went on ultimately to hold, "We conclude that the commissions' failure to challenge the department's authority under the procedures of sec. 147.20, Stats., precluded the later challenge under ch. 227, because sec. 147.20 is the exclusive method of administrative and judicial review of the department's action." 102 Wis. 2d at 621. Moreover, the court quoted from *Superior v. Committee on Water Pollution*, 263 Wis. 23, 26, 56 N.W.2d 501 (1953), holding that an administrative order (more analogous to a permit decision) could not be attacked collaterally in a declaratory judgment action where a more specific procedure, "which, like sec. 147.20, included judicial review . . . subsequent to the agency's review of the challenge" *Sewerage Commission*, 102 Wis. 2d at 630.

For the above reasons, I believe that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit term or condition. Finally, please note that Wis. Stat. § 283.63 and the *Sewerage Commission* case apply to reviews of the reasonableness and necessity of WPDES permit terms and conditions.² Neither Wis. Stat. § 283.63 nor the *Sewerage Commission* case,

² Wisconsin Stat. § 283.63(1) also applies to review of "any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5)." These are not the subject of your question, although there is no reason to believe the holdings in *Sewerage Commission* are not applicable to judicial challenges to them.

suggest that declaratory ruling actions under Wis. Stat. § 227.41 or declaratory judgment actions under Wis. Stat. § 227.40 may not apply to the application or validity of WPDES rules under other circumstances than those where a WPDES permit term or condition may be at issue.

Issue #7 NSPS.

Does the Department have authority, pursuant to Wis. Stat. § 283.31(3)(d) and Wis. Admin. Code § NR 220.13, to include limitations in permits based on federal NSPS (New Source Performance Standards) even if the Department has not yet promulgated new or revised rules for the NSPS in the administrative code?

Response: In my view the answer is yes. Clearly, the Department may include limitations in permits based on federal NSPS standards that already are in Department rules. Wis. Stat. § 283.31(3) provides in pertinent part, "The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . the following, whenever applicable: . . . (b) [s]tandards of performance for new sources." The standards in this section of the rule refer to "the state requirements provided in § 283.31(3)(a)-(c)." *Andersen v. Department of Natural Resources*, 2011 WI 19, ¶ 57, 332 Wis. 2d 41, 796 N.W.2d 1.

As for "new or revised" federal NSPS standards that have not been incorporated into Wisconsin permits, Wis. Admin. Code § NR 220.13, provides, "In the event that federal regulations establishing effluent guidelines have been promulgated for a point source included in one of the categories and classes of point sources listed in s. NR 220.02, the department may establish in the discharge permit for such source, effluent limitations based upon these federal regulations."

This rule is consistent with Wis. Stat. § 283.31(3), which provides that the "department may issue a permit . . . for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . (d) [a]ny more stringent limitations, including those: 1. [n]ecessary to meet federal . . . water quality standards" or "2. . . . to comply with any applicable federal law or regulation." The statute is express and clear that the DNR may issue a permit that complies with federal new source performance standards and effluent limitations that are "more stringent" than state new source performance standards and limitations referred to in Wis. Stat. § 283.31(a)-(c) without DNR having first promulgated the federal standards as state rules. In *Andersen*, the Wisconsin Supreme Court sustained the Department's explanation of Wis. Stat. § 283.31(3)(d)2., which interprets that particular subsection as requiring "the DNR to issue permits that meet the requirements of 'any applicable federal law or regulation' that the EPA has promulgated over a state rule—that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." *Andersen*, 332 Wis. 2d 41, ¶ 55. In *Andersen*, the court held that Wis. Stat. § 283.31(3)(d)2. applies only to new or revised federal standards or limitations that are "promulgated over a state rule", that is, over an existing state

rule within the contemplation of Wis. Stat. § 283.31(3)(a)-(c), which includes new source performance standards. 332 Wis. 2d 41, ¶¶ 55, 57. Based on the court's reasoning, it follows that if there are new or revised NSPS standards adopted by EPA and the state has not yet revised those new standards or limitations, the DNR still may include the new or revised more stringent federal limitations in the permit for the types of standards and limitations specified in Wis. Stat. § 283.31(3)(a)-(c). 332 Wis. 2d 41, ¶¶ 55, 57. As DNR has adopted NSPS rules as contemplated in Wis. Stat. § 283.31(3)(b), DNR may incorporate new "more stringent" federal NSPS standards in WPDES permits without having first incorporating them in DNR rules. *See also* discussion of *Andersen*, *infra*.

Issue #10 GLI Procedures.

Is the Department's interpretation of its authority under Wis. Stat. § 283.31 consistent with the Wisconsin Supreme Court's decision in the *Andersen* case? Specifically, does the Department have the authority to administer applicable provisions of 40 C.F.R. § 132.6 (concerning discharges of toxic substance to the Great Lakes Basin in Great Lakes states)?

Response: In my view the answer is yes. In *Andersen v. Department of Natural Resources*, the Wisconsin Supreme Court sustained the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. that the "more stringent" language in the statute refers to "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 55. The court explained, "It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 57. As an example of a regulation that the EPA has promulgated over a state rule, the court cited 40 C.F.R. § 132.6(f) – (j), which "expressly apply[s] certain federal requirements to the Great Lakes System in the State of Wisconsin." 332 Wis. 2d 41, ¶ 55, n. 20. It is necessary for the Department to set more stringent effluent limitations and standards in discharge permits in order to comply with the procedures contained within 40 C.F.R. § 132.6(f) – (j). Because the applicable provisions of 40 C.F.R. § 132.6 were promulgated by the EPA "over a state rule," as that term is used in *Andersen*, and the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. is valid, the Department is authorized to administer those provisions in WPDES permits for discharges to the Great Lakes Basin.

Issue # 12 Downstream Waters.

Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (including tribes)?

Response: In my view the answer is yes. Wisconsin Stat. § 283.13(5) provides that the Department "shall require compliance with . . . water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation." Under 40 C.F.R. § 131.8, the EPA may approve a federally recognized Indian tribe to administer a water quality standards program in the same manner as a state.

In addition, Wis. Stat. § 283.31(3)(d)1. and 2. allows the Department to issue a WPDES permit with more stringent limitations if "[n]ecessary to meet federal or state water quality standards" or "[n]ecessary to comply with any applicable federal law or regulation." Wisconsin Admin. Code §§ NR 106.06(1)(b)1., NR 106.32(1)(b), 106.55(9), and 106.56(9) all contain provisions allowing the Department to establish water quality based effluent limitations necessary to protect downstream waters. The term "downstream waters" as used in these rules is not limited to intrastate waters. Downstream waters would include navigable waters of the United States that are protected by state and tribal water quality standards that have been adopted in compliance with and as required by the federal Clean Water Act. *See* 33 U.S.C. § 1312(a).

Also, Wis. Stat. § 283.41 and Wis. Admin. Code § NR 203.03 require the Department to provide notice of receipt of a completed permit application to other government agencies, which include "other states potentially affected by the proposed discharge." State and tribal government agencies are permitted to "obtain additional information, submit written comments, or request a public hearing with respect to issuance of a particular permit." Wis. Admin. Code § NR 203.03(1).

Issue # 19 and #44 Concentrated Aquatic Animal Production facilities and the definitions of point source and pollutant.

1. Does the Department have the authority to issue WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities?

Response: In my view the answer is yes. The department also has the authority to issue WPDES permits to fish hatcheries that do not meet the definition of concentrated aquatic animal production facilities. You state that DNR has been issuing WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities under Wis. Stat. §§ 283.01(12) & (13), and 283.31.

40 C.F.R. § 122.24 (b) & (c) provide:

(b) Definition. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.

(c) Case-by-case designation of concentrated aquatic animal production facilities.

(1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. . . .

Appendix C prescribes standard criteria for defining a concentrated aquatic animal production facility as containing fish species or other aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, and are fed threshold amounts of food or produce threshold amounts (by weight) of fish.

Wisconsin Stat. § 283.31(1) provides in pertinent part, "The discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge or disposal is done under a permit issued by the department under this section" Wisconsin Stat. § 283.01(12) defines a point source as "[a] discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . container . . . from which pollutants may be discharged . . . into waters of the state." The purpose of fish hatcheries and aquatic animal production facilities is to confine, produce and cultivate fish for either consumption or for stocking waterways. Fish hatcheries and concentrated aquatic animal production facilities are and operate by use of some or all of the conveyances described in Wis. Stat. § 283.01(12). The feces and waste products produced at fish hatcheries and concentrated aquatic animal production facilities consist of biological materials, which are defined under Wis. Stat. § 283.01(13) as a pollutant. Wisconsin Admin. Code § NR 220.02(20) appropriately includes fish hatcheries as point sources that are regulated under Wis. Stat. ch. 283.

2. Are the definitions of "discharge" and "point source" broad enough to require permits for discharges from landfill leachate collection systems?

Response: In my view the answer is yes. Landfill leachate contains material that is defined as a pollutant under Wis. Stat. § 283.01(13). Any landfill leachate collection system that discharges to any water of the state, which includes groundwater under Wis. Stat. § 283.01(20), meets the definition of a "discharge" and "discharge of pollutant" under Wis. Stat. § 283.01 (4) & (5), respectively. A landfill leachate collection system that discharges to waters of the state satisfies the definition of point source under Wis. Stat. § 283.01(12)(a) because a collection system is a discernible, confined and discrete conveyance of pollutants that discharge to waters of the state. The discharge of pollutants from a leachate collection system to waters of the state is prohibited unless permitted by DNR. Wis. Stat. § 283.31(1).

3. Is the definition of "pollutant" broad enough to cover discharges of filter backwash from a point source?

Response: In my view the answer is yes. The purpose of backwashing a filter is to remove dirt, filth, grease, fibers, particles and other pollutants from the filter's pores. The particles being removed by the backwashing process are either (a) pollutants that are already the subject of a WPDES permit (thus requiring the filter), or (b) fit into the broad definition of pollutant under Wis. Stat. § 283.01(13), which includes solid waste, chemical waste, biological material, rock, sand, and industrial, municipal, and agricultural waste.

Issue # 51 Request for an Informational Hearing.

Is Wisconsin law, concerning an individual's request for a public hearing on a draft WPDES permit, consistent with federal regulations?

Response: In my view the answer is yes. 40 C.F.R. § 124.11 states that "any interested person . . . may request a public hearing on the draft permit." 40 C.F.R. § 124.12(a)(1) states that "[t]he Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest" Wisconsin Stat. § 283.49(1)(a) states that any person may request a public hearing, and that the request must "indicate the interest of the party filing the request and the reasons why a hearing is warranted." In addition, Wisconsin Stat. § 283.49(1)(b) states that "[t]he department shall hold a public hearing on a permit application . . . on the petition of 5 or more persons or if the department deems that there is a significant public interest in holding such a hearing." Wisconsin Stat. § 283.49(1)(a) clearly provides any interested individual the right to request a public hearing and for the DNR to grant it based on the person's interest and reasons warranting a hearing. Therefore, the requirement in 40 C.F.R. § 124.11, that any interested person may request a public hearing, is satisfied. Wisconsin Stat. § 283.49(1)(b) clearly provides the Department discretion to grant a public hearing based on sufficient public interest. Like 40 C.F.R. § 124.12(1), the Department is required to hold a public hearing when it "deems that there is a significant public interest in holding such a hearing." Wis. Stat. § 283.49(1)(b). Therefore, the requirements of 40 C.F.R. § 124.12(1) are satisfied by Wisconsin law.

Issue # 58 Waters of the State Definition.

Is Wisconsin's definition of "waters of the state" broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes?

Response: In my view the answer is yes. Wisconsin's broad definition of "waters of the state" is "those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are

entirely confined and retained completely upon the property of a person." Wis. Stat. § 283.01(20); *See also* Wis. Admin. Code § NR 205.03(44).

The definition includes wetlands and other water places where water is part of the groundwater or near or at the surface. Wisconsin statutes define "wetland" as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." Wis. Stat. §§ 23.32(1) and 281.01(21). Under Wis. Stat. § 281.15(1), the Department is required to establish water quality standards for all waters of the state. As a result, the Department promulgated Wis. Admin. Code ch. NR 103, Water Quality Standards for Wetlands.

Moreover, the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(20) is broad enough to include mudflats, sandflats, sloughs, prairie potholes, wet meadows, and playa lakes which, like wetlands, are areas that consist of water either below, at, or above the land surface, which is surface or ground water. Point source discharges into these areas undoubtedly would enter ground or surface waters, and thus are prohibited without a permit.

Issue # 59 Exemption for Disposal of Solid Waste to a Landfill – Wis. Admin. Code § NR 200.03(3)(f).

Is the exemption from a permit application for disposal of solid waste into a solid waste facility consistent with federal law?

Response: In my view the answer is yes. The exemption in Wis. Admin. Code § NR 200.03(3)(f) allows a person to deposit solid waste into a licensed solid waste facility without obtaining a pollution discharge permit. A solid waste facility is not included among "waters of the state" and, therefore, a discharge of solid waste to a solid waste facility does not require a WPDES permit. *See* Wis. Stat. § 283.31(1); Wis. Admin. Code § NR 200.03(1). If the solid waste facility discharges solid waste into ground or surface waters of the state, then the solid waste facility is a point source and must have a WPDES permit.

Issue # 60 Exemption for Discharges from Private Alcohol Fuel Production Systems in Wis. Stat. § 283.61.

Does the Attorney General agree with the Department's interpretation of the law that the private alcohol fuel production systems exemption does not apply to discharges from such systems that reach waters of the United States?

Response: The answer is yes. "Waters of the United States" as that term is used in the Clean Water Act are navigable surface waters, or waters or wetlands having a sufficient "nexus" to them so that pollution of them would "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos v.*

U.S., 547 U.S. 715, 780 (2006, Kennedy, J., concurring); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167-168 (2001). "Waters of the state" are ground and surface waters, Wis. Stat. § 283.01(20), and thus include "waters of the United States."

Under Wis. Stat. § 283.61(2), the owner of a private alcohol fuel production system is not required to obtain a WPDES permit "to discharge or dispose of any distillate waste product if the waste product is stored in an environmentally sound storage facility and disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An environmentally sound storage facility is a distillate waste facility that does not allow any waste products to "enter or leach into the waters of the state." Wis. Stat. §§ 283.61(1)(b) and 289.44(1)(b). Thus, no permit is required for a distillate waste storage facility that is stored in an environmentally sound manner because there would be no discharge. If discharges from such facilities were to occur, they would violate the prohibition of discharges from point sources without a permit. Wis. Stat. § 283.31(1).

As for discharges and disposal of distillate waste product, the statute requires that it be "disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An "environmentally safe land spreading technique" is not defined in the statutes or Department rules. However, by requiring an "environmentally safe land spreading technique," the owner must discharge the distillate waste onto land, as opposed to discharging into surface water, whether directly or indirectly. Moreover, if the discharge were to enter a surface water, then it would no longer be confined exclusively to the owner's land.

Issue # 63 False Statements.

Does the state have the authority under either state statutes or rules to assess multiple penalties for multiple instances of knowingly making false statements consistent with 40 C.F.R. § 123.27?

Response: In my view the answer is yes. 40 C.F.R. § 123.27(a)(3)(iii) states that "[c]riminal fines shall be recoverable against any person who knowingly makes any false statement . . . fines shall be recoverable . . . for each instance of violation." Wisconsin Stat. § 283.91(4) states that "[a]ny person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall be fined not less than \$10 nor more than \$10,000 or imprisoned for not more than 6 months or both."

On its face, Wis. Stat. § 283.91(4) allows the assessment of multiple penalties for multiple instances, respectively, of knowingly making false statements. The statute states that

"any" person making "any" false statement on "any" application shall be fined. Therefore, each false statement made by a person on a single application is a false statement that will subject the person to a fine or imprisonment. This is not only the interpretation of the Department, but is also the interpretation and practice of the Department of Justice in charging violations under this statute.

Issue # 64 Public Participation in Enforcement Process.

Does the state provide for public participation in the state enforcement process consistent with 40 CFR § 123.27(d)?

Response: In my view the answer is yes. 40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). The State often settles an enforcement action before a complaint is filed with a court, and then files the complaint and a stipulation and order for judgment at the same time effectively beginning and ending the lawsuit on the same day. An entry of judgment is not a bar to intervention. The Wisconsin Court of Appeals stated that "[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewage Commission*, 104 Wis. 2d at 188.

Issue # 75 Wis. Stat. § 227.10(2m).

Taking into account the recent enactment of Wis. Stat. § 227.10(2m), does the state still have adequate permitting and enforcement authority required pursuant to 40 C.F.R. §§ 123.25 and 123.27?

Response: In my view the answer is yes. 40 C.F.R. §§ 123.25 and 123.27 are provided with this letter. They provide a list of the federal requirements for permitting and enforcement, respectively. Your question is whether the long-standing authority to comply with these requirements remains after enactment of Wis. Stat. § 227.10(2m). Recently enacted Wis. Stat. § 227.10(2m) states, in part, that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter."

First, the enactment of Wis. Stat. § 227.10(2m) did not change the Department's express and clear authority for permitting discharge of pollutants as stated in 40 C.F.R. § 123.25. Under Wis. Stat. § 283.31(1), "[t]he discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge . . . is done under a permit issued by the department." The Department is "explicitly" granted authority to issue a permit for the discharge of a pollutant based on whether the discharge will meet certain limitations and standards, including any more stringent limitation "[n]ecessary to comply with any applicable federal law or regulation." Wis. Stat. § 283.31(3).

The enactment of Wis. Stat. § 227.10(2m) did not change the Department's explicit authority and duty to promulgate rules that ensure compliance with federal standards. Wisconsin Stat. § 283.001(2) states that "[t]he purpose of [Wis. Stat. ch. 283] is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and *consistent with all the requirements of the federal water pollution control act amendments of 1972*, P.L. 92-500; 86 Stat. 816." (Emphasis added.) That authority specifically is provided under Wis. Stat. § 283.11(1), in which the Department is explicitly required to "promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant." Furthermore, Wis. Stat. § 283.11(2) explicitly requires that all rules promulgated by the Department under Wis. Stat. ch. 283 "as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387."

Second, the Department has adequate authority to enforce WPDES permits as required by 40 C.F.R. § 123.27. Wisconsin Stat. § 283.91(1) states that "[t]he department of justice . . . may initiate a civil action for a temporary or permanent injunction for any violation of this chapter or any rule promulgated thereunder or of a term or condition of any permit issued under this chapter." Any person that violates a term or condition of a permit or knowingly makes false statements is subject to forfeitures and may be subject to imprisonment. Wis. Stat. § 283.91(2), (3), and (4). *See also* Wis. Stat. § 299.95.

Issue: What are the primary holdings in *Andersen v. Department of Natural Resources*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1?

You ask for a statement on the primary holdings in the *Andersen* case.

Response: The primary holding of *Andersen* is that "Wis. Stat. § 283.63 does not require the DNR to hold a public hearing on a petition for review when the premise of the petition is that the permit fails to comply with basic requirements of the federal Clean Water Act and federal regulations promulgated thereunder." 332 Wis. 2d 41, ¶ 58. *See also* ¶ 8. *See also* discussion above under "Issue #7 NSPS" and "Issue #10 GLI Procedures."

The court also held that there is no provision in state law, i.e., Wis. Stat. ch. 283, that *generally* requires DNR to issue permits (as opposed to rules, 332 Wis. 2d 41, ¶¶ 43, 51) that comply with federal Clean Water Act standards.

The court did hold, however, there is one narrow exception in state law that requires DNR to issue a permit in compliance with a federal standard. The court held that Wis. Stat. § 283.31(3)(d)2. requires DNR to establish more stringent limitations in permits where "EPA has promulgated over a state rule – that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 55, 57. The court held that where new or revised federal laws or regulations are promulgated by EPA and dictate a more stringent limitation compared to the *existing* state limitations and standards listed in Wis. Stat. § 283.31(3)(a)-(c), the DNR has the authority to include those new or revised more stringent federal limitations in state permits. The court held, however, that these conditions for operation of the exception did not exist in that case.

In *Andersen*, petitioners did not argue that the WPDES permit was inconsistent with an existing *state* law or standard. Rather, they argued that some of the terms in the state permit were inconsistent with *federal* Clean Water Act standards, that state permits must be consistent with federal law and standards and, therefore, some of the state permit terms were invalid. *Id.* at ¶¶ 12, 17. The court concluded that in such a situation "only the EPA has the authority to determine whether a WPDES permit comports with federal law." *Id.* at ¶ 25. The EPA has the authority to object to the permit as being inconsistent with federal law, but did not in this case. *Id.* at ¶ 62. "[T]he EPA has the authority to withdraw its approval of a state's permit program if

the program no longer complies with the requirements of 40 C.F.R. pt. 123 and of the Clean Water Act, and if the state fails to take corrective action." 332 Wis. 2d 41, ¶ 39. At that point, EPA may choose to administer and enforce the federal Clean Water Act provisions in the noncomplying state. *Id.* at ¶¶ 35, 36.

This holding and conclusion are consistent with well established law governing the relationship in our federal system between the states and the federal government that respects state sovereignty. States administer and enforce state laws. They do not administer and enforce federal laws. Neither the courts nor EPA can legally force Wisconsin to administer a federal permit provision. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York v. U.S.*, 505 U.S. 144, 178 (1992). Under the "partnership" of "cooperative federalism" envisioned in the Clean Water Act, the states do not administer and enforce the federal law, *per se*. If states choose to administer laws and programs consistent with federal laws and programs, they do so only voluntarily and as a matter of state law. Only the federal government may enforce federal laws.

Consistent with cooperative federalism principles, the court in *Andersen* recognized that if a state wishes to administer state laws that are similar to or mirror-images of provisions of the Clean Water Act, "the Clean Water Act empowers each state to administer 'its own permit program for discharges into navigable waters within its jurisdiction . . .'" – under state law consistent with the Clean Water Act. *Andersen*, 332 Wis. 2d 41, ¶ 34. Such so-called "delegated" state programs are administered under *state* law, however, with or without federal approval. The benefit of EPA approval, of course, is that under the Clean Water Act "[o]nce a state program is approved, the EPA must suspend its own issuance of NPDES permits covering the navigable waters subject to the state program." *Id.* at ¶ 36.

Make no mistake, however, the state is administering state law, here Wis. Stat. ch. 283, not the federal Clean Water Act, in Wisconsin. For example, as stated previously, Wis. Stat. § 283.11(1) & (2) require DNR to adopt rules consistent with the requirements of the Clean Water Act. To the extent that Wisconsin permits might not be consistent with the Clean Water Act and its regulations, this would not be a "violation" of the Clean Water Act *per se*, certainly not in the sense that the state can be forced to administer the Act as EPA requires, or that the inconsistency may be enforced by fines or injunction. It merely means, as the court in *Andersen* said, that when there is no violation of state law and it is alleged that a state permit is inconsistent with the existing federal law, it is up to EPA, the agency that administers and enforces the federal law, to decide whether a permit or the state program does not comply with federal law. Such a decision could then precipitate an EPA objection to the state permit and resolution between DNR and EPA, issuance of an EPA permit with required limitations, or in an extreme case EPA disapproval of Wisconsin's program and decision to administer the federal program by issuing its own permits in Wisconsin. Under any circumstance, EPA cannot amend or repeal

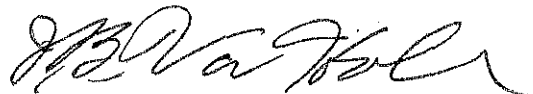
Wis. Stat. ch. 283, nor may it impose the Clean Water Act on Wisconsin to administer. Of course, the whole point of Wis. Stat. ch. 283 and Wisconsin's WPDES program is to allow the State to administer a program that would not invite such federal intervention.

In *Andersen*, because DNR is authorized to administer the WPDES program only as directed under state law, the issue before the court was whether DNR's permit terms violated state law, not whether DNR's permit terms violated federal law. As stated above, the court could find no state law that generally required DNR to issue a permit that includes all federal requirements. As noted above, Wis. Stat. § 283.11 does require DNR to adopt rules consistent with the requirements of the Clean Water Act.

The court did hold that one state law, Wis. Stat. § 283.31(3)(d)2., does specifically require DNR to issue permits consistent with "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, — "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)–(c)." 332 Wis. 2d 41, ¶ 55. The court held, however, that it did not apply in this case. "By the statute's plain language, the 'applicable federal law or regulation' must provide for a 'more stringent limitation[]' than something else. It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)–(c), including those necessary to comply with any applicable federal law or regulation." 332 Wis. 2d 41, ¶ 57. The court agreed with DNR's interpretation that this statutory provision applies in those situations where EPA has overpromulgated the state rules. It follows that it also applies to those situations where EPA has promulgated a new or revised more stringent limitation that is the type of limitations in Wis. Stat. § 283.31(3)(a)–(c), but where the state has not yet updated its regulation to include the limitation. Thus, Wis. Stat. § 283.31(3)(d)2. did not apply to require the federal standard to be incorporated in the state permit. The court correctly held that the only remedy for the situation in *Andersen* "rests with the EPA" under federal law. 332 Wis. 2d 41, ¶¶ 8, 65, 66.

If you have any questions regarding the Department of Justice's response to the issues detailed in your October 14, 2011 letter, please contact Assistant Attorney General Thomas Dawson at (608) 266-8987.

Sincerely,



J.B. VAN HOLLEN
Attorney General

CLEAN WATER ACTION COUNCIL
OF NORTHEAST WISCONSIN,

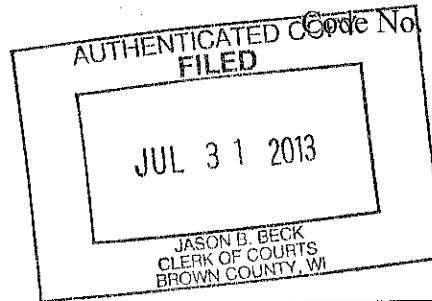
Petitioner,

Case No. 12 CV 2197

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.



DECISION ON APPLETON COATED LLC'S MOTION TO DISMISS.

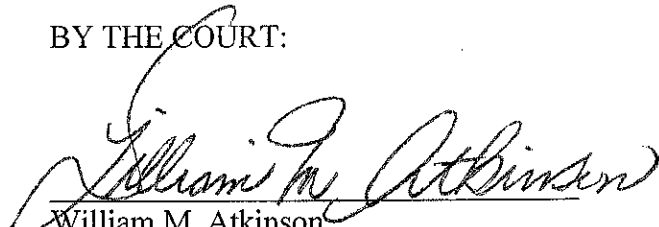
This Court finds that *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613 (1981) is the controlling case. The Court hereby adopts by reference the arguments and conclusions of law set forth in Appleton Coated LLC's Reply Brief at I. ¶ A. B. C. D.

Based upon the arguments incorporated by reference, the Court hereby grants the Motion to Dismiss.

Having granted the Motion to Dismiss this Court will not consider the second prong of Appleton Coated LLC's motion concerning the matters do not constitute final agency action within the meaning of the Wisconsin Administrative Procedure Act.

Dated this 31 day of July, 2013.

BY THE COURT:



William M. Atkinson
Circuit Judge

c: Attorney Dennis M. Grzezinski
Attorney James E. Parra
Attorney Lorraine Carol Stoltzfus
Attorney Jordan J. Hemaïdan
Attorney Michael P. Screnock
Attorney Edwin F. Bush II



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 13, 2013

VIA HAND DELIVERY

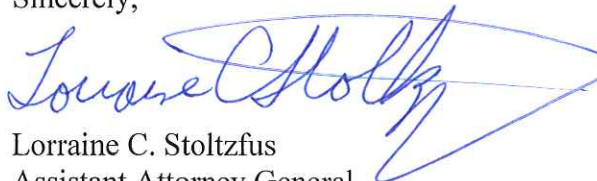
Honorable Frank D. Remington
Dane County Circuit Court – Br. 8
Dane County Courthouse – Room 4103
215 South Hamilton Street
Madison, Wisconsin 53703

Re: *Midwest Environmental Defense Center v. Wisconsin Department of
Natural Resources and Foremost Farms USA, Intervenor*
Dane County Case No. 12-CV-3352

Dear Judge Remington:

Enclosed for filing in the above referenced case please find Respondent Wisconsin Department of Natural Resources' Response Brief in Opposition to Petition for Judicial Review. A copy has been provided to counsel of record via email this same date.

Sincerely,


Lorraine C. Stoltzfus
Assistant Attorney General

LCS:jph

Enclosure

cc (w/enc; via email): Attorneys James E. Para, Elizabeth Lawton and Sarah Williams
Attorney Donald Schott
Attorney Robin Nyffeler (WDNR)

MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.,

Petitioner,

v.

Case No. 12-CV-3352

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

FOREMOST FARMS USA

Intervening-Respondent.

RESPONDENT WISCONSIN DEPARTMENT OF NATURAL RESOURCES'
RESPONSE BRIEF IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW

The Respondent Wisconsin Department of Natural Resources (WDNR) by its counsel, Attorney General J.B. Van Hollen and Assistant Attorneys General Bradley J. Motl and Lorraine C. Stoltzfus, submits this brief in opposition to the petition for review. WDNR asks this Court to affirm its decision to grant a Wisconsin Pollution Discharge Elimination System (WPDES) permit to Foremost Farms USA Coop Plover, and to deny all relief requested by the Petitioner. WDNR's decision should be upheld because WDNR properly interpreted and applied Wis. Admin. Code ch. NR 217 to calculate and include a phosphorus water-quality based effluent limitation (WQBEL) in the Foremost Farms WPDES permit. WDNR calculated the WQBEL based on the water quality criteria

for the Wisconsin River, the water receiving the discharge. Wisconsin Admin. Code § NR 217.13 provides WDNR with discretion to determine whether a WPDES permit limitation should be calculated based on the water quality standards of downstream waters. WDNR's decision to not include a phosphorus WQBEL based on the criteria of downstream waters was a valid exercise of the agency's discretion.

PRELIMINARY STATEMENT

WDNR is committed, through the enactment and implementation of state water quality standards and phosphorus WQBELs, to "reduc[ing] the amount of phosphorus discharged to surface waters." Wis. Admin. Code § NR 217.01. WDNR is also committed to issuing legally defensible, scientifically sound WPDES permits.

The upper Wisconsin River Basin is a complex system. (R. 057.) "There are 30 permitted municipal and industrial discharges to the main stem of the Wisconsin River" from Rhinelander to the head end of Petenwell Lake. (R. 056.) In addition, there are more than 30 other discharges to tributary streams. (R. 056.) Foremost Farms is one of these point source dischargers. All of the point sources combined "make up slightly less than 50% of the total load" to Petenwell and Castle Rock Lakes. (R. 057.) The majority of the phosphorus entering Petenwell and Castle Rock Lakes is from nonpoint sources such as runoff from agricultural operations.

To fully consider all sources of phosphorus in the Basin, WDNR has committed itself to completing a United States Environmental Protection Agency (USEPA) – approved total maximum daily load (TMDL) for phosphorus for the upper Wisconsin

River Basin between Rhinelander and the Castle Rock Lake. (R. 159; *See* Wis. Admin. Code § NR 217.16(1).) A TMDL is "the amount of pollutants specified as a function of one or more water quality parameters that can be discharged into a water quality limited segment and still ensure attainment of the applicable water quality standard in a watershed." Wis. Admin. Code § NR 217.11(7). A TMDL will allow WDNR to identify all of the sources of phosphorus in the Upper Wisconsin River Basin in order to create a comprehensive plan for reducing phosphorus in the Basin so that all of the water bodies within the Basin will meet their applicable phosphorus water quality standard.

The Wisconsin Legislature allocated resources in 2009 to examine nutrient transport and its effects in the Wisconsin River Basin upstream of the Castle Rock Dam. (R. 056.) Currently, WDNR is engaged in extensive monitoring and modeling of the Wisconsin River Basin in order to produce a phosphorus TMDL by 2016.¹ (R. 058 and 109.) As part of this process, WDNR is monitoring 29 river sites and 19 flowage sites within the Wisconsin River Basin. (R. 109.) WDNR "believes that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs." (R. 159.)

¹ MEDC attempts to question when the TMDL will be completed. (MEDC Initial Brief, at 4.) In support of this proposition, MEDC quotes and cites to a presentation by WDNR employee Anne Hirekatur on March 28, 2013. *Id.* It should be noted that the Foremost Farms permit was issued on July 18, 2012. (R. 158.) Therefore, this presentation was not available to WDNR when it made its permit decision and is subsequently not part of the official record that was submitted to the Court by WDNR. The review of an administrative decision under Wis. Stat. ch. 227 "shall be confined to the record." Wis. Stat. § 227.57(1). Therefore, the March 28, 2013 presentation is not relevant to this review of Foremost Farms' WPDES permit.

STATEMENT OF FACTS REGARDING FOREMOST FARMS' PERMIT

On July 18, 2012, WDNR issued Foremost Farms USA Coop Plover WPDES Permit No.: WI-0003859-08-0 ("the Permit"). (R. 158.) The total phosphorus effluent limitation for the Permit was based on the water quality criteria at the point of Foremost Farms' discharge (the Wisconsin River) along with available assimilative capacity. (R. 058.) For Outfall 005, the Permit includes a final total phosphorus effluent limitation of 0.93 milligrams per liter (mg/L). (R. 169.) The initial total phosphorus limit is 3.0 mg/L and the interim phosphorus limitation, effective December 31, 2014, is 2.0 mg/L. (R. 169.) Pursuant to Wis. Admin. Code § NR 217.17, the Permit includes a 7-year schedule of compliance, which requires Foremost Farms to take specific actions necessary for it to come into compliance with the final total phosphorus effluent limitation. (R. 173-75.)

Compliance with the final phosphorus effluent limitation will require Foremost Farms to make substantial changes to its wastewater treatment plant. (R. 160.) Implementing these changes will require Foremost Farms to spend a substantial amount of money. (R. 39-40.) Foremost Farms currently uses an enhanced biological phosphorus removal process followed by a chemical process that allows it to achieve discharge levels of approximately 2.25 mg/L. (R. 37 and 160.) Based on the amount of phosphorus going into Foremost Farms' wastewater treatment plant, a discharge of 2.25 mg/L represents a phosphorus reduction of 97.4 percent. (R. 38.) WDNR believes the facility can achieve the 2.0 mg/L interim limit by making adjustments to its existing wastewater treatment plant. (R. 160.) However, WDNR does not think that Foremost

Farms can achieve the final phosphorus effluent limitation by increasing the chemical dosage; it is already adding a substantial amount of chemicals to achieve the 3.0 mg/L limit in its prior WPDES permit. (R. 160.) To achieve the final phosphorus limit will require a phosphorus removal efficiency of over 99 percent. (R. 160.)

PHOSPHORUS WQBEL PERMITTING PROCESS

Wisconsin Stat. § 283.31(1) states that "[t]he discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge . . . is done under a permit issued by [WDNR] under this section" Wisconsin Stat. § 283.31(3)(d)1. states that WDNR "may issue a permit under this section for the discharge of any pollutant . . . upon condition that such discharges will meet all the following, **whenever applicable**: . . . (d) Any more stringent limitations, including those: 1. Necessary to meet federal or state water quality standards" (emphasis added). *See also* Wis. Stat. § 283.13(5). WDNR is required to "promulgate rules setting standards of water quality to be applicable to the waters of the state" Wis. Stat. § 281.15(1).

Wisconsin Admin. Code § NR 102.06 sets forth the phosphorus water quality standards for Wisconsin's surface waters. The total phosphorus criterion for the Wisconsin River is 0.1 milligrams per liter (mg/L)². Wis. Admin. Code § NR 102.06(3)(a)44. The total phosphorus criterion for Petenwell and Castle Rock Lakes is 0.04 mg/L. Wis. Admin. Code § NR 102.06(4)(a).

² 1000 micrograms per liter (ug/L) is equal to 1 milligram per liter (mg/L).

Wisconsin Admin. Code ch. NR 217, Subchapter III provides the regulatory framework for determining which phosphorus water quality standards are applicable under Wis. Stat. § 283.31(3)(d)1. Furthermore, Subchapter III establishes procedures for calculating WQBELs for phosphorus and procedures for determining when to include a phosphorus limitation in a WPDES permit. The requirement that a phosphorus limit be included in a WPDES permit is triggered whenever WDNR determines that "[t]he discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters." Wis. Admin. Code § NR 217.12(1)(a); *See* Wis. Admin. Code § NR 217.15(1)(a).

Once the trigger is met, and a phosphorus WQBEL is required, WDNR must include a calculated WQBEL in the permit pursuant to Wis. Admin. Code § NR 217.13. Wis. Admin. Code § NR 217.13(1)(a). Wisconsin Admin. Code § NR 217.13(1)(b) states that WQBELs "for phosphorus shall be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except [WDNR] *may* calculate the limitation to protect downstream waters." (emphasis added).

SUMMARY OF WDNR'S ARGUMENT

Wisconsin Stat. s. 283.13(5) requires WDNR to include WQBELs necessary to meet applicable water quality standards. Wisconsin Admin. Code §§ NR 217.12(1)(a) and NR 217.15(1)(a) do not determine which water quality standard is applicable. They merely trigger the requirement that a phosphorus WQBEL be included in the permit. If

this requirement is triggered, then Wis. Admin. Code § NR 217.13(1)(b) states that WDNR must calculate phosphorus effluents limits at the point of discharge but *may* calculate the limitation to protect downstream waters. Therefore, the applicable water quality standard for purposes of Wis. Stat. s. 283.13(5) is the phosphorus water quality standard of the receiving water at the point of discharge, but it could instead be the water quality standard at some downstream water if WDNR decides to exercise its discretion and calculate a limitation to protect downstream waters.

In the instant case, WDNR determined that Foremost Farms' discharge had the potential to cause or contribute to an exceedance of the phosphorus water quality criteria in either the immediate receiving water or downstream waters. WDNR calculated the phosphorus QBEL based on the water quality criteria of the receiving water, the Wisconsin River. WDNR exercised its discretion and did not calculate the phosphorus QBEL based on the water quality criteria of the Petenwell and Castle Rock Lakes because it is in the process of completing a TMDL for the Wisconsin River Basin.

STANDARD OF REVIEW

The standard of review is prescribed by Wis. Stat. § 227.57. Review is limited to the administrative record before the court. Wis. Stat. § 227.57(1); *State Public Intervenor v. Wisconsin Dept. of Natural Resources*, 171 Wis. 2d 243, 249-50, 490 N.W.2d 770 (Ct. App. 1992). The court must affirm WDNR's decision unless it finds specific grounds stated in Wis. Stat. § 227.57 for not affirming it. Wis. Stat. § 227.57(2).

WDNR's "interpretation and application of its own regulations are entitled to controlling weight deference." *Sierra Club v. Wisconsin Dept. of Natural Resources*, 2010 WI App 89, ¶ 24, 327 Wis. 2d 706, 725, 787 N.W.2d 855, citing *Wisconsin Dept. of Revenue v. Menasha Corp.*, 2008 WI 88, ¶¶ 44, 53, 311 Wis. 2d 579, 754 N.W.2d 95. Under controlling weight deference, a court will "uphold an agency's interpretation if it is reasonable and is not inconsistent with the language or the regulation or clearly erroneous." *Id.* citing *Menasha*, 311 Wis. 2d 579, ¶ 54. Furthermore, a court "will sustain an agency's conclusions of law even if an alternative view of the law is just as reasonable or even more reasonable." *Menasha*, 311 Wis. 2d 579, ¶ 54, quoting *DaimlerChrysler v. Labor and Industry Review Com'n*, 2007 WI 15, ¶ 16, 299 Wis. 2d 1, 727 N.W.2d 311. The controlling weight "standard embodies the principle that an administrative agency is in the best position to interpret and apply its own regulation because it knows the specific purposes of the regulations it has promulgated and has a certain expertise in the area it is charged with regulating." *Sierra Club*, 327 Wis. 2d 706, ¶ 24, citing *Pfeiffer v. Board of Regents*, 110 Wis. 2d 146, 155, 328 N.W.2d 279 (1983).

WDNR's factual findings are entitled to substantial deference under the substantial evidence test. *Hilton ex rel. Pages Homeowners' Association v. Department of Natural Resources*, 293 Wis. 2d 1, ¶16, 717 N.W.2d 199 (Ct. App. 2006); Wis. Stat. § 227.57(6). Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Sterlingworth Condominium Ass'n, Inc. v. State, Dept. of Natural Resources*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996); *Village of Menomonee Falls v.*

Wisconsin Dept. of Natural Resources, 140 Wis. 2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987).

Where the facts are determined without a hearing, the court shall affirm the WDNR's decision unless "the facts compel a particular action as a matter of law." Wis. Stat. § 227.57(7). The facts here show that WDNR's decision should be affirmed.

ARGUMENT

In its initial brief, MEDC argues that WDNR is required to include a phosphorus water-quality based effluent limitation (WQBEL) in Foremost Farms' WPDES permit that is calculated based on the water quality criteria of downstream water bodies Petenwell and Castle Rock Lakes. (MEDC's Initial Brief, at 12-13.) Because WDNR chose to issue Foremost Farms a WPDES permit that included a phosphorus WQBEL calculated based on the water quality criteria of the receiving water at the point of discharge (the Wisconsin River) instead of Petenwell and Castle Rock Lakes, MEDC argues that this Court should set aside WDNR's decision to issue Foremost Farms' WPDES permit and declare that Wis. Admin. Code ch. NR 217 requires WDNR to include WQBELs that are calculated based on the phosphorus water quality criteria of downstream waters in certain situations. (MEDC's Initial Brief, at 18-19.)

MEDC's argument is based on an incorrect interpretation of Wis. Admin. Code. ch. 217. Wisconsin Admin. Code §§ NR 217.12(1)(a) and 217.15(1)(a) trigger whether WDNR must place a phosphorus WQBEL in a WPDES permit. These rules do not specify what numerical phosphorus limit WDNR must place in a permit. Instead, WDNR

is required, pursuant to Wis. Admin. Code § NR 217.13(1), to calculate phosphorus WQBELS for point source discharges using Wis. Admin. Code § NR 217.13. Wisconsin Admin. Code § NR 217.13(1)(b) provides WDNR discretion as to whether or not to include a phosphorus WQBEL that is calculated based on the water quality criteria of downstream waters. Wisconsin Admin. Code § NR 217.13(1)(b) states that WQBELS "for phosphorus **shall** be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except [WDNR] **may** calculate the limitation to protect downstream waters." (emphasis added.)

WDNR is not required to calculate a phosphorus WQBEL based on the water quality criteria of downstream waters. Wisconsin Admin. Code § NR 217.13(1)(b) allows WDNR to exercise its discretion in determining whether to calculate a phosphorus WQBEL based on the water quality criteria of downstream waters. Specifically, MEDC's argument fails for the following reasons:

First, the plain meaning of Wis. Admin. Code ch. NR 217 supports WDNR's interpretation of its own administrative rules. The clear and unambiguous language of Wis. Admin. Code ch. NR 217 provides WDNR discretion to decide whether or not to include phosphorus WQBELS protective of downstream waters.

Second, in this case, WDNR exercised its discretion when it issued the Foremost Farms WPDES permit and did not include a phosphorus WQBEL based on the water quality criteria of downstream waters because it was in the process of completing a TMDL for the Wisconsin River Basin, which will identify maximum phosphorus loads

for sources in the Basin for the purpose of achieving compliance with applicable phosphorus criteria.

Third, the Court should uphold WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), 217.13(1)(b), and 217.15(1)(a) even if the language of the rules is ambiguous. WDNR is due controlling weight deference when it interprets its own administrative rules. Furthermore, standard rules of statutory construction indicate that WDNR's interpretation should be upheld.

Fourth, USEPA approved Wis. Admin. Code ch. NR 217 and did not object to WDNR issuing the Permit. Therefore, USEPA has effectively determined that the Foremost Farms WPDES permit complies with federal regulations and the Clean Water Act.

I. THE PLAIN MEANING OF WIS. ADMIN. CODE § NR 217.13(1)(B) IS THAT WDNR HAS DISCRETION TO DECIDE WHETHER OR NOT TO INCLUDE PHOSPHORUS WQBELS PROTECTIVE OF DOWNSTREAM WATERS.

MEDC's argument is that the administrative scheme contained in Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) requires WDNR to calculate and include a phosphorus WQBEL in Foremost Farms' WPDES permit that is based on the water quality criteria of downstream waters. (R. 012-013.) This interpretation of these rules contradicts the plain meaning of the rules. WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a), that WDNR has discretion to decide whether or not to calculate and include

a phosphorus WQBEL based on the water quality criteria of downstream waters, is consistent with the plain meaning of the administrative rules.

When interpreting administrative regulations, a court uses the same rules of interpretation as it applies to statutes. *Menasha*, 311 Wis. 2d 579, ¶ 45, quoting *DaimlerChrysler*, 299 Wis. 2d 1, ¶ 10. Statutory interpretation is a question of law. *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis. 2d 650, 659, 539 N.W.2d 98, (1995) (citation omitted). When interpreting a statute, a court first determines "whether or not the statute's language clearly and unambiguously sets forth the intent of the legislature." *Industry to Industry, Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 6, 252 Wis. 2d 544, 644 N.W.2d 236 (citation omitted). "If the plain meaning of the statute is clear, a court need not look to rules of statutory construction or other extrinsic aids." *UFE Inc. v. Labor and Industry Review Com'n*, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996) (citation omitted). In that case, the "court should simply apply the clear meaning of the statute to the facts before it." *Id.* at 281-82.

In Wisconsin, courts generally construe the word "may" as permissive and the word "shall" as mandatory "unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature." *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963), citing *Scanlon v. City of Menasha*, 16 Wis. 2d 437, 114 N.W.2d 791 (1962). Furthermore, "the use of the word 'may' implies a discretionary element." *Swatek v. County of Dane*, 192 Wis. 2d 47, 59, 531 N.W.2d 45 (1995), citing *Miller v. Smith*, 100 Wis. 2d 609, 616, 302 N.W.2d 468, 471 (1981). "When the words 'shall' and 'may' are used in the same section of a statute,

one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings." *Karow v. Milwaukee County Civil Service Commission*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978), citing *Armes v. Kenosha County*, 81 Wis. 2d 309, 260 N.W.2d 515 (1977); *Scanlon v. City of Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962); and 2A Sands, Sutherland Statutory Construction, sec. 57.11 (1973).

Phosphorus WQBELs "**shall** be included in a permit whenever [WDNR] determines: (a) The discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters." Wis. Admin. Code § NR 217.12(1)(a) (emphasis added); *See also* Wis. Admin. Code § NR 217.15(1)(a). These sections trigger when WDNR is required to place a phosphorus WQBEL in a WPDES permit. It is mandatory that WDNR include a phosphorus WQBEL if the point source will cause an exceedance of Wis. Admin. Code § NR 102.06 in either the receiving water or downstream water. The "shall" in these sections only obligates WDNR to place a phosphorus WQBEL in a permit, it does not create a mandatory duty to place a phosphorus WQBEL in a permit that is protective of downstream waters, even if the point source will cause an exceedance of the water quality criteria for the downstream waters.

Wisconsin Admin. Code § NR 217.13(1)(b) states that "[WQBELs] for phosphorus **shall** be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except [WDNR] **may** calculate the limitations to protect

downstream waters." (emphasis added.) If WDNR is required to include a phosphorus WQBEL in a permit pursuant to Wis. Admin. Code §§ NR 217.12(1)(a) and NR 217.15(1)(a), then WDNR uses Wis. Admin. Code § NR 217.13(1)(b) to calculate the WQBEL. The "shall" in this section obligates WDNR to calculate the phosphorus WQBEL to ensure compliance with the applicable phosphorus water quality criteria in the receiving water at the point of discharge. The "may" in this section provides WDNR discretion to calculate the WQBEL to ensure compliance with the phosphorus water quality criteria of downstream waters. Therefore, including a phosphorus WQBEL protective of downstream waters is permissive, not mandatory.

The plain meaning of the administrative scheme contained in Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) is clear and not ambiguous. If WDNR is required to place a phosphorus WQBEL in a WPDES permit, then WDNR must place a phosphorus WQBEL protective of the receiving water in the permit, but WDNR has the discretion to determine whether or not to include a phosphorus WQBEL that is protective of downstream waters.

II. WDNR'S DECISION TO ISSUE THE FOREMOST FARMS WPDES PERMIT WITH A PHOSPHORUS WQBEL PROTECTIVE OF THE RECEIVING WATER WAS A VALID EXERCISE OF WDNR'S DISCRETION.

On July 18, 2012, WDNR issued the Foremost Farms WPDES permit. (R. 158.) The Permit includes a final total phosphorus effluent limitation of 0.93 milligrams per liter (mg/L) that is calculated to be protective of the receiving water at the point of discharge, the Wisconsin River. (R. 058, 169.) WDNR exercised its discretion, provided

under Wis. Admin. Code § NR 217.13(1)(b), and did not calculate a phosphorus WQBEL based on the water quality criteria of downstream waters Petenwell and Castle Rock Lakes because it is currently creating a TMDL for the Wisconsin River Basin. (R. 159.)

In reviewing an administrative decision, Wis. Stat. § 227.57(8) states that "[t]he court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion." The Supreme Court has explained the term "discretion" in the following manner:

Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out in *State v. Hutnik* (1968), 39 Wis. 2d 754, 764, 159 N.W.2d 733, ". . . there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth."

McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

WDNR's decision to not calculate and include a phosphorus WQBEL based on the water quality criteria of downstream waters was a valid exercise of its discretion. The Record provides evidence that WDNR exercised its discretion and sets forth the basis for the exercise of discretion. WDNR issued a Notice of Final Determination when it issued the Foremost Farms WPDES permit. (R. 158-161.) In response to comments from Midwest Environmental Advocates, WDNR stated that it "has chosen to develop a water

quality management plan with total maximum daily loads rather than imposing WQBELs based on downstream water quality criteria on individual point sources." (R. 159.) This statement shows that WDNR exercised its discretion in fact.

The Notice also explains why WDNR exercised its discretion and did not calculate and include a phosphorus WQBEL in Foremost Farms' WPDES permit based on the water quality criteria of downstream waters:

[WDNR] has considered and continues to take seriously the impacts of phosphorus loading from all point sources and nonpoint sources to all reaches of the Wisconsin River including the Petenwell and Castle Rock Flowages. That is why monitoring and modeling in the Upper Wisconsin River Basin are currently underway with the goal of having an approved water quality management plan with total maximum daily loads within the next five years. [WDNR] believes that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs.

(R. 159.) This statement shows WDNR's basis for exercising its discretion. WDNR exercised its discretion because it is currently in the process of completing a TMDL for the Wisconsin River Basin, and the TMDL process is the most economically efficient and most expedient way to bring all water bodies within the Wisconsin River Basin into compliance with their applicable phosphorus water quality criteria.

WDNR exercised its discretion in fact and provided the basis for exercising its discretion. WDNR's decision to issue Foremost Farms' WPDES permit without a phosphorus WQBEL calculated based on the water quality criteria of the downstream waters was a valid exercise of its discretion. Therefore, this Court should not substitute its judgment for the agency's and should uphold WDNR's valid exercise of discretion by wholly affirming WDNR's Foremost Farms WPDES permit decision.

III. WDNR'S INTERPRETATION OF WIS. ADMIN. CODE § NR 217.13(1)(B) IS CONSISTENT WITH THE RULES OF STATUTORY CONSTRUCTION.

If the Court determines that the administrative scheme contained in Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) is ambiguous, which WDNR does not concede, the Court should nevertheless uphold WDNR's interpretation of the rules under the rules of statutory construction. WDNR's interpretation of its administrative rules is afforded controlling weight deference and its interpretation harmonizes and gives effect to all of the words in Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a). MEDC's interpretation reads the word "may," and the discretion that word gives WDNR, out of Wis. Admin. Code § NR 217.13(1)(b).

Under the rules of statutory construction, "[I]f the language of the statute is ambiguous, the court must resort to judicial construction." *Industry*, 252 Wis. 2d, ¶ 7 (citations omitted). "A statute is ambiguous if it is capable of being understood by a reasonable person in either of two senses." *Id.* (citation omitted). "A statute is not rendered ambiguous, however, merely because two parties disagree as to its meaning." *Id.* (citation omitted). If the statute is ambiguous, the court looks to extrinsic factors. *Id.* (citation omitted). A court may look to an agency's interpretation of the statute if the "administrative agency has been charged with the statute's enforcement." *UFE*, 201 Wis. 2d at 282 (citation omitted).

- A. WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) is due controlling weight deference and should be upheld because it is reasonable.

As discussed above, WDNR's "interpretation and application of its own regulations are entitled to controlling weight deference." *Sierra Club*, 327 Wis. 2d 706, ¶ 24, citing *Menasha*, 311 Wis. 2d 579, ¶¶ 44, 53. Under controlling weight deference, a court will "uphold an agency's interpretation if it is reasonable and is not inconsistent with the language or the regulation or clearly erroneous." *Id.* citing *Menasha*, 311 Wis. 2d 579, ¶ 54. Furthermore, a court "will sustain an agency's conclusions of law even if an alternative view of the law is just as reasonable or even more reasonable." *Menasha*, 311 Wis. 2d 579, ¶ 54, quoting *DaimlerChrysler*, 299 Wis. 2d 1, ¶ 16.

Case law indicates that the threshold is low for determining if an interpretation is reasonable. The Supreme Court has stated: "[a]n interpretation is unreasonable if it *directly contravenes* the words of the statute, it is *clearly contrary* to legislative intent or it is *without rational basis*." *Harnischfeger*, 196 Wis. 2d at 662 (citations omitted) (emphasis added).

WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) is reasonable because its interpretation does not directly contravene the words of the administrative rules, it is not clearly contrary to the intent of the rules, and it is not without a rational basis. As discussed above, WDNR's interpretation is consistent with the plain meaning of the rules and therefore does not directly contravene the words of the rules. Under Wis. Admin. Code §§ NR 217.12(1)(a)

and NR 217.15(1)(a) WDNR is required to put a phosphorus WQBEL in a permit if certain conditions are met. Those rules do not direct WDNR as to which limit to put into the permit or how to calculate the limit. Wisconsin Admin. Code § NR 217.13(1)(b) requires WDNR to place a phosphorus WQBEL that is protective of the water receiving the discharge, but WDNR may, at its discretion, calculate a phosphorus WQBEL that is protective of downstream waters.

WDNR's interpretation is not clearly contrary to the intent of the rule or WDNR's intention when it promulgated the rule. The intent of Wis. Admin. Code §§ NR 217.12(1)(a) and NR 217.15(1)(a) is to determine when WDNR is required to include a phosphorus WQBEL in a WPDES permit. There is nothing in those rules that mandates that the phosphorus WQBEL must protect downstream waters in every permit. The clear intent of Wis. Admin. Code § NR 217.13(1)(b), as evidenced by the wording of the rule, is to give WDNR discretion as to whether or not to include a phosphorus WQBEL that is protective of downstream waters. Wisconsin Admin. Code § NR 217.13(1)(b) states: "except [WDNR] **may** calculate the limitation to protect downstream waters." (emphasis added). This language clearly contemplates situations where WDNR may choose not to include a WQBEL to protect downstream waters.

Lastly, WDNR's interpretation that it has discretion as to whether or not it includes a phosphorus WQBEL protective of downstream waters has a rational basis. The case at bar provides an example of why WDNR's interpretation is rational. Issuing legally defensible, scientifically sound WPDES permits that are protective of the phosphorous water quality criteria for Petenwell and Castle Rock Lakes is difficult because the upper

Wisconsin River Basin is a complex system. (R. 057.) All of the point sources in the Basin combined "make up slightly less than 50% of the total load" of phosphorus in Petenwell and Castle Rock Lakes. (R. 057.) The majority of the phosphorus entering Petenwell and Castle Rock Lakes is coming from nonpoint sources, such as agricultural operations. Currently, WDNR is engaged in extensive monitoring and modeling of the Wisconsin River Basin in order to produce a phosphorus TMDL. (R. 058 and 109.) This extensive program began in 2009. (R. 056.) WDNR "believes that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs." (R. 159.)

Given that assessing downstream impacts of any individual point source discharge can be complicated, it is rational for WDNR to interpret its regulations to provide discretion on when and how to calculate WQBELs based on the water quality criteria for downstream waters. It is also rational for WDNR to determine, in this case, that the TMDL process will provide the best way to assess whether Foremost Farms' phosphorus WQBELs should be adjusted to protect water quality in the Petenwell and Castle Rock Lakes.

In sum, WDNR's interpretation and application of the administrative scheme contained in Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) is reasonable. Therefore, under the controlling weight deference that WDNR is due when interpreting its own administrative rules, this Court should uphold WDNR's interpretation of those rules and conclude that WDNR has the discretion to include or not include a phosphorus WQBEL that is protective of downstream waters.

- B. Standard rules of statutory construction support WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a).

The courts of Wisconsin have recognized several standard rules for interpreting statutes that are applicable to interpreting administrative rules. *See Menasha*, 311 Wis. 2d 579, ¶ 45, quoting *DaimlerChrysler*, 299 Wis. 2d 1, ¶ 10. "Statutes are interpreted to give effect to each word . . ." *Klemm v. American Transmission Co., LLC*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 798 N.W.2d 223. In interpreting two statutes, the court will harmonize them in a way that will give effect to both. *Byers v. Labor and Industry Review Com'n*, 208 Wis. 2d 388, 395, 561 N.W.2d 678 (1997).

Interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) should ensure that all of the rules are given effect. WDNR's interpretation gives effect to all of the rules and all of the words contained within those rules. Wisconsin Admin. Code §§ NR 217.12(1)(a) and NR 217.15(1)(a) provide a trigger for when WDNR is required to include a phosphorus WQBEL in a WPDES permit. Those rules do not state what the limit should be or what water body the limit must be protective of. Wisconsin Admin. Code § NR 217.13(1)(b) specifies how WDNR must calculate the phosphorus WQBEL and requires that the WQBEL must be protective of the receiving water, but may also be protective of downstream waters. In contrast, MEDC's interpretation of the administrative rules effectively rewrites Wis. Admin. Code § NR 217.13(1)(b) to change the permissive "may" to a mandatory "shall."

These standard rules of statutory interpretation show that WDNR's interpretation of Wis. Admin. Code §§ NR 217.12(1)(a), NR 217.13(1)(b), and NR 217.15(1)(a) should be upheld.

IV. USEPA'S ACTIONS SUPPORT WDNR'S DECISION TO ISSUE FOREMOST FARMS' WPDES PERMIT WITH A PHOSPHORUS WQBEL PROTECTIVE OF THE RECEIVING WATERS.

In its initial brief at 13-16, MEDC appears to argue that USEPA disapproves of how WDNR interprets Wisconsin statutes and Wis. Admin. Code. ch. NR 217.³ MEDC makes this argument to imply that USEPA does not approve of the phosphorus WQBEL in the WDNR-issued Foremost Farms WPDES permit. (MEDC Initial Brief, at 13-16.) However, this argument is a red herring because USEPA approved WDNR's phosphorus regulations and did not object to the issuance of the Foremost Farms WPDES permit. (Petition, ¶¶ 11-12; WDNR NOASOP, ¶¶ 11-12; R. 160.)

Recently, the Supreme Court extensively discussed the relationship between USEPA and WDNR in the WPDES permit program. *Andersen v. Department of Natural Resources*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1. USEPA approved Wisconsin's WPDES permit program on February 4, 1974, but "retains significant authority through its continuing oversight of the state's permit program." *Andersen*, 332 Wis. 2d 41, ¶¶ 37-38. First, USEPA reviews and then must approve or disapprove any substantial revisions

³ MEDC makes this argument primarily using documents that are not in the Record. The review of an administrative decision under Wis. Stat. ch. 227 "shall be confined to the record." Wis. Stat. § 227.57(1). Therefore, the documents MEDC cites to in order to argue that USEPA disapproves of WDNR's interpretations are not relevant to this review of Foremost Farms' WPDES permit.

to the state's WPDES permit program. *Andersen*, 332 Wis. 2d 41, ¶ 38. Second, "[i]f the [USEPA] objects to the issuance of a proposed permit, the state may not issue the permit as drafted." *Andersen*, 332 Wis. 2d 41, ¶ 40. Third, USEPA "has the authority to withdraw its approval of a state's permit program if the program no longer complies" with federal regulations and the Clean Water Act "and if the state fails to take corrective action." *Andersen*, 332 Wis. 2d 41, ¶ 39. Therefore, if USEPA approves a revision to Wisconsin's WPDES permit program and fails to object to a permit, USEPA has "effectively determined that the permit complies with" federal regulations and the Clean Water Act. *Andersen*, 332 Wis. 2d 41, ¶ 63.

MEDC does not allege that USEPA has withdrawn its approval of Wisconsin's WPDES permit program. MEDC does not allege that USEPA did not approve of WDNR's phosphorus water quality criteria or procedures for placing phosphorus WQBELs in WPDES permits. Furthermore, MEDC does not allege that USEPA objected to WDNR's issuance of the permit at issue in this case, the Foremost Farms WPDES permit.

Instead, on December 30, 2010, USEPA did approve Wisconsin's phosphorus water quality criteria in Wis. Admin. Code ch. NR 102 and procedures for placing phosphorus WQBELs in WPDES permit in Wis. Admin. Code ch. NR 217, Subchapter III. (Petition, ¶¶ 11-12; WDNR NOASOP, ¶¶ 11-12.) Furthermore, USEPA did not object to WDNR issuing the Foremost Farms WPDES permit that is at issue in this case.

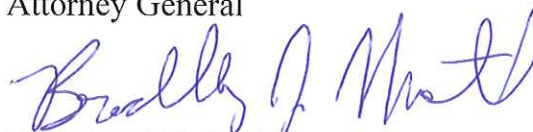
(R. 160.)⁴ Therefore, USEPA has effectively determined that the Foremost Farms WPDES permit complies with federal regulations and the Clean Water Act.

CONCLUSION

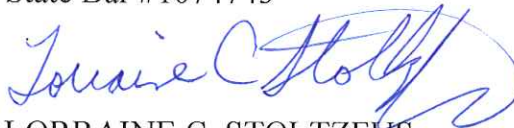
For the above reasons, WDNR asks that the Court deny all of MEDC's requested relief and affirm WDNR's Foremost Farms USA WPDES permit decision in its entirety.

Respectfully submitted this 13th day of June 2013.

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⁴ MEDC may argue that USEPA's failure to provide WDNR comments on the Foremost Farms' WPDES permit means that USEPA did not review the permit. For instance, MEDC states in its initial brief at 14, n. 8, that USEPA only reviews a subset of WPDES permits. WDNR notes that the Record does not contain any indication of what level of review USEPA did on the Foremost Farm's WPDES permit. All that can be determined from the Record is that USEPA did not provide WDNR any comments on the proposed permit, and therefore, did not object to WDNR issuing the Foremost Farms WPDES permit. (R. 160.)



WPDES PERMIT

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
**PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE
ELIMINATION SYSTEM**

Domtar A.W. LLC

is permitted, under the authority of Chapter 283, Wisconsin Statutes, to discharge from the following facilities:

Nekoosa Mill

301 Point Basse Ave., Nekoosa, Wisconsin

Wastewater Reclamation Center

405 Church Avenue, Nekoosa Wisconsin
NW 1/4 of Section 2, Town of Saratoga

to the Wisconsin River, groundwaters in Wood County, and land application sites in Adams, Juneau, Portage, Waushara and Wood Counties in accordance with the effluent limitations, monitoring requirements and other conditions set forth in this permit.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit, according to Chapter NR 200, Wis. Adm. Code, at least 180 days prior to the expiration date given below.

State of Wisconsin Department of Natural Resources
For the Secretary

By *Susan Sylvester*
Susan Sylvester
Director, Bureau of Water Quality

12/26/12
Date Permit Signed/Issued

PERMIT TERM: EFFECTIVE DATE – January 1, 2013

EXPIRATION DATE – December 31, 2017

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1 Surface Water Intake Requirements

1.1 Surface Water Intakes

Intake Number	Surface Water Intake Description and Location
701	Intake number 701 represents the Nepco Lake pumping station's intake.
702	Intake number 702 represents the Nekoosa mill's Wisconsin River intake.

1.2 Intake Structure Evaluation

Based on the Department's review of available information regarding the location, design, operation, and capacity of the intake structures, and a lack of any known adverse environmental impacts caused or contributed to by the structure, the Department believes that Intakes 701 and 702 meet the requirements of s. 283.31(6), Wis. Stats. The permittee shall at all times properly operate and maintain all intake equipment and give advance notice to the Department of any planned changes in the location, design, operation, or capacity of the intake structure from the point at which water is withdrawn from the surface water source up to and including the intake pumps. The permittee shall also inform the Department of any plans for the Nepco Lake pumping station to provide water to the Port Edwards mill.

1.3 Intake Screen Discharges and Removed Substances

Floating debris and accumulated trash collected at Intakes 701 and 702 shall be removed and disposed in a manner to prevent any pollutant from the material from entering the waters of the State pursuant to s. NR 205.07(3)(a), Wis. Adm. Code. The permittee may discharge backwash from intake screens when the backwash is treated to remove debris and trash.

2 In-Plant Requirements

2.1 Sampling Points

Sampling Point Designation	
Sampling Point No.	Sampling Point Location, Waste Type and Sample Contents (as applicable)
101	At in-plant Sampling Point 101 (NK BLEACH PLANT D1), overflow from the first stage chlorine dioxide washer seal box (D1) in the Nekoosa mill's pulp bleach plant shall be sampled prior to combining with overflow from either the enhanced caustic washer seal box (EOP) or the second stage chlorine dioxide washer seal box (D2).
102	At in-plant Sampling Point 102 (NK BLEACH PLANT EOP), overflow from the EOP stage in the Nekoosa mill's pulp bleach plant shall be sampled prior to combining with overflow from either the D1 or D2 stages.
103	At in-plant Sampling Point 103 (NK BLEACH PLANT D2), overflow from the D2 stage in the Nekoosa mill's pulp bleach plant shall be sampled prior to combining with overflow from either the D1 or EOP stages.
104	At in-plant Sampling Point 104 (NK D1, EOP and D2 COMBINED), overflow from the Nekoosa mill's D1, EOP and D2 bleach stages shall be sampled after mixing, but prior to combining with other waste streams from the Nekoosa mill's chlorine dioxide plant and tall oil plant.
106	At in-plant Sampling Point 106 (NK MAIN COLLECTION TANK), process wastewaters from the Nekoosa mill shall be sampled after mixing at the mill's main collection tank, but prior to discharge to the Wastewater Reclamation Center.
109	Field blank to accompany mercury monitoring at the Wastewater Reclamation Center

2.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

2.2.1 Sampling Points (In-plant) 101 - NK BLEACH PLANT D1, 102 - NK BLEACH PLANT EOP and 103 - NK BLEACH PLANT D2

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Weekly	Estimated	See 2.2.1.2
Chloroform		mg/L	Weekly	Grab Comp	See 2.2.1.2 and 2.2.1.1

2.2.1.1 Sample Type for Chloroform

A separate grab-composite sample for chloroform is required at Sampling Points 101 (NK BLEACH PLANT D1), 102 (NK BLEACH PLANT EOP), and 103 (NK BLEACH PLANT D2). The three grab-composite samples shall be collected during the same 24-hour period and analyzed separately.

For each bleach stage, a sample type of grab composite means a composite sample made up of at least three equal-volume grab samples. The permittee shall collect the grab samples at approximately equal time intervals over a 24-hour period with at least one grab sample being collected during each 8-hour shift. While grab samples may be composited prior to being analyzed for chloroform, they must be composited at the laboratory where the analysis is performed.

2.2.1.2 Alternative Chloroform Monitoring Method

- The permittee is not required to monitor flow rate or chloroform at Sampling Points 101, 102 and 103 if the permittee maintains a record of the maximum value for each of the following process and operating conditions for the fiber line that was recorded during the collection of each of the samples used to make the compliance demonstration required under 40 CFR 430.02 (f)(2)(i):
 - pH of the first chlorine dioxide bleaching stage;
 - chlorine (Cl₂) content of the chlorine dioxide (ClO₂) used on the bleach line;
 - kappa factor of the first chlorine dioxide bleaching stage; and
 - total bleach line chlorine dioxide application rate.

Should the permittee change process and operating conditions on the fiber line so that one or more exceeds the maximum value recorded during the compliance demonstration required under 40 CFR 430.02 (f)(2)(i), the permittee must comply with 40 CFR 430.02 (f)(3) if the permittee wishes to continue the exemption from chloroform monitoring.

As used above, the “compliance demonstration” represents the period from January 1, 2001 through March 31, 2003 when pH, chlorine content and total chlorine dioxide application data were collected and the period from February 21, 2001 through March 31, 2003 when chloroform data were collected. “Kappa factor,” “total bleach line chlorine dioxide application rate,” and “chlorine-containing compounds” have the meanings specified in 40 CFR 430.02 (f)(7).

2.2.2 Sampling Point 104 - NK D1, EOP and D2 COMBINED

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Total Daily	
Dioxin, 2,3,7,8-TCDD	Daily Max.	<10 pg/L	Quarterly	24-Hr Comp	
Furan, 2,3,7,8-TCDF	Daily Max.	31.9 pg/L	Quarterly	24-Hr Comp	
Chloroform	Daily Max.	6.7 lbs/day	Weekly	Calculated	See 2.2.2.5
Chloroform	Monthly Avg.	4.01 lbs/day	Weekly	Calculated	See 2.2.2.5
Trichlorosyringol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
3,4,5-Trichlorocatechol	Daily Max.	<5.0 µg/L	Quarterly	24-Hr Comp	

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
3,4,6-Trichlorocatechol	Daily Max.	<5.0 µg/L	Quarterly	24-Hr Comp	
3,4,5-Trichloroguaiacol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
3,4,6-Trichloroguaiacol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
4,5,6-Trichloroguaiacol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
2,4,5-Trichlorophenol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
2,4,6-Trichlorophenol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
Tetrachlorocatechol	Daily Max.	<5.0 µg/L	Quarterly	24-Hr Comp	
Tetrachloroguaiacol	Daily Max.	<5.0 µg/L	Quarterly	24-Hr Comp	
2,3,4,6-Tetrachlorophenol	Daily Max.	<2.5 µg/L	Quarterly	24-Hr Comp	
Pentachlorophenol	Daily Max.	<5.0 µg/L	Quarterly	24-Hr Comp	

2.2.2.1 Analytical Test Methods

The permittee shall use Method 1613 for TCDD and TCDF and Method 1653 for the chlorinated phenolic compounds listed in the table above. Alternate methods may be used if they are approved by EPA for use with wastewater effluents and provide a minimum level equal to or less than the effluent limit of the parameter being tested.

2.2.2.2 Determination of Compliance

Detectable effluent concentrations equal to or greater than the effluent limit and non-detectable effluent concentrations at limits of detection greater than the effluent limit do not comply with an effluent limit that is expressed as a less-than value. For example, monitoring results of 10 pg/L, 11 pg/L and <11 pg/L do not comply with the 2,3,7,8-TCDD daily maximum effluent limit of <10 pg/L.

2.2.2.3 Sample Type for Dioxin, Furan and the Chlorinated Phenolics

The sample type of 24-hour composite for dioxin, furan and the chlorinated phenolics may be either time-proportional or flow-proportional.

2.2.2.4 Sample Type for Chloroform

A calculated sample type for chloroform means the sum of test results for Sampling Points 101 (NK BLEACH PLANT D1), 102 (NK BLEACH PLANT EOP) and 103 (NK BLEACH PLANT D2) when the results are expressed in units of pounds per day.

2.2.2.5 Alternative Method for Demonstrating Compliance with Chloroform Limits

The permittee may demonstrate compliance with the monthly average chloroform limit of 4.01 lbs/day by utilizing the alternative monitoring method specified by footnote 2.2.1.2 and certifying each month that:

The chlorine-containing compound used for bleaching is unchanged from that used during the compliance demonstration, and the pH of the first chlorine dioxide bleaching stage, the chlorine (Cl₂) content of the chlorine dioxide (ClO₂) used on the

bleach line, the kappa factor of the first chlorine dioxide bleaching stage, and the total bleach line chlorine dioxide application rate during the reporting period did not exceed the maximum value recorded for each such condition during the collection of samples used to make the compliance demonstration.

The permittee shall include the above certification statement as a facility comment on monthly electronic discharge monitoring report forms.

2.2.3 Sampling Point (In-plant) 109 - WRC MERCURY FIELD BLANK

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Mercury, Total Recoverable		ng/L	Monthly	Blank	

2.2.3.1 Total Recoverable Mercury Monitoring

The permittee shall collect and analyze all mercury samples according to the data quality requirements of ss. NR 106.145(9) and (10), Wis. Adm. Code. The limit of quantitation (LOQ) shall be less than 1.3 ng/L unless the samples are quantified at levels above 1.3 ng/L. The permittee shall collect at least one mercury field blank for each day that mercury samples are collected at the Wastewater Reclamation Center. The permittee shall report results of samples and field blanks to the Department on Discharge Monitoring Reports.

2.3 Best Management Practices for Spent Pulping Liquor, Soap and Turpentine Management, Spill Prevention and Control

The permittee shall implement Best Management Practices (BMPs) as specified in 40 CFR 430.03 for direct discharging mills. Best Management Practices for spent liquor, soap and turpentine management, spill prevention and control include, but are not limited to, the following.

2.3.1 Requirement to Implement Best Management Practices

The permittee shall implement the following BMPs:

- The permittee shall return spilled or diverted spent pulping liquors, soap and turpentine to the process to the maximum extent practicable as determined by the mill, recover such materials outside the process, or discharge spilled or diverted material at a rate that does not disrupt the receiving wastewater treatment system.
- The permittee shall implement a program to identify and repair leaking equipment items. This program shall include:
 - Regular visual inspections (e.g., once per day) of process areas with equipment items in spent pulping liquor, soap and turpentine service;
 - Immediate repairs of leaking equipment items, when possible. Leaking equipment items that cannot be repaired during normal operations shall be identified, temporary means for mitigating the leaks shall be provided, and the leaking equipment items repaired during the next maintenance outage;
 - Identification of conditions under which production will be curtailed or halted to repair leaking equipment items or to prevent pulping liquor, soap and turpentine leaks and spills; and
 - A means for tracking repairs over time to identify those equipment items where upgrade or replacement may be warranted based on frequency and severity of leaks, spills or failures.

- The permittee shall operate continuous, automatic monitoring systems that are necessary to detect and control leaks, spills and intentional diversions of spent pulping liquor, soap and turpentine. These monitoring systems should be integrated with the mill process control system.
- The permittee shall implement a program of initial and refresher training of operators, maintenance personnel and other technical and supervisory personnel who have responsibility for operating, maintaining or supervising the operation and maintenance of equipment items in spent pulping liquor, soap and turpentine service. The refresher training shall be conducted at least annually and the training program shall be documented.
- The permittee shall prepare a brief report that evaluates each spill and any intentional diversion of spent pulping liquor, soap and turpentine that is not contained at the immediate process area. The report shall describe the equipment items involved, the circumstances leading to the incident, the effectiveness of the corrective actions taken to contain and recover the spill or intentional diversion, and plans to develop changes to equipment and operating and maintenance practices as necessary to prevent recurrence. Discussion of the reports shall be included as part of the annual refresher training.
- The permittee shall establish a program to review any planned modifications to the pulping and chemical recovery facilities and any construction activities in the pulping and chemical recovery areas before these activities commence. The purpose of such review is to prevent leaks and spills of spent pulping liquor, soap and turpentine during the planned modifications, and to ensure that construction and supervisory personnel are aware of possible liquor diversions and of the requirement to prevent leaks and spills of spent pulping liquors during construction.
- The permittee shall install and maintain secondary containment (i.e., containment constructed of materials impervious to pulping liquors) for spent pulping liquor bulk storage tanks equivalent to the volume of the largest tank plus sufficient freeboard for precipitation. An annual tank integrity testing program, if coupled with other containment or diversion structures, may be substituted for secondary containment for spent pulping liquor bulk storage tanks.
- The permittee shall conduct wastewater monitoring to detect leaks and spills, to track the effectiveness of the BMPs, and to detect trends in spent pulping liquor losses. Such monitoring shall be performed in accordance with section 2.3.7.
- The permittee shall install and maintain secondary containment for turpentine bulk storage tanks.
- The permittee shall install and maintain curbing, a dike or other means of isolating soap and turpentine processing and loading areas from the wastewater treatment facilities.

2.3.2 Requirement for a BMP Plan

The permittee shall implement a BMP plan that specifies the procedures and practices required to meet the requirements of section 2.3.1, the construction necessary to meet those requirements including a schedule for such construction, the monitoring program, including the statistically derived action levels, that will be used to meet the requirements of section 2.3.6, and the period of time that the action levels may be exceeded without triggering the responses specified in section 2.3.7.

The BMP plan shall be based on a detailed engineering review of the pulping and chemical recovery operations, including but not limited to process equipment, storage tanks, pipelines and pumping systems, loading and unloading facilities, and other appurtenant pulping and chemical recovery equipment items in spent pulping liquor, soap and turpentine service, for the purpose of:

- Determining the magnitude and routing of potential leaks, spills and intentional diversions of spent pulping liquors, soap and turpentine during process startups and shutdowns, maintenance, production grade changes, storm or other weather events, power failures, and normal operations.

- Determining whether existing spent pulping liquor containment facilities are of adequate capacity for collection and storage of anticipated intentional liquor diversions with sufficient contingency for collection and containment of spills.
- Considering the need for continuous automatic monitoring systems to detect and control leaks and spills of spent pulping liquor, soap and turpentine; the need for process wastewater diversion facilities to protect end-of-pipe wastewater treatment facilities from adverse effects of spills and diversion of spent pulping liquors, soap and turpentine; the potential for contamination of storm water from the immediate process areas; and the extent to which segregation and/or collection and treatment of contaminated storm water from immediate process areas are appropriate.

2.3.3 Amendment of the BMP Plan

The permittee shall amend its BMP plan whenever there is a change in mill design, construction, operation or maintenance that materially affects the potential for leaks or spills of spent pulping liquor, soap or turpentine from the immediate process areas.

The permittee shall complete a review and evaluation of the BMP plan five years after the first BMP plan is prepared and, except as provided above, once every five years thereafter. As a result of this review and evaluation, the permittee shall amend the BMP plan within three months of the review if the permittee determines that any new or modified management practices and engineering controls are necessary to reduce significantly the likelihood of spent pulping liquor, soap and turpentine leaks, spills or intentional diversions from the immediate process areas. The amended BMP plan shall include a schedule for implementation of such practices and controls.

2.3.4 Review and Certification of the BMP Plan

The BMP plan, and any amendments thereto, shall be reviewed by the senior technical manager at the mill and approved and signed by the mill manager. Any person signing the BMP plan or its amendments shall certify to the Department that the BMP plan or its amendments have been prepared in accordance with good engineering practices and in accordance with 40 CFR 430.03.

2.3.5 Record Keeping Requirements

The permittee shall maintain on the mill premises a complete copy of the current BMP plan and the records specified below and shall make such BMP plan and records available to the Department and the Regional Administrator or his or her designee for review upon request.

The permittee shall maintain the following records for three years from the date they are created:

- Records tracking the repairs performed in accordance with the repair program described in section 2.3.1;
- Records of initial and refresher training conducted in accordance with section 2.3.1;
- Reports of uncontained spills and intentional diversions of spent pulping liquor, soap and turpentine prepared in accordance section 2.3.1; and
- Records of monitoring required by sections 2.3.1. and 2.3.7.

2.3.6 Action Levels

The permittee shall implement action levels that will trigger requirements to initiate investigations on BMP effectiveness and to take corrective action. An action level is a statistically determined pollutant loading determined by a statistical analysis of at least six months of daily measurements. The action levels shall consist of a lower action level, which if exceeded will trigger the investigation requirements described in section 2.37, and an upper action level, which if exceeded will trigger the corrective action requirements described in section 2.37.

Action levels developed as specified above shall be revised using at least six months of monitoring data after any change in mill design, construction, operation or maintenance that materially affects the potential for leaks or spills of spent pulping liquor, soap or turpentine from the immediate process areas.

The permittee shall employ the following procedures to revise action levels:

- The permittee shall collect 24-hour composite samples and analyze the samples for a measure of organic content (e.g., chemical oxygen demand (COD) or total organic carbon (TOC)), or a measure related to spent pulping liquor losses measured continuously and averaged over 24 hours (e.g., specific conductivity or color).
- Monitoring shall be conducted at **Sampling Point 106**, Nekoosa mill main collection tank.

2.3.7 Monitoring, Corrective Action and Reporting Requirements

The permittee shall conduct daily monitoring at **Sampling Point 106** in accordance with the procedures described in section 2.3.6 for the purpose of detecting leaks and spills, tracking the effectiveness of the BMPs, and detecting trends in spent pulping liquor losses.

Whenever monitoring results exceed the lower action level for the period of time specified in the BMP plan, the permittee shall conduct an investigation to determine the cause of such exceedance. Whenever monitoring results exceed the upper action level for the period of time specified in the BMP plan, the permittee shall complete corrective action to bring the mass loading below the lower action level as soon as practicable.

Although exceedances of the action levels will not constitute violations of this permit, failure to take the actions required above as soon as practicable will be a permit violation.

By the 15th of February each year, the permittee shall report to the Department the results of the daily monitoring conducted as required above for the previous calendar year. Such reports shall include a summary of the monitoring results, the number and dates of exceedances of the applicable action levels, and brief descriptions of any corrective actions taken to respond to such exceedances.

3 Surface Water Requirements

3.1 Sampling Points

The discharges shall be limited to the waste types designated for the listed sampling points.

Sampling Point Designation	
Sampling Point No.	Sampling Point Location, Waste Type and Sample Contents (as applicable)
001	At Sampling Point 001 (NK CLO ₂ LIFT STATION OVERFLOW), the Nekoosa mill's chlorine dioxide plant lift station emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 001.
002	At Sampling Point 002, final effluent from the Wastewater Reclamation Center shall be sampled prior to discharge to the Wisconsin River via Outfall 002.
006	At Sampling Point 006, noncontact cooling waters (No. 6 Turbine condenser, chlorine dioxide plant chiller and other sources) shall be sampled after mixing, but prior to discharge to the Wisconsin River via Outfall 006.
008	At Sampling Point 008 (NK COLLECTION TANK OVERFLOW), the Nekoosa mill's main collection tank emergency overflow shall be sampled prior to discharge to the Wisconsin River via Outfall 008.
011	At Sampling Point 011, overflow from the intake water standpipe shall be sampled prior to discharge to the Wisconsin River via Outfall 011.
013	Sampling Point 013 represents the combined loadings from Outfalls 001 (Nekoosa CLO ₂ lift station overflow), 002 (Wastewater Reclamation Center effluent), and 008 (Nekoosa collection tank overflow).

3.2 Monitoring Requirements and Effluent Limitations

The permittee shall comply with the following monitoring requirements and limitations.

3.2.1 Sampling Points 001 - NK CLO₂ LIFT STATION OVERFLOW and 008 - NK COLLECTION TANK OVERFLOW

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Estimated	
BOD ₅ , Total		lbs/day	Daily	Grab Comp	
Suspended Solids, Total		lbs/day	Daily	Grab Comp	
pH Field	Daily Max.	9.0 s.u.	Daily	Grab	
pH Field	Daily Min.	5.0 s.u.	Daily	Grab	

3.2.1.1 Scheduled and Unscheduled Bypassing

The discharge shall comply with Standard Requirements 7.2.2 and 7.2.3 of this permit.

3.2.1.2 Daily Sample Frequency

The discharge shall be sampled daily when discharge occurs.

3.2.1.3 Grab Composite Sample Type

Grab composite sampling means a composite of individual grab samples of equal volume that are collected over the duration of the discharge at approximately equal intervals of time not to exceed one hour.

3.2.2 Sampling Point (Outfall) 002 - WRC EFFLUENT

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Continuous	
BOD ₅ , Total		lbs/day	5/Week	24-Hr Flow Prop Comp	Sample 5 times per week November through April
BOD ₅ , Total		lbs/day	Daily	24-Hr Flow Prop Comp	Sample daily May through October
Suspended Solids, Total		lbs/day	5/Week	24-Hr Flow Prop Comp	
pH (Minimum)	Daily Min.	5.0 s.u.	Daily	Continuous	
pH (Maximum)	Daily Max.	9.0 s.u.	Daily	Continuous	
AOX		lbs/day	3/Week	24-Hr Flow Prop Comp	
Phosphorus, Total		mg/L	Monthly	24-Hr Flow Prop Comp	
Temperature, Maximum		deg F	Daily	Continuous	
Chlorine, Total Residual		µg/L	Monthly	Grab	
Dioxins and Furans (all seventeen 2,3,7,8-substituted polychlorinated congeners)		pg/L	Annual	Composite	See 3.2.5.5 for a list of the seventeen congeners.
Mercury, Total Recoverable		ng/L	Monthly	Grab	

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Acute WET		TU _a	Annual	24-Hr Flow Prop Comp	WET Testing shall be performed during the calendar quarters specified in 3.2.2.10.
Chronic WET		rTU _c	Annual	24-Hr Flow Prop Comp	

3.2.2.1 BOD₅ Sample Frequency

During the months of May through October each year, BOD₅ monitoring is required daily. During the months of November through April each year, BOD₅ monitoring is required five times per week with the following exception. BOD₅ monitoring at Sampling Point 002 during the months of November through April is required on each day that discharge occurs from Outfall 001 (Nekoosa mill's chlorine dioxide plant lift station emergency overflow), Outfall 008 (Nekoosa mill's main collection tank emergency overflow) or both.

If the permittee exceeds technology-based effluent limits for BOD₅, fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the BOD₅ monitoring frequency during the months of November through April.

3.2.2.2 Total Suspended Solids Sample Frequency

If the permittee exceeds technology-based effluent limits for total suspended solids (TSS), fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the TSS monitoring frequency.

3.2.2.3 Continuous pH Monitoring

The permittee shall maintain the pH of this discharge within the range of 5.0 to 9.0 standard units (s.u.) except excursions are permitted subject to the following conditions:

- The pH is monitored continuously;
- The total time during which the pH is outside the range of 5.0 to 9.0 s.u. shall not exceed 446 minutes during any calendar month;
- No individual pH excursion outside the range of 5.0 to 9.0 s.u. shall exceed 60 minutes in duration;
- No individual pH excursion shall be outside the range of 4.0 to 11.0 s.u.; and
- On a daily basis, the permittee shall report the minimum and maximum pH, total time that the pH is outside the range of 5.0 to 9.0 s.u., and the number of pH excursions outside the range of 5.0 to 9.0 s.u. that exceed 60 minutes in duration.

3.2.2.4 Adsorbable Organic Halide (AOX) Monitoring

When testing for AOX, the permittee shall use EPA Method 1650 or any other method that are approved by EPA and provides a minimum level (ML) of 20 µg/L for AOX.

3.2.2.5 Temperature Monitoring

For monitoring temperature continuously, discrete measurements shall be recorded at intervals of 15 minutes or less during each 24-hour monitoring period pursuant to s. NR 218.04(13), Wis. Adm. Code. Report the maximum temperature measured during each 24-hour monitoring period on the monthly Discharge Monitoring Report.

3.2.2.6 Chlorine Monitoring

Monitoring for total residual chlorine is required at least monthly. If the permittee adds chlorine, in any form, or any other halogen to its wastewater treatment system on one or more days during a month, the permittee shall make a reasonable effort to monitor for total residual chlorine when the additive is most likely to be present in the treatment system effluent.

3.2.2.7 Dioxins and Furans Test Methods

When testing for dioxin and furan congeners, the permittee shall use EPA Method 1613 or any other method that is approved by EPA and provides a minimum level (ML) of 10 pg/L for 2,3,7,8-TCDD.

3.2.2.8 Composite Sample Type for Dioxins and Furans

When monitoring for dioxin and furan congeners, flow proportional composite samples shall be obtained over a period of time of one to five consecutive days and shall be made up using continuous flow proportional samples or the greater of:

- Twelve nearly equally spaced, flow proportioned grab samples; or
- The total number of grab samples that would be obtained if a minimum of six nearly equally spaced, flow proportional samples are taken on each day of sampling.

3.2.2.9 Mercury Test Method

The permittee shall collect and analyze all mercury samples according to the data quality requirements of ss. NR 106.145(9) and (10), Wis. Adm. Code. The limit of quantitation (LOQ) shall be less than 1.3 ng/L unless the samples are quantified at levels above 1.3 ng/L.

3.2.2.10 Whole Effluent Toxicity (WET) Testing

Primary Control Water: Wisconsin River.

Instream Waste Concentration: 3.2 percent

Dilution series: At least five effluent concentrations and dual controls must be included in each test.

- **Acute:** 100, 50, 25, 12.5, 6.25% and any additional selected by the permittee.
- **Chronic:** 100, 30, 10, 3, 1% and any additional selected by the permittee.

WET Testing Frequency: Tests are required during the following quarters:

- **Acute:** October through December of 2013, July through September of 2014, April through June of 2015, January through March of 2016, and April through June of 2017.
- **Chronic:** October through December of 2013, July through September of 2014, April through June of 2015, January through March of 2016, and April through June of 2017.

Reporting: The permittee shall report test results on the Discharge Monitoring Report form, and also complete the "Whole Effluent Toxicity Test Report Form" (Section 6, "*State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 2nd Edition*"), for each test. The original, complete, signed version of the Whole Effluent Toxicity Test Report Form shall be sent to the Biomonitoring Coordinator, Bureau of Watershed Management, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921, within 45 days of test completion. The original Discharge Monitoring Report (DMR) form and one copy shall be sent to the contact and location provided on the DMR by the required deadline.

Determination of Positive Results: An acute toxicity test shall be considered positive if the Toxic Unit - Acute (TU_a) is greater than 1.0 for either species. The TU_a shall be calculated as follows: If $LC_{50} \geq 100$, then $TU_a = 1.0$. If LC_{50} is < 100 , then $TU_a = 100 \div LC_{50}$. A chronic toxicity test shall be considered positive if the Relative Toxic

Unit - Chronic (rTU_c) is greater than 1.0 for either species. The rTU_c shall be calculated as follows: If $IC_{25} \geq IWC$, then $rTU_c = 1.0$. If $IC_{25} < IWC$, then $rTU_c = IWC \div IC_{25}$.

Additional Testing Requirements: Within 90 days of a test which showed positive results, the permittee shall submit the results of at least 2 retests to the Biomonitoring Coordinator on "Whole Effluent Toxicity Test Report Forms". The 90 day reporting period shall begin the day after the test which showed a positive result. The retests shall be completed using the same species and test methods specified for the original test (see the Standard Requirements section herein).

3.2.3 Sampling Point (Outfall) 006 - NK CLEAR SEWER NCCW

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Daily	Continuous	
Temperature, Average	Daily Max.	120 deg F	Daily	Continuous	<u>Daily Average</u> temperature effluent limit for all twelve months of the year effective until January 1, 2014.
Temperature, Maximum	Daily Max.	120 deg F	Daily	Continuous	<u>Daily Maximum</u> temperature effluent limit only for the months of January, February, April, May, June, October and November effective beginning January 1, 2014.
Chlorine, Total Residual	Daily Max.	38 μ g/L	Monthly	Grab	Effluent limit effective July 1, 2015

3.2.3.1 Maximum Temperature Monitoring

For monitoring temperature continuously, discrete measurements shall be recorded at intervals of 15 minutes or less during each 24-hour monitoring period pursuant to s. NR 218.04(13), Wis. Adm. Code. Report the maximum temperature measured and the calculated average temperature during each 24-hour monitoring period on the monthly Discharge Monitoring Report.

3.2.3.2 Determination of Compliance with Total residual Chlorine Effluent Limit

Compliance with the daily maximum effluent limit for total residual chlorine shall be determine pursuant to s. NR 106.07 (6), Wis. Adm. Code.

3.2.4 Sampling Point (Outfall) 011 - NEPCO LAKE STANDPIPE OVERFLOW

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Flow Rate		MGD	Monthly	Estimated	
Chlorine, Total Residual	Daily Max.	38 µg/L	Monthly	Grab	Effluent limit effective July 1, 2015

3.2.4.1 Total Residual Chlorine Sample Location

When sampling for total residual chlorine, the permittee may collect a sample of standpipe water at the Nekoosa mill rather than collect a sample of standpipe overflow.

3.2.4.2 Determination of Compliance with Total residual Chlorine Effluent Limit

Compliance with the daily maximum effluent limit for total residual chlorine shall be determined pursuant to s. NR 106.07 (6), Wis. Adm. Code.

3.2.5 Sampling Point (Outfall) 013 – 001, 002 and 008 COMBINED

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
BOD ₅ , Total	Daily Max.	12,437 lbs/day	5/Week	Calculated	Sample 5 times per week November through April
BOD ₅ , Total	Monthly Avg.	6,454 lbs/day	5/Week	Calculated	
BOD ₅ , Total	Daily Max.	12,437 lbs/day	Daily	Calculated	Sample daily May through October and see 3.2.5.6
BOD ₅ , Total	Monthly Avg.	6,454 lbs/day	Daily	Calculated	
Suspended Solids, Total	Daily Max.	24,525 lbs/day	5/Week	Calculated	
Suspended Solids, Total	Monthly Avg.	13,179 lbs/day	5/Week	Calculated	
AOX	Daily Max.	921 lbs/day	3/Week	Calculated	
AOX	Monthly Avg.	603 lbs/day	3/Week	Calculated	
Phosphorus, Total	Rolling 12 Month Avg.	1.0 mg/L	Monthly	Calculated	Final WQBELs for total phosphorus equal 0.21 mg/L 6-month average, 27 lbs/day 6-month average, and 0.63 mg/L monthly average (see 3.2.5.4 and 6.4).

Monitoring Requirements and Effluent Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Dioxin, 2,3,7,8-TCDD	Monthly Avg.	1.2 µg/day	Annual	Calculated	
Dioxin, 2,3,7,8-TCDD TE	Monthly Avg.	11 µg/day	Annual	Calculated	
Mercury, Total Recoverable	Daily Max.	18 ng/L	Monthly	Calculated	

3.2.5.1 Applicability

Effluent limitations specified in the above table are applicable to the combined loadings from Outfalls 001, 002 and 008 as monitored at Sampling Points 001, 002 and 008. The table's monitoring requirements refer to the calculation of combined loads. Sampling requirements for BOD₅, TSS, AOX, phosphorus, 2,3,7,8-TCDD, dioxin and furan congeners that are necessary to calculate total dioxin equivalents, and mercury are specified elsewhere in this permit.

3.2.5.2 BOD₅ Sample Frequency

During the months of May through October each year, BOD₅ monitoring is required daily. During the months of November through April each year, BOD₅ monitoring is required five times per week with the following exception. BOD₅ monitoring at Sampling Point 002 (Wastewater Reclamation Center effluent) during the months of November through April is required on each day that discharge occurs from Outfall 001 (Nekoosa mill's chlorine dioxide plant lift station emergency overflow), Outfall 008 (Nekoosa mill's main collection tank emergency overflow) or both.

If the permittee exceeds technology-based effluent limits for BOD₅, fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the BOD₅ monitoring frequency during the months of November through April.

3.2.5.3 Total Suspended Solids Sample Frequency

If the permittee exceeds technology-based effluent limits for total suspended solids (TSS), fails to submit discharge monitoring reports or is subject to formal enforcement action, the Department may modify this permit without public notice to increase the TSS monitoring frequency.

3.2.5.4 Phosphorus Water Quality Based Effluent Limitations (WQBELs)

Final WQBELs for total phosphorus, which become effective according to Schedule of Compliance 6.4, equal 0.21 mg/L six-month average, 27 lbs/day six-month average, and 0.63 mg/L monthly average unless:

- As part of the application for the next reissuance, or prior to filing the application, the permittee submits either: a watershed adaptive management plan and a completed Watershed Adaptive Management Request Form 3200-139, an application for water quality trading, an application for a variance, or new information or additional data that supports a recalculation of the numeric limitation; and
- The Department modifies, revokes and reissues, or reissues the permit to incorporate a revised limitation before the expiration of the compliance schedule. (Note: The Department will prioritize reissuances and revocations, modifications, and reissuances of permits to allow permittees the opportunity to implement adaptive management or nutrient trading in a timely and effective manner.)

If Adaptive Management or Water Quality Trading is approved as part of the permit application for the next reissuance or as part of an application for a modification or revocation and reissuance, the plan and specification submittal, construction, and final effective dates for compliance with the total phosphorus WQBEL may change in the reissued or modified permit. In addition, the numeric value of the water quality based effluent limit may change based on new information (e.g., a TMDL) or additional data. If a variance is approved for the next reissuance, interim limits and conditions will be imposed in the reissued permit in accordance with s. 283.15, Stats., and applicable regulations. A permittee may apply for a variance to the phosphorus WQBEL at the next reissuance even if the permittee did not apply for a phosphorus variance as part of this permit reissuance.

Note: If a WQBEL has taken effect in a permit, any increase in the limit is subject to s. NR 102.05(1) and ch. NR 207 Wis. Adm. Code. Also, averaging periods for total phosphorus six-month average WQBELs are May through October and November through April.

3.2.5.5 2,3,7,8-TCDD TE

The permittee shall demonstrate compliance with the monthly average effluent limit for 2,3,7,8-TCDD TE by using the 2,3,7,8-TCDD toxicity equivalence concentration and the effluent flow rate. The permittee shall use the following equation to calculating the 2,3,7,8-TCDD toxicity equivalence concentration:

$$(TEC)_{tcdd} = \sum(C)_x (TEF)_x (BEF)_x$$

where:

$(TEC)_{tcdd}$ = 2,3,7,8-TCDD toxicity equivalence concentration in the effluent;

$(C)_x$ = concentration of congener “x” in the effluent;

$(TEF)_x$ = toxicity equivalency factor for congener “x”; and

$(BEF)_x$ = bioaccumulation equivalency factor for congener “x.”

When a congener is not detected, a zero may be used in the above equation for the concentration of the congener.

The following table provides the toxicity and bioaccumulation equivalency factors:

3.2.5.5.1 Toxicity and Bioaccumulation Equivalency Factors

Congener	TEF	BEF
2,3,7,8-TCDD	1.0	1.0
1,2,3,7,8-PeCDD	0.5	0.9
1,2,3,4,7,8-HxCDD	0.1	0.3
1,2,3,6,7,8-HxCDD	0.1	0.1
1,2,3,7,8,9-HxCDD	0.1	0.1
1,2,3,4,6,7,8-HpCDD	0.01	0.05
OCDD	0.001	0.01
2,3,7,8-TCDF	0.1	0.8
1,2,3,7,8-PeCDF	0.05	0.2
2,3,4,7,8-PeCDF	0.5	1.6
1,2,3,4,7,8-HxCDF	0.1	0.08
1,2,3,6,7,8-HxCDF	0.1	0.2
1,2,3,7,8,9-HxCDF	0.1	0.6
2,3,4,6,7,8-HxCDF	0.1	0.7
1,2,3,4,6,7,8-HpCDF	0.01	0.01
1,2,3,4,7,8,9-HpCDF	0.01	0.4
OCDF	0.001	0.02

3.2.5.6 Waste Load Allocation Requirements

Each year during the months of May through October the total daily discharge of BOD₅ from Outfalls 001, 002 and 008 is limited to a maximum of 12,437 lbs/day and the following wasteload allocated water quality related effluent limitations.

Definitions:

- Flow in the following waste load allocation tables shall be defined as the daily average flow value derived from continuous river flow monitoring data for the Wisconsin River collected at the Biron Dam. If such flow data is unavailable for any day, the daily average flow value shall be derived from continuous river flow monitoring data for the Wisconsin River collected at the Centralia Dam. Daily average flow values reported by the Wisconsin Valley Improvement Company for the Biron Dam and Centralia Dam locations are acceptable.
- Temperature in the following waste load allocation tables shall be defined as the daily average temperature value derived from continuous river temperature monitoring data for the Wisconsin River collected at the Wisconsin Rapids Dam. If such temperature data is unavailable for any day, the daily average temperature value shall be derived from continuous river temperature monitoring data for the Wisconsin River collected at the Biron Dam. Daily average temperature values reported by the Wisconsin Valley Improvement Company for the Wisconsin Rapids Dam and Biron Dam locations are acceptable.
- Point source allocation values (pounds per day BOD₅) in the following waste load allocation tables represent water quality related effluent limitations. The flow and temperature conditions used to determine a point source allocation value for a given day shall be the representative measurements of the flow and temperature of the previous day.

Determination of Effluent Limitations: For the purposes of determining compliance with the wasteload allocated water quality related effluent limitations, the following conditions shall be met:

- The sum of the actual daily discharges of BOD₅ for any 5-consecutive-day period shall not exceed the sum of the daily point source allocation values for the same 5-consecutive-day period.
- For any one-day period, the actual discharge of BOD₅ shall not exceed 120.5% of the point source allocation value for that day.

Monitoring Requirements: Flow and temperature monitoring of the Wisconsin River and flow and BOD₅ monitoring at Sampling Point 002 (Wastewater Reclamation Center effluent) shall be performed on the same schedule. For example, Wisconsin Valley Improvement Company provides flow and temperature data for the 24-hour period beginning at 7:00 a.m. each day. If the permittee uses Wisconsin Valley Improvement Company's river flow and temperature data, the permittee must begin collecting 24-hour composite samples for BOD₅ at 7:00 a.m. each day and must total effluent flow over the 24-hour period beginning and ending at 7:00 a.m. This requirement does not preclude the definition of point source allocation value, which requires the previous day's river temperature and flow to be used to derive the day's point source allocation value.

Reporting Requirements: During the months of May through October inclusive, the permittee shall report the following:

- Daily river flow (cfs);
- Daily river temperature (°F);
- Daily point source allocation value (lbs BOD₅ per day);
- Daily adjusted point source allocation values (percent adjustment factor multiplied by the point source allocation value) (lbs BOD₅ per day)
- Actual daily discharge value of BOD₅ (lbs BOD₅ per day);
- Number of times that the actual daily discharge value of BOD₅ exceeds the daily adjusted point source waste load allocation value;

- Sum of the actual daily discharge values of BOD₅ (lbs BOD₅) for each 5-consecutive-day period (present day's discharge plus the four previous day's discharge);
- Sum of the daily point source waste load allocation values (lbs BOD₅) for each 5-consecutive-day period (present day's discharge plus the four previous day's discharge); and
- Number of times that the sum of actual daily discharge values of BOD₅ exceeds the sum of daily point source waste load allocation values.

Point Source Allocation Values: Point source allocation values are provided in the following tables:

3.2.5.6.1 Point Source Waste Load Allocated Values for May and June (lbs BOD₅ per day)

Temperature (previous day average in °F)	Flow at Biron Dam (previous day average in cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥82	6882	8213	10594	14765	20173	26242	27164	52819	60746	60746
78 TO 81	6882	8558	11176	15810	22076	28938	29703	59820	60746	60746
74 TO 77	6882	8898	11802	17028	24127	32034	32912	60746	60746	60746
70 TO 73	6882	9504	12709	18482	26695	36220	37231	60746	60746	60746
66 TO 69	7113	11146	14908	21760	31739	43359	44423	60746	60746	60746
62 TO 65	8691	13601	18216	26912	39543	54407	55846	60746	60746	60746
58 TO 61	11062	17338	23387	34746	51735	60746	60746	60746	60746	60746
54 TO 57	14784	23358	31882	47031	60746	60746	60746	60746	60746	60746
50 TO 53	20799	33479	46208	60746	60746	60746	60746	60746	60746	60746
46 TO 49	31137	50537	60746	60746	60746	60746	60746	60746	60746	60746
42 TO 45	49935	60746	60746	60746	60746	60746	60746	60746	60746	60746
≤41	60746	60746	60746	60746	60746	60746	60746	60746	60746	60746

3.2.5.6.2 Point Source Waste Load Allocated Values for July and August (lbs BOD₅/day)

Temperature (previous day average in °F)	Previous Day Average Flow at Biron Dam (cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥ 82	6882	6882	6882	8622	12354	16821	17353	36974	51094	58671
78 TO 81	6882	6882	6882	10086	14789	20360	21036	45547	60746	60746
74 TO 77	6882	6882	7848	11787	17575	24363	25009	55866	60746	60746
70 TO 73	6882	6882	8972	13725	20681	28894	29801	60746	60746	60746
66 TO 69	6882	8242	11388	17294	26035	36353	37374	60746	60746	60746
62 TO 65	6882	10796	14849	22564	33957	47564	48979	60746	60746	60746
≤61	8928	14582	20074	30624	46154	60746	60746	60746	60746	60746

3.2.5.6.3 Point Source Waste Load Allocated Values for September and October (lbs BOD₅/day)

Temperature (previous day average in °F)	Flow at Biron Dam (previous day average in cfs)									
	0 TO 999	1000 TO 1199	1200 TO 1499	1500 TO 1999	2000 TO 2499	2500 TO 2999	3000 TO 3999	4000 TO 4999	5000 TO 5999	6000 OR MORE
≥82	6882	6882	6882	6882	7404	10776	11205	25680	36097	41643
78 TO 81	6882	6882	6882	6882	9347	13601	14075	33030	46893	54362
74 TO 77	6882	6882	6882	7074	11634	17023	17585	42654	58873	60746
70 TO 73	6882	6882	6882	8947	14572	21243	21834	53041	60746	60746
66 TO 69	6882	6882	7370	12280	19527	28145	29047	60746	60746	60746
62 TO 65	6882	7044	10466	17003	26740	38291	39286	60746	60746	60746
58 TO 61	6882	10293	15016	24117	37655	53795	55393	60746	60746	60746
54 TO 57	8587	15401	22234	35382	55146	60746	60746	60746	60746	60746
50 TO 53	13532	23885	34381	54683	60746	60746	60746	60746	60746	60746
46 TO 49	21958	38463	55176	60746	60746	60746	60746	60746	60746	60746
42 TO 45	37364	60746	60746	60746	60746	60746	60746	60746	60746	60746
≤41	60746	60746	60746	60746	60746	60746	60746	60746	60746	60746

4 Land Treatment Requirements

4.1 Sampling Point

The discharge shall be limited to the waste type designated for the listed sampling point.

Sampling Point Designation	
Sampling Point No.	Sampling Point Location, Waste Description and Treatment Description (as applicable)
005	At Sampling Point 005, supernatant from the Nepco Lake alum sludge settling basin, which is located in SW 1/4, SW 1/4, Section 31, T22N, R6E, Town of Grand Rapids, Wood County, shall be sampled prior to seeping to groundwaters via Outfall 005.

4.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

4.2.1 Sampling Point (Outfall) 005 - NEPCO LAKE ALUM SLUDGE BASIN,

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
pH Field		s.u.	Once	Grab	Sample during 2015
COD, Filtered		mg/L	Once	Grab	Sample during 2015
Aluminum Dissolved		mg/L	Once	Grab	Sample during 2015
Copper Dissolved		µg/L	Once	Grab	Sample during 2015
Lead Dissolved		µg/L	Once	Grab	Sample during 2015
Manganese Dissolved		mg/L	Quarterly	Grab	
Zinc Dissolved		µg/L	Once	Grab	Sample during 2015

5 Land Application Requirements

5.1 Sampling Point

The discharge shall be limited to land application of the waste type designated for the listed sampling point on Department approved land spreading sites or by hauling to another facility.

Sampling Point Designation	
Sampling Point No.	Sampling Point Location, Waste Type and Sample Contents(as applicable)
010	At Sampling Point 010, sludge from the Wastewater Reclamation Center shall be sampled prior to land application via Outfall 010.

5.2 Monitoring Requirements and Limitations

The permittee shall comply with the following monitoring requirements and limitations.

5.2.1 Sampling Point (Outfall) 010 - WRC SLUDGE

Parameter	Limit and Units	Sample Frequency	Sample Type	Notes
Solids, Total	Percent	Quarterly	Grab	
Nitrogen, Total Kjeldahl, Dry Wt.	Percent	Quarterly	Grab	
Nitrogen, Ammonia (NH ₃ -N) Total, Dry Wt.	Percent	Quarterly	Grab	
Nitrogen, Nitrite + Nitrate Total, Dry Wt.	Percent	Once	Grab	Sample during 2015
pH Field	s.u.	Annual	Grab	
Phosphorus, Dry Wt.	Percent	Annual	Grab	
Potassium, Dry Wt.	Percent	Annual	Grab	
Chloride, Dry Wt.	Percent	Once	Grab	Sample during 2015
Fluoride, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Sulfate, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Aluminum, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Arsenic, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Barium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Boron, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Cadmium, Dry Wt.	mg/kg	Annual	Grab	
Calcium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015

Parameter	Limit and Units	Sample Frequency	Sample Type	Notes
Chromium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Copper, Dry Wt.	mg/kg	Annual	Grab	
Iron, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Lead, Dry Wt.	mg/kg	Annual	Grab	
Magnesium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Manganese, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Mercury, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Molybdenum, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Nickel, Dry Wt.	mg/kg	Annual	Grab	
Sodium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Strontium, Dry Wt.	mg/kg	Once	Grab	Sample during 2015
Zinc, Dry Wt.	mg/kg	Annual	Grab	
PCBs, Total, Dry Wt.	mg/kg	Once	Calculate	Sample during 2015
Dioxins and Furans, Dry Wt. (all seventeen 2,3,7,8-substituted polychlorinated congeners)	ng/kg	Annual	Grab Comp	See 5.3.3.1 for list of dioxin and furan congeners
Priority Pollutant Scan, Dry Wt. (as specified in ch. NR 215.03 (1) through (6), Wis. Adm. Code, but excluding asbestos)	mg/kg µg/kg	Once	Grab	Sample during 2015

5.2.1.1 Dry Weight Basis

All sludge results shall be reported on a dry weight basis.

5.2.1.2 Test Methods

For those parameters not listed in Table EM of ch. NR 219, Wis. Adm. Code, the permittee may use SW-846 methods as listed in Tables B, C, and D of ch. NR 219. The permittee may use EPA Method 7780 for strontium. The permittee may also use any other test method that is approved by the Department prior to use.

5.2.1.3 Sample Type for Dioxin, Furan and Congeners

The permittee may use a composite of daily sludge samples that are obtained over a period of one to five days when monitoring for dioxins and furans.

5.3 Sludge Application Rate Limitations

The permittee shall comply with the following sludge application rate limitations. Additional land application rate limitations and reporting requirements are provided in the Standard Requirements section of this permit.

5.3.1 Nitrogen Requirements

The total pounds of nitrogen applied per acre per year shall be limited to the nitrogen needs of the cover crop minus any other nitrogen added to the land application site, including fertilizer or manure. Nitrogen applied can be calculated on the basis of plant available nitrogen, as long as the release of nitrogen from the organic material is credited to future years. Nitrogen applied may be based on information provided by the landowner or operator with respect to alternate sources of nitrogen. If plant available nitrogen is not taken into consideration, the application of total Kjeldahl nitrogen (TKN) shall not exceed 200 pounds per acre per year on agricultural landspreading sites or 100 pounds per acre per year on silvicultural landspreading sites unless the permittee demonstrates via the management plan that more can be applied and obtains written concurrence from the Department.

5.3.2 Total Dioxin Equivalents Limitations

- Total dioxin equivalents shall not exceed 1.2 ppt in the soil profile after application and incorporation of Wastewater Reclamation Center sludge on agricultural sites. The soil profile shall include the sludge plus underlying litter and soil to a depth of 15 centimeters below the litter-soil interface.
- Sludge may be applied on sites where livestock will graze only if the resulting soil concentration does not exceed 0.5 ppt total dioxin equivalents. The soil profile shall include the sludge plus underlying litter and soil to a depth of 2 centimeters below the litter soil interface if livestock graze on the site before the sludge is incorporated or 15 centimeters below the litter soil interface if livestock graze on the site after the sludge is incorporated.
- Total dioxin equivalents for sludge applied to agricultural sites and sites where livestock will graze, in the soil and in the mix of sludge and soil, shall be calculated as follows:

$$\text{TDE (ng/kg)} = [2,3,7,8\text{-TCDD(ng/kg)}] + 0.1 \times [2,3,7,8\text{-TCDF (ng/kg)}]$$

Where: TDE = Total Dioxin Equivalents

[2,3,7,8-TCDD (ng/kg)] = concentration of 2,3,7,8-TCDD in units of ng/kg dry weight basis.

[2,3,7,8-TCDF (ng/kg)] = concentration of 2,3,7,8-TCDF in units of ng/kg dry weight basis.

- Total dioxin equivalents shall not exceed 0.53 milligrams per acre after application of Wastewater Reclamation Center sludge on silvicultural sites. Total dioxin equivalents for silvicultural sites shall be calculated as follows:

$$\text{TDE (ng/kg)} = [2,3,7,8\text{-TCDD (ng/kg)}] + 0.0013 \times [2,3,7,8\text{-TCDF (ng/kg)}]$$

Where: TDE = Total Dioxin Equivalents

[2,3,7,8-TCDD (ng/kg)] = concentration of 2,3,7,8-TCDD in units of ng/kg dry weight basis.

[2,3,7,8-TCDF (ng/kg)] = concentration of 2,3,7,8-TCDF in units of ng/kg dry weight basis.

5.3.3 Dioxin Toxic Equivalence Alternative Limitations

If the cumulative TDE load predicted for an agricultural application site or a site where livestock will graze as specified below in section 5.4.1 exceeds TDE limits specified above in section 5.3.2, the permittee shall not apply any more Wastewater Reclamation Center sludge to the site unless the following alternative dioxin toxic equivalence limits are met.

- When the dioxin toxic equivalence (dioxin TEQ) of Wastewater Reclamation Center sludge is less than 1.2 ng/kg, the permittee may apply the sludge to agricultural sites with greater than 1.2 ng/kg dioxin TEQ in the soil profile if the permittee demonstrates that application of the sludge lowers the dioxin TEQ in the soil profile.
- When the dioxin TEQ of the permittee's sludge is less than 0.5 ng/kg, the permittee may apply sludge to sites where livestock will graze that exceed 0.5 ng/kg dioxin TEQ in the soil profile if the permittee demonstrates that application of the sludge lowers the dioxin TEQ in the soil profile.

- Dioxin TEQ for sludge and soil profile shall be calculated as follows:

$$\text{Dioxin toxic equivalence or dioxin TEQ in ng/kg} = \sum C_x \times \text{TEF}_x$$

Where: C_x = Concentration of congener “x” in units of ng/kg. When a congener is not detected, a zero may be used in the above equation for the concentration of the congener.

TEF_x = Toxicity equivalency factor for congener “x” as provided in the following table.

5.3.3.1 Toxicity Equivalency Factors (TEFs)

Dioxin Congener	TEF	Furan Congener	TEF
2,3,7,8-TCDD	1	2,3,7,8-TCDF	0.1
1,2,3,7,8-PeCDD	1	1,2,3,7,8-PeCDF	0.03
1,2,3,4,7,8-HxCDD	0.1	2,3,4,7,8-PeCDF	0.3
1,2,3,6,7,8-HxCDD	0.1	1,2,3,4,7,8- HxCDF	0.1
1,2,3,7,8,9-HxCDD	0.1	1,2,3,6,7,8- HxCDF	0.1
1,2,3,4,6,7,8-HpCDD	0.01	1,2,3,7,8,9- HxCDF	0.1
OCDD	0.0003	2,3,4,6,7,8- HxCDF	0.1
		1,2,3,4,6,7,8-HpCDF	0.01
		1,2,3,4,7,8,9- HpCDF	0.01
		OCDF	0.0003

5.4 Soil Monitoring Requirements

The permittee shall comply with the following monitoring requirements for land application sites.

5.4.1 Soil Monitoring Requirements

Prior to the application of Wastewater Reclamation Center sludge on an agricultural site, the permittee shall predict the resulting cumulative load of total dioxin equivalents (TDE) at the site. As part of the prediction the permittee shall assume all total dioxin equivalents from previous applications of Wastewater Reclamation Center sludge are still present in the soil profile unless soil from the application site has been tested for 2,3,7,8-TCDD and 2,3,7,8-TCDF. If the soil from the application site was tested for 2,3,7,8-TCDD and 2,3,7,8-TCDF prior to application of Wastewater Reclamation Center sludge, the soil test results, and any Wastewater Reclamation Center sludge applications subsequent to the soil test, must be used in the prediction of resulting of TDE loads.

If the predicted cumulative total dioxin equivalents load exceeds **0.8 ng/kg in the soil profile**, or **0.35 ng/kg in the soil profile** for sites where livestock will graze, the permittee shall either use another application site or, prior to application of Wastewater Reclamation Center sludge, test the application site for the seventeen 2,3,7,8-substituted dioxin and furan congeners listed in table 5.3.3.1 and use the soil test results to predict the cumulative TDE load that will result from application of the sludge.

5.4.2 Background Testing for Dioxins and Furans

Once during 2014, the permittee shall collect a composite sample of soil from a land application site upon which no Wastewater Reclamation Center sludge has been applied. The permittee shall test the composite soil sample for the seventeen 2,3,7,8-substituted polychlorinated congeners listed in table 5.3.3.1.

5.5 Application Site Restriction

- Sludge that contains greater than 10 ng/kg total dioxin equivalents (TDE) shall not be applied within the range of Prairie Chickens (*Tympanuchus cupido*), or any other threatened or endangered wildlife species, unless the sludge is incorporated into the soil within 21 days of application.
- Sludge shall not be applied within 1,200 feet of a public water supply when the sludge contains detectable concentrations of either 2,3,7,8-TCDD or 2,3,7,8-TCDF.

5.6 Reporting Requirements

The permittee shall comply with the following reporting requirements.

5.6.1 Daily Log

Land application activity shall be documented on log sheets. Originals of the log sheets shall be kept by the permittee as described under "Records Retention" in the Standard Requirements section, and if requested, made available to the Department. At minimum, the log sheets shall include the following:

5.6.1.1 Minimum Content of Daily Log Sheets

Parameters	Units	Sample Frequency	Sample Type
DNR Site Number(s)	Number	Daily	Log
Acres Applied	Acres	Daily	Log
Application Rate	Tons/Acre/Day	Daily	Calculated

5.6.2 Annual Reporting (Form 3400-55)

The annual totals for the land application loadings of sludge to field spreading sites shall be submitted electronically on the Annual Land Application Report Form 3400-55 by **January 31** each year whether or not waste is land applied. Following submittal of the electronic Annual Land Application Report Form 3400-55, this form shall be certified electronically via the 'eReport Certify' page by a principal executive officer or duly authorized representative. The 'eReport Certify' page certifies that the electronic report form is true, accurate and complete.

5.6.2.1 Land Application Loadings Information Reported Annually

Parameters	Units	Reporting Frequency	Sample Type
DNR Site Number(s)	Number	Annual	-
Facility Site No./Field No.	Number	Annual	-
Landowner	-	Annual	-
Acres Land Applied	Acres	Annual	Total Annual
Total Amount Per Site	Tons (DWB)	Annual	Total Annual

Total Kjeldahl Nitrogen per Site	Pounds/Acre/Year	Annual	Calculated
Amount of Nitrogen from Other Sources	Pounds/Acre/Year	Annual	Total Annual
Crop Code and Year	Code	Annual	-
Nitrogen Recommendation	Pounds/Acre/Year	Annual	Total Annual

5.6.3 Total Dioxin Equivalents Loadings Reporting

By **February 15th** of each year, the permittee shall report cumulative total dioxin equivalents loadings in the soil profile for each land application site that received Wastewater Reclamation Center sludge during the previous year (ng TDE per kg soil or ppt on a dry weight basis). When soil monitoring results are available, the permittee shall use the results in the calculation of cumulative TDE loadings or in place of a calculated loading if the soil testing was performed after sludge applied. Soil monitoring results should be included in the report also.

5.6.4 Soil Monitoring Results Reporting

The results of soil testing for the seventeen 2,3,7,8-substituted polychlorinated dioxin and furan congeners as required by section 5.4.2 above shall be reported by **March 31, 2015**.

5.7 Sludge Management Plan

The permittee's application program and all land applications sites used for Wastewater Reclamation Center sludge shall be operated in accordance with a Department approved management plan.

6 Schedules of Compliance

6.1 BMP Implementation and Reporting Compliance Schedule

The permittee shall submit BMP reporting dates as specified by section 2.3.7, Monitoring, Corrective Action, and Reporting Requirements in accordance with the following schedule.

Required Action	Date Due
Submit First Annual BMP Report: Submit the first annual report on daily BMP monitoring.	2/15/2013
Submit Second Annual BMP Report: Submit the second annual report on daily BMP monitoring.	2/15/2014
Submit Third Annual BMP Report: Submit the third annual report on daily BMP monitoring.	2/15/2015
Submit Fourth Annual BMP Report: Submit the fourth annual report on daily BMP monitoring.	2/15/2016
Submit Fifth Annual BMP Report: Submit the fifth annual report on daily BMP monitoring.	2/15/2017

6.2 Outfall 006 Total Residual Chlorine

The permittee shall comply with the effluent limit for total residual chlorine imposed by table 3.2.3 of this permit for Outfall 006 (No. 6 Turbine condenser, chlorine dioxide plant chiller and other noncontact cooling water sources) in accordance with the following schedule.

Required Action	Date Due
Action Plan Submittal: Submit an action plan for complying with total residual chlorine effluent limits imposed at Outfall 006. If construction is required, include plans and specifications with the submittal.	9/30/2013
Initiate Actions: Initiate actions identified in the plan for complying with total residual chlorine limits imposed at Outfall 006.	12/31/2013
Submit Progress Report: Submit a report on the progress made to complete actions necessary to achieve compliance with total residual chlorine effluent limits imposed at Outfall 006.	9/30/2014
Complete Actions: Complete actions necessary to achieve compliance with total residual chlorine effluent limits imposed at Outfall 006.	6/30/2015

6.3 Outfall 011 Total Residual Chlorine

The permittee shall comply with the effluent limit for total residual chlorine imposed by table 3.2.4 of this permit for Outfall 011 (intake water standpipe overflow), in accordance with the following schedule.

Required Action	Date Due
Action Plan Submittal: Submit an action plan for complying with total residual chlorine effluent limits imposed at Outfall 011. If construction is required, include plans and specifications with the submittal.	9/30/2013

Required Action	Date Due
Initiate Actions: Initiate actions identified in the plan for complying with total residual chlorine limits imposed at Outfall 011.	12/31/2013
Submit Progress Report: Submit a report on the progress made to complete actions necessary to achieve compliance with total residual chlorine effluent limits imposed at Outfall 011.	9/30/2014
Complete Actions: Complete actions necessary to achieve compliance with total residual chlorine effluent limits imposed at Outfall 011.	6/30/2015

6.4 WQBELs for Total Phosphorus

The permittee shall comply with the water quality based effluent limits (WQBELs) for total phosphorus as specified in footnote 3.2.5.4 in accordance with the following schedule.

Required Action	Date Due
<p>Operational Evaluation Report: The permittee shall prepare and submit to the Department for approval an operational evaluation report. The report shall include an evaluation of collected effluent data, possible source reduction measures, operational improvements or other minor facility modifications that will optimize reductions in phosphorus discharges from the treatment plant during the period prior to complying with final phosphorus WQBELs and, where possible, enable compliance with final phosphorus WQBELs by January 1, 2016. The report shall provide a plan and schedule for implementation of the measures, improvements, and modifications. Implementation of the measures, improvements, and modifications should be as quickly as possible, but not later than January 1, 2016. The report shall state whether the measures, improvements, and modifications will enable compliance with final phosphorus WQBELs. Regardless of whether they are expected to result in compliance, the permittee shall implement the measures, improvements, and modifications in accordance with the plan and schedule specified in the operational evaluation report.</p> <p>If the operational evaluation report concludes that the facility can achieve final phosphorus WQBELs using the existing treatment system with only source reduction measures, operational improvements, and minor facility modifications, the permittee shall comply with the final phosphorus WQBEL by January 1, 2016 and is not required to comply with the milestones identified below for years 3 through 7 of this compliance schedule ('Preliminary Compliance Alternatives Plan', 'Final Compliance Alternatives Plan', 'Treatment Plant Upgrade to Meet WQBELs', 'Final Plans and Specifications', 'Complete Construction', and 'Achieve Compliance').</p>	12/31/2013
<p>Study of Feasible Alternatives: If the Operational Evaluation Report concludes that the permittee cannot achieve final phosphorus WQBELs with source reduction measures, operational improvements and other minor facility modifications, the permittee shall initiate a study of feasible alternatives for meeting final phosphorus WQBELs and comply with the remaining required actions of this schedule of compliance. If the Department disagrees with the conclusion of the report, and determines that the permittee can achieve final phosphorus WQBELs using the existing treatment system with only source reduction measures, operational improvements, and minor facility modifications, the Department may reopen and modify the permit to include an implementation schedule for achieving the final phosphorus WQBELs sooner than January 1, 2020.</p>	12/31/2013

Required Action	Date Due
<p>Compliance Alternatives, Source Reduction, Improvements and Modifications Status Report: The permittee shall submit a 'Compliance Alternatives, Source Reduction, Operational Improvements and Minor Facility Modification' status report to the Department. The report shall provide an update on the permittee's: (1) progress implementing source reduction measures, operational improvements, and minor facility modifications to optimize reductions in phosphorus discharges and, to the extent that such measures, improvements, and modifications will not enable compliance with the WQBELs, (2) status evaluating feasible alternatives for meeting phosphorus WQBELs.</p>	12/31/2014
<p>Preliminary Compliance Alternatives Plan: The permittee shall submit a preliminary compliance alternatives plan to the Department. If the plan concludes upgrading of the permittee's wastewater treatment facility is necessary to achieve final phosphorus WQBELs, the submittal shall include a preliminary engineering design report. If the plan concludes Adaptive Management will be used, the submittal shall include a completed Watershed Adaptive Management Request Form 3200-139 without the Adaptive Management Plan. If water quality trading will be undertaken, the plan must state that trading will be pursued. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)</p>	12/31/2015
<p>Final Compliance Alternatives Plan: The permittee shall submit a final compliance alternatives plan to the Department. If the plan concludes upgrading of the permittee's wastewater treatment is necessary to meet final phosphorus WQBELs, the submittal shall include a final engineering design report addressing the treatment plant upgrades, and a facility plan if required pursuant to ch. NR 110, Wis. Adm. Code. If the plan concludes Adaptive Management will be implemented, the submittal shall include a completed Watershed Adaptive Management Request Form 3200-139 and an engineering report addressing any treatment system upgrades necessary to meet interim limits pursuant to s. NR 217.18, Wis. Adm. Code. If the plan concludes water quality trading will be used, the submittal shall identify potential trading partners. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)</p>	12/31/2016
<p>Progress Report on Plans & Specifications: Submit progress report regarding the progress of preparing final plans and specifications. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)</p>	9/30/2017
<p>Final Plans and Specifications: Unless the permit has been modified, revoked and reissued, or reissued to include Adaptive Management or Water Quality Trading measures or to include a revised schedule based on factors in s. NR 217.17, the permittee shall submit final construction plans to the Department for approval pursuant to s. 281.41, Stats., specifying treatment plant upgrades that must be constructed to achieve compliance with final phosphorus WQBELs, and a schedule for completing construction of the upgrades by the complete construction date specified below. Permit modification, revocation and reissuance, and reissuance are subject to s. 283.53(2) Stats. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)</p>	3/31/2018
<p>Treatment Plant Upgrade to Meet WQBELs: The permittee shall initiate construction of the upgrades. The permittee shall obtain approval of the final construction plans and schedule from the Department pursuant to s. 281.41, Stats. Upon approval of the final construction plans and schedule by the Department pursuant to s. 281.41, Stats., the permittee shall construct the treatment plant upgrades in accordance with the approved plans and specifications. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)</p>	6/30/2018

Required Action	Date Due
Construction Upgrade Progress Report: The permittee shall submit a progress report on construction upgrades. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)	6/30/2019
Complete Construction: The permittee shall complete construction of wastewater treatment system upgrades. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)	12/31/2019
Achieve Compliance: The permittee shall achieve compliance with final phosphorus WQBELs. (Note: See section 6.4.2, 'Alternative Approaches to Phosphorus WQBEL Compliance'.)	1/1/2020

6.4.1 Reporting Requirements

No later than 30 days following each compliance date in the above schedule, the permittee shall notify the department in writing of its compliance or noncompliance with the required action. If a submittal is required, a timely submittal fulfills the notification requirement.

6.4.2 Alternative Approaches to Phosphorus WQBEL Compliance

Rather than upgrading its wastewater treatment facility to comply with WQBELs for total phosphorus, the permittee may use Water Quality Trading or the Watershed Adaptive Management Option, to achieve compliance under ch. NR 217, Wis. Adm. Code, provided that the permit is modified, revoked and reissued, or reissued to incorporate any such alternative approach. A permittee may also implement a upgrade to its wastewater treatment facility in combination with Water Quality Trading or the Watershed Adaptive Management Option to achieve compliance, provided that the permit is modified, revoked and reissued, or reissued to incorporate any such alternative approach. If the Final Compliance Alternatives Plan concludes that a variance will be pursued, the Plan shall provide information regarding the basis for the variance.

The permittee shall submit the permit application for the next reissuance at least 6 months prior to expiration of this permit. If the permittee intends to pursue adaptive management to achieve compliance with the phosphorus water quality based effluent limitation, the permittee shall submit with the application for the next reissuance: a completed Watershed Adaptive Management Request Form 3200-139, the completed Adaptive Management Plan and final plans for any system upgrades necessary to meet interim limits pursuant to s. NR 217.18. If the permittee intends to pursue pollutant trading to achieve compliance, the permittee shall submit an application for water quality trading with the application for the next reissuance. If system upgrades will be used in combination with pollutant trading to achieve compliance with the final water quality-based limit, the reissued permit will specify a schedule for the necessary upgrades. If the permittee intends to seek a variance, the permittee shall submit an application for a variance with the application for the next reissuance.

6.5 Mercury Pollutant Minimization Program

The permittee shall implement or continue to implement a pollutant minimization program as defined in s. NR 106.145(2), Wis. Adm. Code, in accordance with the following schedule.

Required Action	Date Due
Implement Mercury Pollutant Minimization Program: The permittee shall implement the PMP as submitted on February 3, 2012 and approved by the Department for the Wastewater Reclamation Center and Nekoosa mill.	3/31/2013

Required Action	Date Due
Submit First Annual Status Report Submittal: The permittee shall submit to the Department an annual status report on the progress of the PMP as required by s. NR 106.145(7), Wis. Adm. Code. Annual status reports for the Wastewater Reclamation Center and Nekoosa mill may be combined into a single annual status report.	3/31/2014
Submit Second Annual Status Report Submittal: The permittee shall submit to the Department an annual status report on the progress of the PMP as required by s. NR 106.145(7), Wis. Adm. Code. Annual status reports for the Wastewater Reclamation Center and Nekoosa mill may be combined into a single annual status report.	3/31/2015
Submit Third Annual Status Report Submittal: The permittee shall submit to the Department an annual status report on the progress of the PMP as required by s. NR 106.145(7), Wis. Adm. Code. Annual status reports for the Wastewater Reclamation Center and Nekoosa mill may be combined into a single annual status report.	3/31/2016
Submit Fourth Annual Status Report Submittal: The permittee shall submit to the Department an annual status report on the progress of the PMP as required by s. NR 106.145(7), Wis. Adm. Code. Annual status reports for the Wastewater Reclamation Center and Nekoosa mill may be combined into a single annual status report.	3/31/2017

6.6 Total Dioxin Equivalents Cumulative Loadings Report

By February 15th each year, the permittee shall report the cumulative loading of total dioxin equivalents (TDE) for each site that received Wastewater Reclamation Center sludge during the previous calendar year as required by footnote 5.6.3, Total Dioxin Equivalents Loadings Reporting, and consistent with the following schedule.

Required Action	Date Due
Submit First Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents in the soil for each land application site that received Wastewater Reclamation Center sludge during 2012.	2/15/2013
Submit Second Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents in the soil for each land application site that received Wastewater Reclamation Center sludge during 2013.	2/15/2014
Submit Third Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents in the soil for each land application site that received Wastewater Reclamation Center sludge during 2014.	2/15/2015
Submit Fourth Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents in the soil for each land application site that received Wastewater Reclamation Center sludge during 2015.	2/15/2016
Submit Fifth Annual TDE Loadings Report: Report the cumulative loading of total dioxin equivalents in the soil for each land application site that received Wastewater Reclamation Center sludge during 2016.	2/15/2017

6.7 Soil Monitoring Results Reporting

The permittee shall report the results of soil testing for the seventeen 2,3,7,8-substituted polychlorinated dioxin and furan congeners as required by section 5.4.2 in accordance with the following schedule.

Required Action	Date Due
Soil Monitoring Results Reporting: The permittee shall report the results of soil testing for the seventeen 2,3,7,8-substituted polychlorinated dioxin and furan congeners as required by section 5.4.2.	3/31/2015

7 Standard Requirements

NR 205, Wisconsin Administrative Code (Conditions for Industrial Dischargers): The conditions in ss. NR 205.07(1) and NR 205.07(3), Wis. Adm. Code, are included by reference in this permit. The permittee shall comply with all of these requirements. Some of these requirements are outlined in the Standard Requirements section of this permit. Requirements not specifically outlined in the Standard Requirement section of this permit can be found in ss. NR 205.07(1) and NR 205.07(3).

7.1 Reporting and Monitoring Requirements

7.1.1 Monitoring Reports

Monitoring results obtained during the previous month shall be summarized and reported on a Department Wastewater Discharge Monitoring Report. The report may require reporting of any or all of the information specified below under 'Recording of Results'. This report is to be returned to the Department no later than the date indicated on the form. A copy of the Wastewater Discharge Monitoring Report Form or an electronic file of the report shall be retained by the permittee.

Monitoring results shall be reported on an electronic discharge monitoring report (eDMR). The eDMR shall be certified electronically via the 'eReport Certify' page by a principal executive officer, a ranking elected official or other duly authorized representative. The 'eReport Certify' page certifies that the electronic report form is true, accurate and complete.

7.1.2 Sampling and Testing Procedures

Sampling and laboratory testing procedures shall be performed in accordance with Chapters NR 218 and NR 219, Wis. Adm. Code and shall be performed by a laboratory certified or registered in accordance with the requirements of ch. NR 149, Wis. Adm. Code. Groundwater sample collection and analysis shall be performed in accordance with ch. NR 140, Wis. Adm. Code. The analytical methodologies used shall enable the laboratory to quantitate all substances for which monitoring is required at levels below the effluent limitation. If the required level cannot be met by any of the methods available in NR 219, Wis. Adm. Code, then the method with the lowest limit of detection shall be selected. Additional test procedures may be specified in this permit.

7.1.3 Recording of Results

The permittee shall maintain records which provide the following information for each effluent measurement or sample taken:

- the date, exact place, method and time of sampling or measurements;
- the individual who performed the sampling or measurements;
- the date the analysis was performed;
- the individual who performed the analysis;
- the analytical techniques or methods used; and
- the results of the analysis.

7.1.4 Reporting of Monitoring Results

The permittee shall use the following conventions when reporting effluent monitoring results:

- Pollutant concentrations less than the limit of detection shall be reported as < (less than) the value of the limit of detection. For example, if a substance is not detected at a detection limit of 0.1 mg/L, report the pollutant concentration as < 0.1 mg/L.

- Pollutant concentrations equal to or greater than the limit of detection, but less than the limit of quantitation, shall be reported and the limit of quantitation shall be specified.
- For purposes of calculating NR 101 fees, the 2 mg/l lower reporting limits for BOD₅ and Total Suspended Solids shall be considered to be limits of quantitation.
- For the purposes of reporting a calculated result, average or a mass discharge value, the permittee may substitute a 0 (zero) for any pollutant concentration that is less than the limit of detection. However, if the effluent limitation is less than the limit of detection, the department may substitute a value other than zero for results less than the limit of detection, after considering the number of monitoring results that are greater than the limit of detection and if warranted when applying appropriate statistical techniques.

If the permittee monitors any pollutant more frequently than required by this permit, the results of such monitoring shall be included on the Wastewater Discharge Monitoring Report.

7.1.5 Records Retention

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 3 years from the date of the sample, measurement, report or application, except for sludge management forms and records, which shall be kept for a period of at least 5 years.

7.1.6 Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Department, it shall promptly submit such facts or correct information to the Department.

7.2 System Operating Requirements

7.2.1 Noncompliance Notification

- The permittee shall report the following types of noncompliance by a telephone call to the Department's regional office within 24 hours after becoming aware of the noncompliance;
 - any noncompliance which may endanger health or the environment;
 - any violation of an effluent limitation resulting from an unanticipated bypass;
 - any violation of an effluent limitation resulting from an upset; and
 - any violation of a maximum discharge limitation for any of the pollutants listed by the Department in the permit.
- A written report describing the noncompliance shall also be submitted to the Department's regional office within 5 days after the permittee becomes aware of the noncompliance. On a case-by-case basis, the Department may waive the requirement for submittal of a written report within 5 days and instruct the permittee to submit the written report with the next regularly scheduled monitoring report. In either case, the written report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times; the steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance; and if the noncompliance has not been corrected, the length of time it is expected to continue.
- The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

NOTE: Section 292.11(2)(a), Wisconsin Statutes, requires any person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance to notify the Department of Natural Resources **immediately** of any discharge not authorized by the permit. The discharge of a hazardous substance that is not authorized by this permit or that violates this permit may be a hazardous substance spill. To report a hazardous substance spill, call DNR's 24-hour HOTLINE at **1-800-943-0003**.

7.2.2 Unscheduled Bypassing

Any unscheduled bypass or overflow of wastewater at the treatment works or from the collection system is prohibited, and the Department may take enforcement action against a permittee for such occurrences under s. 283.89, Wis. Stats., unless all of the following occur:

- The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.
- There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance.
- The permittee notifies the department of the unscheduled bypass or overflow. The permittee shall notify the department within 24 hours of initiation of the bypass or overflow occurrence by telephone, voicemail, fax or e-mail. Within 5 days of conclusion of the bypass or overflow occurrence, the permittee shall submit to the department in writing, all of the following information:
 - Reason the bypass or overflow occurred, or explanation of other contributing circumstances that resulted in the overflow event. If the overflow or bypass is associated with wet weather, provide data on the amount and duration of the rainfall or snow melt for each separate event.
 - Date the bypass or overflow occurred.
 - Location where the bypass or overflow occurred.
 - Duration of the bypass or overflow and estimated wastewater volume discharged.
 - Steps taken or the proposed corrective action planned to prevent similar future occurrences.
 - Any other information the permittee believes is relevant.

7.2.3 Scheduled Bypassing

Any construction or normal maintenance which results in a bypass of wastewater is prohibited unless authorized by the Department in writing. If the Department determines that there is significant public interest in the proposed action, the Department may schedule a public hearing or notice a proposal to approve the bypass. Each request shall specify the following minimum information:

- Proposed date of bypass.
- Estimated duration of the bypass.
- Alternatives to bypassing.
- Measures to mitigate environmental harm caused by the bypass.
- Estimated volume of the bypass.

7.2.4 Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control which are installed or used by the permittee to achieve compliance with the conditions of this permit. The wastewater treatment facility shall be under the direct supervision of a state certified operator as required in s. NR 108.06(2), Wis. Adm. Code. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training as required in ch. NR 114, Wis. Adm. Code, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

7.2.5 Spill Reporting

The permittee shall notify the Department in accordance with ch. NR 706 (formerly NR 158), Wis. Adm. Code, in the event that a spill or accidental release of any material or substance results in the discharge of pollutants to the waters of the state at a rate or concentration greater than the effluent limitations established in this permit, or the spill or accidental release of the material is unregulated in this permit, unless the spill or release of pollutants has been reported to the Department in accordance with s. NR 205.07 (1)(s), Wis. Adm. Code.

7.2.6 Planned Changes

In accordance with ss. 283.31(4)(b) and 283.59, Stats., the permittee shall report to the Department any facility expansion, production increase or process modifications which will result in new, different or increased discharges of pollutants. The report shall either be a new permit application, or if the new discharge will not violate the effluent limitations of this permit, a written notice of the new, different or increased discharge. The notice shall contain a description of the new activities, an estimate of the new, different or increased discharge of pollutants and a description of the effect of the new or increased discharge on existing waste treatment facilities. Following receipt of this report, the Department may modify this permit to specify and limit any pollutants not previously regulated in the permit.

7.2.7 Duty to Halt or Reduce Activity

Upon failure or impairment of treatment facility operation, the permittee shall, to the extent necessary to maintain compliance with its permit, curtail production or wastewater discharges or both until the treatment facility operations are restored or an alternative method of treatment is provided.

7.3 Surface Water Requirements

7.3.1 Permittee-Determined Limit of Quantitation Incorporated into this Permit

For pollutants with water quality-based effluent limits below the Limit of Quantitation (LOQ) in this permit, the LOQ calculated by the permittee and reported on the Discharge Monitoring Reports (DMRs) is incorporated by reference into this permit. The LOQ shall be reported on the DMRs, shall be the lowest quantifiable level practicable, and shall be no greater than the minimum level (ML) specified in or approved under 40 CFR Part 136 for the pollutant at the time this permit was issued, unless this permit specifies a higher LOQ.

7.3.2 Appropriate Formulas for Effluent Calculations

The permittee shall use the following formulas for calculating effluent results to determine compliance with average limits and mass limits:

- **Weekly/Monthly/Six-Month/Annual Average Concentration** = the sum of all daily results for that week/month/six-month/year, divided by the number of results during that time period. [Note: When a six-

month average effluent limit is specified for Total Phosphorus the applicable periods are May through October and November through April.]

- **Weekly Average Mass Discharge (lbs/day):** Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34, then average the daily mass values for the week.
- **Monthly Average Mass Discharge (lbs/day):** Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34, then average the daily mass values for the month.
- **Six-Month Average Mass Discharge (lbs/day):** Daily mass = daily concentration (mg/L) x daily flow (MGD) x 8.34, then average the daily mass values for the six-month period. [Note: When a six-month average effluent limit is specified for Total Phosphorus the applicable periods are May through October and November through April.]

The permittee shall comply with all limits for each parameter regardless of monitoring frequency. For example, monthly, weekly, and/or daily limits shall be met even with monthly monitoring. The permittee may monitor more frequently than required for any parameter.

7.3.3 Visible Foam or Floating Solids

There shall be no discharge of floating solids or visible foam in other than trace amounts.

7.3.1 Total Residual Chlorine Requirements (When De-Chlorinating Effluent)

Test methods for total residual chlorine, approved in ch. NR 219 - Table B, Wis. Adm. Code, normally achieve a limit of detection of about 20 to 50 micrograms per liter and a limit of quantitation of about 100 micrograms per liter. When de-chlorinating effluent, reporting of test results and compliance with effluent limitations for chlorine residual and total residual halogens shall be as follows:

- Sample results which show no detectable levels are in compliance with the limit. These test results shall be reported on Wastewater Discharge Monitoring Report Forms as "< 100 µg/L". (Note: 0.1 mg/L converts to 100 µg/L)
- Samples showing detectable traces of chlorine are in compliance if measured at less than 100 µg/L, unless there is a consistent pattern of detectable values in this range. These values shall also be reported on Wastewater Discharge Monitoring Report Forms as "<100 µg/L." The facility operating staff shall record actual readings on logs maintained at the plant, shall take action to determine the reliability of detected results (such as re-sampling and/or calculating dosages), and shall adjust the chemical feed system if necessary to reduce the chances of detects.
- Samples showing detectable levels greater than 100 µg/L shall be considered as exceedances, and shall be reported as measured.
- To calculate average or mass discharge values, a "0" (zero) may be substituted for any test result less than 100 µg/L. Calculated values shall then be compared directly to the average or mass limitations to determine compliance.

7.3.2 Compliance with Technology Based Phosphorus Limitation

Compliance with the technology based concentration limitation for phosphorus shall be determined as a rolling twelve-month average and shall be calculated as follows:

First, determine the pounds of phosphorus for an individual month by multiplying the average of all the concentration values for phosphorus (in mg/L) for that month by the total flow for the month in Million Gallons times the conversion factor of 8.34.

Then, the monthly pounds of phosphorus determined in this manner shall be summed for the most recent 12 months and inserted into the numerator of the following equation.

$$\text{Average concentration of P in mg/L} = \frac{\text{Total lbs of P discharged (most recent 12 months)}}{\text{Total flow in MG (most recent 12 months)} \times 8.34}$$

The compliance calculation shall be performed each month with a reported discharge volume after substituting data from the most recent month(s) for the oldest month(s). A calculated value in excess of the concentration limitation will be considered equivalent to a violation of a monthly average.

7.3.3 Additives

In the event that the permittee wishes to commence use of a water treatment additive, or increase the usage of the additives greater than indicated in the permit application, the permittee must get a written approval from the Department prior to initiating such changes. This written approval shall provide authority to utilize the additives at the specific rates until the permit can be either reissued or modified in accordance with s. 283.53, Stats. Restrictions on the use of the additives may be included in the authorization letter.

7.3.4 Whole Effluent Toxicity (WET) Monitoring Requirements

In order to determine the potential impact of the discharge on aquatic organisms, static-renewal toxicity tests shall be performed on the effluent in accordance with the procedures specified in the "*State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 2nd Edition*" (PUB-WT-797, November 2004) as required by NR 219.04, Table A, Wis. Adm. Code). All of the WET tests required in this permit, including any required retests, shall be conducted on the *Ceriodaphnia dubia* and fathead minnow species. Receiving water samples shall not be collected from any point in contact with the permittee's mixing zone and every attempt shall be made to avoid contact with any other discharge's mixing zone.

7.3.5 Whole Effluent Toxicity (WET) Identification and Reduction

Within 60 days of a retest which showed positive results, the permittee shall submit a written report to the Biomonitoring Coordinator, Bureau of Watershed Management, 101 S. Webster St., PO Box 7921, Madison, WI 53707-7921, which details the following:

- A description of actions the permittee has taken or will take to remove toxicity and to prevent the recurrence of toxicity;
- A description of toxicity reduction evaluation (TRE) investigations that have been or will be done to identify potential sources of toxicity, including some or all of the following actions:
 - Evaluate the performance of the treatment system to identify deficiencies contributing to effluent toxicity (e.g., operational problems, chemical additives, incomplete treatment)
 - Identify the compound(s) causing toxicity
 - Trace the compound(s) causing toxicity to their sources (e.g., industrial, commercial, domestic)
 - Evaluate, select, and implement methods or technologies to control effluent toxicity (e.g., in-plant or pretreatment controls, source reduction or removal)
- Where corrective actions including a TRE have not been completed, an expeditious schedule under which corrective actions will be implemented;
- If no actions have been taken, the reason for not taking action.

The permittee may also request approval from the Department to postpone additional retests in order to investigate the source(s) of toxicity. Postponed retests must be completed after toxicity is believed to have been removed.

7.3.6 Upset

Definition: "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

Effect of an upset: An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the conditions listed below are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

Conditions necessary for demonstration of upset: A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- An upset occurred and that the permittee can identify the cause(s) of the upset;
- The permitted facility was at the time being properly operated;
- The permittee submitted notice of the upset as required in the "Noncompliance Notification" Standard Requirement; and
- The permittee complied with any remedial measures required under the "Noncompliance Notification" Standard Requirement.

Burden of proof: In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

7.4 Land Application Requirements

7.4.1 General Sludge Management Information

The General Sludge Management Form 3400-48 shall be completed and submitted prior to any significant sludge management changes.

7.4.2 Land Application Characteristic Report

The analytical results from testing sludges that are land applied shall be reported annually on the Characteristic Report Form 3400-49. The Characteristic Report Form 3400-49 shall be submitted electronically no later than the date indicated on the form. Following submittal of the electronic Characteristic Report Form 3400-49, this form shall be certified electronically via the 'eReport Certify' page by a principal executive officer or duly authorized representative. The 'eReport Certify' page certifies that the electronic report form is true, accurate and complete.

The permittee shall use the following convention when reporting sludge monitoring results: Pollutant concentrations less than the limit of detection shall be reported as < (less than) the value of the limit of detection. For example, if a substance is not detected at a detection limit of 1.0 mg/kg, report the pollutant concentration as < 1.0 mg/kg.

All sludge results shall be reported on a dry weight basis.

7.4.3 Monitoring and Calculating PCB Concentrations in Sludge

When sludge analysis for "PCB, Total Dry Wt" is required by this permit, the PCB concentration in the sludge shall be determined as follows.

Either congener-specific analysis or Aroclor analysis shall be used to determine the PCB concentration. The permittee may determine whether Aroclor or congener specific analysis is performed. Analyses shall be performed in accordance with the following provisions and Table EM in s. NR 219.04, Wis. Adm. Code.

- EPA Method 1668 may be used to test for all PCB congeners. If this method is employed, all PCB congeners shall be delineated. Non-detects shall be treated as zero. The values that are between the limit of detection and the limit of quantitation shall be used when calculating the total value of all congeners. All results shall be added together and the total PCB concentration by dry weight reported. **Note:** It is recognized that a number of the congeners will co-elute with others, so there will not be 209 results to sum.
- EPA Method 8082A shall be used for PCB-Aroclor analysis and may be used for congener specific analysis as well. If congener specific analysis is performed using Method 8082A, the list of congeners tested shall include at least congener numbers 5, 18, 31, 44, 52, 66, 87, 101, 110, 138, 141, 151, 153, 170, 180, 183, 187, and 206 plus any other additional congeners which might be reasonably expected to occur in the particular sample. For either type of analysis, the sample shall be extracted using the Soxhlet extraction (EPA Method 3540C) (or the Soxhlet Dean-Stark modification) or the pressurized fluid extraction (EPA Method 3545A). If Aroclor analysis is performed using Method 8082A, clean up steps of the extract shall be performed as necessary to remove interference and to achieve as close to a limit of detection of 0.11 mg/kg as possible. Reporting protocol, consistent with s. NR 106.07(6)(e), should be as follows: If all Aroclors are less than the LOD, then the Total PCB Dry Wt result should be reported as less than the highest LOD. If a single Aroclor is detected then that is what should be reported for the Total PCB result. If multiple Aroclors are detected, they should be summed and reported as Total PCBs. If congener specific analysis is done using Method 8082A, clean up steps of the extract shall be performed as necessary to remove interference and to achieve as close to a limit of detection of 0.003 mg/kg as possible for each congener. If the aforementioned limits of detection cannot be achieved after using the appropriate clean up techniques, a reporting limit that is achievable for the Aroclors or each congener for the sample shall be determined. This reporting limit shall be reported and qualified indicating the presence of interference. The lab conducting the analysis shall perform as many of the following methods as necessary to remove interference:

3620C – Florisil

3640A - Gel Permeation

3630C - Silica Gel

3611B – Alumina

3660B - Sulfur Clean Up (using copper shot instead of powder)

3665A - Sulfuric Acid Clean Up

7.4.4 Other Methods of Disposal or Distribution Report

The permittee shall submit electronically the Other Methods of Disposal or Distribution Report Form 3400-52 by January 31 each year whether or not waste is hauled to another facility, landfilled, incinerated, or stored in a manure pit. Following submittal of the electronic Report Form 3400-52, this form shall be certified electronically via the 'eReport Certify' page by a principal executive officer or duly authorized representative. The 'eReport Certify' page certifies that the electronic report form is true, accurate and complete.

7.4.5 Land Application Site Approval

The permittee is authorized to landspread permitted liquid wastes, by-product solids and sludges on sites approved in writing by the Department in accordance with ss. NR 214.17(2) and 214.18(2), Wis. Adm. Code. Any site use restrictions or granting of case-by-case exceptions shall be identified in the approval letter. If the permittee wishes to have approval for additional sites, application shall be made using Land Application Site Request Form 3400-53. Complete information shall be submitted about each site, including location maps and soil maps, any soil analyses results and other information showing that the site complies with all application requirements and permit conditions. Spreading on a site may commence upon receipt of Department approval. If an existing spreading site

is found by the Department to be environmentally unacceptable, a written notice will be issued to withdraw approval of that site.

7.4.6 Operating Requirements/Management Plan

All land application sites used for sludges shall be operated in accordance with a Department approved management plan. The management plan shall be consistent with the requirements of this permit, ss. NR 214.18 (3) and (6), Wis. Adm. Code. If operational changes are needed, the land application management plan shall be amended by submitting a written request to the Department for approval.

7.4.7 Soil Incorporation Requirements

After land application, sludge shall be incorporated into the soil. The timing of such incorporation and other related requirements and procedures shall be specified in the management plan or in specific site applications, subject to Department approval. The permittee shall comply with the requirements in the Department approved management plan, specific site-approval requirements and the terms and conditions of this permit.

7.4.8 Field Stockpiles

The permittee is encouraged to landspread sludges as they are transported to the fields; but if it becomes necessary to stockpile solids in the fields, the stockpiles shall be spread within 72 hours or as specified in the approved management plan.

7.4.9 Additional Requirements from ch. NR 214, Wis. Adm. Code

The requirements of s. NR 214.18 (4)(b), and (d) through (h) [application, nutrient, pH, metals, and PCB limitations] for sludge spreading systems are included by reference in this permit. The permittee shall comply with these requirements.

8 Summary of Reports Due

FOR INFORMATIONAL PURPOSES ONLY

Description	Date	Page
BMP Implementation and Reporting Compliance Schedule – Submit First Annual BMP Report	2/15/2013	27
Total Dioxin Equivalents Cumulative Loadings Report – Submit First Annual TDE Loadings Report	2/15/2013	31
Mercury Pollutant Minimization Program – Implement Mercury Pollutant Minimization Program	3/31/2013	30
Outfall 006 Total Residual Chlorine – Action Plan Submittal	9/30/2013	27
Outfall 011 Total Residual Chlorine – Action Plan Submittal	9/30/2013	27
Outfall 006 Total Residual Chlorine – Initiate Actions	12/31/2013	27
Outfall 011 Total Residual Chlorine – Initiate Actions	12/31/2013	27
WQBELs for Total Phosphorus – Operational Evaluation Report	12/31/2013	28
WQBELs for Total Phosphorus – Study of Feasible Alternatives	12/31/2013	28
BMP Implementation and Reporting Compliance Schedule – Submit Second Annual BMP Report	2/15/2014	27
Total Dioxin Equivalents Cumulative Loadings Report – Submit Second Annual TDE Loadings Report	2/15/2014	31
Mercury Pollutant Minimization Program – Submit First Annual Status Report	3/31/2014	30
Outfall 006 Total Residual Chlorine – Submit Progress Report	9/30/2014	27
Outfall 011 Total Residual Chlorine – Submit Progress Report	9/30/2014	27
WQBELs for Total Phosphorus – Compliance Alternatives, Source Reduction, Improvements and Modifications Status Report	12/31/2014	28
BMP Implementation and Reporting Compliance Schedule – Submit Third Annual BMP Report	2/15/2015	27
Total Dioxin Equivalents Cumulative Loadings Report – Submit Third Annual TDE Loadings Report	2/15/2015	31
Mercury Pollutant Minimization Program – Submit Second Annual Status Report	3/31/2015	30
Soil Monitoring Results Reporting – Soil Monitoring Results Reporting	3/31/2015	32
Outfall 006 Total Residual Chlorine – Complete Actions	6/30/2015	27
Outfall 011 Total Residual Chlorine – Complete Actions	6/30/2015	27
WQBELs for Total Phosphorus – Preliminary Compliance Alternatives Plan	12/31/2015	28

Description	Date	Page
BMP Implementation and Reporting Compliance Schedule – Submit Fourth Annual BMP Report	2/15/2016	27
Total Dioxin Equivalents Cumulative Loadings Report – Submit Fourth Annual TDE Loadings Report	2/15/2016	31
Mercury Pollutant Minimization Program – Submit Third Annual Status Report	3/31/2016	30
WQBELs for Total Phosphorus – Final Compliance Alternatives Plan	12/31/2016	28
BMP Implementation and Reporting Compliance Schedule – Submit Fifth Annual BMP Report	2/15/2017	27
Total Dioxin Equivalents Cumulative Loadings Report – Submit Fifth Annual TDE Loadings Report	2/15/2017	31
Mercury Pollutant Minimization Program – Submit Fourth Annual Status Report	3/31/2017	30
WQBELs for Total Phosphorus – Progress Report on Plans & Specifications	9/30/2017	28
Submit Annual Land Treatment Report Forms 3400-48, 3400-52 and 3400-55	by January 31st of each year for the previous calendar year	25, 39 and 40
Wastewater Discharge Monitoring Reports and Land Application Characteristic Report Form 3400-49	no later than the date indicated on the form	33 and 39

Report forms shall be submitted to the address printed on the report form. Any facility plans or plans and specifications for industrial wastewater systems shall be submitted to the Bureau of Watershed Management, P.O. Box 7921, Madison, WI 53707-7921. All other submittals required by this permit shall be submitted to: West Central Region, 1300 W. Clairemont Ave., P.O. Box 4001, Eau Claire, WI 54702-4001 and copied to Department of Natural Resources, Wastewater Section, 101 S. Webster St., PO Box 7921, Madison, WI 53707-7921.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

NOTICE OF FINAL DETERMINATION TO REISSUE

A WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM (WPDES) PERMIT No. WI-0049964-03-0

Permittee: Fish, Crystal and Mud Lake Rehabilitation Di, W12367 Padley Road, Lodi, WI, 53555

Facility Where Discharge Occurs: Fish, Crystal and Mud Lake Rehabilitation District in the Roxbury Creek Watershed.

Receiving Water And Location: SEQ, NWQ, Section 6, T9N-R7E at the Wisconsin River (Outfall 001) and NEQ, NEQ, Section 15, T9N-R7E at Roxbury Creek (Outfall 004) both in the Roxbury Creek Watershed, LW08 - Lower Wisconsin River Basin in Dane County

Brief Facility Description: The Fish, Mud and Crystal Lake District has applied for reissuance of their existing WPDES that regulates the discharge of excess water from Fish Lake to the Lower Wisconsin River at a location in the Roxbury Creek Watershed (LW18) of the Lower Wisconsin River Basin. The application includes an additional discharge of excess water from Crystal Lake to Roxbury Creek via a pipeline to a level that will restore the nature of the lake and alleviate flooding. Without the pumping, high waters have led to the flooding of septic systems, roads, and garages adding nutrients and pollutants to the lakes. The WI Dept. of Health Services believes that lowering the water levels would reduce health concerns related to drinking water, wastewater disposal, electric safety and problems with mold/bacteria growth.

The discharge from Fish Lake pumps water at approximately 540 gpm into a wetwell and then through a 2.5 mile pipe to the outfall at the Wisconsin River, opposite Prairie Du Sac. The Lake District is able to pump until the water level reaches the ordinary high water mark (OHWM) of 858.70 mean sea level. The discharge from Fish Lake currently discharges October through June at highly variable pumping rates. The proposed intake pump for the new discharge from Crystal Lake is sized for 1100 gpm. The proposed intake structure consists of a collection area of two cells filled with stone which drain into a perforated 12 inch pipe. At certain times of the year, there will be a fabric on top of the stone to provide a filter to meet total suspended solids (TSS) and phosphorus limits. The pipe collects the lake water in a wet well and then is pumped through a forcemain and ultimately reaches Roxbury Creek. The District is only allowed to discharge October through April. Actual pumping rates are unknown at this time.

Permit Drafter's Name, Address and Phone: Brenda Howald, DNR, SCR Headquarters, 3911 Fish Hatchery Rd, Fitchburg, WI, 53711, (608) 275-3285

Basin Engineer's Name, Address, and Phone: Amy Schmidt, 3911 Fish Hatchery Road, Fitchburg, WI 53711, (608) 275-3258

Date Permit Signed/Issued: November 29, 2013

Date of Effectiveness: December 1, 2013

Date of Expiration: September 30, 2018

Following the public notice period and public information hearing held October 21, 2013 at the West Point Town Hall, the Department has made a final determination to reissue the WPDES permit for the above-named permittee for this existing (Outfall 001) and new (Outfall 004) discharge. The permit application information from the WPDES permit file, comments received on the proposed permit and applicable Wis. Adm. Codes were used as a basis for this final determination.

The Department has the authority to issue, modify, suspend, or revoke WPDES permits and to establish effluent limitations and permit conditions under ch. 283, Stats.

Following is a summary of significant comments and any significant changes which have been made in the terms and conditions set forth in the draft permit:

Comments Received from the Applicant, Individuals or Groups and Any Permit Changes as Applicable

Betsy Lawton from Midwest Environmental Advocates (MEA) submitted comments on behalf of the Friends of the Lower Wisconsin River (FLOW) by email and were received on October 22, 2013.

MEA Comment #1 – Petitioners challenged the previous permit (WI-0049964-02), which resulted in a 2011 Stipulation and revised permit which authorized discharge from Fish Lake to the Lower Wisconsin River. The Lake District's proposal to discharge Crystal Lake water to Roxbury Creek (Outfall 004) violates the 2011 Stipulation. The Stipulation states, "The Lake District agrees to withdraw its application for Chapter 30.12 permit IP-SC-2010-11-04711 (Intake in Crystal Lake). The Lake District agrees not proceed with construction of an intake in Crystal Lake and will instead explore pumping groundwater adjacent to that navigable water." Now it appears that the district has moved full-force ahead with a project that contradicts its prior agreements and commitments. It is a

costly project that won't effectively reduce water levels in Crystal Lake.

DNR Response #1 – The Department does not believe the proposal to discharge Crystal Lake water violates the 2011 Stipulation. The Stipulation did not state that the Lake District would never pump and discharge Crystal Lake water. It stated that the Lake District must first explore ground water pumping adjacent to Crystal Lake to lower water levels. The District hired another consultant and did explore pumping groundwater adjacent to Crystal Lake. The District, with input from its engineering consultant, concluded that groundwater pumping was not an effective option for lowering the water level in Crystal Lake. Furthermore, the existing permit contained a condition (section 1.2.4) which stated that pumping from Crystal Lake and discharge to the Wisconsin River or any tributaries of the Wisconsin River under the existing permit was prohibited, but if the District wanted to pursue this option, the permit would need to be modified (or reissued). This permit language was attached to the Stipulation. The District explored ground water pumping, determined it would not be effective, and then submitted a second application for an intake in Crystal Lake as well as an application (reissuance application) for an additional discharge (outfall 004) from Crystal Lake.

MEA Comment #2 – Chapter NR 207, Wisconsin's Antidegradation procedures, do not comply with federal regulations regarding antidegradation nor the Clean Water Act.

DNR Response #2: The Department is aware of MEA's concerns regarding Wisconsin's antidegradation procedures.

MEA Comment #3 - Draft eliminates 1.5 MGD flow rate max contained in prior permit for Outfall 001.

DNR Response #3 – The pump that is currently being used at the Fish Lake intake has a capacity of 1000 gpm; however, the daily max flow rate limit of 1.5 MGD will be included in the permit. The flow rate parameter units will also be changed to MGD from the current gallons per day (gpd).

MEA Comment #4 - Draft permit eliminates biweekly MSL water level reporting required in prior permit for Outfall 001.

DNR Response #4 – Water level reporting currently is required, including during times of no discharge, in the permit, see section 1.2.1. No changes will be made based on this comment.

MEA Comment #5 – (Outfall 001) The prior (existing) permit prohibited the discharge from Fish Lake during July, August, and September, except in emergency situations, however the Draft permit authorizes the discharge of BOD, TSS, and DO during July, August, and September, so long as weekly samples are collected, without the requisite antidegradation analysis for this new or increased discharge.

DNR Response #5 – Allowing pumping during the months of July through September does not fit the definition of a new or increased discharge according to ss. NR 207.02(6). It is not a new discharge to the Lower Wisconsin River because the prior (existing) permit allowed a discharge to occur during July, August and September if there was an emergency as was the case in July 2013. No changes will be made to the permit based on this comment.

MEA Comment #6 – Given the current and anticipated decline in water quality in Fish Lake, DNR must reassess the need for phosphorus limits prior to reauthorizing a discharge to the Lower Wisconsin River.

DNR Response #6 – Phosphorus monitoring was required as part of the existing permit. Of the 15 samples taken between October 2011 and July 2013, only one result was above the level of detection (0.047 mg/L). This data is considered representative of the current conditions of the lake and there is no reasonable potential to cause or contribute to an exceedance of water quality standards in the receiving water. The phosphorus concentration in Fish Lake is actually lower than the background level in the Wisconsin River. See page 3-4 of the Fish Lake WQBEL dated July 29, 2013. No changes will be made to the permit based on this comment.

MEA Comment #7 – (Outfall 004) DNR has failed to consider the impact of the new discharge on the Wisconsin River slough/side channel at the mouth of Roxbury Creek, "Second River". According to information contained in the WQBEL memo and fact sheet, the WQBELs proposed in the Draft permit are calculated based on water quality data and water quality standards applicable to the main stem of the Wisconsin River. DNR must consider the impact of the new Crystal Lake discharge on both the Lower Wisconsin River and Second River. Data shows that Second River is a drainage lake greater than 5 acres for which the 40 ug/L phosphorus criterion applies.

DNR Response #7 – The WQBEL dated August 9, 2013 calculated water quality based limits based on the immediate receiving stream, Roxbury Creek, not the main stem of the Wisconsin River because these limitations were more restrictive and will be protective of the downstream Wisconsin River as well as Second River. Based on the data currently available for Second River (WBIC 1259800), this waterbody is believed to be an impounded flowing water as defined in s. NR 102.06(4)(c), Wis. Adm. Code. Second River does not meet the definition of a reservoir as the mean water residence time for this waterbody is less than 14 days. Additionally, Second River is hydrologically connected to the Wisconsin River in such a way that the waterbody displays more characteristics of a river than a lake. Therefore, WDNR finds Second River to be an impounded flowing water. Pursuant to s. NR 102.06(4)(c), Wis. Adm. Code, the applicable criteria for Second River is 100 ug/L because the predominant water flowing into Second River is the Wisconsin River.

WDNR acknowledges that the Wisconsin River, which is a downstream water, is classified as an exceptional resource water. However, the direct receiving water, Roxbury Creek, and the immediate downstream water, Second River, are not exceptional resource waters. Because Second River is clearly attaining its applicable phosphorus criteria, the proposed limitations are believed to be sufficiently protective of the immediate downstream water quality in Second River and of water quality in the Wisconsin River. No changes will be made to the permit based on this comment.

MEA Comment #8 - The Draft permit limits fail to meet state and federal antidegradation requirements for Outfall 004. The WQBEL memo indicates that BOD, TSS, and phosphorus antidegradation limits are equal to full assimilative capacity. Yet, the WQBEL memo includes no assessment of how these limits meet the requirements of NR 207 and Wis Stat 283.13(5).

DNR Response #8 – After reevaluating the BOD limitations, the DNR has determined that the BOD limits should be included equal to one-third the assimilative capacity of the receiving stream to account for antidegradation. The BOD concentration limits are therefore 2 mg/L during the summer (May through September) and 3 mg/L during the winter (October through April). Due to the low limitations, the Department does not believe that the District will be able to meet the 2 mg/L limit during the summer months (data from 2010 ranged from 3.5-5.1 mg/L); therefore the District is prohibited from discharging during the summer months. These changes have been made to the permit.

Total suspended solids (TSS) does not have water quality criteria and the limit is based on best professional judgment as stated in the WQBEL dated August 9, 2013. The Department believes that the limit of 10 mg/L for TSS is protective of the narrative water quality standards in s. NR 102.04.

MEA Comment #9 – The Draft permit contains WQBELs equal to the phosphorous criteria applicable to Roxbury Creek despite the lack of any available assimilative capacity in violation of NR 207 and without any indication whether those limits meet antidegradation requirements for Second River, or are equal to or greater than background levels in the downstream ERW.

DNR Response #9 – Data provided to the Department on the application included 12 phosphorus sample results ranging from March through October. Excluding the months the District is not allowed to pump (May through September) due to the low BOD limitations, the average is extremely low and less than one-third of the calculated limit (see pages 6-7 of the Crystal Lake WQBEL). As for Roxbury Creek, the phosphorus limit is equal to the applicable criterion which is below background levels in Roxbury Creek. The added discharge does not reduce assimilative capacity in Roxbury Creek, it may add assimilative capacity with the added flow that has phosphorus concentrations below background. The background data in the Wisconsin River is 0.099 mg/L and the phosphorus limit of 0.075 mg/L is protective of that background concentration. This limitation is also below the criterion (100 ug/L) for the Wisconsin River and Second River. See the DNR comment #7 and #13. No changes to the permit will be made based on this comment.

The comment also incorrectly stated that the effluent limitation must be equal to or less than the background levels of Second River – an ERW. Second River is not an ERW under applicable administrative codes.

MEA Comment #10 – The DNR has failed to assess the necessity or utility of this discharge, including any alternatives that would eliminate or reduce the water quality impacts resulting from this new discharge of Crystal Lake surface water.

DNR Response #10 – As discussed in the Environment Analysis, there are several alternatives that the District could consider. However, the Department does not have the authority to require that

every possible alternative be explored or implemented. The Department also lacks authority to require a treatment technology or installation of best management practices on private property. The District followed the conditions from the 2011 stipulation as stated in DNR response #1 and explored the alternative of ground water pumping. Also, it should be noted that historically, the District has explored numerous options for pumping water from the Mud, Fish and Crystal Lakes. Some of these options have included pumping to a seepage pond, pumping to a quarry, pumping to a wetland, flood proofing/moving threatened structures. These options were discussed within the environmental analysis and no further discussion is needed here.

The Department recognizes that there isn't certainty regarding whether the pumping will effectively reduce water levels, however, pumping may be effective in reducing water levels in Crystal Lake which will have the social and economic benefit of diminishing impacts from future flood events.

MEA Comment #11 – The Total Phosphorus WQBELs in the Draft permit fail to ensure the attainment of water quality standards in Roxbury Creek, Second River, and the Lower Wisconsin River. As highlighted in the Draft permit documents, phosphorus levels in Roxbury Creek already exceed applicable water quality standards and Roxbury Creek lacks any capacity to assimilate additional phosphorus discharged via the Crystal Lake surface water pumping system.

DNR Response #11 – According to ss. NR 217.13(7), if the calculated limit equals less than the phosphorus criterion for a water body, the effluent limit shall be set to criteria. Roxbury Creek's background concentration is above the water quality criteria (0.075 mg/L); however, is not listed on the 303(d) impaired waters list so is not a phosphorus impaired water. Also, see DNR Response #10 and #13. No change to the permit will be made based on this comment.

MEA Comment #12 – Phosphorus data included in the Crystal Lake WPDES permit application, and relied on by DNR in development of the draft limits, does not appear consistent with current and historic water quality data and the widely acknowledged hypereutrophic status of Crystal Lake. The Crystal Lake WPDES permit application reports phosphorus concentration in Crystal Lake below 0.05 mg/L in June and July, however, samples reported on DNR's SWIMS database indicate phosphorus concentrations in Crystal Lake during those months as 0.122 mg/L and 0.117 mg/L respectively. These monitoring data indicate that absent significant treatment of pumped water; the District is not likely to meet the 0.075 mg/L phosphorus limits. Yet, the permit does not require the District to shut off the pump if limits are exceeded.

DNR Response #12 – The data listed above for June and July (0.122 and 0.117 mg/L) was sampled during 2010 at the SWIMS station #10031439 on the west shore of Crystal Lake; however, this is not the correct location of the intake pump. The correct pump location is at the SWIMS station #10038189 which is on the south shore of Crystal Lake. Since there are no phosphorus samples taken at this SWIMS station, the results reported on the application were accepted as representative of the water quality at the point of intake. Also, the pump is no longer allowed to discharge during the summer months (see DNR response #8) and therefore the summer data is no longer applicable. Language has been added to the permit to prohibit pumping if the phosphorus limit is exceeded (see DNR response #18). No further changes will be made to the permit based on this comment.

MEA Comment #13 – The Draft Permit requires compliance with 1.2 lbs/day phosphorus limits, based on anticipated maximum flow of the Crystal Lake pump – 1.872 MGD. If the effluent flow diminishes, the District could meet permit limits, but significantly impair the receiving waters.

DNR Response #13 – The proposed pump capacity, according to the Chapter 30 permit (IP-SC-2013-00228) is 1100 gpm. Since the District is only allowed to pump during the winter months (October through April) the annual average flow is 0.92 MGD. Using this flow and the 6-month average concentration limit (0.075 mg/L), the new mass limit is 0.56 lbs/day. The permit will be changed to reflect the new phosphorus limitation.

MEA Comment #14 – The documents supporting the Draft permit lack any assessment of water quality impacts on Roxbury Creek in other than absolute low in-stream flows.

DNR Response #14 – Water quality based effluent limits were calculated using the procedures documented in ch. NR 106 and s. NR 217.13. No changes to the permit will be made based on this comment.

MEA Comment #15 – Compliance with monthly phosphorus average limits authorizes discharges at levels well in excess of background levels and water quality standards in the receiving waters. However, compliance with limits DNR relies on for its determination of no impacts to receiving water (0.075 mg/L) will not be assessed until 6 months'

worth of phosphorus discharge data has been reported. The draft permit authorizes a discharge of phosphorus at levels in excess of background concentrations in Roxbury Creek and Wisconsin River for 2/3 of the summer.

DNR Response #15 – Phosphorus limitations are expressed according to ss. NR 217.14(2). As stated above in previous responses, the final permit prohibits pumping and discharge during the summer months. No additional changes will be made to the permit based on this comment.

MEA Comment #16 – The DNR and District have failed to provide any evidence that the Crystal Lake pump design will eliminate/reduce concentration of phosphorus in pumped water as necessary to meet the effluent limits in the Draft permit.

DNR Response #16 – Phosphorus results from Crystal Lake provided by the District and summarized in DNR response #9 and the WQBEL dated August 9, 2013 do not demonstrate the need to reduce concentrations of the phosphorus in the discharge to meet effluent limitations. No changes to the permit will be made in response to this comment.

MEA Comment #17 – The Draft permit fails to require monitoring for algae and water quality impacts from sedimentation, etc. in Roxbury Creek, Second River, or the Wisconsin River.

DNR Response #17 – Section 1.2.2.9 states that pumping must cease if algal growth is determined to be discovered in the immediate vicinity of the outfall. Further observations will be addressed within the Pumping Operational Manual required as part of the permit. The Department lacks authority to require that the permittee conduct ambient monitoring of downstream waters. No changes will be made to the permit based on this comment.

MEA Comment #18 – (Outfall 004) The Draft permit fails to require the District to cease pumping if permit limits are exceeded, a very likely scenario without a filter in most months.

DNR Response #18 – Language exists in the permit to cease pumping if the BOD or TSS exceeds or equals the limitations (sections 1.2.2.3 & 1.2.2.4). Similar language also exists for outfall 001 (sections 1.2.1.3 and 1.2.1.4). This language will be updated to reflect the changes to limitations stated above (DNR comment #8) and language will be added to cease pumping if phosphorus exceeds limitations (new section 1.2.2.5).

MEA Comment #19 – Given the highly variable nature of the Crystal Lake Discharge, monthly phosphorus monitoring is insufficient.

DNR Response #19 – Discharge is prohibited during the summer months (see DNR response #8) which are when the phosphorus results tend to be highly variable. Based on data supplied by the District, winter phosphorus levels are in the low range. Due to the nature of the discharge, the Department believes monthly monitoring of phosphorus during the winter months is appropriate. No changes to the permit will be made based on this comment.

MEA Comment #20 – The District's application for this Draft permit contains TSS data for Crystal Lake that may not accurately reflect actual TSS in Crystal Lake during summer months. The District likely cannot meet the proposed TSS limits absent TSS removal technology, and the permit related documents lack any assessment related to whether filter can remove TSS to levels necessary to meet WPDES limits. DNR must clarify where sampling for the Crystal Lake surface water discharge will occur and whether such sampling will consider the addition of pollutants caused by erosion.

DNR Response #20 – As per DNR response #8, the District is no longer allowed to pump during the summer months. It is expected that the District will be able to meet TSS concentrations during the winter months without filter technology based on data submitted to the Department. Permit section 1.2.2.8 has been included to state the point of sampling is at the outfall prior to mixing with the drainage ditch.

MEA Comment #21 – Temperature limits to protect downstream waters must be assessed and included in the Draft permit. If, after data is collected, there is no reasonable potential to violate those standards, the limits can be removed from the permit.

DNR Response #21 – Temperature limitations as stated in the WQBEL were added in the permit (section 1.2.2.11), effective immediately.

MEA Comment #22 – Low DO and high ammonia are likely to occur in the summer at the point of the surface water

intake in Crystal Lake – 5 feet below the surface of the water. DNR must consider the increase impact of these pollutants on receiving waters.

DNR Response #22 – As stated above (DNR response #8), the District is no longer allowed to pumping during the summer months (May through September) due to the low BOD limitations. It is not anticipated that low DO or high ammonia will occur during the winter months. For reference, the data provided on the application to the Department for ammonia average at 0.054 mg/L which is less than one-third of the calculated limits. Therefore, there was no reasonable potential for exceeding ammonia limitations. No changes will be made to the permit based on this comment.

MEA Comment #23 – Eurasian milfoil could be transferred from Crystal Lake to areas of the Wisconsin River with relatively little milfoil.

DNR Response #23 – Eurasian milfoil is already present within the Second River and portions of the Wisconsin River and transferring milfoil from Crystal Lake would not be introducing a new invasive species to the Wisconsin River and surrounding areas. To prevent spreading of new invasive species, section 1.2.2.9 within the permit prohibits pumping if a new species is discovered in Crystal Lake. No changes will be made to the permit based on this comment.

During the public comment period, emails in support of the WPDES permit allowing pumping from Crystal Lake were received from the following people between October 21, 2013 and October 28, 2013: Thomas and Paula Larrabee, Larry and Sharon Bibow, John and Joann Jeffers, Eric and Lori Mathey, Richard Brummett, Rodney Engelkes, Robert Smith, Dave Van Ert, Jeff Hellenbrand, Russel Rufer, David Stowell, Mike Levi, Jane and Joe Kuehn, Bill and Janet Evans, Stephanie, Mike and Donna Spencer, Chris Strabel, J. Waltz, Mike Eckstein, Mark Green, Dick and Nancy Smith, Mary Varner, Tony and Stephanie Meinking, Robert and Carol Miner, Beth Hellwig and Family, Cindy Jimenez, Gary Campbell, Benjamin Eiden, Phil Gerg, Bud Styer, Carole Victorson, Rafael Curutchet, Ken Werner, and Donna Ackerman.

Ray and Ruth Kruchten submitted comments by email and were received on October 25, 2013. These comments were in opposition with the project but the comments did not specifically pertain to the WPDES permit or the EA. These comments were noted but are not addressed as part of this notice of final determination.

Dave Padley from the Lake District presented comments at the public informational hearing on October 21, 2013.

Padley Comment #1 – The District would like to remove the requirement to cease pumping from Fish Lake during July through September.

DNR Response #1 – This request has already been incorporated into the WPDES permit for outfall 001. No additional changes will be made to the permit based on this comment.

Padley Comment #2 – The District would like a reduction in the monitoring requirements (for Outfall 001) proposed for July, August and September from weekly to once every two weeks. Pumping in July 2013 did not result in a result higher than 5 mg/L and additional sampling does not appear necessary.

DNR Response #2 – The summer months (July, August, and September) are known to have very variable TSS results. In order to insure compliance with the limits, the Department has included weekly monitoring during those months. No changes to the permit will be made in response to this comment.

Additional comments were made by Dave Padley in support of the WPDES permit. However, these comments were more of a narrative nature and not specific WPDES permit or EA comments. These comments were noted but are not addressed as part of this notice of final determination.

Kevin Kessler from Columbia County Board presented comments at the public informational hearing on October 21, 2013.

Kessler Comment #1 – Due to the nature of this discharge, since it is just pumping lake water and not a municipal or industrial discharge, the Department should simplify the permit. Fecal coliform monitoring should be removed for both Outfall 001 and Outfall 004 and the frequency of monitoring should be reduced from weekly. The department should be considering how to save the Lake District money instead of over regulating this type of discharge.

DNR Response #1 – Fecal coliform is a parameter monitored for recreational use as per NR 210. As for reduced monitoring, see Padley DNR response #2 above. No changes are being made to the permit based on this comment.

Kessler Comment #2 – The phrase “causes algal growth” should be clarified. It is a subjective definition, obviously there are algae in the discharge, Roxbury Creek, and some algae might be favorable to species. It should be more along the lines of problematic algal growth.

DNR Response #2 – Sections 1.2.1.8 & 1.2.2.8 has been edited to reflect a more descriptive definition of algal growth.

Kessler Comment #3 – The language part of section 1.2.1.3, 1.2.1.4, 1.2.2.3, 1.2.2.4, 1.2.2.5 & 1.2.2.6 regarding pumping to cease if BOD, TSS, and/or exceed limit within 12 hours, should not be considered a violation due to the communication and responsibility between District members.

DNR Response #3 – The 12 hour language is from the 2011 stipulation. The Department felt it is necessary to include the 12 hour time frame for the new discharge as well. To anticipate this permit condition, the District should develop, as part of the Pumping Operation Manual, a communication plan to insure that the 12 hour time frame can be met. No changes to the permit will be made based on this permit comment.

Additional comments were made by Kevin Kessler in support of the WPDES permit. However, these comments were more of a narrative nature and not specific WPDES permit or EA comments. These comments were noted but are not addressed as part of this notice of final determination.

During the public information hearing, the following people spoke in approval of the WPDES permit: Mike Spencer, Brent Varner, Chris Garber, and Patty Bennett. No specific comments pertaining to the WPDES permit or EA were given. Their comments were noted but not addressed as part of this notice of final determination.

During the public information hearing, the following people spoke in opposition of the WPDES permit: Ray Kruchten and Ron Grasshuff. No specific comments pertaining to the WPDES permit or EA were given. Their comments were noted but not addressed as part of this notice of final determination.

Received at the public hearing was a petition in support of the approval of the WPDES permit with 330 signatures.

Comments Received from EPA or Other Government Agencies and Any Permit Changes as Applicable

No comments received from EPA or other government agencies.

As provided by s. 283.63, Stats., and ch. 203, Wis. Adm. Code, persons desiring further adjudicative review of this final determination may request a public adjudicatory hearing. A request shall be made by filing a verified petition for review with the Secretary of the Department of Natural Resources within 60 days of the date the permit was signed (see permit signature date above). Further information regarding the conduct and nature of public adjudicatory hearings may be obtained by contacting the Department of Natural Resources, Bureau of Watershed Management, WPDES Permits, Box 7921, Madison, Wisconsin 53707 and by review of ch. NR 203, Wis. Adm. Code, s. 283.63 Stats., and applicable code law.

Information on file for this permit action may be inspected and copied at either the above named permit drafter's address or the above named basin engineer's address, Monday through Friday (except holidays), between 9:00 a.m. and 3:30 p.m. Information on this permit action may also be obtained by calling the permit drafter at (608) 275-3285 or by writing to the Department. Reasonable costs (usually 20 cents per page) will be charged for copies of information in the file other than the public notice and fact sheet. Pursuant to the Americans with Disabilities Act, reasonable accommodation, including the provision of informational material in an alternative format, will be made to qualified individuals upon request.

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, RENUMBERING, AMENDING, REPEALING AND RECREATING, AND CREATING
RULES**

The statement of scope for this rule was published in Register No. 652, on May 1, 2010.

The Wisconsin Natural Resources Board adopts an order to **repeal** NR 211.03 (19m) (d), NR 211.11 (3) (b) and (c), NR 211.12 (6); to **renumber** NR 211.03 (5), NR 211.235 (1) (intro.) and (a) to (g); to **renumber and amend** NR 211.15 (4), NR 211.235 (3); to **amend** NR 211.01, NR 211.03 (8), (16) and (19m) (a) and (c), NR 211.10 (3) (d), NR 211.11 (3) (title) and (4) (a) (intro.), NR 211.15 (1) (e) (intro) and (1) (e) 1., (5), (6), (7) and (10) (b) 2., NR 211.23 (1) (j), NR 211.235 (1) (am) (intro) and 3., 6., 7., and (4) (a), NR 211.25 (2), and (4) (c) and (d); to **repeal and recreate** NR 211.13 (2) (e) 2. b., NR 211.30 (7); to **create** NR 211.03 (1e), (5), (8m), NR 211.10 (3) (e), NR 211.11 (3) (a) 5., (bm), (cm), (d) and (e), NR 211.15 (4) (b), (c) and (d), NR 211.235 (1) (am) 8., (b), (c) and (d), (3) (a), (b) and (c), NR 211.25 (3) (e), (4) (a) 3. and (4) (e) relating to pretreatment requirements for industrial users, publicly owned wastewater treatment plants and the Department of Natural Resources and affecting small businesses.

WT-28-10

Analysis Prepared by the Department of Natural Resources

- 1. Statutes interpreted:** Sections 283.11(1),(2); 283.21(2); 283.31
- 2. Statutory authority:** Sections 283.11(1),(2); 283.21(2); 283.31
- 3. Explanation of agency authority:** Chapter 283 of the Wisconsin Statutes grants authority to the Department to establish, administer and maintain a Wisconsin Pollutant Discharge Elimination System (WPDES). Section 283.21(2), Stat., authorizes the Department to promulgate pretreatment standards to regulate the introduction of pollutants into publicly owned treatment works. Sections 283.11 and 283.31, Stats. provide authority to promulgate rules to administer the WPDES permit program consistent with federal requirements in the Clean Water Act.
- 4. Related statutes or rules:** NR 211, General Pretreatment Requirements, relates to the regulation of industrial wastewater discharges to publicly owned treatment plants (POTWs) in the ch. NR 200 series of rules and in ch 283, Stats.
- 5. Plain language analysis:** On July 18, 2011, the Department received a letter from US EPA identifying seventy-five questions or potential inconsistencies between Wisconsin law and federal Clean Water Act requirements. Issue # 16 of the EPA letter identified inconsistencies concerning requirements for industrial discharges to POTWs in Wis. Admin. Code, ch. NR 211, compared with its federal counterpart in 40 CFR Part 403. The Department is proposing amendments to NR 211 regarding pretreatment requirements for industrial users and POTWs, in response to issue #16 identified by EPA. The proposed changes more closely align Wisconsin's pretreatment requirements with revisions to the federal pretreatment regulations known as the Pretreatment Streamlining Rule, so named because many of the changes reduced federal pretreatment requirements for both regulated industries and their regulators (DNR or delegated POTWs with pretreatment programs).

The proposed Streamlining revisions to NR 211 would make the following significant changes:

1. Remove sampling requirements for wastewater pollutants, discharged by industries to sanitary sewers, shown to be neither present nor expected to be present in the discharge.

2. Remove all pretreatment sampling and reporting requirements for industries never discharging more than 100 gallons per day (gpd) of regulated industrial wastewater to the sanitary sewer.
3. Reduce pretreatment sampling and reporting requirements (from twice per year to once per year) for industries which discharge less than .01 percent of the wastewater flow capacity of the municipal treatment plant they discharge to.
4. Reduce pretreatment inspection requirements (from once per year to once per 2 years) for municipal wastewater treatment plants, with industrial pretreatment programs, when inspecting industries which discharge less than .01 percent of the wastewater flow capacity of the municipal treatment plant they discharge to.
5. Require municipal wastewater treatment plants with industrial pretreatment programs to repeat sampling at industries if a test result from the municipal sample exceeded a limit.
6. Allow municipal wastewater treatment plants with industrial pretreatment programs to use a general discharge permit to regulate several similar industries rather than several individual discharge permits.
7. Require municipal wastewater treatment plants with industrial pretreatment programs to include applicable Best Management Practices and slug control measures in industrial discharge permits.

6. Summary and comparison with existing and proposed federal regulations.

NR 211 is currently deficient in many respects compared with its federal counterpart, 40 CFR Part 403, which was revised in 2005 to include the changes collectively known as the Pretreatment Streamlining Rule. These changes include the above significant changes, along with a number of lesser changes which address more detailed aspects of pretreatment regulations such as signature requirements and record keeping.

In its July 18, 2011 letter, U.S. EPA stated that existing state pretreatment regulations did not incorporate the changes made by EPA to the federal pretreatment regulations in 2005. Some of these changes made the federal regulation less stringent than it used to be, by reducing requirements; others made it more stringent. EPA has stated that Wisconsin must adopt the more stringent provisions into NR 211.

(These, more stringent, provisions are described at:
http://www.epa.gov/npdes/pubs/pretreatment_streamlining_required_changes.pdf.)

The proposed revision to NR 211 is intended to address EPA's concerns and also to incorporate those Streamlining changes that reduce pretreatment requirements for regulated industries and delegated POTWs without adversely affecting environmental protection.

7. Comparison of similar rules in adjacent states:

The following U.S. EPA Region 5 states (Illinois, Indiana, Minnesota and Ohio) have adopted the 2005 changes to the federal pretreatment regulation into their corresponding state regulations. In Michigan, a streamlining rule has been drafted but the authority of the state's environmental agency to adopt such a rule has been removed.

8. Summary of factual data and analytical methodologies:

The Department has compared Wisconsin pretreatment regulations in ch. NR 211 with the federal rule, 40 C.F.R. Part 403, and has proposed these changes to NR 211 to make it consistent with its federal counterpart and to address recent EPA concerns about the lack of consistency between these two rules.

9. Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis:

As part of its research in creating the federal Pretreatment Streamlining Rule in 2005, U.S. EPA was required to address the economic impact of the same rule changes on small entities, i.e., small governmental units, industries and not-for-profit organizations, as are being proposed here. EPA concluded, in its Final Rule published Oct. 14, 2005, in the Federal Register, at 70 Fed. Reg. 60134 (Oct. 14, 2005), that the national economic effect of its rule, "will either relieve regulatory burden or have no significant impact for all small entities." It also estimated that, overall, governmental units and industries would save \$10.1 million annually by implementing the Streamlining changes.

10. Effect on small business:

Based on responses from industrial manufacturers, about one-half of small business manufacturers are expected to realize small reductions in costs (\$810 annually) for wastewater sampling and testing.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03 (2m), Stats., for rules proposed by the Department of Veterans Affairs: [if not applicable, so state]

Not applicable.

12. Agency Contact (include email and telephone number):

Robert Liska
Department of Natural Resources
Water Quality Bureau – WT/3
P.O. Box 7921
Madison, WI 53707 - 7921
Fax: 608/267-2800
Robert.Liska@wisconsin.gov

SECTION 1. NR 211.01 is amended to read:

NR 211.01 Purpose. The purpose of this chapter is to establish under s. 283.55(2) 283.21(2), Stats., the responsibilities of industrial users and of publicly owned treatment works in preventing the discharge into publicly owned treatment works of pollutants which will interfere with the operation of the POTW, will pass through the POTW treatment works insufficiently treated, or which will impair the use or disposal of POTW sludge.

SECTION 2. NR 211.03 (1e) is created to read:

NR 211.03 (1e) "Best management practices" or "BMPs" means maintenance or operating procedures, schedules of activities, prohibited practices, treatment requirements and other management practices to implement the prohibitions listed in s. NR 211.10 (1) and (2) or to

control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw materials storage areas.

SECTION 3. NR 211.03 (4m) is created to read:

NR 211.03 (4m) "EPA" means the U.S. environmental protection agency.

SECTION 4. NR 211.03 (8) is amended to read:

NR 211.03 (8) "Interference" means the inhibition or disruption of a POTW's sewer system, treatment processes, or operations by an indirect discharge which, alone or in conjunction with the discharge or discharges from other sources, causes a violation or increases the magnitude or duration of a violation of any requirement of the POTW's WPDES permit, ~~including the impairment of or impairs~~ the use or disposal of POTW sludge under chs. 281 and 283, Stats.

SECTION 5. NR 211.03 (8m) is created to read:

NR 211.03 (8m) "Maximum allowable industrial loading" means the total mass of a pollutant that all industrial users of a POTW, or groups of industrial users identified by the POTW, may discharge pursuant to local limits developed under s. NR 211.10 (3).

SECTION 6. NR 211.03 (16) and (19m) (a) and (c) are amended to read:

NR 211.03 (16) "Pretreatment standard" means any regulation which applies to industrial users and which contains pollutant discharge limits promulgated by the department in accordance with s. ~~283.55 (2) (a)~~ 283.21(2), Stats. This term includes both prohibited discharge standards set forth in or established under s. NR 211.10 and categorical pretreatment standards set forth in s. NR 211.11 and in chs. NR 221 through 297.

(19m) (a) Any industrial user subject to the categorical pretreatment standards in chs. NR 221 to 297 except as provided in s. NR 211.15(4)(d);

(c) Any industrial user that discharges to the POTW a process waste stream which makes up 5% or more of the average dry weather hydraulic or organic capacity of the POTW treatment plant; or

SECTION 7. NR 211.03 (19m) (d) is repealed.

SECTION 8. NR 211.10 (3) (d) is amended to read:

NR 211.10 (3) (d) Where specific prohibited discharge standards or limits on pollutants or pollutant parameters are developed by a POTW under this subsection, they shall be deemed pretreatment standards for the purposes of s. ~~283.55(2)~~ 283.21(2), Stats.

SECTION 9. NR 211.10 (3) (e) is created to read:

NR 211.10 (3) (e) POTWs may develop best management practices to implement the prohibitions of subs. (1) and (2). Such BMPs shall be considered specific prohibited discharge standards under this subsection and pretreatment standards for the purposes of s. 283.21 (2), Stats.

SECTION 10. NR 211.11 (3) (title) is amended to read:

NR 211.11 (3) (title) ~~CONVERSION FROM PRODUCTION-BASED STANDARDS TO EQUIVALENT MASS OR CONCENTRATION STANDARDS.~~

SECTION 11. NR 211.11 (3) (a) 5. is created to read:

NR 211.11 (3) (a) 5. Any industrial user operating under a control mechanism incorporating equivalent mass or concentration limits calculated from a production based standard shall notify the control authority within 2 business days after the industrial user has reason to know that the production level will significantly change within the next calendar month. Any industrial user which does not notify the control authority of such anticipated change shall meet the mass or concentration limits in its control mechanism that were based on the original estimate of the long-term average production rate.

SECTION 12. NR 211.11 (3) (b) is repealed.

SECTION 13. NR 211.11 (3) (bm) (1) is created to read:

NR 211.11 (3) (bm) 1. When the limits in a categorical pretreatment standard are expressed only in terms of pollutant concentrations, an industrial user may request that the control authority convert the limits to equivalent mass limits. The determination to convert concentration limits to mass limits is within the discretion of the control authority. The control authority may establish equivalent mass limits only if the industrial user:

a. Employs or demonstrates that it will employ water conservation methods and technologies that substantially reduce water use during the term of its control mechanism;

b. Uses control and treatment technologies that are adequate to achieve compliance with the applicable categorical pretreatment standard, and has not used dilution as a substitute for treatment;

c. Provides sufficient information to establish the facility's actual average daily flow rate for all waste streams, based on data from a continuous effluent flow monitoring device, as well as the facility's long-term average production rate. Both the actual average daily flow rate and the long-term average production rate shall be representative of current operating conditions;

d. Does not have daily flow rates, production levels, or pollutant levels that vary so significantly that equivalent mass limits are not appropriate to control the discharge; and

e. Has consistently complied with all applicable categorical pretreatment standards during the period prior to the industrial user's request for equivalent mass limits.

2. Upon approval by the control authority an industrial user subject to equivalent mass limits shall:

a. Maintain and effectively operate control and treatment technologies adequate to achieve compliance with the equivalent mass limits;

b. Continue to record the facility's flow rates through the use of a continuous effluent flow monitoring device;

c. Continue to record the facility's production rates and notify the control authority whenever production rates are expected to vary by more than 20 percent from its baseline production rates determined in subd. 1. c. Upon notification of a revised production rate, the control authority shall reassess the equivalent mass limit and revise the limit as necessary to reflect changed conditions at the facility; and

d. Continue to employ the same or comparable water conservation methods and technologies as those implemented pursuant to subd. 1. a. so long as it discharges under an equivalent mass limit.

3. A control authority which chooses to establish equivalent mass limits:

a. Shall calculate the equivalent mass limit by multiplying the actual average daily flow rate of the regulated processes by the concentration-based daily maximum and monthly average standard for the applicable categorical pretreatment standard and the appropriate unit conversion factor;

b. Upon notification of a revised production rate, shall reassess the equivalent mass limit and recalculate the limit as necessary to reflect changed conditions at the facility; and

c. May retain the same equivalent mass limit in subsequent control mechanism terms if the industrial user's actual average daily flow rate was reduced solely as a result of the implementation of water conservation methods and technologies, and the actual average daily flow rates used in the original calculation of the equivalent mass limit were not based on the use of dilution as a substitute for treatment as prohibited by s. NR 211.10 (4). The industrial user shall also be in compliance with s. NR 211.19.

4. A control authority may not express limits in terms of mass for pollutants such as pH, temperature, radiation, or other pollutants which cannot appropriately be expressed as mass.

SECTION 14. NR 211.11 (3) (c) is repealed.

SECTION 15. NR 211.11 (3) (cm), (d), and (e) are created to read:

NR 211.11 (3) (cm) The control authority may convert the mass limits of the categorical pretreatment standards in chs. NR 233, 235, and 279 to equivalent concentration limits. When converting such limits to concentration limits, the control authority shall use the concentrations listed in the applicable subparts of chs. NR 233, 235, and 279 and document that dilution is not being substituted for treatment as prohibited by s. NR 211.10 (4).

(d) Equivalent limitations calculated in accordance with par. (a), (bm) or (cm) are deemed pretreatment standards for the purposes of this chapter and s. 283.21(2), Stats. The control authority shall document how the equivalent limits were derived and make this information available to the public. Once incorporated into its control mechanism, the industrial user shall comply with the equivalent limitations in lieu of the promulgated categorical standards from which the equivalent limitations were derived.

(e) When pretreatment standards specify both maximum daily and maximum average limits, the same production or flow figures shall be used in calculating maximum daily and maximum average limits.

SECTION 16. NR 211.11 (4) (a) (intro.) is amended to read:

NR 211.11 (4) (a) (intro.) Categorical pretreatment standards may be adjusted to reflect the presence of pollutants in an industrial user's intake water if the applicable categorical pretreatment standards specifically provide that they may be applied on a net basis and or if the industrial user demonstrates to the control authority that:

SECTION 17. NR 211.12 (6) is repealed.

SECTION 18. NR 211.13 (2) (e) 2. b. is repealed and recreated to read:

NR 211.13 (2) (e) 2. b. The POTW is complying with all WPDES permit requirements and any additional requirements in any order or decree issued pursuant to the Federal Water Pollution Control Act, (33 U.S Code section 1251 *et seq.*), (Clean Water Act), affecting combined sewer outflows. These requirements include, but are not limited to, any requirements contained in EPA's Combined Sewer Overflow Control Policy.

SECTION 19. NR 211.15 (1) (e) (intro.) and 211.15 (1) (e) 1. are amended to read:

NR 211.15 (1) (e) (intro.) The nature and concentration of pollutants in the discharge from each of the industrial user's regulated processes and an identification of the applicable categorical pretreatment standards and pretreatment requirements. The nature and concentration of pollutants in each discharge shall be determined in accordance with subds. 1. to 5. In cases where the standard requires compliance with a best management practice or pollution prevention alternative, the user shall submit documentation as required by the control authority or the applicable standard to determine compliance.

1. Sampling and analysis shall be performed to identify the concentration or mass of regulated pollutants in the discharge from each regulated process, according to the requirements of the applicable categorical pretreatment standard and the control authority. Both daily maximum and average values shall be reported. Samples shall be representative of daily operations. A minimum of 4 grab samples per day shall be used for pH, cyanide, total phenols, oil and grease, sulfide and volatile organics. All other samples shall be 24-hour flow proportional composites, except when the industrial user demonstrates to the control authority's satisfaction that flow proportional sampling is infeasible. When flow proportional sampling is infeasible, the industrial user may use time proportional composite sampling or at least 4 grab samples if the industrial user has shown to the control authority's satisfaction that these methods provide representative samples of the effluent being discharged unless time proportional or grab sampling is authorized by the control authority. Where alternative sampling is authorized by the control authority, the samples shall be representative of the discharge and the decision to allow alternative methods shall be documented in the industrial user's file. Multiple grab samples collected during a 24-hour period may be composited prior to analysis provided appropriate protocols specified in ch. NR 219, and in EPA and department guidance are followed. Samples for cyanide, total phenols and sulfides may be composited in the laboratory or in the field. Samples for volatile organics and oil and grease may be composited in the laboratory. Other samples may be composited using approved methodologies as authorized by the control authority.

SECTION 20. NR 211.15 (4) is renumbered NR 211.15 (4) (a) and amended to read:

NR 211.15 (4) (a) After the compliance date for an applicable categorical pretreatment standard, industrial users, except those meeting the requirements in par. (c) or (d), shall submit semi-annual reports to the control authority. New sources and sources that become industrial users subsequent to the compliance date of an applicable categorical pretreatment standard shall submit the semi-annual reports to the control authority after commencement of discharge to the POTW. The report shall include the information required by sub. (1) (d) to and (e) except that the

control authority may require more detailed reporting of flows and alternative sampling techniques may be used if they result in samples that are representative of the user's discharge and are approved by the control authority and documented in the industrial user's file. For industrial users subject to equivalent mass or concentration limits established by the control authority according to s. NR 211.11 (3), this report shall contain a reasonable measure of the industrial user's long-term production rate. For all other industrial users subject to categorical pretreatment standards expressed in terms of allowable pollutant discharge per unit of production or other measure of operation, this report shall include the industrial user's actual production or other measure of operation during the reporting period. For all wastes subject to categorical pretreatment standards that have been shipped off-site for disposal, these reports shall include the category, manufacturing process, volume and destination of such wastes. In cases where the pretreatment standard requires compliance with best management practices (or pollution prevention alternative) the user shall submit documentation needed to determine the compliance status of the user. These reports shall be submitted during June and December unless otherwise specified by the control authority. Industrial users shall submit these reports more frequently if required to do so by the control authority, or the department, or the applicable categorical pretreatment standards.

SECTION 21. NR 211.15 (4) (b), (c) and (d) are created to read:

NR 211.15 (4) (b) The control authority may authorize a monitoring waiver for individual pollutants for an industrial user subject to a categorical standard if the user has demonstrated through sampling and other technical factors that the pollutant is neither present nor expected to be present in the discharge, or is present only at background levels from intake water and without any increase in the pollutant due to activities of the industrial user. This authorization is subject to the following conditions:

1. The control authority may authorize a waiver where a pollutant is determined to be present solely due to sanitary wastewater discharged from the facility provided that the sanitary wastewater is not regulated by an applicable categorical standard and otherwise includes no process wastewater.
2. The monitoring waiver is valid only for the duration of the effective permit or equivalent control mechanism, but in no case longer than 5 years. The user shall submit a new request for the waiver before the waiver may be granted for each subsequent control mechanism or 5 year period.
3. In making a demonstration that a pollutant is not present, the industrial user shall provide data from at least one sampling of the facility's process wastewater prior to any treatment present at the facility that is representative of all wastewater from all processes. The request for a monitoring waiver shall include the certification statement and be signed in accordance with s.

NR 211.15 (10) (b). Non-detectable sample results may only be used as a demonstration that a pollutant is not present if the EPA approved method from 40 CFR Part 136 with the lowest minimum detection level for that pollutant was used in the analysis.

4. Any grant of the monitoring waiver by the control authority shall be included as a condition in the user's control mechanism. The reasons supporting the waiver and any information submitted by the user in its request for the waiver shall be maintained by the control authority for 3 years after expiration of the waiver.

5. Upon approval of the monitoring waiver and revision of the user's control mechanism by the control authority, the industrial user shall certify on each report with the statement below, that there has been no increase in the pollutant in its wastestream due to activities of the industrial user:

Based on my inquiry of the person or persons directly responsible for managing compliance with the applicable pretreatment standards, I certify that, to the best of my knowledge and belief, there has been no increase in the level of _____ [list pollutant(s)] in the wastewaters due to the activities at the facility since filing of the last periodic report.

6. In the event that a waived pollutant is found to be present or is expected to be present based on changes that occur in the user's operations, the user shall immediately comply with the monitoring requirements of par. (a) or other more frequent monitoring requirements and notify the control authority.

7. This paragraph does not supersede certification processes and requirements established in categorical pretreatment standards, except as otherwise specified in the categorical pretreatment standard.

(c) The control authority may reduce the frequency of the reports required under par. (a) to no less than once per year, unless required more frequently by the pretreatment standard or the department, where the industrial user meets all of the following conditions:

1. The industrial user's total categorical wastewater flow does not exceed any of the following:

a. 0.01 percent of the design dry weather hydraulic capacity of the POTW, or 5,000 gallons per day, whichever is smaller, as measured by a continuous effluent flow monitoring device unless the industrial user discharges in batches;

b. 0.01 percent of the design dry weather organic treatment capacity of the POTW; and

c. 0.01 percent of the maximum allowable headworks loading for any pollutant regulated by the applicable categorical pretreatment standard for which approved local limits were developed by a POTW in accordance with s. NR 211.10 (3);

2. The industrial user has not been in significant noncompliance, as defined in s. NR 211.23 (1) (j), at any time in the past two years;

3. The industrial user does not have daily flow rates, production levels, or pollutant levels that vary so significantly that decreasing the reporting requirement would result in data that are

not representative of conditions occurring during the reporting period;

4. The industrial user shall notify the control authority immediately of any changes at its facility causing it to no longer meet conditions of subd. 1. or 2. Upon notification, the industrial user shall immediately begin complying with the minimum reporting requirements in par. (a); and

5. The control authority shall retain documentation to support the determination that a specific industrial user qualifies for reduced reporting requirements under this paragraph for a period of 3 years after the expiration of the term of the control mechanism.

(d) The control authority may determine that an industrial user subject to categorical pretreatment standards is a non-significant categorical industrial user rather than a significant industrial user on a finding that all of the following conditions are met:

1. The industrial user never discharges more than 100 gallons per day of total categorical wastewater, excluding sanitary, non-contact cooling and boiler blowdown wastewater, unless specifically included in the pretreatment standard.

2. The industrial user has consistently complied with all applicable categorical pretreatment standards and requirements.

3. The industrial user never discharges any untreated concentrated wastewater.

4. The industrial user annually submits the following certification statement signed in accordance with the signatory requirements of s. NR 211.15 (10) along with any additional information required by the control authority:

Based on my inquiry of the person or persons directly responsible for managing compliance with pretreatment standards, I certify that, to the best of my knowledge and belief that during the period from _____, to _____, [months, days, year], the facility described as _____ [facility name] met the definition of a non-significant categorical industrial user as described in s. NR 211.15 (4) (d); the facility complied with all applicable pretreatment standards and requirements during this reporting period; and the facility never discharged more than 100 gallons of total categorical wastewater on any given day during this reporting period. This compliance certification is based upon the following information: _____

SECTION 22. NR 211.15 (5), (6) and (7) are amended to read:

NR 211.15 (5) Significant industrial users which are not subject to categorical pretreatment standards and which discharge to a POTW with a pretreatment program shall submit reports to the control authority at least twice per year. At a minimum, these reports shall describe the flow rate and concentration of pollutants in wastewater discharges, and shall be based on sampling and analysis performed in the period covered by the report. Sampling shall be conducted at the appropriate sampling location and shall be representative of conditions during the reporting

period. If a user monitors any regulated pollutant more frequently than required by the control authority using procedures prescribed in sub. (8), the results of this monitoring shall be included in the report. In cases where a local limit requires compliance with best management practices or pollution prevention alternative, the user shall submit documentation required by the control authority to determine the compliance status of the user. Other industrial users not subject to categorical pretreatment standards shall submit reports according to the requirements of the control authority.

NR 211.15 (6) The industrial user shall notify the POTW control authority, and the POTW if the POTW is not the control authority, in advance of any substantial change in the volume or character of the pollutants in the discharge, including changes in listed or characteristic hazardous wastes for which the industrial user has submitted initial notification according to s. NR 211.17. Industrial users shall immediately notify the POTW of any discharge that could cause problems at the POTW, such as any slug loading in violation of s. NR 211.10 (2); or of any changes at the facility affecting the potential for a slug discharge and the need for a slug control plan as required by s. NR 211.235 (4) (a).

NR 211.15 (7) If sampling and analysis performed by an industrial user indicates a violation, the industrial user shall notify the control authority within 24 hours of becoming aware of the violation. The industrial user shall repeat the sampling and analysis and submit the results of the repeat analysis to the control authority within 30 days after becoming aware of the violation, unless the control authority regularly performs sampling at the industrial user at least once per month or performed sampling at the industrial user between the time of the industrial user's initial sampling and the time when the industrial user received the results of the initial sample. Where the control authority has performed the original sampling and analysis in lieu of the industrial user as allowed in sub. (9), the control authority shall perform the repeat sampling and analysis unless it notifies the user of the violation and requires the user to perform the repeat analysis.

SECTION 23. NR 211.15 (10) (b) 2. is amended to read:

NR 211.15 (10) (b) 2. The manager of one or more manufacturing facilities having a total of at least 250 employees or having gross annual sales or expenditures exceeding \$25 million in second quarter 1980 dollars, but only if provided the manager is authorized to make decisions which govern the operation of the facility, make major capital investment recommendations, initiate and direct comprehensive measures to assure long-term compliance with environmental laws, can ensure the necessary systems are established to gather complete and accurate information for the report and where authority to sign documents has been delegated to the manager according to the corporation's procedures; or

SECTION 24. NR 211.23 (1) (j) is amended to read:

NR 211.23 (1) (j) Annually publish a list of the industrial users that were in significant noncompliance with the applicable pretreatment standards and requirements at any time during the previous 12 months. The list shall be published in ~~the daily a newspaper with the largest circulation in the municipality in which the POTW is located~~ of general circulation that provides meaningful public notice in the area served by the POTW. ~~An A significant industrial user has been in significant noncompliance if: any of the criteria in subds. 1. to 8. apply. A non-significant industrial user has been in significant noncompliance if criteria in subd. 3., 4., or 8 apply.~~

1. Sixty-six percent or more of all the measurements of the industrial user's wastewater for any the same pollutant taken during a 6 month period exceeded by any magnitude ~~the daily maximum limit or the average~~ any numeric pretreatment standard or requirement including an instantaneous limit;

2. Thirty-three percent or more of all the measurements of the industrial user's wastewater for any the same pollutant taken during a 6 month period ~~equal or exceed~~ equaled or exceeded the product of ~~the daily maximum limit or the average~~ the numeric pretreatment standard or requirement including an instantaneous limit multiplied by either 1.4 for BOD, TSS, and fats-oil-grease; 1.2 for all other pollutants except pH; or ~~exceed~~ exceeded a pH limit by .4 standard units;

3. The control authority has reason to believe that the industrial user has caused, alone or in combination with other discharges, interference, pass through or endangerment of the health of POTW personnel or the general public because of a violation of a pretreatment standard or requirement;

4. The industrial user has discharged a pollutant that has caused imminent endangerment to human health, welfare or the environment or has otherwise resulted in the POTW's exercise of its emergency authority to halt or prevent a discharge;

5. The industrial user failed to meet, by 90 days or more, a milestone date contained in a compliance schedule within a local control mechanism or enforcement order for starting construction, completing construction or attaining compliance;

6. The industrial user has failed to provide within ~~30~~ 45 days of a deadline a required report containing all required monitoring results and other information, such as a baseline monitoring report, 90 day compliance report, periodic self-monitoring report or report on compliance with a compliance schedule;

7. The industrial user has failed to accurately report noncompliance; ~~or.~~

8. The control authority has determined that any other violation or group of violations, which may include a violation of required best management practices, by the industrial user has adversely affected the operation or implementation of the local pretreatment program.

SECTION 25. NR 211.235 (1) (intro.) and (a) to (g) are renumbered NR 211.235 (1) (am) (intro.) and 1. to 7. and NR 211.235 (1) (am) (intro.) and 3., 6., and 7. are amended to read:

NR 211.235 (1) (am) (intro.) Control the discharge from each significant industrial user through individual control mechanisms or, as provided in par. (b), through general control mechanisms. The control mechanism shall have a duration of no longer than 5 years. ~~The control mechanism~~ and may not be transferred without prior notification to the POTW. The control mechanism shall contain or contain by reference the following:

3. Effluent limits, including best management practices, based on prohibited discharge standards, categorical pretreatment standards, local limits and state and local law;
6. Any applicable compliance schedule; and
7. A description of the civil and criminal penalties for violation of pretreatment standards or requirements; and

SECTION 26. NR 211.235 (1) (am) 8. is created to read:

NR 211.235 (1) (am) 8. Requirements to control slug discharges, if determined by the control authority to be necessary.

SECTION 27. NR 211.235 (1) (b), (c) and (d) are created to read:

NR 211.235 (1) (b) At the discretion of the POTW, this control may include use of general control mechanisms which contain the elements listed in par. (am) if all facilities to be covered:

1. Involve the same or substantially similar types of operations;
2. Discharge the same types of wastes;
3. Require the same effluent limitations;
4. Require the same or similar monitoring; and
5. Are more appropriately controlled under a general control mechanism than under individual control mechanisms as determined by the control authority.

(c) To be covered by the general control mechanism, the user shall file a written request for coverage that identifies its contact information, production processes, the types of wastes generated, the location for monitoring all wastes covered by the general control mechanism, any requests in accordance with s. NR 211.15 (4) (b) for a monitoring waiver for a pollutant neither present nor expected to be present in the discharge, and any other information the control authority deems appropriate. A monitoring waiver for a pollutant neither present nor expected to be present in the discharge is not effective in the general control mechanism until after the control authority has provided written notice to the user that such a waiver request has been granted in

accordance with s. NR 211.15 (4) (b). The control authority shall retain a copy of the general control mechanism, documentation to support the determination that a specific user meets the criteria in par. (b) 1. to 5., and a copy of the user's written request for coverage for 3 years after the expiration of the general control mechanism.

(d) A control authority may not use general control mechanisms for facilities that are subject to production-based categorical standards, standards expressed as mass of a pollutant discharged per day, limits that are based on the combined waste stream formula in s. NR 211.12 or limits that are adjusted for pollutants in intake water in s. NR 211.11 (4).

SECTION 28. NR 211.235 (3) is renumbered NR 211.235 (3) (intro.) and amended to read:

NR 211.235 (3) (intro.) Inspect and sample the effluent from each significant industrial user at least once per year: except as otherwise specified below:

SECTION 29. NR 211.235 (3) (a), (b), and (c) are created to read:

NR 211.235 (3) (a) Where the POTW has authorized a user subject to a categorical pretreatment standard to forego sampling for a pollutant that is not present in accordance with s. NR 211.15 (4) (b), the POTW shall sample for the waived pollutant at least once during the term of the user's control mechanism. In the event that the POTW subsequently determines that a waived pollutant is present or is expected to be present in the industrial user's wastewater based on changes that occur in the user's operations, the POTW shall immediately begin at least annual effluent monitoring for that pollutant and inspection.

(b) Where the POTW has determined that an industrial user meets the criteria for classification as a non-significant categorical industrial user in accordance with s. NR 211.15 (4) (d), the POTW shall evaluate, at least once per year, whether the industrial user continues to meet those criteria.

(c) Where the POTW has determined that an industrial user is subject to reduced reporting requirements under s. NR 211.15 (4) (c), the POTW shall inspect and sample the effluent from the industrial user at least once every two years. If the industrial user no longer meets the conditions for reduced reporting, the POTW shall immediately begin sampling and inspecting the industrial user at least once a year.

SECTION 30. NR 211.235 (4) (a) is amended to read:

NR 211.235 (4) (a) ~~At least once every two years, evaluate~~ Evaluate whether each significant industrial user's need for a slug control plan user needs a plan or other action to control slug discharges. For industrial users identified as significant prior to [30 days after the effective date

of this paragraph...LRB insert date], this evaluation shall have been conducted by [1 year after effective date of this paragraph...LRB insert]. Additional significant industrial users shall be evaluated within 1 year of being designated as significant industrial users.

SECTION 31. NR 211.25 (2) is amended to read:

NR 211.25 (2) Documents submitted in accordance with this section shall be signed by a principal executive officer, ranking elected official, or a duly authorized employee if the employee is responsible for the overall operation of the POTW ~~or the pretreatment program~~. This authorization shall be made in writing by the principal executive officer or ranking elected official and submitted to the department prior to or together with the report being submitted.

SECTION 32. NR 211.25 (3) (e) is created to read:

NR 211.25 (3) (e) POTWs that elect to receive electronic documents shall satisfy the requirements of 40 CFR Part 3 – Electronic Reporting.

SECTION 33. NR 211.25 (4) (a) 3. is created to read:

NR 211.25 (4) (a) 3. An identification of categorical users listed in subd. 1 that are subject to reduced reporting requirements under s. NR 211.15 (4) (b) and (c).

SECTION 34. NR 211.25 (4) (c) and (d) are amended to read:

NR 211.25 (4) (c) A summary of industrial user compliance over the reporting period; and
(d) ~~Any other information requested by the department.~~ A summary of changes to the POTW's program that have not been previously reported to the department; and

SECTION 35. NR 211.25 (4) (e) is created to read:

NR 211.25 (4) (e) Any other information requested by the department.

SECTION 36. NR 211.30 (7) is repealed and recreated to read:

NR 211.30 (7) (a) The department shall use the procedures in par. (b) for approval of any of the following substantial pretreatment program modifications:

1. Modifications that relax POTW legal authorities, as outlined in s. NR 211.22, except for modifications that directly reflect a revision to this chapter or to other state or federal

pretreatment requirements and are reported under par. (c);

2. Modifications that relax local limits, except for pH and reallocations of maximum allowable industrial loadings that do not increase the total industrial loadings of a pollutant and are reported under par. (c);

3. Changes to the POTW's control mechanism;

4. A decrease in the frequency of self-monitoring or reporting required of industrial users;

5. A decrease in the frequency of industrial user inspections or sampling by the POTW;

6. Changes to the POTW's confidentiality procedures; and

7. Other modifications designated as substantial by the department on the basis that the modification could have a significant impact on the operation of the POTW's pretreatment program, result in an increase in pollutant loadings at the POTW or result in less stringent requirements being imposed on industrial users of the POTW.

(b) The department shall approve or disapprove the modifications listed in par. (a) using the procedures in subs. (1) to (5) except as provided in subds. 1. and 2. The modification shall become effective upon approval by the department.

1. The department need not publish a notice of decision under sub. (5) provided:

a. The notice of request for approval under sub. (2) states that that the request will be approved if no comments are received by the date specified in the notice;

b. No substantive comments are received; and

c. The request is approved without change.

2. Notices required by subs. (2) and (5) may be performed by the POTW provided that the department finds that the notice otherwise satisfies the requirements of those subsections.

(c) For modifications not listed in par. (a) and that are not considered substantial the following procedures will be used.

1. The POTW shall notify the department of any non-substantial modifications at least 45 days prior to implementation in a statement as described in s. NR 211.27.

2. Within 45 days after receipt of the POTW's statement the department shall notify the POTW of its decision to approve or disapprove the non-substantial modification or to treat the modification as substantial under par. (a). If the department does not notify the POTW within 45 days of its decision, the POTW may implement the modification.

(d) After approval by the department, the modification shall be incorporated into the POTW's WPDES permit.

SECTION 37. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 38. BOARD ADOPTION. The forgoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 14, 2013.

Dated at Madison, Wisconsin 12/9/13

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By 
 Cathy Stepp, Secretary

(SEAL)

COPY

STATE OF WISCONSIN

CIRCUIT COURT
Branch 10

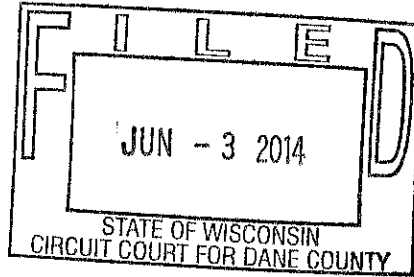
DANE COUNTY

Petenwell and Castle Rock Stewards, Inc. et al.,
Petitioners

vs.

Domtar A.W. LLC,
Intervening Respondent and

Wisconsin Department of Natural Resources,
Respondent



Case No. 13CV290

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

On July 31, 2013 the court denied Domtar’s motion to dismiss this action for judicial review. On April 30, 2014 Domtar filed a motion for reconsideration of that order, based upon the decision of the Court of Appeals in *Clean Water Action Council of Northeast Wisconsin v. Wisconsin Department of Natural Resources and Appleton Coated, LLC*, 2014 WI App 61, ___ Wis.2d ___, ___ NW2d ___ (issued April 29, 2014 publication ordered May 28, 2014, pet. rev. pending) (“*CWAC*”). The parties have briefed the motion for reconsideration. The court is bound by the holding of the Court of Appeals that Wis. Stat. §283.63(1) is an exception to judicial review under §227.52 and the doctrine of exhaustion of remedies requires a party to seek a contested case hearing before seeking judicial review. It is squarely on point and expressly rejects the analysis on which the court relied for its July 31, 2013 order. However, the application of the doctrine of exhaustion of remedies is still in the discretion of the court. This court concludes that the doctrine does not apply in this case because the Department of Natural Resources takes the position that challenges of the kind made by the petitioners in this case are not within the scope of reviews authorized by Wis. Stat. §283.63, an question not before the Court of Appeals in *CWAC*.

One exception to the doctrine is when seeking administrative review would be futile. Futility in this context refers to the legal impossibility of obtaining administrative relief. It can include cases when an agency lacks authority. *Fazio v. Dep’t of Employee Trust Funds*, 2002 WI App 127, 255 Wis. 2d 801, 813, 645 N.W.2d 618, 624. But it can also include cases when an agency refuses to hear an appeal. *League of Women Voters of Appleton, Inc. v. Outagamie Cnty.*, 113 Wis. 2d 313, 320, 334 N.W.2d 887, 890 (1983)). Exhibit G of petitioners’ original brief in opposition to the motion to dismiss is a letter from the Department of Natural Resources stating its position that Wis. Stat. §283.63 does not authorize a review “of the Department’s decision to issue a permit in the first place” or “to not include certain terms or conditions” in a permit. Pet. Brief Opposing Motion to Dismiss, Exh. G, p.2-3. That is the type of review sought here. The Department took the position that the contested case hearing under §283.63 only permits review of “the reasonableness of or the necessity for a term or condition contained” in the permit. *Id.* There is no evidence that the


department has changed its position or would now entertain a challenge of the type it had previously categorically refused. The Department's position that §283.63 does not authorize contested case hearings for challenges of the kind raised by petitioners in this case would have made a demand for such a hearing futile and satisfies the futility exception to the doctrine.

CONCLUSION

For the reasons stated above, the doctrine of exhaustion of remedies does not compel dismissal of this action and the motion for reconsideration is DENIED.

Dated: June ³/~~2~~, 2014

BY THE COURT:


Juan B. Colás
Circuit Court Judge

Copy: Counsel

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

DANE COUNTY

MIDWEST ENVIRONMENTAL DEFENSE
CENTER, INC.,

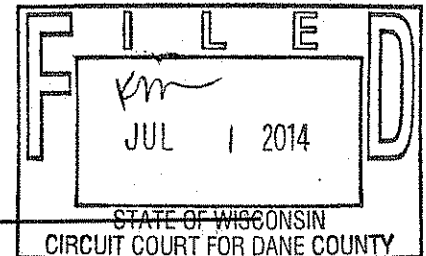
Plaintiff,

v.

Case No. 12CV3654

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES, NATURAL RESOURCES BOARD,
and CATHY STEPP,

Defendants.



**DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Midwest Environmental Defense Center, Inc. ("MEDC") filed this declaratory judgment action under Wis. Stat. § 227.40, seeking declarations that regulations and environmental standards promulgated by defendants, the Wisconsin Department of Natural Resources, Natural Resources Board and Secretary Cathy Stepp (collectively, "WDNR"), are inconsistent with federal law and thus invalid.

On January 31, 2014, MEDC filed a motion for summary judgment. WDNR submitted a response brief on March 17, 2014. MEDC filed a reply brief on April 8, 2014.

For the reasons stated below MEDC's motion for summary judgment is **GRANTED** on claims based on Wis. Admin. Code §§ NR 106.145(2)(b)2, NR 106.33(2), NR 106.32(2)(b)2, NR 106.32(3)(a)4.a, NR 106.37(2)-(3) and NR 106.88(1).

MEDC's motion for summary judgment is **DENIED** on claim based on Wis. Admin. Code § NR 106.91. Furthermore, MEDC's request for injunctive relief is **DENIED**.

BACKGROUND

MEDC filed a first amended complaint challenging ten WDNR regulations. MEDC withdrew its claim based on Wis. Admin. Code § NR 106.07(2). In addition, two other regulations - Wis. Admin. Code § NR 205.07(1)(v) and (2)(d) – have subsequently been revised, effectively mooted MEDC's claims based on them. The remaining seven regulations are: Wis. Admin. Code §§ NR 106.145(2)(b)2, NR 106.33(2), NR 106.91, NR 106.32(2)(b)2, NR 106.32(3)(a)4.a, NR 106.37(2)-(3) and NR 106.88(1) (the "Challenged Rules"). These regulations were enacted between 2000 and 2004.

On July 18, 2011, the EPA sent a letter to WDNR outlining concerns with various Wisconsin statutes and regulations ("EPA Letter"). (MEDC Br. Saul Aff., Ex. A). In the 75-point enclosure that accompanied the EPA letter, the EPA specifically identified regulatory deficiencies with the Challenged Rules. *Id.* ¶¶ 8, 31, 35, 40 and 43.¹ MEDC's arguments in support of its contention that the Challenged Rules are invalid are based on the concerns outlined in the EPA Letter. WDNR is in the process of revising the Challenged Rules. (WDNR Br. Stoltzfus Aff., Ex. A at ¶¶ 11, 15, 17, 19, 21, 23 and 26).²

STANDARD OF REVIEW

Wis. Stat. § 227.40 authorizes "judicial review of the validity of a rule" in a declaratory judgment action. Wis. Stat. § 227.40(4)(a) requires the court "to declare the

¹ In paragraph 8 of the enclosure, the EPA reiterated its concern with Wis. Admin Code § NR 106.145. It previously disapproved the rule in a letter to Matthew Frank dated February 17, 2009. This letter is attached as Exhibit B to MEDC's First Amended Complaint.

² Even though WDNR is in the process of revising the Challenged Rules, the court notes that WDNR's rulemaking procedures from start to finish take a minimum of 31 months. It involves public participation and consultation from EPA. Stoltzfus Aff., Ex. C, Letter from Cathy Stepp to Susan Hedman dated May 18, 2012. However, this case was filed on September 12, 2012, almost two years ago. Plaintiff is entitled to the resolution of its claims without further delay.

rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.”

A challenge to the statutory authority of a state agency rule is a question of law to be reviewed by the courts de novo. *Andersen v. Dep't of Natural Res.*, 2011 WI 19, ¶ 25, 332 Wis. 2d 41, 54, 796 N.W.2d 1. To determine whether an administrative agency has exceeded its statutory authority in promulgating a rule, the court should “look to the enabling statute to determine whether there is express or implied authorization for the rule.” *Wisconsin Hosp. Ass'n v. Natural Res. Bd.*, 156 Wis. 2d 688, 705, 457 N.W.2d 879, 886 (Ct. App. 1990).

This case involves the construction of the Challenged Rules. The interpretation of a rule begins with the language of the rule at issue. *Wisconsin Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 15, 342 Wis. 2d 576, 819 N.W.2d 240. “If the meaning of the [rule] is plain, [the court] ordinarily stop[s] the inquiry.” *Id.* (citation omitted). “The plain meaning of a [rule] can be discerned from the words used, as well as the context in which those words are used. *Id.* (citation omitted). “Additionally, [regulatory] purpose is helpful in a plain meaning analysis; courts will favor an interpretation of [regulatory] language that fulfills the [rule]’s purpose. *Id.* (citation omitted). “Moreover, [regulatory] language is not interpreted in isolation ‘but as part of a whole; in relation to the language of surrounding or closely-related [rules]; and reasonably, to avoid absurd or unreasonable results.’” *Id.* (citation omitted).

If the language of the rule is plain, “the [rule] is applied according to the plain meaning of the terms used.” *Id.* at ¶ 16 (citation omitted). “However, if a [rule] is

‘capable of being understood by reasonably well-informed persons in two or more senses, then the [rule] is ambiguous.’” *Id.* (citation omitted). When a rule is ambiguous, the court may look to extrinsic evidence in order to determine the meaning of the rule. *Id.* (citation omitted).

THE CLEAN WATER ACT AND THE NPDES PERMIT PROGRAM

The Clean Water Act (“CWA”) was enacted in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Generally, the CWA prohibits the discharge of a pollutant into navigable waters. *Id.* § 1311(a). However, Congress created the National Pollution Discharge Elimination System (“NPDES”) which allows the discharge of pollutants through a permit system. *Id.* § 1342(a). Each permit must contain effluent limitations reflecting the best practicable control technology available to achieve pollution reduction (a technology-based effluent limitation “TBEL”), (33 U.S.C. § 1311(b)(1)(A)), and any more stringent pollutant discharge limitations necessary to meet the water quality standards (a water quality-based effluent limitation “WQBEL”), 33 U.S.C. § 1311(b)(1)(C). *Andersen v. Dep’t of Natural Res.*, 2011 WI 19, ¶ 33, 332 Wis. 2d 41, 59, 796 N.W.2d 1, 10 (citation omitted).

“[T]he Clean Water Act envisions a partnership between the states and the federal government” and “empowers each state to administer its own permit program for discharges into navigable waters within its jurisdiction. . . .” *Id.* at ¶ 34. After the EPA approves a state permit program, the state agency is in charge of administering the permit program, subject to the EPA’s oversight. *Id.* at ¶ 38. The CWA requires that the state permit program be in compliance with the CWA and federal regulations. *Id.* (citing

33 U.S.C. § 1342(c)(2)). In addition, the EPA has the authority to withdraw its approval of a state's permit program if the program no longer complies with the requirements of the CWA, and if the state fails to take corrective action. *Id.* at ¶ 39.

Wisconsin's Pollution Discharge Elimination System ("WPDES") was approved on February 4, 1974. *Id.* at ¶ 37. Wisconsin statutes chapter 283 grants the WDNR the authority to implement the WPDES program "consistent with all the requirements of the federal water pollution control act amendments of 1972." Wis. Stat. § 283.001(2). Furthermore, Wis. Stat. § 283.11(2) imposes a constraint upon WDNR's authority to promulgate rules to implement the WPDES program:

(2) Compliance with federal standards. (a) Except for rules concerning storm water discharges for which permits are issued under s. 283.33, **all rules promulgated by the department under this chapter** as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards **shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387, and regulations adopted under that act.**

(Emphasis added.)

ANALYSIS

I. WDNR's Rules on Water Quality-Based Effluent Limitations – Wis. Admin. Code §§ NR 106.145(2)(b)2, NR 106.33(2), and NR 106.91.

EPA regulation 40 C.F.R. § 122.44(d)(1)(iii) requires the WDNR to determine whether a WQBEL is necessary in a permit and to include such limitation in the permit whenever the pollutant is or may be discharged at a level that will "cause[], have a reasonable potential to cause, or contribute to an in-stream excursion" beyond State water quality criteria. The following three rules allegedly are inconsistent with 40 C.F.R. § 122.44(d)(1)(iii).

a. WDNR's rule NR 106.145(2)(b)2.

Wis. Admin. Code § NR 106.145(2) establishes a process by which the WDNR determines the necessity for mercury effluent limitations in a permit. Wis. Admin. Code § NR 106.145(2) states:

(2) Determining the necessity of mercury effluent limitations.

(a) The department shall determine whether a mercury effluent limitation is necessary using the procedures in s. NR 106.05.

(b) For the determination under par. (a), the department shall use representative data that comply with all of the following:

1. Data shall meet the sampling and analysis requirements of subs. (9) and (10).

2. **Data shall consist of at least 12 monitoring results spaced out over a period of at least 2 years.**

(Emphasis added).

The federal counterpart regulation provides:

When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

40 C.F.R. § 122.44(d)(1)(iii).

40 C.F.R. § 122.44(d)(1)(iii) does not require 12 monitoring results collected over 24 months before the need for a WQBEL must be assessed, as Wis. Admin. Code § NR 106.145(2) does. In effect, the rule bars the WDNR from including a mercury WQBEL in a permit unless it has at least 12 samples collected over 2 years. MEDC asserts that Wisconsin Admin Code § NR 106.145(2)(b)(2) is inconsistent, and does not comply, with 40 C.F.R. § 122.44(d)(1)(iii).

WDNR argues that as a matter of practical reality, the rule is no longer of any consequence because “all major facilities in the state already have at least 12 mercury samples.” (WDNR Br. at 20). However, practical reality does not determine the validity

of the rule. The current rule, while still a part of the administrative code, can be applied to new facilities.

In addition, WDNR argues that if there were to be found a permittee that did not have 12 samples, the WDNR would conduct mercury reasonable potential determinations utilizing the more general rule at Wis. Admin. Code § NR 106.05. (WDNR Br. at 20). In sum, WDNR requests the court to validate the rule on the future promise that it will not apply it to a new permittee. The court cannot do that. Because the state rule does not comply with the federal rule, it is invalid.

b. WDNR's rule NR 106.33(2) – Seasonal Ammonia Limitations for a Sewage Treatment Works.

Wis. Admin. Code § NR 106.33(2) states:

Whenever ammonia effluent limitations calculated under s. NR 106.32 for a sewage treatment works regulated under ch. NR 210 and treating primarily domestic wastewater are greater than or equal to 20 mg/L for the period of May through October or greater than or equal to 40 mg/L for the period of November through April, **ammonia effluent limitations may not be included in the permit** for the period or periods.

(Emphasis added).

The federal counterpart regulation is found in 40 C.F.R. § 122.44(d)(1)(iii), and provides that:

When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

MEDC argues that the phrase “may not” bars WDNR from imposing ammonia effluent limitations despite a finding that such limitation is necessary, or it grants WDNR the discretion to not include ammonia effluent limitations even where necessary. (MEDC Br. at 16.) WDNR makes two arguments in opposition. First, it argues that in reality, “it is improbable that there is ever a reasonable potential to exceed [ammonia] limits of

20/40” indicated in the rule. (WDNR Br. at 15-16). Second, WDNR asserts that if the calculated ammonia limit were to exceed the limits indicated in the rule, WDNR would always include an ammonia WQBEL in the permit. *Id.* at 16. The court is not persuaded by WDNR’s arguments.

The factual “improbability” that the rule would be implicated in the future permitting decision and WDNR’s assurance that if it is implicated it would disregard the rule, are immaterial as to whether the rule, on its face, conflicts with 40 C.F.R. § 122.44(d)(1)(iii). The plain language of the rule either bars WDNR or provides discretion not to include ammonia effluent limitation despite a finding that a discharger “causes, have a reasonable potential to cause, or contribute to an in-stream excursion.” Therefore, the rule conflicts with 40 C.F.R. § 122.44(d)(1)(iii) and is invalid.

Furthermore, WDNR’s future commitments that it will implement the rule differently from how it is written, does not save the rule. It is the rule we are addressing, not WDNR’s assertion that it will not follow the rule. The court notes that an administrative agency must abide by its own rules. *George v. Schwarz*, 2001 WI App 72, 242 Wis. 2d 450, 462, 626 N.W.2d 57, 63-64 (citation omitted). Therefore, WDNR would arguably violate state law if it deliberately failed to implement its promulgated rules as written.

c. WDNR’s rule NR 106.91 – Chloride Discharge from Certain Publicly Owned Treatment Works.

Wis. Admin. Code § NR 106.91 allows the WDNR to set a chloride limit other than the WQBEL for a publicly owned treatment works under certain circumstance. Wis. Admin. Code § NR 106.91 states:

Publicly owned treatment works which accept wastewater from a public water system treating water to meet the primary maximum contaminant levels specified in ch. NR 809,

if not able to meet the calculated limitation, **may be given an interim limitation, a target value, a target limitation and appropriate source reduction requirements, pursuant to s. NR 106.83.** No calculated limitation, interim limitation, target value, target limitation, or source reduction requirement shall interfere with the attainment of the primary maximum contaminant levels specified in ch. NR 809.

(Emphasis added).

The federal regulation relating to water quality based effluent limitations in permits provides:

When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

40 C.F.R. § 122.44(d)(1)(iii).

MEDC argues that Wis. Admin. Code § NR 106.91 gives WDNR discretion to give “an interim limitation, a target value, a target limitation and appropriate source reduction requirements” instead of an actual WQBEL in permits for certain publicly owned treatment works if WDNR determines that the discharger is not able to meet the calculated limitation. (MEDC Br. at 17-18). On the other hand, WDNR argues that any interim limitations, target values, target limitations and source reduction requirements for chloride imposed pursuant to Wis. Admin. Code § NR 106.91 are included in a permit instead of an actual chloride WQBEL only as part of a variance under Wis. Admin. Code § NR 106.83. Wis. Admin. Code § NR 106.83 describes the procedure for an application for a chloride variance.

The court disagrees with MEDC’s contention that Wis. Admin. Code § NR 106.91 gives WDNR discretion to give “an interim limitation, a target value, a target limitation and appropriate source reduction requirements” only if WDNR determines that the discharger is “not able to meet the calculated limitation.” Wis. Admin. Code § NR

106.91 clearly states that WDNR may give “an interim limitation, a target value, a target limitation and appropriate source reduction requirements” if the provisions of Wis. Admin. Code § NR 106.83 for a chloride variance are met. Furthermore, Wis. Admin. Code § NR 106.83(2)(d)2 uses substantially the same language as Wis. Admin. Code § NR 106.91 – “an interim limitation, a target value or, where appropriate, a target limitation, and source reduction activities.”

The EPA’s letter informed WDNR that the rule does not conform to the federal counterpart. EPA Letter, Enclosure, ¶ 43. However, the EPA acknowledged that, “[t]o the extent that Wisconsin implements the rule as a variance, such variances are subject to EPA approval.” *Id.* WDNR concedes that Wis. Admin. Code § NR 106.91 is implemented as part of a variance under Wis. Admin. Code § NR 106.83 and that such variances are subject to EPA approval. (WDNR Br. Stoltzfus Aff., Ex. A, ¶ 26).

The court finds that Wis. Admin. Code § NR 106.91 does not grant WDNR discretion to give “an interim limitation, a target value, a target limitation and appropriate source reduction requirements.” Instead the rule requires a publicly owned treatment works, which accepts wastewater from public water systems treating water, to meet the provisions of Wis. Admin. Code § NR 106.83 for a chloride variance before WDNR will grant “an interim limitation, a target value, a target limitation and appropriate source reduction requirements.” Therefore, the court finds Wis. Admin. Code § NR 106.91 to be valid.³

³ The court notes that WDNR is in process of revising Wis. Admin. Code § NR 106.91. (WDNR Br. Stoltzfus Aff., Ex. A, ¶ 26). The court’s ruling that the rule is valid is not intended to hinder the rule revision process currently underway. The court understands that WDNR’s rulemaking procedures from start to finish take a minimum of 31 months. It involves public participation and consultation from EPA. (WDNR Br. Stoltzfus Aff., Ex. C, Letter from Cathy Stepp to Susan Hedman dated May 18, 2012). WDNR should continue with the process.

II. **WDNR's Ammonia Compliance Schedule Rules – Wis. Admin. Code §§ NR 106.32(2)(b)2, NR 106.32(3)(a)4.a., and NR 106.37(2)-(3).**

MEDC argues that Wis. Admin. Code §§ NR 106.32(2)(b)2, NR 106.32(3)(a)4.a., and NR 106.37(2)-(3) (“Schedule of Compliance Rules”) exceed WDNR’s statutory authority because these rules allow WDNR to grant a compliance schedule not for the purpose of achieving eventual compliance with an effluent limitation, as federal law instructs, but rather to enable the discharger to gather data or conduct studies in an attempt to convince WDNR to change an effluent limitation. The three challenged rules deal with the ammonia effluent limitation.

The first challenged regulation, which applies to WQBEL for ammonia, is Wis. Admin. Code § NR 106.32(2)(b)2 which states:

If the permittee can demonstrate to the department through site specific information that the fish present in the receiving water are limited to those included in CW Category 2, CW Category 3 or CW Category 5, as described in ch. NR 105, Table 2C, then effluent limitations shall be established based on the criteria shown in ch. NR 105 Table 2C for the respective CW Category. If the permittee intends to make a site-specific demonstration, the permittee shall notify the department prior to the end of the public comment period for permit reissuance. **An additional period of time, not to exceed 6 months, shall be provided in the schedule of compliance under s. NR 106.37 to perform the demonstration.** If the department grants approval for an alternative limitation based on CW Category 2, 3 or 5, the department shall propose a modification to the permit that includes the alternative limit.

(Emphasis added).

The second challenged regulation, which applies to chronic toxicity for ammonia, is Wis. Admin. Code § NR 106.32(3)(a)4.a. which states:

Whenever the department determines that early life stage present ammonia criteria are applicable under this subdivision, the permittee may make a demonstration that the early life stages of burbot are not present at the discharge location and will not be affected by the discharge during the months of January and February. If the permittee intends to perform the demonstration, the permittee shall notify the department prior to the end of the public comment period for permit reissuance. **The department shall allow an extended compliance schedule in the permit not to exceed one year for the permittee to provide the demonstration.**

(Emphasis added).

The third challenged regulation, which establishes standards for compliance schedules for ammonia, Wis. Admin. Code § NR 106.37(2)-(3) which states:

(2) One additional year may be added to the compliance schedule, subject to the 5-year maximum, if either one of the following applies:

(a) The permittee is authorized in the permit to gather stream data in accordance with s. NR 106.32(4) (c) that will significantly add to the data base used for limit calculations.

(b) The permittee is authorized in the permit to conduct a study to demonstrate that early life stages of burbot are not affected by its discharge in accordance with s. NR 106.32 (3) (a) 4. a.

(3) Six additional months may be added to the compliance schedule, subject to the 5-year maximum, if the permittee is authorized in the permit to make a cold water category demonstration pursuant to s. NR 106.32 (2) (b) 2.

(Emphasis added).

The CWA authorizes NPDES permitting agencies to implement schedules of compliance. 33 U.S.C. § 1313(e)(3)(A). Schedule of compliance is defined as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” 33 U.S.C.A. § 1362(17); Wis. Stat. § 283.01(15). EPA promulgated regulation on schedules of compliance that states:

(a) General. The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.

(1) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

(2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

(3) Interim dates. Except as provided in paragraph (b)(1)(ii), if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) The time between interim dates shall not exceed 1 year, except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

40 C.F.R. § 122.47(a).

The WDNR argues that it has authority “to issue permits requiring the facility to meet an effluent limit based on an information gathering process.” (WDNR Br. at 8). The WDNR relies for this argument on *In re Alexandria Lake Area Sanitary Dist.*, 763 N.W.2d 303 (Minn. 2009). The court agrees with MEDC that WDNR misinterprets this case.

One of the issues decided by the *Alexandria Lake* court was whether a permit condition that requires a wastewater treatment facility to comply with the results of then-pending lake study and implementation plan regarding phosphorus limits, constitutes a “schedule of compliance” under 33 U.S.C. § 1363(17). The Minnesota Supreme Court held that the permit condition that required “progressively more stringent effluent limits . . . to meet an effluent limit set upon completion of the TNDL [total-maximum-daily-load] process” was consistent with the meaning of “schedule of compliance” under 33 U.S.C. § 1363(17). *In re Alexandria Lake*, 763 N.W.2d. at 318.

In *Alexandria Lake* the TNDL study conducted by a state-agency was ongoing when the permit was reissued to the facility. The challenged permit actually included a final effluent limitation for phosphorus of 0.30 mg/L. *Id.* at 307, 314. It also included a condition that requires the facility to comply with the future limit based upon a yet-to-be-completed lake study. However, the Court did not “approve[] a schedule of compliance to allow further time to set an effluent limitation” as WDNR contends. (WDNR Br. at 7).

WDNR next contends that the plain definition of schedule of compliance under 33 U.S.C. § 1363(17) supports the Schedule of Compliance Rules that are intended to give

the permittee time to “demonstrate to the WDNR, by gathering site-specific data, that the current effluent limitation is incorrect.” (WDNR Br. at 8.) The court disagrees.

The federal statute defines schedules of compliance as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” 33 U.S.C.A. § 1362(17); Wis. Stat. § 283.01(15). The plain language of the federal statute does not allow the WDNR to include a schedule of compliance in a permit for a permittee to show that the current effluent limitation is incorrect. Furthermore, as MEDC points out in its reply brief, WDNR already calculates ammonia effluent limitations based upon “site-specific data” under Wis. Admin. Code §§ NR 106.32(2)(b), (d) and NR106.(3)(b)1. In addition, a permittee who believes an effluent limitation included in a permit is “incorrect” may challenge the WDNR’s determination pursuant to Wis. Stat. § 283.63.

EPA has explained that a compliance schedule may only be used to achieve eventual compliance with effluent limitations by certain date, and not for other purposes such as delaying compliance with applicable limitations while further research is conducted or management strategies implemented. *See* EPA Letter, Enclosure, ¶ 31; Letter from Alexis Straus, EPA, to Cleste Cantu, Cal. State Res. Bd. (Oct. 23, 2006), MEDC Br. Saul Aff., Ex. D; Memorandum from James A. Hanlon, EPA Office of Wastewater Management, to Alexis Strauss, EPA Region 9 (May 10, 2007), MEDC’s First Am. Compl., Ex. E; and letter from Jon Capacasa, EPA Region 3, to Lisa McClung and Randy Huffman, West Va. Dep’t of Env’tl Protection (Nov. 16, 2007), MEDC Br. Saul Aff., Ex. E.

The Schedule of Compliance Rules authorize the use of compliance schedules for purposes other than to achieve compliance with ammonia effluent limitation and are in direct conflict with EPA's regulation at 40 C.F.R. § 122.47(a) and 33 U.S.C. § 1363(17). These rules exceed WDNR's statutory authority and are invalid.

III. WDNR's rule NR 106.88(1) – Compliance Schedule Regulation for Chloride.

Wis. Admin. Code § NR 106.88(1) states:

If chloride water quality-based effluent limitations are deemed to be necessary in accordance with s. NR 106.85 and the permittee's representative effluent data indicate that the permittee **can consistently meet** the calculated limitation, the department **may include** the calculated limitations in the permit with an appropriate compliance schedule.

(Emphasis added).

The federal counterpart regulation provides:

When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

40 C.F.R. § 122.44(d)(1)(iii).

MEDC makes two arguments in support of its contention that Wis. Admin. Code § NR 106.88(1) is invalid. First, MEDC argues that Wis. Admin. Code § NR 106.88(1) gives WDNR discretion to avoid including a WQBEL for chloride in a permit even where WDNR has determined a limitation is necessary to comply with water quality standards, and thus is in conflict with 40 C.F.R. § 122.44(d)(1)(iii). Second, MEDC argues that Wis. Admin. Code § NR 106.88(1) gives WDNR discretion to include a compliance schedule for meeting a chloride limitation in a permit even when the permittee is presently capable of meeting the limitation on a regular basis, and thus is in conflict with 40 C.F.R. § 122.47(a).

On the other hand, WDNR makes several arguments in support of its contention that Wis. Admin. Code § NR 106.88(1) is consistent with its federal counterpart. First, WDNR argues that the plain language of the regulation “does not necessarily indicate present capability to meet the limitation.” (WDNR Br. at 13). WDNR suggests that a permittee may not be able to meet the calculated limitation at the time the permit is issued, but may be able to meet the calculated limitation by a certain date in the future, in which case a schedule of compliance would be appropriate. *Id.*

The phrase of the rule at issue is “*can consistently meet* the calculated limitation.” The plain reading of the rule indicates that a permittee can meet an effluent limitation presently. Furthermore, this reading is supported by the next subsection, Wis. Admin. Code § NR 106.88(2), that addresses a situation where a permittee “cannot consistently meet the calculated limitation.” In that situation, WDNR may include “[a] target value or a target limitation with an appropriate compliance schedule.” Wis. Admin. Code § NR 106.88(2)(b), (d).

Next, WDNR contends that the phrase “may include” should be read to relate to “appropriate compliance schedule” and not to “calculated limitations.” (WDNR Br. at 13). Even if the phrase is read as WDNR contends, it does not save the regulation. A schedule of compliance is defined as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” 33 U.S.C.A. § 1362(17); Wis. Stat. § 283.01(15). Therefore, since the plain language of the rule indicate that the permittee can meet an effluent limitation presently, it is not appropriate to include a compliance schedule in a permit.

Lastly, WDNR contends that its implementation of the rule is in accordance with the federal counterpart rules. Specifically, it states that it “does include and will continue to include” chloride effluent limits where necessary, and that it “does not include and will not include a compliance schedule” if the discharger can meet an effluent limitation. (WDNR Br. at 14). However, WDNR’s actual implementation of the rule does not render the rule valid as written. It may be that the current staff at WDNR are implementing the rule according to the federal standards. However, the situation may change when the current staff who are implementing the rule depart WDNR. The guidance for the new employees would be the rule itself. Furthermore, this is a facial challenge to the rule. Therefore, the implementation of the rule is immaterial.

Wis. Admin Code § NR 106.145(2) is inconsistent and does not comply with 40 C.F.R. § 122.44(d)(1)(iii), 40 C.F.R. § 122.47(a) and 33 U.S.C.A. § 1362(17). Therefore, it is invalid.

IV. Injunctive Relief

In addition to a declaratory relief, MEDC requests the court to “enjoin DNR Secretary Stepp from applying or using [the Challenged Rules] in the future WPDES permitting decisions.” (MEDC Br. at 16, 17, 18, and 27). WDNR correctly points out that Wis. Stat. § 227.40 does not provide for injunctive relief. Therefore, MEDC’s request for injunctive relief is denied.

CONCLUSION

For the above stated reasons MEDC’s motion for summary judgment is **GRANTED** on claims based on Wis. Admin Code §§ NR 106.145(2)(b)2, NR 106.33(2), NR 106.32(2)(b)2, NR 106.32(3)(a)4.a, NR 106.37(2)-(3) and NR 106.88(1) because

these rules are invalid. MEDC's motion for summary judgment is **DENIED** on claim based on Wis. Admin Code § NR 106.91 because this rule is valid. Furthermore, MEDC's request for injunctive relief is **DENIED**.

Counsel for plaintiff will kindly submit an order or judgment consistent with this decision, with the approval as to form by counsel for defendants. Counsel will also kindly confer and let the court know whether further proceedings here will be necessary.

Pursuant to Wis. Stat. § 227.40(6), the court is sending a copy of this decision to the Legislative Reference Bureau.

Dated this 1st of July, 2014 in Madison, Wisconsin.

BY THE COURT:



John W. Markson
Circuit Court Judge

cc: Atty. James Saul
AAG Lorraine C. Stoltzfus
Legislative Reference Bureau

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

04-28-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

MIDWEST ENVIRONMENTAL DEFENSE
CENTER, INC.,
Petitioner-Respondent,

v.

APPEAL NO. 2013AP002746

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,
Respondent-Co-Appellant,

FOREMOST FARMS, LLC,
Intervenor-Appellant.

On Appeal from the Dane County Circuit Court
The Honorable Frank D. Remington, Presiding
Circuit Court Case No. 12-CV-3352

**BRIEF OF PETITIONER-RESPONDENT MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.**

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ISSUES PRESENTED

1. Whether Wis. Stat. § 283.63 and Wis. Admin. Code Ch. NR 217, Subchapter III provide DNR discretion to issue a WPDES permit without phosphorus limits necessary to ensure that the discharge will not contribute to a violation of water quality standards in downstream waters?

Answered by the Circuit Court: No.

2. Whether DNR's decision to issue a Wisconsin Pollutant Discharge Elimination System permit without limits necessary to protect downstream waters is a final agency action for purposes of judicial review pursuant to Wis. Stat. §§ 227.52-.58.

Answered by the Circuit Court: Yes.

3. Whether MEDC, as an individual person, may challenge DNR's decision to issue a WPDES permit pursuant to Wis. Stat. §§ 227.52-.58.

Answered by the Circuit Court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioner-Respondent Midwest Environmental Defense Center (“MEDC”) believes that the issues and theories of law relevant to this appeal have been fully presented in the briefs. However, MEDC would be pleased to appear before this Court for an oral argument if it will assist the Court.

Currently there are no published Wisconsin court opinions interpreting Wis. Admin. Code Ch. NR 217, Subchapter III. Similarly, there are no published opinions discussing an individual’s right to seek judicial review of the DNR’s decision to issue a WPDES permit pursuant to Wis. Stat. § 227.52. MEDC requests publication of the Court’s decision because publication will advance the public interest by 1) clarifying that DNR has an obligation to protect the water quality of downstream waters when authorizing the discharge of phosphorus pollution pursuant to a WPDES permit, 2) clarifying that DNR’s decision to issue a WPDES permit is a final agency order subject to judicial review under Wis. Stat. § 227.52, and 3) clarifying whether there are procedural hurdles not present in the Wisconsin statutes that

individual petitioners must satisfy prior to seeking judicial review of DNR's decision to issue a WPDES permit.

STATEMENT OF THE CASE

In this case the Department of Natural Resources (“DNR”) and Foremost Farms (“Foremost”) seek appellate review of the Circuit Court’s decision that, as a matter of state law, DNR must require compliance with phosphorus water quality-based effluent limits (“WQBELs”) necessary to protect downstream waters (R.59:21, A-App.98). Additionally, Foremost seeks review of the Circuit Court’s decisions that pursuant to Wis. Stat. §§ 227.52-.58: 1) DNR’s decision to issue the Foremost permit without considering the need for, or imposing, limits necessary to protect downstream waters was a final decision for purposes of judicial review and 2) MEDC did not fail to exhaust mandatory administrative remedies.

I. LEGAL BACKGROUND

The Clean Water Act (“CWA”) prohibits the discharge of pollutants to waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. §§ 1251(a),1311(a), 1342(a). The United States Environmental Protection Agency (“EPA”) has primary

authority to administer the NPDES program, though EPA may delegate administration of the program to a state having the authority to administer the program consistent with the Act. 33 U.S.C. § 1342(b).

EPA has authorized DNR to administer the NPDES permit program in Wisconsin. *See* Wis. Stat. § 283.001(2). DNR is authorized to issue a Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit only upon condition that the permitted discharge will comply with all applicable requirements, including compliance with water quality standards. Wis. Stat. §§ 283.13(5), 283.31(3); *see also* 33 U.S.C. § 1342(a)(1). These water quality standards establish both the designated uses of the waters—such as recreational uses—and the level of pollutants that ensure the use will be met, referred to as water quality criteria. Wis. Stat. § 281.15(1). WQBELs are the permit limits that ensure a discharge of pollutants will not contribute to a violation of applicable water quality standards. Wis. Stat. § 283.13(5).

EPA retains limited oversight of delegated programs: it must approve or disapprove state program revisions, it may object to state issued permits, or it may withdraw delegation of the program. 33 U.S.C. § 1342(d)(2); 40 C.F.R. §§ 123.62-.63.

According to the Wisconsin Attorney General, “the whole point of Wis. Stat. ch. 283 and Wisconsin’s WPDES program is to allow the State to administer a program that would not invite such federal intervention.” (R.20:19, A-App.76.)

The Wisconsin Supreme Court recently considered the interaction between federal NPDES requirements and Wisconsin’s WPDES permitting authority. *See generally Andersen v. DNR*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1. The Court noted that in approving the WPDES program, EPA had found Wisconsin’s statutory and regulatory authority adequate to issue permits that comply with the CWA and “any substantial revisions to the WPDES permit program have been, and will continue to be subject to the EPA’s approval.” *Id.*

¶¶60-61.

Following the *Andersen* decision, EPA identified 75 concerns with Wisconsin’s authority to administer the WPDES program and “[i]n light of the *Andersen* case” requested that “the omissions and deviations in State authority be corrected quickly.” (R.-App. 102.)¹ EPA also emphasized that it “has not approved those elements of the State’s program that are less

¹ MEDC requests that this Court take judicial notice of the EPA’s letter pursuant to Wis. Stat. § 902.

stringent or comprehensive than federally required.” (R.-App. 102.)

II. STATEMENT OF FACTS

Foremost discharges wastewater to the Wisconsin River, upstream of the Petenwell and Castle Rock Lakes (“Lakes”). (R.11:56-58, A-App.30-32.) In 1996, DNR listed the Lakes as “officially impaired” by phosphorus pollution. (R.11:56, A-App. 30.)

Phosphorus has long been recognized as the controlling factor in plant and algae growth in Wisconsin lakes and streams. Small increases in phosphorus can fuel substantial increases in aquatic plant and algae growth, which in turn can reduce recreational use, property values, and public health.

(R.39:89, R.-App. 127.)

In 2010, DNR adopted phosphorus water quality standards to protect aquatic life in streams and rivers and aquatic life *and* recreation in lakes and reservoirs. Wis. Admin. Code § NR 102.06(3)-(4). “Lakes and reservoirs [which] tend to be more sensitive to phosphorus than streams and reservoirs,” have more stringent standards. (R.11:65-66, A-App. 65-66.) The phosphorus standard to protect *aquatic life* in the Wisconsin River at the point of Foremost’s discharge, 100

µg/l, allows over twice as much pollution as the standard to protect *recreation and aquatic life* in the downstream lakes, 40 µg/l. See Wis. Admin. Code § NR 102.06(3)(a)44 and (4)(a).

In 2009, the Wisconsin Legislature allocated funding to study phosphorus pollution on the Wisconsin River above the Castle Rock dam. (R.11:56, A-App.30.) DNR intends to use the information to form the basis for a Total Maximum Daily Load (“TMDL”)² for multiple waters in the Wisconsin River basin. (R.11:56, A-App.30.) DNR extended water quality monitoring through 2013, with the goal of completing the final TMDL by 2017. (R.-App. 158.) In “reality”, completion of the TMDL “is contingent on availability of staff and funding resources . . . and spending restrictions and federal funding cuts have reduced available resources.” (R.-App. 158.)

A. Foremost WPDES Permit

Foremost’s final permit includes final phosphorus WQBELs calculated to protect aquatic life in the Wisconsin River, and a schedule of compliance requiring Foremost to take a series of actions to bring the facility into compliance with

² A TMDL calculates the maximum amount of pollution that a waterbody can tolerate on a daily basis and still meet water quality standards. Wis. Admin. Code § NR 212.04(21).

those final limits within “7 years after permit issuance.” (R.11:169, 174-75, A-App.10, 15-16.) Foremost’s permit does not contain phosphorus WQBELs calculated to protect aquatic life and recreation in the downstream Lakes. (R.11:59, A-App. 33.)

Months before the Foremost permit was issued, DNR decided not to require Foremost, or any other discharger upstream of the Lakes, to comply with phosphorus limits necessary to protect the downstream Lakes until a TMDL was complete. (R. 11:201, R.-App. 160.) Specifically, the Deputy Administrator of DNR’s Division of Water, Russ Rasmussen, decided that DNR would “defer the implementation of water quality based limits to protect downstream uses until the TMDL process plays out.” (R. 11:201, R.-App. 160.)

This decision superseded a September 20, 2011, memo issued by a DNR water resources manager, noting that there was “insufficient **guidance** on how to develop effluent limitations in situations covering multiple discharges which are contributing to a downstream impairment,” and recommending “[a] scientifically and legally defensible approach [] to determine provisional water quality based phosphorus limitations prior to completion of the ongoing study of nutrient

transport and impacts in the Wisconsin River basin.” (R. 11:56-57, A-App. 30-31.) (emphasis added.) According to that memo, DNR considered establishing limits for these permittees based solely on meeting the water quality standards in the Wisconsin River but rejected that alternative because “the wealth of empirical evidence” shows that limits calculated only to meet the “criteria in the Wisconsin River were insufficient to protect the Lakes.” (R. 11:57, A-App. 31.) Following Mr. Rasmussen’s decision to supersede that memo, DNR calculated limits of 930 $\mu\text{g}/\text{L}^3$ - over 9 times higher than the 100 $\mu\text{g}/\text{L}$ limit recommended just months earlier in the September 20, 2011, memo. (R. 11:58-59, A-App. 32-33.)

MEDC expressed concerns that DNR’s failure to consider the need for, calculate, and include phosphorus WQBELs necessary to protect downstream waters violated state law. (R. 11:150-152, A-App. 53-55.) DNR responded that the calculation of phosphorus limits to protect downstream waters was “optional.” (R. 11:159-160, A-App.58-59.) DNR recognized that its guidance “recommends phosphorus WQBELs be based on downstream water quality criteria when the discharge is upstream of a reservoir or lake.” (R. 11:159, A-

³ 1000 $\mu\text{g}/\text{L}$ equals 1 mg/L .

App.58.) However, DNR chose to await development of a TMDL rather than “imposing WQBELS based on downstream water quality criteria on individual points sources.” (R. 11:159, A-App.58.)

ARGUMENT

I. STATE STATUTES AND DNR’S REGULATIONS DO NOT PROVIDE DISCRETION TO FORGO LIMITS NECESSARY TO PROTECT DOWNSTREAM WATERS

DNR and Foremost are wrong, State law and DNR regulations do NOT provide DNR any discretion to issue a WPDES permit that fails to require compliance with phosphorus limits necessary to protect downstream waters. DNR’s legal analysis ignores well-established doctrines of statutory construction and ignores the plain language of and statutory authority underlying NR 217.

DNR’s decision not to calculate and impose phosphorus WQBELS necessary to protect downstream waters was not based on whether such limits were necessary to protect more sensitive and polluted downstream waters; and neither DNR nor Foremost argue that the downstream Lakes do not require more stringent protections than the Wisconsin River. (R. 11:75-76, A-App. 49-50.) Rather, DNR and Foremost argue that NR

217.13 makes the inclusion of phosphorus WQBELs necessary to protect downstream waters “optional”. According to their reading, the term “may” in NR 217.13, that authorizes DNR to **calculate** WQBELs in a permit to protect downstream waters, must be read to provide DNR unlimited discretion NOT to impose those WQBELs.

DNR’s myopic focus on NR 217.13 as providing unlimited discretion to forgo necessary WQBELs directly contravenes DNR’s legal obligation to impose limits that ensure compliance with *all* water quality standards. *See* Wis. Stat. §§ 283.13(5), 283.31(3). If a discharge has the reasonable potential to cause or contribute to an exceedance of water quality standards in downstream waters, state law requires DNR to include a limit in the permit that ensures compliance with that standard—this is not optional.⁴ *See* Wis. Stat. §§ 283.13(5), 283.31(3)-(4); Wis. Admin. Code §§ NR 217.12(1), NR 217.15(1).

DNR’s fantastical assertion that it is authorized to knowingly permit discharges that contribute to violations of state water quality standards requires ignorance of key

⁴ In a response to comments on another draft permit, DNR has since acknowledged “effluent limits must protect the water quality standards of the receiving water and downstream waters.” (R. 29:42, R.-App. 163.)

provisions of the statutes and regulations. It is also a new reading of the statutes never before advanced by DNR. State statutes and regulations *never* authorize DNR to issue a permit that allows a discharge to contribute to a violation of *any* water quality standards.

A. The Standard of Review is *De Novo* and No Deference is Due to DNR's Interpretations.

MEDC's petition seeks judicial review of DNR's decision to issue the Foremost WPDES permit pursuant to Wis. Stat. §§ 227.52-.58. "In an administrative appeal, the scope of [] review is identical to that of the circuit court and is set forth in Wis. Stat. § 227.57." *Andersen*, 332 Wis. 2d 41, ¶24.

On review, this Court must determine whether DNR erroneously interpreted state statutes and regulations and exceeded the scope of its authority under Wis. Stat. ch. 283 and Wis. Admin. Code ch. NR 217. The interpretation and application of statutes and agency regulations are questions of law to be determined *de novo* by a court. *DaimlerChrysler v. Labor and Indus. Review Comm'n*, 2007 WI 15, ¶10, 299 Wis. 2d 1, 727 N.W.2d 311

In certain circumstances a court may grant varying

levels of deference to an agency's interpretation of statutes and regulations. *See Andersen*, 332 Wis. 2d 41, ¶26. There are, however, several reasons why this Court should not grant any deference to DNR's interpretation of either Wis. Stat. ch. 283 or DNR's regulations. First, because the statutes and regulations here "manifest[] a clear meaning," consideration of extrinsic evidence, such as an agency's interpretation, is beyond the scope of review. *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶¶26-27, 299 Wis. 2d 561, 729 N.W.2d 396.

Second, DNR's interpretation of ch. 283 and NR 217 directly contravenes the words of state statutes and regulations and are clearly contrary to legislative intent. *See id.*, ¶¶32-33 (providing that "only reasonable agency interpretations are given any deference."); *Morris v. Employee Trust Funds Bd. of State of Wis.*, 203 Wis. 2d 172, 186-87, 554 N.W.2d 205 (Ct. App. 1996) (providing that no deference is due to an agency interpretation that "is clearly contrary to legislative intent").

Third, courts owe no deference to an agency's interpretation of its own authority to act. *Andersen*, 332 Wis. 2d 41, ¶25.

Finally, DNR's interpretation is not one of long

standing, is so inconsistent as to be rendered meaningless, and is not likely to result in uniform and consistent application given the diverse factual scenarios presented and the unlimited discretion DNR asserts it has to apply to those scenarios. *Id.*, ¶27; *Rock-Koshkonong v. DNR*, 2013 WI 74, ¶60, 350 Wis. 2d 45, 833 N.W.2d 800. Absent a clearly identified legal basis or regulatory or statutory standard to guide the exercise of its discretion, which neither DNR nor Foremost have identified, deference to the agency's decision would not provide uniformity. *Id.*

B. DNR's WPDES Permitting Authority and Regulations Must Be Construed in Harmony with and in Context of Closely Related Statutes and Regulations.

The purpose of statutory interpretation is to determine what a statute means in order to give the statute its full, proper, and intended effect. *Orion Flight Services, Inc. v. Basler Flight Service*, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130.

Courts interpreting administrative regulations use the same rules of interpretation as used to interpret statutes.

DaimlerChrysler, 299 Wis. 2d 1, ¶10. The plain meaning of a statute must be determined in the context of statutes related to the same subject and should harmonize those statutes if

possible. *Orion*, 290 Wis. 2d 421, ¶35.

Sections 283.13(5) and 283.31(3)-(4) must be interpreted in the context of DNR’s statutory authority to issue WPDES permits, in relation to the language of the agency’s closely-related statutory authority to establish water quality standards for Wisconsin waters, and to avoid absurd or unreasonable results. *Id.* at ¶16. Likewise, NR 217 was promulgated pursuant to legislatively delegated power and must be construed “together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.” *Id.*

C. State Law Requires DNR to Calculate and Impose Phosphorus WQBELs to Protect Downstream Waters Where a Discharge Has the Potential to Contribute to a Violation of Water Quality Standards in Downstream Waters.

State law is clear: DNR must include in WPDES permits WQBELs necessary to meet **any** applicable water quality standards. Wis. Stat. §§ 283.13(5), 283.31(3)-(4).⁵

⁵ As contemplated in Wis. Stat. § 283.001, these statutory sections mirror the CWA, which requires the imposition of effluent limitations necessary to meet, or required to implement, any applicable water quality standards. *See* 33 U.S.C. § 1311(b)(1)(C). *See also* 40 C.F.R. §122.44(d)(1)(i) (state permitting authorities must establish permit limitations necessary to control all pollutants that may contribute to an excursion above **any** State water quality standard.) (emphasis added); *see also* 40 C.F.R. § 122.44(d)(1)(iii) (“When developing water quality-

Accordingly, NR 217 clearly directs that DNR *must* include phosphorus WQBELs in permits when “the discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of [the applicable phosphorus standard] in s. NR 102.06 in **either** the receiving water **or** downstream waters.” Wis. Admin. Code § NR 217.12(1) (emphasis added). DNR must calculate and include these WQBELs “based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except the department may calculate the limitation to protect downstream waters.” Wis. Admin. Code §§ NR 217.13(1)(b), 217.15(1)(b). According to DNR Guidance, “[w]here **downstream waters require more protection than the immediate receiving water, a more stringent limit will be included in the WPDES permit.**” (R. 11:64, A-App.38; *see also* R. 39:36, R.-App. 167.) (emphasis added).

based effluent limits . . . the permitting authority must ensure that the level of water quality to be achieved by limits on point sources . . . is derived from, and complies with **all** applicable water quality standards.”) (emphasis added).

i. **Wis. Admin. Code Ch.NR 217 Does Not Establish Procedures for Determining What Water Quality Standards are Applicable for Permitting Purposes.**

DNR and Foremost do not dispute that 283.13(5) and 283.31(3)(d) require DNR to impose WQBELs calculated to meet all applicable water quality standards. Rather, their entire argument hinges on an unsupported assertion that “applicable” water quality standards are determined as part of the individual permitting decisions under Subchapter III of NR 217. This interpretation is contrary to the plain language of state statutes, DNR regulations, and a decades old Wisconsin Supreme Court decision finding that water quality standards apply to waterbodies, not permittees. *See* Wis. Stat. § 281.15(1); *Niagara of Wisconsin Paper Corp. v. DNR*, 84 Wis. 2d 32, 54, 268 N.W.2d 153 (1978).

A water quality standard is a measurement of the water itself and does not focus on any single polluter. *Niagara*, 84 Wis. 2d at 54. DNR “promulgate[s] rules setting standards of water quality to be **applicable** to waters of the state, recognizing that different standards may be required for different waters or portions thereof.” Wis. Stat. § 281.15(1) (emphasis added). DNR undertook rulemaking to establish the

phosphorus water quality standards “that shall be met in surface waters” in Wis. Admin. Code § NR 102.06. Upon EPA’s approval, NR 102.06(3)-(4) became the “applicable water quality standards” for Wisconsin’s rivers, streams, lakes and reservoirs. 40 C.F.R. § 131.21(c). DNR’s own Guidance recognizes that NR 102.06(3)-(4) describe the applicable phosphorus criteria for rivers, streams, lakes and reservoirs.” (R.-App. 178.)

Neither ch. 283 nor NR 217 authorize DNR to, at the time it issues WPDES permits, determine what criteria are applicable to a permittee. Numerous provisions of the NR 217 reiterate that the “applicable criteria” for purposes of NR 217 are the “criteria in s. NR 102.06.” *See* Wis. Admin. Code §§ NR 217.12(1); 217.13(1)(b); 217.15(1).

The only decision to make at the time of permit issuance is whether the discharge will contribute to a violation of any of those water quality standards. That controls what limits are included in a WPDES permit. If the discharge will contribute to a violation, a WQBEL must be imposed to prevent that discharge from contributing to a water quality impairment at the end of a discharge pipe, or further downstream. Wis. Stat. §

283.15; Wis. Admin. Code §§ NR 217.12, 217.15.⁶

ii. **DNR has No Discretion Under Wis. Admin. Code Ch. NR 217 to Issue a WPDES Permit Without Limits Necessary to Protect Downstream Waters.**

DNR’s and Foremost’s argument amounts to an assertion that DNR has the authority to knowingly permit violations of state water quality standards. This interpretation ignores the plain language of other key provisions of Wisconsin law, as well as the manifest purpose of the regulations and their authorizing statute. Chapters 281 and 283, and NR 217 provide no authority for DNR to issue a WPDES permit that will, by its terms, allow a discharge to contribute to an exceedance of water quality standards in *any* water.

The terms “shall” and “may” in NR 217.13 do not, as DNR and Foremost assert, give DNR unbounded discretion to calculate WQBELs to protect the immediate receiving water, but not downstream waters. Such an interpretation would plainly contravene the regulatory and statutory language that provides context and meaning. DNR’s obligation to include

⁶ The water quality standards in NR 102.06 only become inapplicable when DNR sets “site-specific criteria” for a waterbody and seeks EPA approval—which the DNR has not done here. *See* Wis. Admin Code § NR 102.06(7).

limits to protect downstream waters is triggered where a discharge will contribute to a violation of downstream water quality standards.⁷ This is the only reading of the regulations authorized under Wisconsin statutes.

DNR's and Foremost's arguments would require one of two untenable interpretations of law. One option is that DNR could ignore its own regulation that requires it to assess whether a discharge will cause or contribute to a violation of water quality standards in the receiving water **and** any downstream water the discharge may impact. Another equally nonsensical option is that DNR is required to undertake this assessment and determine whether the discharge will violate water quality standards, but then may simply disregard that finding and fail to include limits to protect water quality. When understood in this context, it is clear that neither option is available to DNR.

Under the first option, DNR's interpretation reads out of the regulations DNR's obligation to assess whether a discharge will cause or contribute to a violation of water quality standards in the receiving water **and** any downstream water the discharge

⁷ MEDC does not ask this court to turn the permissive "may" into "shall"—MEDC has never claimed that DNR must include limits to protect downstream waters where DNR has determined that no impact on downstream waters will result from the discharge.

may impact. As DNR reads the regulations, the determination regarding the impact of Foremost's discharge on downstream waters is irrelevant because NR 217.12 and NR 217.15 only require an assessment of whether a discharge will contribute to a violation of water quality standards in **some** water – it is irrelevant whether this water is the receiving water or downstream water. This construction leads to the untenable result that DNR's discretion is so broad as to provide it the discretion to forgo limits to protect downstream waters without ever having assessed whether, or how, the discharge will impact that water quality.

Under the second option, DNR would be required to make this finding, but DNR could then decline to impose limits in a WPDES permit that protect water quality. To reach this conclusion, DNR relies on what it interprets as unbridled discretion under Wis. Admin. Code § NR 271.13.

DNR acknowledges that the term “may” does not imply discretion where a “different construction is demanded by the statute in order to carry out the clear intent of the legislature.” (DNR Br. at 23, citing *City of Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963)). The Wisconsin Supreme Court recently reiterated that even if the

term “may” is permissive, it does not necessarily provide unlimited discretion. *Heritage Farms Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶38, 339 Wis. 2d 125, 810 N.W.2d 465.

Moreover, it is non-sensical that the law would require an agency to make a finding but simply decline to do anything about it, “particularly when the [law] is silent as to what standard [ought to be followed] when exercising such discretion.”⁸ *Id.*, ¶41. Here NR 217.12 and 217.15 require DNR to determine whether a discharge will impact downstream waters. NR 217.13 contains no standards for DNR to follow in exercising discretion to forgo limits necessary to protect water quality in those waters when the discharge will impact downstream waters.

NR 217.13(1)(b) certainly provides authority for DNR to calculate limits to protect downstream waters, but it does not provide discretion NOT to impose limits necessary to ensure that a discharge will not contribute to a violation of phosphorus standards in downstream waters. The term “may” simply reflects that DNR is not required to impose limits to protect

⁸ Compare to NR 217.16, where DNR “may” include a TMDL based limitation in addition to, or in lieu of the WQBEL, the regulation specifies several factors to consider in making the determination.

downstream waters where such limits are not necessary to maintain water quality.

Reading “may,” to provide the agency with unbounded discretion to forgo phosphorus limits to protect downstream waters would lead to unreasonable results. It would require DNR to determine whether a limit is necessary to protect water quality, but then allow DNR to issue a WPDES permit that fails to protect water quality because DNR believes that it is not obligated to **calculate** such a limit. This outcome is not authorized by Wisconsin statutes, **and is clearly illogical.**

iii. DNR Exceeded the Scope of Its Statutory Authority When it Failed to Impose Phosphorus WQBELs to Protect Downstream Waters.

DNR asks this court to condone an interpretation of NR 217.13 that would give DNR discretion to choose not to “protect public health, safeguard fish and aquatic life and scenic and ecological values, and enhance the recreational values of certain state waters”—simply because those waters are downstream of a discharge. Wis. Stat. § 283.001(1). The legislature most certainly did not authorize DNR to bestow upon itself limitless discretion to authorize a permittee to contribute to a water quality impairment. This absurd

construction directly conflicts with DNR's limited authority to administer and maintain the WPDES program to effectuate the policy above. Wis. Stat. § 283.001(2).

Chapter 283 also does not provide DNR the authority to create a WPDES program that violates CWA requirements. *See* Wis. Stat. § 283.001(2) (“The purpose of this chapter is to grant to the [DNR] all authority necessary to establish, administer and maintain” a WPDES program consistent with the CWA.). Any interpretation of regulations established pursuant to ch. 283 that conflicts with federal law is outside the bounds of authority provided to DNR. *See DaimlerChrysler*, 299 Wis. 2d 1, ¶36. The Wisconsin Supreme Court recently acknowledged the significant weight given to EPA's interpretation of DNR's authority to administer the WPDES program. *Andersen*, 332 Wis. 2d 41, ¶¶60-63. EPA's approval of NR 217, its understanding of how Wisconsin's statutes and regulations must be interpreted to comply with federal law, and its position on DNR's legal authority to administer the WPDES permit program, are directly relevant to this Court's analysis of state law.

EPA has made clear to DNR that “when a downstream waterbody requires a more stringent WQBEL than the

immediate receiving waterbody, the more stringent limit would set the effluent limit in the NPDES permit.” (R.39:36, R.-App. 167.) Again, in late 2012 EPA informed DNR that issuance of a permit authorizing a discharge that indirectly entered a phosphorus impaired downstream lake without limits necessary to protect that lake is “inconsistent with the requirements of Wisconsin and federal law. . .” (R.39:62-64, R.-App. 200.) DNR has since acknowledged that “effluent limits must protect the water quality standards of the receiving water *and* downstream waters.” (R. 29:42, R.-App. 163.) (emphasis added).

iv. EPA Has Not Approved the Foremost Farms WPDES Permit, and EPA’s Interpretation of NR 217 is Relevant to This Court’s Review.

Foremost appears to argue that EPA’s failure to review and object to the permit confirms that the permit complies with state and federal law. However, EPA’s silence is just that—silence. EPA is never required to object to a permit, even if it violates state or federal law. *Save the Bay, Inc. v. Adm’r of Env’tl. Prot. Agency*, 556 F.2d 1282, 1294 (5th Cir. 1977).

The statements in *Andersen* on which Foremost relies are based on clearly distinguishable facts. The *Andersen*

Court interpreted EPA's review of and failure to object to the permit at issue, coupled with EPA's approval of the WPDES program, to mean that EPA effectively determined that the permit complied with federal law. *Andersen*, 332 Wis. 2d 41, ¶63. Unlike *Andersen*, the record here does not indicate that EPA reviewed the permit at issue. Further, there is clear evidence that EPA's approval of NR 217 requires DNR to impose limits necessary to ensure a discharge will not contribute to a violation of downstream water quality standards. (R.-App. 206-207.)⁹ It is nonsensical to argue, as Foremost does, that EPA's silence is a determination that "the permit complies federal law."¹⁰ (Foremost Br. at 58.) Particularly, where EPA has clarified that it approved NR 217 as compliant with federal law because that section required DNR to impose limits necessary to protect downstream waters.

If, as Foremost argues, EPA's approval of NR 217 is, at least in part, determinative of the issues presented here, information regarding EPA's interpretation of those rules is

⁹ MEDC requests that this Court take judicial notice of the EPA's letter pursuant to Wis. Stat. § 902.

¹⁰ Regardless, MEDC's arguments are squarely grounded in state law.

certainly relevant and should be considered by this Court.¹¹

v. **Ongoing Studies of Water Quality on the Wisconsin River Do Not Nullify DNR's Obligation to Impose Necessary Limits to Protect Downstream Waters.**

The fact that DNR has collected data and alluded to the development of a TMDL on the horizon, does not make the consideration of, calculation of, or imposition of phosphorus WQBELs to protect downstream waters discretionary. DNR may not choose to avoid its legal obligations.¹²

That DNR's "guidance currently does not contain procedures for calculating such limits short of a TMDL" also does not relieve DNR of its statutory and regulatory obligations. (R.11:57; A-App.31.) While DNR may impose a phosphorus limit derived to meet that TMDL, either *in addition to*, or *in lieu of* the WQBELs calculated under NR 217.13, DNR is not authorized to issue a WPDES permit with neither. Wis. Admin. Code § NR 217.16.

EPA has soundly rejected DNR's prior attempts to delay imposition of limits to protect downstream waters while it awaits the potential future development of a TMDL. During

¹¹ EPA's legal interpretation of NR 217 is relevant to the statutory and regulatory construction and does not supplement the record.

¹² Whether the data collected by DNR is sufficient to develop limits to protect Lakes is not a question before this Court.

the drafting of Wis. Admin. Code NR 217, Subchapter III, EPA informed DNR that “[a] compliance schedule based solely on time to develop a TMDL is not appropriate under 40 C.F.R. § 122.47” and directed DNR to remove draft rule language authorizing DNR to “consider the likelihood that a TMDL will be developed and approved within the permit term . . .” when authorizing a compliance schedule. (R.50:8 at ¶15.) EPA explained the proper procedure for issuing permits before, and after, development of a TMDL:

[t]o the extent that Wisconsin develops and EPA approves a TMDL during a permit term, . . . , the State could modify the permit to incorporate the TMDL-based limit . . .

(R.50.8 at ¶15.) DNR is now attempting to do indirectly that which its regulations and statutes specifically do not authorize—await a complete and approved TMDL before imposing phosphorus WQBELs to protect downstream waters.

Foremost is wrong to imply that DNR has only two options here: 1) issue a permit with technology limits and await a TMDL or 2) not reissue the permit until the TMDL is complete. There is nothing preventing DNR from utilizing the years of data already collected to calculate and impose limits to

protect downstream waters now. If a TMDL is later developed and approved, DNR may include those TMDL-based limits in Foremost's permit at that time. Wis. Admin. Code § NR 217.16. What DNR may not do, is authorize a discharge of pollutants but forgo phosphorus WQBELs to protect downstream waters while it awaits the development and approval of a future TMDL. This violates state and federal CWA requirements.

Foremost repeatedly misquotes the record as indicating that there is no technically feasible way to determine the limits necessary to protect the Lakes.¹³ This is a fact of Foremost's invention, not DNR's conclusion. Foremost misinterprets DNR's statement in the September 20, 2011 memo, that there was no **guidance** regarding imposition of limits in the Wisconsin River Basin. This is not the same as saying DNR is unable to calculate those limits. The record does not indicate that DNR lacked necessary data or technical capacity to develop water quality based effluent limits necessary to ensure that Foremost will not contribute to the impairment in Lakes.

¹³ Foremost grossly mischaracterizes the facts on record, repeatedly asserting that DNR concluded that it is presently **unable** to 'develop effluent limitations in situations covering multiple discharges which are contributing to a downstream impairment . . .' (See Foremost Br. at 9, 11, 19, 49, 54, 55).

What the record does show is that DNR made no further attempts to calculate limits to protect the Lakes after Russ Rasmussen's determination that DNR would not be imposing limits to protect downstream waters until the TMDL process plays out.^{14,15}

II. DNR'S ISSUANCE OF THE FOREMOST PERMIT IS A FINAL AGENCY DECISION FOR PURPOSES OF JUDICIAL REVIEW

Despite its strident assertion that DNR's decision to forgo limits necessary to protect downstream waters was well reasoned and clearly supported by the record, Foremost also argues that the same decision was not actually a well supported decision at all, but a merely preliminary action that does not impact anyone's legal rights, and is the beginning of a 7-year decision making process. (Foremost Br. at 24, 25, 26).

DNR is not authorized to impose *informational* WQBELs, and the Foremost permit does not contain any WQBELs that lack legal effect. More importantly, MEDC is

¹⁴ There is no support in the record for DNR's statement that the TMDL process "is the most economically efficient and expedient method" to attaining phosphorus water quality standards in the Wisconsin River. (R.11:159; A-App.58)

¹⁵ "[P]ost hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981)

challenging DNR's failure to follow statutory and regulatory requirements in preparing and issuing the final permit—namely its failure to assess the need for, to calculate, and to include limits, and other permit terms, necessary to protect aquatic life and recreation in downstream Lakes. (R.1:¶¶74, 77.)

In addition, DNR's justification for failing to take these required actions—that the calculation of limits is optional and that DNR guidance does not contain procedures for calculating such limits short of a TMDL—is an erroneous interpretation of state law and DNR's own regulations. (R.1:¶¶80-81.) Thus, it is the DNR's issuance of the final permit without following mandated requirements that is at the heart of MEDC's request for review. MEDC asks this Court to determine whether DNR followed legal requirements in issuing *this* Permit. Any limits the DNR may impose in the future are irrelevant.

Foremost can only prevail if this Court finds that:

1) DNR's failure to assess the need for and impose phosphorus limits to protect downstream waters during *this* permit term can only be reviewed after *this* permit has expired – an absurd construction of law; or

2) no person, including a permittee, could ever challenge limits associated with permit terms that extend beyond the 5 year term of a WPDES permit – a construction contrary to state laws and the CWA.

3) An individual could challenge a permittee's

effluent limits years after they were calculated and included in a WPDES permit and after the permittee had spent time and money developing plans and taking steps to meet those limits.

A. The Standard of Review is *De Novo*

Whether an administrative order is final for purposes of judicial review is a question of law, which appellate courts review *de novo*. *Sierra Club v. DNR*, 2007 WI App 181, ¶13, 304 Wis. 2d 614, 736 N.W. 2d 918.

B. Wis. Stat. § 227.52 Provides for Review of Final Orders of Administrative Agencies

Wis. Stat. § 227.52 provides for judicial review of “final orders of the agency.” *Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157, 160-61 (1973). The question of finality is not decided by focusing on individual issues:

the legislature did not intend that the term “decision” in WIS. STAT. § 227.52 means a decision on each particular substantive issue. Such a construction would result in more than one appeal in many administrative proceedings concerning a challenge to a permit. This is inconsistent with the principle that judicial review should be of the agency action “in its entirety.”

Sierra Club v. DNR, 304 Wis. 2d 614 at ¶24.

A final administrative order “directly affects the legal rights, duties, or privileges of a person; one aspect of this

standard is whether the person would have another opportunity for judicial review.” *Id.* at ¶15 (quoting *Pasch*, 58 Wis. 2d at 356-357). That an issued permit is a final agency action is often presumed to the point that courts spend little time analyzing the issue. *See Sierra Club v. Dairyland Power Co-op.*, No. 10-CV-303-BBC, 2010 WL 4294622, at *16 (W.D. Wis. Oct. 22, 2010). The legal rights and obligations established for a defined period “have an immediate impact upon the parties concerned” and are final for purposes of judicial review regardless of the possibility that future action by an administrative body may change the requirements in an order. *Friends of the Earth v. PSC*, 78 Wis. 2d 388, 405, 254 N.W.2d 299 (1977). Conversely, “an interlocutory order is one where ‘the substantial rights of the parties involved in the action remain undetermined and ... the cause is retained for further action.’” *Pasch*, 58 Wis. 2d at 354.

C. DNR’s Issuance of the Foremost Permit Is a Final Agency Order for Purposes of Judicial Review.

The requirements, or lack thereof, contained in the Foremost permit establish the legal rights of the parties and the protections that the receiving and downstream waters, and users of those waters, will be or will not be accorded, for, at least, the

next five years. There can be no doubt that the lack of terms in a permit is reviewable at the time the permit is issued, any conclusion to the contrary would eternally delay review of a permit that fails to include provisions, requirements, or terms, that are required by Wisconsin law but not imposed by DNR. Wis. Stat. § 227.52.

MEDC is challenging DNR's failure to follow legal and regulatory requirements when it issued *this* permit. Without judicial review now, at least 5 years will pass without DNR determining permit terms and conditions to protect downstream waters that MEDC alleges is legally required *now*. It is simply beyond logic to make MEDC wait five years to challenge DNR's failure to take an action DNR was legally obligated to take before issuing *this* permit.

Even if MEDC were, as Foremost argues, challenging DNR's use of the term "informational" or the final WQBELs calculated to protect aquatic life in the Wisconsin River at the point of Foremost's discharge, the result is no different – there are no limits in the permit to protect the downstream Lakes, which is precisely what MEDC alleges is contrary to state law. The Foremost permit either does or does not contain WQBELs to protect downstream waters.

Foremost has pointed to no legal authority for DNR to calculate or include *informational* phosphorus limits in permits. Had DNR truly intended the limits to be a tentative first step in a lengthy decision-making process, it could have notified Foremost of the potential limits in a variety of manners other than legally binding WPDES permit obligations.

Any assertion that “final phosphorus effluent limitations” and “required” actions that take effect after the stated five year term of its permit lack legal significance, ignores the plain language of the Foremost permit and is contrary to Wisconsin law. (R. 11:169, 173-175, A-App.10, 14-16.) Foremost ignores key language in the permit indicating that the terms of the permit that take effect after the five-year term of the permit are final and enforceable, including: phosphorus limits labeled as “Final Phosphorus Effluent Limitations” and referred to as the “final calculated effluent limitations for phosphorus” (R.11:169, A-App.10); and compliance schedule actions that are associated with “Due Dates” beyond the five-year term of the permit are “required actions.”¹⁶ (R.:11:174, A-App.15).

¹⁶ That the terms of the permit may be modified at the next reissuance is irrelevant to the finality analysis –all permit terms are subject to

If the phosphorus limits are merely preliminary, the inclusion of a compliance schedule in the Foremost permit is superfluous. For example, by July of this year Foremost must submit a facility planning status report that provides an update “on the permittee’s progress in evaluating feasible alternative for meeting the phosphorus WQBELs.” (R11:174, A-App.15). If limits driving the submittal of facility planning reports do not, as Foremost indicates, “have regulatory impact during the term of the current permit” (Foremost Br. at 24), then what does?

DNR is not authorized to issue a compliance schedule that includes actions that are anything but final and enforceable. Wis. Stat. § 283.01(15) (A schedule of compliance is “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation . . .”). Under Foremost’s logic, DNR could not legally issue a compliance schedule extending beyond the five-year term of a permit because the remedial measures scheduled for completion after the five-year permit term would not be “enforceable.”

modification by facility request or at DNR’s discretion. Wis. Stat. § 283.53.

As DNR has recently explained, limitations or requirements in a compliance schedule that take effect after the stated expiration date of the permit should be challenged at the time they are initially imposed – in other words, *now*. (R.-App. 217.)¹⁷ A challenge is waived if those limitations or requirements take effect and were not challenged at the time they were first included in the permit.¹⁸ (R.-App. 217.) But, if DNR modifies those terms before they go into effect, then the modified terms are challengeable at the time DNR makes the modification.¹⁹ (R.-App. 217.) This is consistent with DNR’s explanation to permittees requesting “advisory” limits:

Since the permit contains a compliance schedule the final effluent limit must be included in the permit, even if it is not effective during the term of the permit. . . . Upon the approval of a TMDL [], the final effluent limit may then be based upon that TMDL. Whether water quality based or TMDL based, those effluent limits are considered final – not

¹⁷ MEDC requests that this Court take judicial notice of the EPA’s letter pursuant to Wis. Stat. § 902.

¹⁸ To the contrary, Foremost’s argument would both 1) bar permittees from challenging the phosphorus WQBELs, and other obligations required after five-year permit term– a result not likely to please permittees and 2) authorize individuals to challenge a facility’s permit limits years after the facility had invested time and money taking steps to meet those limits.

¹⁹ DNR’s analysis of the finality of limits and required actions associated with extended compliance schedules is the same, regardless of whether the compliance schedule incorporates the term “informational” or not.

advisory – and therefore will be referred to as such in the permit.

(R. 29:42, R.-App. 163.) That interpretation is consistent with EPA’s approval of Wis. Admin. Code § NR 217.17, in which EPA stated that “if a NPDES permit is issued with a compliance schedule that extends past the expiration date of a permit, then the permit must include the final effluent limitations and any interim or final requirements that apply after permit expiration must be enforceable.” (R:39:14-15, R.-App. 212.)

DNR’s issuance of the Foremost permit, with, or without, specified requirements is a final agency action subject to review under Wis. Stat. § 227.52. Any interpretation otherwise is contrary to law and the plain language of the Foremost permit, and would lead to absurd results.

III. MEDC PROPERLY SOUGHT REVIEW OF THE DNR’S DECISION TO ISSUE THE FOREMOST FARM’S PERMIT UNDER § 227.52

The Circuit Court correctly found that MEDC has a right to seek § 227.52 judicial review of the DNR’s decision to issue the Foremost WPDES permit. Wisconsin Stat. § 227.52 provides any aggrieved person a right to seek judicial review of administrative agency decisions where such review

is not otherwise explicitly precluded. With respect to DNR's WPDES permitting decisions, the legislature has granted certain individuals an additional, discretionary layer of administrative review for limited aspects of those decisions. *See* Wis. Stat. § 283.63. Section 283.63 does not, either explicitly or implicitly, preclude the separate right to judicial review under Wis. Stat. § 227.52, especially for those who are not even eligible to seek administrative review. This is evident from a simple, plain-language analysis of the relevant statutes and supporting case law.

Lacking any textual support for what amounts to a jurisdictional argument, Foremost instead relies on a strained interpretation of the Supreme Court's decision in *Sewerage Commission v. DNR*, and calls for the incorrect application of discretionary doctrine of exhaustion. 102 Wis. 2d 613, 307 N.W.2d 189 (1981). Foremost's backdoor attempt to eliminate an individual's statutorily guaranteed right to seek review of the DNR's WPDES permitting decisions is not only a waste of judicial resources, but is a direct affront to the principles of fairness and notice that underlie the exhaustion doctrine. This is especially true given DNR itself has

publically indicated that § 227.52 review is available to MEDC and is, in fact, their *only* available remedy.

A. The Standard of Review is *De Novo*

The resolution of the exhaustion issue involves questions of statutory interpretation and legislative intent, and the application of the well-established principle of exhaustion. Statutory interpretation is a matter of law that appellate courts review de novo. *Fazio v. Dep't of Employee Trust Funds*, 2002 WI App 127, ¶7, 255 Wis. 2d 801, 645 N.W.2d 618. As this Court explained in *Metz v Veterinary Examining Bd.*, the majority of reviewing courts also apply a *de novo* standard of review of a circuit court's decision on whether to apply the doctrine of exhaustion. 2007 WI App 220, ¶¶16-17, 305 Wis. 2d 788, 741 N.W.2d 244.

B. Wisconsin Stat. § 283.63 Neither Precludes Judicial Review Nor Establishes a Mandatory Prerequisite to Judicial Review.

While Foremost repeatedly refers to § 283.63 as the “legislatively-mandated,” “mandatory,” and “required” review procedure, the statute itself notably lacks any such mandatory language. Wisconsin Stat. § 283.63 states that a permittee, permit applicant, affected state or 5 or more

persons “*may secure a review by the department.*” Nowhere does it say that 283.63 is the “mandatory” or “required” method of review of permits or that administrative review is a mandatory prerequisite to seeking 227.52 review. According to DNR “§ 283.63 appears to be intended primarily for the protection of WPDES permittees who are aggrieved by a permit term or condition.” (R.19:21, R.-App. 230.)

Though not entirely clear, Foremost appears to point to the clause “[s]uch review shall be accomplished in the following manner” to support its assertion that 283.63 review is mandatory. (Foremost Br. at 32-33.) That clause, however, establishes the procedure that must be followed if 283.63 review is sought—it does anyone seeking review must use 283.63.

In *Stacy v. Ashland County Dep't of Pub. Welfare*, the Supreme Court explained that statutory exceptions to 227.52 review “*should be as clear and expressive as the exceptions provided in [227.52-227.58].*” 39 Wis. 2d 595, 602, 159 N.W.2d 630 (1968) (emphasis added). In numerous statutes, the Legislature has used this requisite “clear and expressive” language to either exempt administrative decisions from 227.52 review or to create mandatory prerequisites to 227.52

review. *See e.g.* Wis. Stat. § 86.18(4) (stating “[a]ppeals from the final determination of the highway commissioner may be had, and shall thereafter be heard as provided in s. 66.0703(12) and such remedy shall be exclusive.”); *see also* Wis. Stat. § 88.44(4) (stating “an interested person shall submit a petition under sub. (1) and obtain either the decision of the drainage board under this section or a denial of the petition for a hearing before seeking judicial review of the drainage board's order levying an assessment.”); *see also* Wis. Stat. § 196.85(8) (stating “[t]he procedure by this section providing for determining the lawfulness of bills and the recovery back of payments made pursuant to such bills shall be exclusive of all other remedies and procedures.”).

Unlike those statutes, Wis. Stat. § 283.63 does not state that a person must petition DNR for a hearing before seeking judicial review. And more importantly, it does not prohibit those who are not able to seek review under 283.63 from seeking judicial review. Given that the legislature has clearly and explicitly established prerequisites to judicial review in other statutes, it would be improper to read such a requirement into 283.63. *See Outagamie County v. Town of Greenville*, 2000 WI App 65, ¶9, 233 Wis. 2d 566, 608

N.W.2d 414 (“[I]f a statute contains a given provision, the omission of that provision from a similar statute concerning a related subject is significant in showing that a different intention existed.”) (*internal quotation omitted*).

C. Interpreting § 283.63 as a Mandatory Prerequisite to Judicial Review Would Defeat the Manifest Purpose of Chapter 283.

If Wis. Stat. § 283.63 is interpreted as a mandatory prerequisite to judicial review, DNR’s permitting program will violate Clean Water Act requirements—therefore defeating the purpose of Chapter 283. The legislature’s explicit purpose in enacting Chapter 283 was to grant DNR authority to “establish, administer and maintain a state pollutant discharge elimination system . . . consistent with all the requirements of the [Clean Water Act].” Wis. Stat. § 283.001(2). The Clean Water Act and its implementing regulations instruct states to allow judicial review of permits “sufficient to provide for, encourage, and assist public participation in the permitting process.” 40 C.F.R. § 123.30. Any judicial review procedure that “narrowly restricts the class of persons” who may challenge a permit violates this requirement. *Id.*

In its letter identifying omissions and deviations between Wisconsin's WPDES program and federal CWA requirements, EPA specifically requested DNR to “document how its provisions for judicial review provide as expansive an opportunity for judicial review as do the federal requirements.” (R.-App. 105.) The EPA’s letter prompted DNR to seek an opinion from the Attorney General regarding individual’s rights to seek judicial review of WPDES permits. In subsequent correspondence to DNR, the EPA stated that its concerns regarding the right to judicial review were resolved based, in part, on the fact that “[t]he AG Letter explains that the State provides for individual petitions for judicial review pursuant to Wis. Stat. §§ 227.52-.58.” (R.-App. 246.)^{20,21}

Through the enactment of the 227.52-.58, the Legislature indicated its intent to allow every person aggrieved by agency action to seek judicial review of that action. The five-person requirement in 283.63 merely reflects that the Legislature has determined that more petitioners are required in order to expend agency resources in a resource-intensive contested case hearing. This does not, however, indicate that the

²⁰ MEDC requests that this Court take judicial notice of EPA’s letter pursuant to Wis. Stat. § 902.

²¹ The Attorney General must demonstrate to EPA that the laws of the delegated state meet the requirements of the CWA. 40 C.F.R. § 123.23.

Legislature intended to make 227.52 review completely unavailable to individual petitioners.

D. The Sewerage Commission Court Did Not Find That Wis. Stat. § 283.63 is a Mandatory Prerequisite to § 227.52 Review.

In asking this court to extend the holding of *Sewerage Commission v. DNR*, Foremost ignores the principles underlying the Supreme Court’s decision and the distinguishing facts of that case. Contrary to Foremost’s interpretation, the *Sewerage Commission* Court never analyzed whether a 283.63 contested case hearing is a prerequisite to judicial review under Wis. Stat. § 227.52. *See* 102 Wis. 2d 613. Furthermore, it is clear from the Court’s reasoning that it would be inappropriate to interpret 283.63 to extinguish MEDC’s right to judicial review because 283.63 does not provide individual petitioners such as MEDC “full access to both the administrative agency and the courts for review of permits.” *Id.* at 630.

The issue decided in *Sewerage* was whether a WPDES permittee who failed to seek review of its permit at the time it was issued could collaterally attack its permit years later in a declaratory judgment action challenging a rule underlying the

permit. *Id.* at 620-21. The Court’s analysis reconciled two statutory provisions prescribing alternative methods for challenging administrative rules: Wis. Stat. § 227.40(2)(e)—which authorizes review of a rule in a judicial review proceeding if the validity of the rule was first challenged before the agency—and Wis. Stat. § 227.40(1)—which authorizes review of the validity of a rule via a declaratory judgment action at any time.²² *Id.* at 621.

The Court assessed whether the more specific right of review under § 227.40(2)(e) was available to the permittee and whether review pursuant to that section superseded the more general right to review under Wis. Stat. § 227.40(1). *Id.* at 628-629. To determine whether 227.40(2)(e) was available to the permittee, the *Sewerage Commission* Court analyzed whether the permittee could have challenged the rule at the time the permit was issued under 283.63. *Id.* at 624-627. Having found that a rule challenge was available at the time the permit was issued via 227.40(2)(e), the Court then analyzed whether the doctrine of exhaustion precluded the permittee from utilizing the more general right of review

²² *Sewerage Commission* analyzed Wis. Stat. §§ 227.05(1), 227.05(2)(e), and 147.20 (1973), which were later renumbered Wis. Stat. §§ 227.40(1), 227.40(2)(e) and 283.63, respectively. For clarity MEDC references current statutes..

under 227.40(1). *Id.* at 630-632. Finding that the permittee “[did] not lose any rights, remedies, or forums by the preclusion of a later declaratory challenge,” because the permittee could have challenged the rule at the time the permit was issued, the Court held that the general procedure authorizing a rule challenge at any time, 227.40(1), was superseded by the specific procedure established in 227.40(2)(e). *Id.* at 631.

The Court’s analysis of Wis. Stat. § 283.63 was exclusively to determine whether the permittee could have met the legal requirements under 227.40(2)(e), namely whether it could have “duly challenged the rule before the agency.” The *Sewerage Commission* Court never addressed the availability of judicial review pursuant to 227.52 nor did it analyze or determine whether a 283.63 contested case hearing is a prerequisite to 227.52 judicial review.²³ *See* 102 Wis. 2d 613.

²³ In its initial brief, *Foremost* misleadingly asserts that the *Sewerage Commission* Court “stated that the administrative review procedure in Section 283.63 is a ‘prerequisite’ to Chapter 227 judicial review.” (*Foremost* Br. at 36.) More accurately, the Court stated section 283.63 review was a prerequisite to “a declaratory challenge to the validity of the rule . . . under the clear and unambiguous terms of sec. [227.40(2)(e)].” 102 Wis. 2d at 621. The Court was merely reiterating that § 227.40(2)(e) explicitly requires a person to first challenge a rule in

Here, unlike the permittee in *Sewerage Commission*, MEDC is not challenging a rule in a declaratory judgment action, and MEDC **will** lose its statutory rights to judicial review if the Court expands the *Sewerage Commission* holding to make 283.63 a prerequisite to judicial review. As noted by Attorney General Van Hollen in an analysis of *Sewerage Commission* that the Circuit Court found persuasive:

Individual “affected” persons did not then, and do not today, have the right either to challenge a decision or to challenge a rule under Wis. Stat. § 283.63. Thus, the only means of judicial review of WPDES decision for lone individuals is through Wis. Stat. §§ 227.52-227.58.

(R.20:5, A-App.62.) Because 283.63 does not provide individual petitioners with “full access to both the administrative agency and the courts for review of permits,” the Attorney General concluded that “*Sewerage Commission* is distinguishable in a very crucial respect” from situations in which individuals are seeking judicial review under 227.52, “and clearly does not apply.” (R.20:5, A-App..62.)

As mentioned, but not fully explained by Foremost, the Court voiced concern that authorizing a permittee to

an administrative proceeding before challenging the rule in a judicial proceeding.

challenge a rule under Wis. Stat. § 227.40(1) *years after a permit was issued*, rather than at the time the permit was issued, would promote “lying in the weeds” and create “an end run around administrative and judicial review of the department’s action at the time the permits are issued.” *Id.* at 632. Here, MEDC is not asking this Court to pass on the validity of a rule, nor are they attempting to collaterally attack the permit years after issuance via alternative legal remedies such as a declaratory judgment action. MEDC is doing precisely what the *Sewerage Commission* court would have expected—they are utilizing the only remedy available to it to challenge DNR’s decision to issue the Foremost Farms permit, all within the statutorily prescribed time limit for judicial review.

For these reasons, *Sewerage Commission* does not alter the plain language analysis of the relevant statutory procedures, which provide individual persons the right to challenge a WPDES permit through Wis. Stat. § 227.52.

E. The Circumstances of This Case Do Not Give Rise to the Doctrine of Exhaustion.

Under the doctrine of exhaustion, statutory procedures for court review of administrative decisions “must be

employed before *other remedies* are used.” *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977) (emphasis added). Accordingly, exhaustion cases generally hold that where available, an aggrieved party should seek review of the agency action before requesting alternative relief available via other judicial remedies, such as declaratory judgment and injunctive relief.²⁴ MEDC is not seeking relief via alternative judicial remedies; they are doing precisely what these cases direct—seeking review of the agency’s decision.

In nearly all of the cases cited by Foremost in its briefs before this and the circuit court—including *Sewerage Commission*, the plaintiff attempted to skirt the statutorily-prescribed avenue for review of an agency action by bringing wholly separate civil actions seeking declaratory and injunctive relief, or by requesting review years after the agency decision was made. In many of these cases, the

²⁴ See *Metz v Veterinary Examining Bd.*, 305 Wis. 2d 788 (plaintiff could not bring actions for declaratory and injunctive review until after he pursued available administrative remedies, including judicial review); *St. Croix Valley Home Builders Ass’n v. Township of Oak Grove*, 2010 WI App 96, 327 Wis. 2d 510, 787 N.W.2d 454, (discussing the doctrine in the context of a declaratory judgment action); *Badger Paper Mills Inc. V. DNR*, 154 Wis. 2d 435, 452 N.W.2d 797 (Ct. App. 1990), (request for declaratory and injunctive relief); *Jackson County Iron Co. v Musolf*, 134 Wis. 2d 95, 396 N.W.2d 323 (1986); *Nodell Inv. Corp v City of Glendale*, 78 Wis. 2d 416; *Sewerage Comm’n of City of Milwaukee v. DNR*, 102 Wis. 2d 613.

plaintiff sought relief unavailable under Wis. Stat. § 227.52, or advanced alternative legal theories because statutory deadlines for administrative and judicial review had expired.

By contrast, MEDC is not seeking review years after it the permit was issued, nor has it filed a separate civil action. Judicial review under 227.52 is an appeal of an administrative action, it is limited in scope, is confined to the record, must be filed within a relatively short period of time, and provides only limited relief.

F. The Doctrine of Exhaustion Does Not Apply Where the Administrative Remedy is Inadequate or Where There Are Good Reasons to Make an Exception.

In the event that this Court extends the reach of the doctrine of exhaustion to the circumstances at hand, Foremost's exhaustion arguments can be disposed of very easily under the principles for applying the doctrine. While Foremost portrays the exhaustion doctrine as a rigid and unbending rule for which there are few exceptions, case law has long-established that it is a rule of "policy, convenience, and discretion." *County of Sauk v. Trager*, 118 Wis. 2d 204, 211-12, 346 N.W.2d 756 (1984); *State ex rel. First Nat'l*

Bank v. M & I Peoples Bank, 82 Wis.2d 529, 542, 263 N.W.2d 196 (1978).

When deciding whether to apply the doctrine, courts should consider a “party’s right to obtain a judicial forum and a just, equitable decision on the merits.” *State ex rel. First Nat’l Bank*, 82 Wis.2d at 543. Accordingly, an important premise underlying the doctrine is that an “administrative remedy is available to the party on his initiative” and that the administrative remedy “will protect the party's claim of right.” *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d at 424 *see also Perkins v. Peacock*, 263 Wis. 644, 658, 58 N.W.2d 536 (1953). Where the administrative remedy is “**for any reason, inadequate**,” or as here, completely unavailable, courts should exercise their discretion to not apply the doctrine. *Trager*, 118 Wis. 2d at 214

It would be improper to apply the doctrine here because MEDC utilized the only remedy available—judicial review of DNR’s issuance of the Foremost permit. As Foremost acknowledges, 283.63 review is available to a limited subset of statutorily defined petitioners: a permit applicant, a permittee, an affected state, or 5 or more persons. A person is defined, in relevant part, as a corporation. Wis. Stat. §

283.01(11). Thus, as an individual corporation, MEDC is legally a person and does not constitute “5 or more persons.” The statutes are clear that review under 283.63 is not available to MEDC.²⁵ *See also supra* at 8-9 discussing the Attorney General’s letter.

Foremost’s sweeping, and unsupported, arguments regarding uniformity and consistency are irrelevant—the Legislature chose to provide to a limited subset of potential challengers a supplementary right to *de novo* review and development of a factual record through a contested case hearing. Those that are prohibited from this opportunity to create an additional factual record under Wis. Stat. § 283.63 do not somehow gain superior rights. To the contrary, individuals are limited to a review of the record and restrained by a high level deference to DNR’s factual determinations.

Moreover, it has been DNR’s practice to deny the

²⁵ While MEDC is a membership organization, the corporation as an individual “person” and not the members of the organization filed the petition in this case. A number of judicially recognized policy reasons support a membership organization’s right to file lawsuits on behalf of its members, including the removal of certain disincentives to filing lawsuits by shielding individual members from potential financial or social retaliation, and allowing individuals to pool money and resources. *See e.g. Metro. Builders Ass’n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶ 16, 282 Wis. 2d 458, 698 N.W.2d 301.

opportunity for a contested case hearing on claims such as those asserted by MEDC. Wis. Stat. § 283.63 is limited by the plain language of the statute, which according to DNR:

sets out a specialized review procedure. . . . The statute is narrow in the scope of review that it affords. Only the reasonableness of or the necessity for a term or condition contained in the [] permit may be reviewed. The statute is unambiguous in this regard. It does not provide an opportunity for a review of the Department's decision to issue a permit in the first place, or for review of other agency action or inaction related to the [] permit, []. Finally, it does not provide a petitioner with the opportunity to propose new or additional "necessary" permit terms or conditions.

MEDC alleges that DNR failed to include phosphorus WQBELs sufficient to protect recreation in downstream waters. MEDC cannot request a contested case hearing to challenge the reasonableness of such a limit because DNR failed to perform the necessary analyses, and the permit does not contain such a limit. There are simply no limits in the permit that protect recreation in downstream waters for MEDC to challenge under Wis. Stat. § 283.63.

Furthermore, the policy reasons underlying the doctrine do not support its application here. Courts do not apply the doctrine where application of the doctrine would be harsh or unfair; and the agency has already informed the party

of its position on a question of law where the facts are not disputed. *Metz v. Veterinary Examining Bd.*, 305 Wis. 2d 788, ¶15

Importantly, DNR has not argued that MEDC failed to exhaust its administrative remedies. Rather, the party asserting that MEDC failed to exhaust its administrative remedies is an intervenor that does not benefit from application of any of the policy reasons underlying the doctrine. Foremost's sole purpose in asserting the doctrine appears to be to extinguish any rights to review for an entire category of petitioners. These unusual and perhaps unprecedented circumstances create a trap for potential petitioners who comply with an agency's instructions for seeking review of an administrative decision.

The sound administration of justice requires that members of the public should be able to rely on the Attorney General's and DNR's statements regarding the proper avenues for seeking redress of harms caused by DNR. It is unjust to allow an intervenor to use the discretionary doctrine of exhaustion to rob the public of their opportunity to participate—especially where there is no textual support for the intervenor's position. Despite Foremost's claim to the

contrary, to deny MEDC any opportunity for review of the Foremost permit, despite their good-faith compliance with the DNR's instructions would be harsh and unfair.

Additionally, exhaustion is not warranted because the issue in this case is purely legal: whether DNR complied with the requirements of state law in issuing the Foremost permit. *See Trager*, 118 Wis. 2d at 216 (providing that where an issue presented is one of law, that issue is “within the court’s expertise” and is “an issue which should be presented to the court”). This Court need not resolve factual questions such as what the appropriate limit might be – those factual considerations will be determined on remand.

Lastly, as recognized by the Circuit Court, DNR has already had an opportunity to develop an administrative record and employ its specialized expertise on questions of law. (R.62:58, A-App. 156.) The exact issues now before the court were presented to DNR during the public comment period, prior to issuance of Foremost’s Permit. DNR considered these comments, but decided not to make any changes to the Permit in response. (R.11:158-160, A-App.57-59). DNR did however explain its legal interpretation that state law does not require the agency to calculate WQBELs

that are protective of downstream waters. (R.11:159, A-App. 58.)

CONCLUSION

For the foregoing reasons, MEDC respectfully requests that this Court affirm the Circuit Court's decision denying Foremost's motion to dismiss and decision and order remanding the Foremost Farms WPDES permit to the DNR with instruction to calculate a WQBEL to protect downstream waters.

Dated this 28th day of April, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,916 words.

Dated: April 28, 2014

BY: /s/ Elizabeth Lawton
Elizabeth Lawton
State Bar No. 1050374

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief as of this date.

Dated: April 28, 2014

BY: /s/ Elizabeth Lawton
Elizabeth Lawton
State Bar No. 1050374

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING,
RENUMBERING, RENUMBERING AND AMENDING, AMENDING, AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 150.03 (11), NR 150.10 (1m) (b), and 150.20 (3) (a) 4. and 5.; to **renumber** NR 150.20 (2) (a) 5.; to **renumber and amend** NR 150.20 (2) (a) 18. and 19.; to **amend** 150.03 (1), (15) (intro.), (19), (25) and (26), 150.10 (1) and (1m) (a), (c) (intro.) and (2) (a), 150.20 (1), (1m) (a), (b), (d), (j), and (k), (2) (a) (intro.), 4., 7., 8., 10., 11., 12., 13., 14., 16., (2) (b), (3) (a) (intro.), 1., 6., 7., and 8., and (4) (b) (intro.), 150.30 (1) (g), (2) (b), (3) (c) 3., and (d), and 150.35; and to **create** NR 150.02 (Note), 150.03 (5m), (12m), (16m), (17m) and (Note), and (23m), 150.20 (1m) (ge), (gm), (gs), (jg), (jr), (m), (n), (nm), (o), (p), (pe), (pm), (ps), (q), (qm), (r), (s), (sb), (sf), (sk), (sp), (ss), (sw), (sy), (t), (u), (ug), (ur), (v), and (w), (2) (a) 2r., 3c., 3g., 3n., 7e., 7m., 7s., 18m., 19m., 20., 21., 22., and (3) (a) 9. and 10., and 150.30 (3) (d) (Note) relating to the department's environmental analysis and review procedures under the Wisconsin Environmental Policy Act.

OE-21-14

Analysis Prepared by the Department of Natural Resources

- 1. Statute interpreted:** Section 1.11, Stats.
- 2. Statutory authority:** Sections 1.11 and 227.11, Stats.
- 3. Explanation of agency authority:** The department has general authority to promulgate rules under s. 227.11 (2)(a), Stats., that interprets the specific statutory authority granted in s. 1.11, Stats.
- 4. Related statute or rule:** Wisconsin Environmental Policy Act (WEPA) compliance is a requirement for all state agencies and department programs. As a result, many statutes and codes are WEPA and ch. NR 150-related.

Statute chapters: 16, 23, 30, 33, 160, 196, 227, 285, 289, 291, 292 and 293.

Administrative Code chapters NR: 1, 2, 19, 44, 48, 52, 60, 103, 107, 108, 110, 113, 126, 128, 131, 132, 133, 134, 162, 166, 182, 191, 200, 243, 299, 300, 305, 310, 327, 345, 347, 406, 410, 489, 512, 670, 700-754, 820, and 852.

5. Plain language analysis:

Chapter NR 150 was revised and went into effect April 1, 2014. An emergency rule was approved by the Natural Resources Board in August 2014 and expired May 27, 2015. A revised scope statement was approved by the Governor on December 11, 2014 and approved by the Natural Resources Board on February 25, 2015. A second emergency rule consistent with the new scope statement was approved Natural Resources Board in May 2015. Public comments on the proposed permanent rule occurred in May and June, with a public hearing held in Madison on June 2.

The purpose of the proposed permanent rule is to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts.

Exhibit B 049

The proposed rule clarifies that emergency rules are “minor actions”, requiring no environmental analysis, and that the process for developing permanent rules is an “integrated analysis action,” requiring no separate environmental analysis process. The April 2014 revision of the rule was not perfectly clear to this point.

Procedures for WEPA compliance determinations and publication requirements have been clarified.

This proposed permanent rule includes clarification changes regarding strategic analysis requirements. Consistent with the intent of the current rule, the rule clarifies that a strategic analysis is required for review of significant policies, but for other policies or issues the strategic analysis may be used as a discretionary tool.

The list of minor actions, not requiring environmental analysis, has been expanded to include actions that originally were intended to be outlined in program guidance. The April 2014 version relied on reference to “routine and small-scale” permits or approvals as a catch-all category for minor actions that would be listed in guidance and reviewed by the public through the guidance review process. The revision in this proposed permanent rule clarifies by rule the list of activities that are minor actions.

The terminology of “equivalent analysis actions,” for which a detailed environmental analysis and public disclosure are already conducted as part of department programmatic procedures, has been changed to “integrated analysis actions” and the definition has been clarified to explain that no separate environmental analysis process is required. The list for this category has been expanded and amended to provide additional clarity on actions covered under this subsection.

The list of prior compliance actions, for which one or more environmental analysis documents exist for similar prior actions, has been expanded to provide additional clarity on actions covered under this subsection.

6. Summary of, and comparison with, existing or proposed federal statutes and regulations:

The 1970 Wisconsin Environmental Policy Act (WEPA) and s. 1.11, Stats., were modeled after the federal National Environmental Policy Act (NEPA) of 1969. NEPA created the Council on Environmental Quality (CEQ), which established guidelines and regulations to implement the Act. As with other state agencies' WEPA rules, ch. NR 150 and these clarifying provisions are based in part upon the federal CEQ guidelines. This proposed revision of ch. NR 150 will remain substantially consistent with the CEQ guidelines as required under s. 1.11 (2)(c), Stats.

7. Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan and Minnesota):

Neighboring states have significant differences in their related laws, so the opportunity to gain from their experience is limited. For example, Minnesota requires that counties also follow WEPA-like analysis procedures, whereas Wisconsin counties have no such requirements. Illinois' law covers only actions conducted by the state itself, whereas in Wisconsin, WEPA applies to all actions by other entities that are subject to state approvals.

8. Summary of factual data and analytical methodologies used and how any related findings

support the regulatory approach chosen: Department of Natural Resources staff obtained the input of an internal team of staff from several department programs, building on the prior review of relevant WEPA case law and federal CEQ regulations.

9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact report: Chapter NR 150 is an administrative process rule that applies internally to the department, so impacts to businesses are minimal.

10. Effect on small business (initial regulatory flexibility analysis):

There will be no impact to small business as a result of this rule revision. This proposed permanent rule will benefit small businesses to the extent that they clarify any ambiguity of the intent of the rule, as presented to the public and approved by the NRB.

11. Agency contact person:

Jim Pardee
Phone: (608) 316-0999

SECTION 1. NR 150.02 (Note) is created to read:

NR 150.02 (Note) There are several statutory exemptions from s. 1.11, Stats., including the following: s. 30.025, Stats. (construction of certain high voltage transmission lines); ss. 160.23 and 160.25, Stats. (responses to groundwater standards exceedances); s. 283.93, Stats. (WPDES permit actions, except for WPDES permit actions for new sources); s. 285.60(2g)(b) and (3)(b), Stats. (air registration permits and general permits); and ss. 295.44, 295.45, 295.65, and 295.645, Stats. (ferrous mining exploration licenses, bulk sampling approvals, successor operators, and responses to groundwater standards exceedances). The department may have previously conducted environmental analyses under s. 1.11 Stats., for actions that are exempt under s. 283.93, Stats., even though the department was not statutorily required to do so.

SECTION 2. NR 150.03 (5m) and (12m) are created to read:

NR 150.03 **(5m)** "Department facility" means department infrastructure, including dams, buildings, roads, and trails for resource management, public use, or other purposes.

(12m) "Integrated analysis action" means a department action for which department programmatic procedures provide for public disclosure and include an environmental analysis that provides sufficient information to establish that an environmental impact statement is not required.

SECTION 3. NR 150.03 (1) is amended to read:

NR 150.03 **(1)** "Action" means any final decision by the department to exercise the department's statutory or administrative rule authority that affects the quality of the human environment including

actions under s. NR 150.20 (1m) to (4), but not including policies as defined in sub. (19).

SECTION 4. NR 150.03 (10) and (11) are repealed.

SECTION 5. NR 150.03 (15) (intro.) is amended to read:

NR 150.03 (15) (intro.) "Minor action" means a department action that is not subject to s. 1.11 (2) (c), Stats., because it is not in conflict with local, state or federal environmental policies and is not likely to do any of the following:

SECTION 6. NR 150.03 (16m) and (17m) and (Note) are created to read:

NR 150.03 (16m) "Natural resource management, timber management, or environmental restoration" includes all actions associated with the management, economic production, protection, and restoration of native and non-native fish, game, plants, trees and timber, habitat protection, habitat management, habitat restoration, silvicultural practices, forest inventory, chemical and mechanical site preparation, timber harvesting, timber sales, timber transporting, tree planting, direct seeding, forest type conversions, invasive species control, timber stand improvement activities, forest nursery operations, prescribed burning, fire prevention, fire detection, fire suppression, rehabilitation of fire burned areas, environmental remediation, fish hatchery operations, state game farm operations, pesticide or herbicide applications, and field surveys for environmental protection.

(17m) "New source" has the meaning given in s. 283.01(8), Stats.

Note: Section 283.01(8), Stats., defines "new source" to mean any point source the construction of which commenced after the effective date of applicable effluent limitations or standards of performance.

SECTION 7. NR 150.03 (19) is amended to read:

NR 150.03 (19) "Policy" means a written plan or set of guiding principles, priorities, or protocols to guide department action that has been ~~enacted as a statute, promulgated as an administrative rule,~~ issued as a department manual code, or approved in writing by the natural resources board or the department secretary, but does not include actions as defined in sub. (1).

SECTION 8. NR 150.03 (23m) is created to read:

NR 150.03 (23m) "Publicly announce" or "public announcement" means publication on the department's internet web site, or other reasonable methods to provide public notice.

SECTION 9. NR 150.03 (25) and (26) are amended to read:

NR 150.03 (25) “Strategic analysis” means an environmental and alternatives analysis of ~~any~~ an issue or policy ~~which involves unresolved conflicts concerning alternative uses of available resources, within the meaning of s. 1.11 (2) (e), Stats.~~

(26) “Unresolved conflicts concerning alternative uses of available resources” means an unsettled disagreement between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin concerning a department policy affecting the utilization of a substantial natural resources, between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin or physical resource where the utilization would be of sufficient magnitude that, on a statewide or regional basis, it would have a considerable and important impact to the natural resources of the state. To be considered an unresolved conflict concerning alternative uses of available resources, the disagreeing parties must have identified a technically and economically feasible alternative use of the contested physical or natural resource, or both, and have the ability to reasonably implement that alternative.

SECTION 10. NR 150.10 (1) and (1m) (a) are amended to read:

NR 150.10 (1) ~~GENERAL REQUIREMENT PURPOSE.~~ Pursuant to This section establishes the procedures to fulfill the requirements of s. 1.11 (2) (e) and (h), Stats., the department shall study, develop, and describe alternatives for natural resource issues or policies which involve unresolved conflicts concerning alternative uses of available resources.

(1m) (a) ~~Administrative rules and manual codes~~ Policies. The department shall conduct a strategic analysis for all new or revised ~~administrative rules and manual codes~~ policies if both of the following apply:

1. ~~The rule or manual code~~ policy involves unresolved conflicts concerning alternative uses of available resources.
2. The department has substantial discretion in formulating important provisions of the ~~rule or manual code~~ policy.

SECTION 11. NR 150:10 (1m) (b) is repealed.

SECTION 12. NR 150.10 (1m) (c) (intro.) and (2) (a) are amended to read:

NR 150.10 (1m) (c) ~~Other issues or policies.~~ (intro.) The Although not required under this section, the department may conduct a use the strategic analysis processes in subs. (2) to (4) for any of the following issues or policies:

Exhibit B 053

(2) (a) *General requirement.* The department shall determine the scope of ~~important issues to be analyzed~~ the analysis, potential alternative approaches, potentially affected natural resources, and likely effects of the alternatives on those resources. The department shall also identify incomplete or unavailable information that is relevant to a reasoned choice among alternatives.

SECTION 13. NR 150.20 (1) and (1m) (a), (b), and (d) are amended to read:

NR 150.20 (1) ~~PROCEDURES ESTABLISHED~~ PURPOSE. This section establishes ~~appropriate procedures for the environmental analysis that WEPA requires for all department actions except those specifically exempted by statute. Notwithstanding subs. (1m) to (3), the department may determine to follow the EIS procedures in s. NR 150.30 for any action~~ the procedures to fulfill the requirements of s. 1.11(2)(c), Stats.

(1m) (a) A real estate action, including property boundary establishment or modification, purchase, sale, easement, lease, ~~or designation, redesignation, or dedication.~~

(b) ~~Facility development~~ Development or construction of new department facilities that follows protocols.

(d) The operation, repair, maintenance, removal, or in-kind replacement of existing department facilities that follows protocols.

SECTION 14. NR 150.20 (1m) (ge), (gm), and (gs) are created to read:

NR 150.20 (1m) (ge) Educational activities.

(gm) Model ordinances developed to assist municipalities in the creation of ordinances.

(gs) Consultation offered to third parties.

SECTION 15. NR 150.20 (1m) (j) is amended to read:

NR 150.20 (1m) (j) Reissuance, modification, revocation, and reissuance, or issuance of a routine or small-scale permit approval or action.

SECTION 16. NR 150.20 (1m) (jg) and (jr) are created to read:

NR 150.20 (1m) (jg) Routine variances from department rule requirements.

(jr) Denial, termination, revocation, or suspension of a grant, permit, license, approval, variance, land application site, or of any proposed activity.

SECTION 17. NR 150.20 (1m) (k) is amended to read:

NR 150.20 (1m) (k) ~~Issuance of a~~ A routine or small-scale approval or action, or an approval or action associated with a permit.

SECTION 18. NR 150.20 (1m) (m), (n), (nm), (o), (p), (pe), (pm), (ps), (q), (qm), (r), (s), (sb), (sf), (sk), (sp), (ss), (sw), (sy), (t), (u), (ug), (ur), (v), and (w) are created to read:

NR 150.20 (1m) (m) Promulgation of emergency administrative rules under ch. 227, Stats.

(n) Any enforcement action.

(nm) Any emergency action that protects public health, safety, or welfare.

(o) Issuance of a minor source construction permit under ch. NR 406 or an operation permit renewal or revision under ss. 285.60, and 285.62, Stats., for air emission sources.

(p) Issuance of licenses for servicing septage and approvals of county programs to regulate the disposal of septage under s. 281.48, Stats.

(pe) Issuance of operator certifications under s. 281.17 (3), Stats., and licenses or registrations for well drillers and pump installers.

(pm) Approvals of geothermal heat exchange projects.

(ps) Approvals of additives to wastewater or cooling water.

(q) Issuance of general permits established by administrative code under ch. 30, Stats.

(qm) Issuance of aquatic plant management permits under ch. NR 109.

(r) Listing and delisting of an impaired water as defined in s. NR 151.002 (16m).

(s) Review and approval of municipal ordinances or approval of changes to municipal floodplain or shoreland-wetland maps.

(sc) Temporary drawdowns of dams under s. 31.02, Stats.

(sg) Reconstruction and repairs of dams under ss. 31.12, 31.18, or 31.185, Stats.

(sl) Transfer of dam ownership under s. 31.14, Stats.

(sp) Dam inspections under s. 31.19, Stats.

(st) Plan approvals for dams under s. 31.33, Stats., and approvals of emergency action plans, inspection plans, operation and maintenance plans, dam failure analysis plans, or stability analysis plans under ch. NR 333.

(sx) Review and approval of hydrologic and hydraulic studies for floodplain mapping under s. NR 116.07.

(t) Approval of construction plans and specifications under s. 281.41, Stats., for municipal and industrial pretreatment wastewater facilities, public water systems, and CAFO reviewable structures.

(u) Decisions related to evaluations of existing reviewable facilities and systems for concentrated animal feeding operations under ch. NR 243.

(ug) Approvals of land application or nutrient management plans or modifications to the plans.

(ur) Approvals of land application sites.

(v) Issuance of natural heritage inventory permits, approvals, or licenses under ch. NR 29 except for permits issued under s. 29.604 (6m), Stats.

(w) Issuance of an order or any action relating to the forest croplands or managed forest land programs under subch. I or VI of ch. NR 77.

SECTION 19. NR 150.20 (2) (a) (intro.) is amended to read:

NR 150.20 (2) ~~EQUIVALENT~~ INTEGRATED ANALYSIS ACTIONS (a) (intro.) The following actions ~~require a WEPA compliance determination under s. NR 150.35~~ but do not require a separate additional environmental analysis process under this chapter because ~~a detailed environmental~~ they are integrated analysis actions and ~~public disclosure are conducted as part of the department programmatic procedure:~~

SECTION 20. NR 150.20 (2) (a) 2r., 3c., 3g., and 3n. are created to read:

NR 150.20 (2) (a) 2r. Cooperative state trail planning.

3c. Development of total maximum daily loads as defined in s. NR 151.002 (46m).

3g. Issuance, reissuance, revocation and reissuance, or modification of a WPDES permit that authorizes a new source discharge that is subject to antidegradation review under ch. NR 207.

3n. Approval of a variance from a water quality standard under ch. 283, Stats.

SECTION 21. NR 150.20 (2) (a) 4. is amended to read:

NR 150.20 (2) (a) 4. Issuance of a major source construction permit under ch. NR 405 or 408 or an initial operation permit under ss. 285.60, 285.61, and 285.62, Stats., for a new source or modification or relocation of an existing air emission source sources.

SECTION 22. NR 150.20 (2) (a) 5. is renumbered NR 150.20 (2) (a) 2g.

SECTION 23. NR 150.20 (2) (a) 7. is amended to read:

NR 150.20 (2) (a) 7. A solid ~~or hazardous~~ waste feasibility approval or a commercial PCB waste storage or treatment facility feasibility approval under ss. 289.25 and 289.53, Stats., and chs. NR 157, 182, and 512, and 670.

SECTION 24. NR 150.20 (2) (a) 7e., 7m., and 7s. are created to read:

NR 150.20 (2) (a) 7e. Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700 to 754.

7m. Issuance of regulatory approvals, liability clarification letters, exemptions, and technical assistance under ch. 292, Stats., and chs. NR 700 to 754.

7s. Except for facilities specified in s. 291.27, Stats., the approval of a feasibility and plan of operation report and issuance of a license for either a new or existing hazardous waste treatment, storage, or disposal facility or class 3 modification of an existing hazardous waste treatment, storage, or disposal facility under ch. NR 670 and s. 291.25, Stats.

SECTION 25. NR 150.20 (2) (a) 8., 10., 11., 12., 13., 14., and 16. are amended to read:

NR 150.20 (2) (a) 8. Issuance of an individual wetland permit or general permit under s. 281.36 (3m), Stats.

10. Issuance of findings of public interest under s. 30.11(5), Stats., for a proposed lease for modification of an existing shoreline under s. 30.11, Stats of the bed of a lake or lease of rights to fill in a bed of a lake or a navigable stream.

11. Issuance of an individual permit ~~for structures on the beds of navigable waters or to construct culverts and bridges across navigable waters under ss. 30.12 (3m) or 30.123 (8),~~ general permit, certification, or contract under subchapter II of ch. 30, Stats.

12. Issuance of an individual permit or general permit under s. 30.19, Stats., including ~~an individual permit~~ permits to construct or alter waterways.

13. Issuance of an individual permit or general permit to change the course of or enclose a navigable stream under s. 30.195 or 30.196, Stats.

14. Issuance of an individual permit, general permit, or contract under s. 30.20, Stats., to remove material from the bed of a navigable waterway under ch. NR 345, or for non-metallic mining and reclamation in and near navigable waters under ch. NR 340.

16. Issuance of a permit ~~to construct, raise, enlarge or abandon~~ order, or approval for water levels or flows, or for the regulation of a dam in navigable or nonnavigable waters under ch. 31, Stats., or establishment of historic or a new level, a flow release or approval of a drawdown of a controlled lake or flowage under s. 31.02, Stats and ch. NR 333.

SECTION 26. NR 150.20 (2) (a) 18. is renumbered NR 150.20 (2) (a) 3r. and amended to read:

NR 150.20 (2) (a) 3r. An approval of a municipal wastewater facilities plan under s. NR 110.08, and approvals of municipal wastewater projects receiving federal grants or state financial assistance under

Exhibit B 057

ss. 281.58 and 281.59, Stats.

SECTION 27. NR 150.20 (2) (a) 18m. is created to read:

NR 150.20 (2) (a) 18m. Issuance of a report under s. 13.097, Stats., that includes the required department findings under s. 13.097(4), Stats., and conclusions under s. 13.097(6), Stats., regarding whether legislation that proposes to convey lake bed or amend a prior conveyance of lake bed area is consistent with protecting and enhancing a public trust purpose.

SECTION 28. NR 150.20 (2) (a) 19. is renumbered NR 150.20 (2) (a) 3w. and amended to read:

NR 150.20 (2) (a) 3w. Issuance, reissuance, revocation and reissuance, or modification of an individual WPDES permit for ~~an~~ a concentrated animal feeding operation under ch. NR 243 that is a new source.

SECTION 29. NR 150.20 (2) (a) 19m., 20., 21., and 22. are created to read:

NR 150.20 (2) (a) 19m. Review of existing or proposed uses for an existing lakebed grant, existing lease of the bed of a lake, or existing lease of rights to fill in a bed of a lake or a navigable stream to ensure the existing or proposed uses are consistent with the purposes and uses for which the grant or lease was issued.

20. Issuance of an aquatic plant management permit under s. NR 107.05 that meets the criteria under s. NR 107.04 (3).

21. Approvals of aquatic plant management plans under s. NR 109.09 and lake management plans under s. NR 191.45.

22. Promulgation of permanent administrative rules under ch. 227, Stats.

SECTION 30. NR 150.20 (2) (b) is amended to read:

NR 150.20 (2) (b) The department may determine under s. NR 150.35 that ~~there is equivalent analysis for a specific an~~ action not listed in par. (a) does not require a separate environmental analysis process under this chapter because it meets the definition of an integrated analysis action.

SECTION 31. NR 150.20 (3) (a) (intro.) and 1. are amended to read:

NR 150.20 (3) PRIOR COMPLIANCE ACTIONS. (a) (intro.) The following actions ~~require a WEPA compliance determination under s. NR 150.35 but~~ do not require additional environmental analysis under this chapter because one or more environmental analysis documents exist for prior actions that are

Exhibit B 058

similar to the proposed action in kind, scale, and environmental setting:

1. ~~Facility~~ Department facility development planned under ch. NR 44.

SECTION 32. NR 150.20 (3) (a) 4. and 5. are repealed.

SECTION 33. NR 150.20 (3) (a) 6., 7., and 8. are amended to read:

NR 150.20 (3) (a) 6. Approval of an extension of a wastewater collection system and other plan approvals under s. 281.41, Stats., that is are covered under an area wide water quality management plan under s. 283.83, Stats., and ch. NR 121.

7. Issuance ~~or~~ , reissuance, revocation and reissuance, or modification of an individual WPDES permit under s. 283.31, Stats., for a facility that is covered under an area wide water quality management plan under s. 283.83, Stats., and ch. NR 121.

8. Issuance or reissuance of an individual or general storm water permit under ~~ch. NR 216 and~~ s. 283.33, Stats., and ch. NR 216.

SECTION 34. NR 150.20 (3) (a) 9. and 10. are created to read:

NR 150.20 (3) (a) 9. Reissuance or modification of any general permit.

10. The approval of a feasibility and plan of operation report and issuance of a license for a class 1 or class 2 modification of an existing hazardous waste treatment, storage, or disposal facility under s. 291.25, Stats., and ch. NR 670.

SECTION 35. NR 150.20 (4) (b) (intro.) is amended to read:

NR 150.20 (4) (b) *EIS projects.* (intro.) The department may ~~decide to~~ follow the EIS procedures in s. NR 150.30 for projects of such magnitude and complexity that one or more of the following apply:

SECTION 36. NR 150.30 (1) (g), (2) (b), and (3) (c) 3. and (d) are amended to read:

NR 150.30 (1) (g) *Environmental Impact Report (EIR).* Pursuant to s. 23.11 (5), Stats., the department may require an applicant for certain proposed projects to submit an EIR. The department may request any applicant to submit an EIR. The purpose of an EIR is to help the department develop the EIS by having the applicant provide a detailed, comprehensive description of the proposed project, reasonable alternatives to the proposed project, the present environmental conditions in the area potentially affected by the proposed project, and anticipated environmental effects of the proposed project and alternatives. Predictive models, bioassays, and other analysis that can be subject to reasonable scientific verification may be required. The instructions to the applicant may also require that certain laboratory tests be

Exhibit B 059

performed by a laboratory certified, registered, or approved under ch. NR 149.

(2) (b) A description of the purpose ~~and need~~ of the proposed project.

(3) (c) 3. ~~If a hearing is held under par. (d), the~~ The public comment period shall ~~may~~ be extended for a minimum of 7 days after the date the hearing is held pursuant to par. (d).

(d) ~~Hearing. If no public hearing is otherwise required on the proposed action, the department may hold one or more public hearings prior to making its WEPA compliance determination under s. NR 150.35. Pursuant to s. 1.11(2)(d), Stats., a public hearing shall be held on the draft EIS and proposed action. Holding a public hearing as required by another statute fulfills the hearing requirement. Any hearings hearing held pursuant to this chapter paragraph shall be publicly announced to the public and held noticed in a manner consistent with s. 1.11 (2) (d), Stats.~~

SECTION 37. NR 150.30 (3) (d) (Note) is created to read:

NR 150.30 (3) (d) (Note) Pursuant to s. 1.11(2)(d), Stats., “notice of the hearing shall be given by publishing a class 1 notice, under ch. 985, at least 15 days prior to the hearing in a newspaper covering the affected area. If the proposal has statewide significance, notice shall be published in the official state newspaper.”

SECTION 38. NR 150.35 is amended to read:

NR 150.35 **WEPA Compliance determination.** (1) Actions under ~~sections s.~~ NR 150.20 (2) to (4) ~~cannot~~ may not be taken until a determination is published publicly announced or noticed regarding compliance with this chapter unless statutory deadlines preclude compliance with the procedural requirements of this chapter. Actions under s. NR 150.20 (1m) are compliant with WEPA and do not require a determination prior to the action being taken.

(1m) For ~~all EISs~~ any EIS under s. NR 150.20 (4) and ~~determinations~~ determination under s. NR 150.20 (2) (b) and (3) (b), the department shall ~~publish~~ publicly announce findings of fact, conclusions of law and a determination that summarizes the procedures and process steps used to achieve compliance with this chapter.

(2) For actions under s. NR 150.20 (2) (a) and (3) (a), the department may ~~publish~~ publicly announce the WEPA determination ~~as part of or provide notice in accordance with the public notification requirements for the proposed permit or approval document.~~

SECTION 39. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication of the affected Administrative Code Chapters in the Register.

SECTION 40. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

(SEAL)

STATE OF WISCONSIN

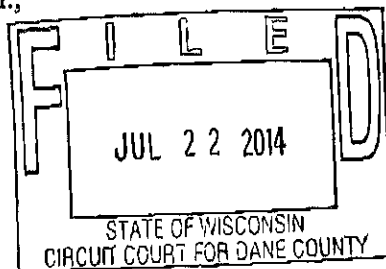
CIRCUIT COURT
Branch 10

DANE COUNTY

Petenwell and Castle Rock Stewards, Inc. et al.,
Petitioners

vs.

Wisconsin Department of Natural Resources,
Respondent



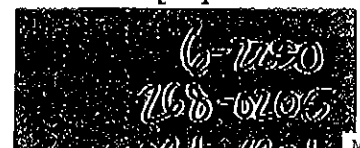
Case No. 13CV290

FINAL DECISION AND ORDER

Petitioners seek review of the decision by the Wisconsin Department of Natural Resources ("the DNR" or "the Department") to issue to Domtar A.W. L.L.C. ("Domtar") a Wisconsin Pollutant Discharge Elimination System permit ("WPDES permit" or "permit") authorizing discharge of phosphorous into the Wisconsin River (the "receiving water"). The Petenwell and Castle Rock flowages, or reservoirs, are downstream from the points at which Domtar's permit authorizes the discharges to occur ("downstream waters.") The phosphorous levels allowed by water quality regulations for both flowages are lower than those allowed for the Wisconsin River at the points of the Domtar discharge.

The question is whether the DNR had the authority to issue the permit without including a Water Quality Based Effluent Level ("WQBEL") calculated to protect the downstream waters. The DNR elected to defer setting a level based on protection of the downstream waters until completion of a comprehensive, complex and multi-year study of all point and non-point sources of phosphorous in the entire Upper Wisconsin River Basin. The study is intended to determine the Total Maximum Daily Load ("TMDL") of phosphorous for the entire system and is expected to be completed in 2017.

Wisconsin Administrative Code s. NR217.13(1)(b) states that the WQBELs for phosphorous "shall be calculated based on the applicable phosphorous criteria in s. NR 102.06 at the point of discharge, except the department may calculate the limitation to protect downstream waters [emphasis



added].” The DNR reads the last clause as allowing it to issue a permit without making such a calculation. Petitioners argue that such an interpretation is incorrect because it is contrary to other state and federal law.

The DNR and Domtar believe the DNR’s interpretation should be given great (controlling) weight. An agency’s interpretation of a statute is given great weight when 1) the agency is charged with interpreting the statute, 2) the agency’s interpretation is long-standing, 3) the agency employed its expertise or specialized knowledge in forming its interpretation and 4) the agency’s interpretation will provide uniformity and consistency in the application of the statute. *Andersen v. DNR*, 2011 WI 19, par. 27, 332 Wis. 2d 41, 796 N.W.2d 1. The DNR also argues that its interpretation of its own regulations is entitled to great weight deference, citing *Sierra Club v. DNR*, 2010 WI App 89, par. 24, 327 Wis. 2d 706, 787 N.W.2d 855.

In this case the DNR is charged with carrying out Ch. 283, has long experience in interpreting and applying the statute and expertise and specialized knowledge were used in forming its interpretation. However, the application of Ch. 283 to WQBEL limitations of phosphorous discharges is not long-standing. Subchapter III of Wis. Adm. Code Ch. NR 217, of which NR 217.13 is a part, had been in effect only 2 years when the Domtar permit was issued. Neither the DNR nor Domtar point to any judicial or administrative decisions interpreting Ch. 283 and Ch. NR 217 as they apply to phosphorous discharges. In addition, NR 217.13,(1)(b), as interpreted by the DNR, purports to give the DNR discretion in whether and when to calculate WQBEL limits for phosphorous based on the protection of downstream waters. As an interpretation concerning the scope of the agency’s own authority and discretion, it is owed no deference by the courts. *Loomis v. Wisconsin Personnel Com’n*, 179 Wis.2d 25, 30, 505 N.W.2d 462.

Therefore, the court will give no weight to the DNR’s interpretation of NR 217.13(1)(b) and due weight deference to the DNR’s interpretation of Ch. 238. Nonetheless, the plain meaning of the language of NR 217.13(1)(b) in its context is unambiguous. It uses the word “may” in contrast with the use of “shall” in NR 217.13(1)(a). It authorizes, but does not require, the DNR to calculate a WQBEL limit on phosphorous in order to protect downstream waters.

The petitioners argue that a reading allowing the DNR to consider only the applicable standards at the point of discharge is contrary to Wis. Stat. secs. 283.13(5) and 283.31(3) and (4). Petitioners do not clearly identify specific language in the cited statutes that requires the DNR to calculate WQBELs using the impact on downstream waters and it is not apparent to the court that it is so. A reading of NR 217.13(1)(b) as permissive, not mandatory, is not inconsistent with or contrary to Ch. 283.

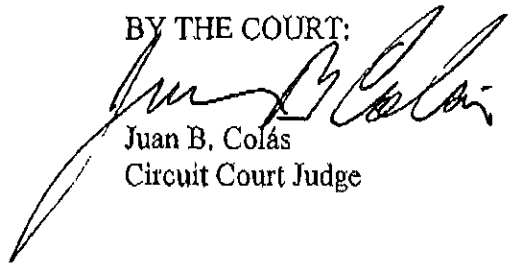
The remaining issue is whether the DNR properly exercised that discretion. It electing to base the permit's WQBEL on the water quality standards of the receiving water at the point of discharge and wait until completion of the TMDL studies before setting WQBELs for Domtar that include consideration of protection of downstream waters. There is substantial evidence in the record to support the DNR's conclusion, though other decisions might also have been reasonable. Under those circumstances the court will not substitute its judgment for the agency's decision.

CONCLUSION AND ORDER

For the reasons stated above, the issuance of the permit is affirmed and the petition is dismissed with prejudice. This is a final order for purposes of appeal as defined by Wis. Stat. sec. 808.03(1).

Dated: July 22, 2014

BY THE COURT:



Juan B. Colás
Circuit Court Judge

Copy: Counsel BY FAX ONLY

**Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item**

SUBJECT:

Request that the Board approve the Statement of Scope for Emergency Board Order OE-10-14(E) and Board Order OE-09-14, and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Clearing House, for housekeeping changes to comply with the intent of the recent ch. NR 150 rewrite.

FOR: June 2014 Board meeting

PRESENTER'S NAME AND TITLE: Dave Siebert, Director, Bureau of Energy, Transportation and Environmental Analysis

SUMMARY:

Ch. NR 150 was revised and went into effect April 1, 2014. It was the product of nearly three years of public outreach, internal input and staff review. An emergency rule is needed to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met, all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts. Once the emergency rule is approved, a permanent rule will subsequently be required

The previous version of ch. NR 150 classified most administrative rules as "Type 3 actions", a classification requiring some form of public notice and no additional environmental analysis as part of the formal rules process.

The rule changes would be simple editorial changes to clarify that emergency rules are "minor actions requiring no additional environmental analysis, and that the process for developing permanent rules are "equivalent analysis actions" under the new ch. NR 150, similar to how they were treated under the old ch. NR 150.

RECOMMENDATION: That the Board approve the Statement of Scope for Emergency Board Order OE-10-14(E) and Board Order OE-09-14, and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Clearing House, for housekeeping changes to comply with the intent of the recent ch. NR 150 rewrite.

LIST OF ATTACHED MATERIALS:

Notice of Public Hearing
Statements of scope

Notice of Submittal of proposed rule to Legislative Council Rules Clearinghouse
Governor approvals of statements of scope

Approved by	Signature	Date
Dave Siebert, Bureau Director	<i>Jeffrey Schimpff for Dave Siebert</i>	6/10/2014
Mark Aquino, Acting Division Administrator	<i>Mark Aquino</i>	6/10/2014
Cathy Stepp, Secretary	<i>Cathy Stepp</i>	6/12/14

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

CORRESPONDENCE/MEMORANDUM

DATE: June 5, 2014

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary

SUBJECT: Background memo relating to the request that the Board approve the Statement of Scope for Emergency Board Order OE-10-14(E) and Board Order OE-09-14, and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Clearing House, for housekeeping changes to comply with the intent of the recent ch. NR 150 rewrite.

Why is the rule being proposed?

Ch. NR 150 was revised and went into effect April 1, 2014. It was the product of nearly three years of public outreach, internal input and staff review. An emergency rule is needed to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met, all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts. Once the emergency rule is approved, a permanent rule will subsequently be required.

Summary of rule.

The previous version of ch. NR 150 classified most administrative rules as "Type 3 actions", a classification requiring some form of public notice and no additional environmental analysis as part of the formal rules process.

The rule changes would be simple editorial changes to clarify that emergency rules are "minor actions requiring no additional environmental analysis, and that the process for developing permanent rules are "equivalent analysis actions" under the new ch. NR 150, similar to how they were treated under the old ch. NR 150.

These changes would more clearly outline the required review process for administrative rules. Additional changes to clarify publication requirements, WEPA compliance determinations for various permits and plan approvals and other housekeeping changes, consistent with the intent of the rule, as presented to the public and approved by the NRB, may also come to light as implementation of the new rule progresses.

How does this affect existing policy?

The rule change would clarify what was intended and what was presented to the public through the Natural Resources Board process for development of the current ch. NR 150.

Has the Board dealt with these issues before?

On October 27, 2013, the Board approved the updated ch. NR 150. The rule took effect April 1, 2014.

Who will be impacted by the proposed rule? How?

DNR staff will have more clarity regarding the implementation of ch. NR 150, regarding the required review process for administrative rules and will have more clarity regarding publication requirements, WEPA compliance determinations for various permits and plan approvals, and other housekeeping changes, consistent with the intent of the rule, as presented to the public and approved by the NRB.

Is an environmental analysis needed?

The Department has made a preliminary determination that adoption of the proposed rules would not involve significant adverse environmental effects and would not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on comments received, an environmental analysis may be prepared before proceeding. This analysis would summarize the Department's consideration of the impacts of the proposal and any reasonable alternatives.

Small Business Analysis.

There will be no impact to small business as a result of this rule amendment. This rule amendment will benefit small businesses to the extent that it clarifies any ambiguity in favor of the intent of the rule, as presented to the public and approved by the NRB.

Manual Code 1022.4

**BEFORE THE
DEPARTMENT OF NATURAL RESOURCES**

NOTICE OF PUBLIC HEARING
Natural Resources Board Order **OE-10-14(E) and OE-09-14**

NOTICE IS HEREBY GIVEN THAT pursuant to ss. 227.16 and 227.17, Stats, the Department of Natural Resources, hereinafter the Department, will hold a public hearing on **revisions to chapter NR 150 Wis. Admin. Code**, relating to Emergency Board Order OE-10-14(E) and Board Order OE-09-14, related to the Department's environmental analysis procedures under the Environmental Policy Act. An emergency and permanent rule is needed to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met, all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts. Once the emergency rule is approved, a permanent rule will subsequently be required. **The hearing will be held** on the date(s) and at the time(s) and location(s) listed below.

Hearing Information

Date and Time
To be determined

Location
State Natural Resources Building (GEF 2), 101 S Webster Street, Madison, WI, 53707, Room G09

Reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Contact Jim Pardee, Wisconsin DNR, Madison, WI 53707; by E-mail to james.pardee@wisconsin.gov, or by calling (608) 266-0426. A request must include specific information and be received at least 10 days before the date of the scheduled hearing.

Availability of the Proposed Rules and Fiscal Estimate

The proposed rule and supporting documents, including the fiscal estimate, may be viewed and downloaded from the Administrative Rules System Web site which can be accessed through the link <https://health.wisconsin.gov/admrules/public/Home>. If you do not have Internet access, a printed copy of the proposed rule and supporting documents, including the fiscal estimate, may be obtained free of charge by contacting Jim Pardee (BETEA/7), Department of Natural Resources, Bureau of Energy, Transportation and Environmental Analysis, 101 S. Webster St, Madison, WI, 53703, or by calling (608) 266-0426.

Submitting Comments

Comments on the proposed rule must be received on or before **[date to be determined]**. Written comments may be submitted by U.S. mail, fax, E-mail, or through the Internet and will have the same weight and effect as oral statements presented at the public hearing. Written comments and any questions on the proposed rules should be submitted to:

Jim Pardee (BETEA/7)

Department of Natural Resources
Bureau of Energy, Transportation and Environmental Analysis
101 S Webster St, Madison, WI 53703

Phone: (608) 266-0426

Fax: (608) 264-6048

E-mail: james.pardee@wisconsin.gov

Internet: Use the Administrative Rules System Web site accessible through the link provided

Analysis Prepared by the Department of Natural Resources

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

An emergency rule is needed to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met, all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts. Once the emergency rule is approved, a permanent rule will subsequently be required.

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

The previous version of ch. NR 150 classified most administrative rules as "Type 3 actions", a classification requiring some form of public notice and no additional environmental analysis as part of the formal rules process.

The Rule changes would be simple editorial changes to clarify that emergency rules are "minor actions requiring no additional environmental analysis, and that the process for developing permanent rules are "equivalent analysis actions" under the new ch. NR 150, similar to how they were treated under the old ch. NR 150.

These changes would more clearly outline the required review process for administrative rules. Additional changes to clarify publication requirements, WEPA compliance determinations for various permits and plan approvals and other housekeeping changes, consistent with the intent of the rule, as presented to the public and approved by the NRB, may also come to light as implementation of the new rule progresses.

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 rule change would clarify what was intended and what was presented to the public through the Natural Resources Board process for development of the current ch. NR 150.

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

The department is responsible for compliance with department rules and procedures pursuant to s. 1.11, and 227.11, Stats., provides rule authority

Pursuant to s. 227.24(1)(a) Stats., the department finds that putting this rule into effect prior to the time it would take effect using the permanent rule process is necessary to ensure that the department and public time involved in lengthy rule processes for current rules is not compromised by a confusing definition in NR 150.

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

48 hours.

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

It is anticipated that no entities shall be affected by the proposed rule. This clarifies internal procedures for rules development.

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:

None.

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

None.

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

The Department anticipates holding one public hearing in the month of September 2014.

The Department will hold this hearing in Madison to seek public comment on the changes to the rule.

10. Effect on Small Business. This rule will have no effect on small business. The Small Business Regulatory Coordinator may be contacted at SmallBusiness@dnr.state.wi.us, or by calling (608) 266-1959.

Environmental Analysis

The Department has made a preliminary determination that adoption of the proposed rules would not involve significant adverse environmental effects and would not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on comments received, an environmental analysis may be prepared before proceeding. This analysis would summarize the Department's consideration of the impacts of the proposal and any reasonable alternatives.

Fiscal Estimate Summary

Because this is a housekeeping change affecting only internal DNR operations, no Fiscal Estimate will be prepared.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

**State of Wisconsin
Department of Natural Resources**

**NOTICE OF SUBMITTAL OF PROPOSED RULE TO
LEGISLATIVE COUNCIL RULES CLEARINGHOUSE**

The statement of scope for this rule, OE-09-14 and OE-10-14E, was approved by the governor on **May 15, 2014**, published in Register No. **701**, on **May 31, 2014**, and approved by the Natural Resources Board on **June 24, 2014**.

Date Submitted to the Rules Clearinghouse:

Board Order No.: OE-09-14 and OE-10-14E

Subject: Emergency Board Order OE-10-14(E) and Board Order OE-09-14 related to the Department's environmental analysis procedures under the Wisconsin Environmental Policy Act.

Administrative Codes: NR 150

Date of Public Hearing: To be determined

Name and Organizational
Unit of Agency Contact: Linda Haddix – Legal Services, (608) 266-1959

Approved by:

Cathy Stepp, Secretary
Department of Natural Resources

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: OE-09-14 and OE-10-14

Relating to: Environmental analysis and review procedures under
Ch.NR 150 Wis. Admin. Code

Rule Type: Permanent and Emergency

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

This rule is needed as housekeeping to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the NR 150 revision is being met and potential procedural questions do not invalidate years of work and public engagement on new rules packages. An emergency rule is needed to ensure processing and enactment of rule proposals in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts.

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

NR 150 was revised and went into effect April 1, 2014. The previous version of the code classified most administrative rules as "Type 3 actions", a classification requiring some form of public notice and no additional environmental analysis as part of the formal rules process.

The rule changes would be simple editorial changes to clarify that emergency rules are "minor actions" requiring no additional environmental analysis, and that the process for developing permanent rules are "equivalent analysis actions". These changes would more clearly outline the required review process for administrative rules. Additional changes to clarify publication requirements, WEPA compliance determinations for various permits and plan approvals and other housekeeping changes, consistent with the intent of the rule, as presented to the public and approved by the NRB, may also come to light as implementation of the new rule progresses.

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 rule change would clarify what was intended and what was presented to the public through the Natural Resources Board process for development of the current ch. NR 150.

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

The department is responsible for compliance with department rules and procedures pursuant to s. 1.11, and 227.11, Stats., which provides rule authority

Pursuant to s. 227.24(1)(a) Stats., the department finds that putting this rule into effect prior to the time it would take effect using the permanent rule process is necessary to ensure that the department and public time involved in lengthy rule processes for current rules is not compromised by a confusing definition in NR 150.

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

8 hours.

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

It is anticipated that no entities shall be affected by the proposed rule. This clarifies internal procedures for rules development.

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:

None.

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

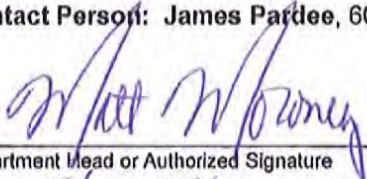
None.

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

The Department anticipates holding one public hearing in the month of September 2014.

The Department will hold this hearing in Madison to seek public comment on the housekeeping changes to the rule.

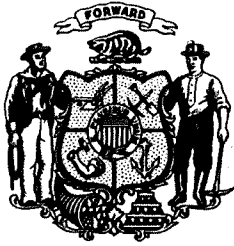
Contact Person: James Pardee, 608-266-0426



Department Head or Authorized Signature

5/12/14

Date Submitted



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

May 15, 2014

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-7921

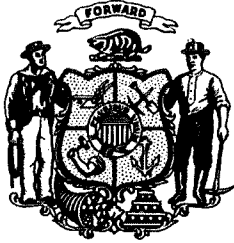
**RE: Scope Statement for modifications to Chapter NR 150 relating to
environmental analysis and review procedures**

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on May 12, 2014, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule modifying Chapter NR 150 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker
Governor



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

May 15, 2014

Cathy Stepp
Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-7921

**RE: Scope Statement for OE-10-14 Emergency Rule modifications to Chapter NR
150 relating to environmental analysis and review procedures**

Dear Secretary Stepp,

I hereby approve the statement of scope submitted on May 12, 2014, pursuant to Wisconsin Statutes § 227.135, in regards to an emergency rule modifying Chapter NR 150 of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.24(1)(e)1d.

Sincerely,

Scott Walker
Governor

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
AMENDING, REPEALING AND RECREATING AND CREATING RULES**

The Wisconsin Natural Resources Board proposes an order to repeal NR 114.03 (8) and (9), NR 114.03 (14) and (16), NR 114.05 (8), NR 114.08, NR 114.09, NR 114.12 (1), NR 114.14 (1) (c) and (d); to amend subch. I NR 114 (title), NR 114.01, NR 114.02, NR 114.03 (2), (3), and (5), NR 114.03 (10), (11), (12), and (13), NR 114.04, NR 114.05 (1), NR 114.06 (1) (b), NR 114.07 (5) (c), NR 114.10 (intro), NR 114.12 (title), NR 114.14 (1) (h); to repeal and recreate NR 114.03 (6), NR 114.07 (5) (b); to create subch. IV of ch. NR 114 relating to certification of waterworks and wastewater treatment plant operators by the Department of Natural Resources.

WT-29-09

Analysis Prepared by Department of Natural Resources

1. Statutory authority: Sections 227.11 and 281.17 (3), Stats.

2. Statutes interpreted: Section 281.17 (3), Stats.

3. Explanation of agency authority:

Chapter 281, Stats. – Water and Sewage, grants authority to the Department to serve, to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, all rules and orders promulgated under chapter 281, Stats., are to be liberally construed in favor of the policy objectives set forth in the chapter. Section 281.17 (3), Stats. specifically directs the department to promulgate rules establishing an examining program for certifying wastewater treatment plant operators.

4. Related statute or rule:

Chapter NR 114, Wis. Adm. Code, relates to regulation of wastewater discharges in the chapter NR 200, Wis. Adm. Code, series of rules. The quality of the discharge from wastewater treatment plants directly relates to the design and construction of the facility, as well the knowledge and competency of the operators, who run and manage the state's wastewater treatment plants. A well-operated and managed wastewater treatment plant produces a high quality effluent thus protecting and maintaining water quality in the state.

5. Plain language analysis:

Operator certification requirements in Wisconsin originated with Chapter 614, Wisconsin laws of 1965. After passage of the Clean Water Act of 1972, the operator certification program became more solidified with the establishment of wastewater treatment plant classifications (1, 2, 3, and 4) and numerous subclasses. Study guides and exams were developed for operators of the different classes and subclasses of treatment plants. The Bureau of Science Services administers

the certification program, while the Bureau of Water Quality provides the technical base and support. Examinations are given in each of the regions twice a year in May and November.

The program underwent code revisions in the 1990's and currently has a critical need of revisions with the advent of changes and innovation in computer and wastewater technologies over the past two decades. Wisconsin permits over 1000 industrial and municipal wastewater treatment plants and has 2400 certified operators operating these wastewater plants. In the past 25 years, most treatment plants have received more stringent effluent limitations, and have become more complex and technologically advanced through upgrading and new construction. Well-operated and maintained wastewater treatment plants and associated collection systems by knowledgeable and skilled operators directly translates into protections of public health and the environment. Increased competency of operators also results in more consistent and improved compliance with Wisconsin Pollutant Discharge Elimination System (WPDES) permit requirements. This then leads to fewer instances of noncompliance and a lowered potential for costs due to enforcement of permit violations by the Department.

Chapter NR 114, Subchapter I – Certification of Waterworks and Wastewater Treatment Plant Operators, Wis. Adm. Code, is being amended to remove references to wastewater treatment plant operators and subch. IV is being created of the same chapter to address certification of wastewater treatment plant operators separately from certification of waterworks. Five objectives are achieved: (1) update and revise treatment plant classifications and subclasses to reflect new and changed technologies; (2) eliminate advanced certification examinations and replace them with an advanced certification point system to allow operators more flexibility and educational options towards advancement; (3) expand certification to include sanitary sewer collection systems; (4) provide more options for a new generation of operators to gain knowledge and competency through on-line classes and apprenticeship opportunities; and (5) separate the certification requirements for waterworks and wastewater plant operators for improved readability and understanding.

Chapter NR 114, Wis. Adm. Code, establishes revised plant classification levels (basic or advanced) and subclasses, an advanced certification point system, future certification requirements for sanitary sewer collection systems and a fair conversion (grandfathering) process of transferring existing operators into the new certification system.

6. Summary and comparison with existing and proposed federal regulations:

While 33 USC 1251, federal Clean Water Act, does not mandate operator certification for wastewater treatment plants, the need for operating and maintaining wastewater treatment plants properly by knowledgeable and highly skilled operators is recognized by all states. All fifty states have wastewater treatment plant operator certification programs.

7. Comparison of similar rules in adjacent states:

All U.S. Environmental Protection Agency (EPA) Region 5 states (Illinois, Indiana, Michigan, Minnesota, and Ohio) have wastewater treatment plant operator certification programs. These certification programs are based on examination and experience.

Of the EPA Region 5 states, Ohio is the only state that requires a certified operator in charge for wastewater collection systems. Minnesota requires a collection system certificate for operation of wastewater collection, pumping, and conveyance facilities that are managed separately from the wastewater treatment facility. Illinois offers a voluntary wastewater collection system operator certificate while, Indiana and Michigan do not offer state certification.

ILLINOIS: In Illinois, a voluntary collection system operator certification is available for wastewater operators. The certification is administered by the Illinois State Environmental Protection Agency's Bureau of Water. Prerequisites for certification include a high school diploma (or equivalent), 6 months collection system operating experience and the equivalent of 6 months substitution experience. There is only one level of voluntary certification offered.

INDIANA: The Indiana Department of Environmental Management, who oversees certification of Wastewater Operators, does not offer collection system certification. The professional member association, Indiana Water Environment Association has a Collection System Committee (30+ members) who administer a voluntary collection system operation certification at 4 levels for wastewater operators.

MICHIGAN: The State of Michigan's Department of Environmental Quality, who certifies Wastewater Operators, does not offer certification for collection systems.

MINNESOTA: The Minnesota Pollution Control Agency (MPCA), who certifies wastewater operators, requires at least one certified collection system operator for a system of collection, pumping, and conveyance facilities that is operated separately from the facility that treats, stabilizes and disposes of wastewater. The MPCA classifies these facilities as type-S facilities with four subclasses (A, B, C, & D), based upon the size of the population served. If the collection facility is not operated separately from the treatment facility, the designated operator of the treatment facility is responsible and does not need a type S certificate.

OHIO: The Ohio Environmental Protection Agency's Division of Drinking and Groundwater certifies the person responsible and in charge of a collection system. Sewerage systems, a.k.a. collection systems, are classified. Sewerage systems may be classified at one of two levels (I and II) based upon design flow (< or > 0.15 MGD respectively).

8. Summary of factual data and analytical methodologies used in the rules and how any related findings support the regulatory approach chosen:

Given the increase in on-line training courses and programs for wastewater treatment plant operators, especially in the last ten years, it became apparent and imperative that the Department revise and modernize its certification program to allow operators more flexibility and choices in achieving advanced certification beyond only examinations. During the revisions of ch. NR 114, Wis. Adm. Code, the Department of Workforce Development, Bureau of Apprenticeship Standards received federal grant monies to develop an Apprenticeship Program for Wastewater Treatment plant operators. The Apprenticeship Program has since been developed and is now

available for wastewater treatment plant operators. Operators earn 6 of 10 points towards advanced certification by completing this program.

The concept of an advanced certification point system came from the Kansas wastewater operator certification program. Kansas uses a point system to determine what level exam an operator is eligible to take. The Department adapted the point system concept by developing one for advanced certification. Advanced certification allows operators to gain an increased knowledge about a particular aspect of wastewater treatment. A stronger knowledge through advanced certification is critical in operating more complex wastewater treatment plants and requires greater operational skills because of various factors.

Concurrent to these ch. NR 114, Wis. Adm. Code revisions, the Department has also drafted revisions to various rules for collection systems, more commonly referred to as the “Sanitary Sewer Overflow (SSO) Rules” (WT-23-11). These rule revisions are primarily intended to prevent, to the extent possible, the overflow of untreated sewage to state waters and land surfaces and/or the backup of sewage into basements and buildings where such discharges present a risk to public health and may cause environmental harm. The SSO rules require that all sewage collection system owners implement defined programs to assure the long-term viability of those systems. Effective programs for the proper operation and maintenance of the systems will be less costly in the long-term by reducing and preventing infiltration and inflow that lead to SSOs and building backups, assuring treatment facility capacity is not exceeded, and proactively dealing with potential failures of the system components. The SSO rules will require that all collection system owners develop and implement a Capacity, Management, Operation and Maintenance (CMOM) program within three years to assure proper long-term operation of sewage collection systems. The SSO Rules will also specify what components must be included in a CMOM and the documentation and reporting requirements associated with such a program.

With CMOM requirements and implementation of the SSO Rules, certification requirements for collection system operators will complement those rule revisions. It will provide the needed knowledge and skills for operators to develop and implement successful CMOM Programs and better operate and maintain their collection systems. Improved operational knowledge of sanitary sewer systems directly translates into protecting public health and water quality from basement back-ups and sanitary sewer overflows. Knowledgeable collection system operators also help protect and maintain the large investment of government funding of infrastructure. The Department evaluated collection system certification programs for every state in the nation. Approximately 46% of the states require some level of collection system certification.

In March 2010, the Department established a wastewater operators trainers stakeholders workgroup to assist and advise the Department in revising the certification program for wastewater treatment plant operators. The workgroup consisted of representatives from the Wisconsin Wastewater Operators Association (WWOA), Wisconsin Rural Water Association (WRWA), private trainers, consultants, technical colleges, UW-Stevens Point, and EPA. Several workgroup meetings were held during 2010-2012 in crafting the revisions. Comments and ideas for revisions from the workgroup members contributed significantly to the changes and modernization of the certification program.

9. Analysis and supporting documentation used to support the small business analysis:

No small businesses, as defined in s. NR 227.114 (1), Wis. Adm. Code will be affected by changes in wastewater treatment plant operator certification requirements. Small businesses, as defined, do not generally own and operate treatment plants, or at least mechanical treatment plants with surface water discharges, that require certified operators under ch. NR 114, Wis. Adm. Code. Any fiscal impacts that would occur from these rule changes would affect municipalities and larger industries that have treatment plants or municipal sanitary sewer collection systems.

For example, in the small businesses analysis prepared for the phosphorus water quality criteria, Board Order WT-25-08, that could also potentially apply to treatment plant operator certification, 11 dairy operations were identified that met the small business definition. Small cheese factories may be the best example of a small business. Of those 11, 6 apply wastes to the land through a variety of methods and are exempt from certification requirements. The other 5 discharge their wastes to municipal wastewater treatment plants, also exempt from certification requirements.

Based on this analysis, the Department concluded there are few, if any, small businesses that will be affected by changes in wastewater treatment plant or sanitary sewer system operator certification requirements.

10. Effect on small business, including how this rule will be enforced:

Based on the above analysis, the Department determined that few, if any, small businesses would be affected by the proposed changes in wastewater treatment plant operator certification requirements. Small cheese factories may be the best example of a small business that would have wastewater treatment and management needs. Many of these small dairies land apply their wastewater and thus are excluded from operator certification requirements.

A positive effect on small business will be additional training opportunities for consultants and private trainers to provide advanced training (on-line or classroom) to operators, especially those seeking advanced certification through education. The requirement for municipal collection systems to have a certified operator will result in the development of sanitary sewer collection system classes by wastewater education based businesses and technical colleges for municipal operators who will need this certification in the next 5-10 years.

11. Agency Contact:

Jack Saltes
Bureau of Water Quality
P.O. Box 7921
101 South Webster Street
Madison, WI 53707
jack.saltes@wisconsin.gov

12. Place where comments are to be submitted and deadline for submittal:

Jack Saltes
Bureau of Water Quality
P.O. Box 7921
101 South Webster Street
Madison, WI 53707
jack.saltes@wisconsin.gov

SECTION 1. subch. I of NR 114 (title) is amended to read:

SUBCHAPTER I — CERTIFICATION OF WATERWORKS AND ~~WASTEWATER~~
TREATMENT PLANT OPERATORS

SECTION 2. NR 114.01, NR 114.02, NR 114.03 (2), (3), and (5) are amended to read:

NR 114.01 Purpose. The purpose of this subchapter is to establish rules for the certification of waterworks ~~and wastewater treatment plant~~ operators pursuant to s. 281.17 (3), Stats.

NR 114.02 Applicability. The provisions of this subchapter are applicable to all owners and operators of waterworks ~~and wastewater treatment plants~~ as defined in this subchapter.

NR 114.03 (2) "Certified operator" means a person who has met the requirements of this subchapter and has been issued a certificate by the department to work at one or more of the classifications of waterworks ~~or wastewater treatment plants~~.

NR 114.03 (3) "Classification" or "class" means a number assigned to a waterworks ~~or wastewater treatment plant~~ based on a rating system.

NR 114.03 (5) "Direct responsible charge" means to provide detailed on-site technical direction of the operation of a waterworks ~~or wastewater treatment plant~~.

SECTION 3 NR114.03 (6) is repealed and recreated to read:

NR114.03 (6) "Experience in the operation of a waterworks" means to have performed the basic duties involved with the operation of a specific treatment subclass for 12 months, or to have provided daily on-site technical supervision of the operator or operators performing those duties.

SECTION 4. NR 114.03 (8) and (9) are repealed.

SECTION 5. NR 114.03 (10), (11), (12), and (13) are amended to read:

NR 114.03 (10) "Operate" means to be in direct responsible charge of a subclass or subclasses of operations at a waterworks ~~or a wastewater treatment plant~~.

NR 114.03 (11) "Operator-in-charge" means the person designated by the owner of a waterworks ~~or wastewater treatment plant~~ to be in direct responsible charge of a subclass of operations of the waterworks ~~or wastewater treatment plant~~. Not included in this definition are utility managers, city engineers, directors of public works or the equivalent, who are not actually involved in day-to-day operations.

NR 114.03 (12) "Owner" means the state, county, town, town sanitary district, city, village, ~~metropolitan sewerage district~~, corporation, firm, company, institution, association, utility district, school district, ~~joint sewerage commission~~ or individual owning or operating any ~~or wastewater treatment plant~~ waterworks.

NR 114.03 (13) "Subclass" means a letter assigned ~~a plant or system to a waterworks~~ based upon a particular type of process at the ~~plant~~ waterworks and the letter assigned to a person based on passing an examination for a specific operational process.

SECTION 6. NR 114.03 (14) and (16) are repealed.

SECTION 7. NR 114.04 and NR 114.05 (1) are amended to read:

NR 114.04 General requirements. No person may be an operator-in-charge of a subclass of a waterworks ~~or wastewater treatment plant~~ unless that person holds a valid certificate issued pursuant to this subchapter. Every subclass at a waterworks ~~or wastewater plant~~ shall have a designated operator-in-charge.

NR 114.05 (1) Examinations and on-the-job experience shall be used to determine knowledge, skill and ability of the applicant to perform duties at a waterworks ~~or wastewater treatment plant~~. A score of 75% or higher shall be a passing score on each written examination. An applicant desiring to be certified to perform duties at a waterworks ~~or wastewater treatment plant~~ shall submit a completed application to the department at least 28 days prior to the established date of a written examination on an application form provided by the department. Fees as outlined in s. NR 114.06 shall accompany the application. Applicants shall be notified of their eligibility for examination.

SECTION 8. NR 114.05 (8) is repealed.

SECTION 9. NR 114.06 (1) (b) is amended to read:

NR 114.06 (1) (b) Three year renewal-waterworks ~~or wastewater~~.....\$45.00

SECTION 10. NR 114.07 (5) (b) is repealed and recreated to read:

NR114.07 (5) (b) Applicants shall meet the following continuing education requirements: Waterworks certified operators at Grade T and 1 require 18 hours per 3 year renewal period, except the operator-in-charge of a surface water treatment plant shall be required to submit 24 hours per 3 year renewal period.

SECTION 11. NR 114.07 (5) (c) is amended to read:

NR 114.07 (5) (c) For ~~both waterworks and wastewater treatment~~ certified operators, not more than 6 hours of health and safety training may be used per 3 year renewal period.

SECTION 12. NR 114.08 and NR 114.09 are repealed.

SECTION 13. NR 114.10 (intro.) is amended to read:

NR 114.10 (intro.) Classification of waterworks. The classification of each waterworks shall be class 1 and assigned one or more of the applicable subclasses based on the operations performed at ~~the plant~~ that waterworks.

SECTION 14. NR 114.12 (title) is amended to read:

NR 114.12 (title) Required grades for the operation of waterworks ~~and wastewater treatment plants~~.

SECTION 15. NR 114.12 (1) is repealed.

SECTION 16. NR 114.14 (1) (c) and (d) are repealed.

SECTION 17. NR 114.14 (1) (h) is amended to read:

NR 114.14 (1) (h) By intentional or negligent action, caused or significantly contributed to a violation of any provision of ch. 281-~~or 283~~, Stats., or any administrative codes, permits or orders adopted or issued under those chapters.

SECTION 18. Subchapter IV of NR 114 is created to read:

SUBCHAPTER IV - CERTIFICATION OF WASTEWATER TREATMENT PLANT OPERATORS

NR 114.50 Purpose. The purpose of this subchapter is to establish rules for the certification of wastewater treatment plant operators pursuant to s. 281.17 (3), Stats.

NR 114.51 Applicability. The provisions of this subchapter are applicable to all owners and operators of wastewater treatment plants as defined in this subchapter and under the coverage of a WPDES permit.

NR 114.52 Definitions. In this subchapter:

(1) “Advanced coursework” means education that is beyond the basic knowledge of a particular aspect of wastewater treatment. It concentrates advanced wastewater studies in only a few subjects in blocks of a minimum of 20, 40, 60 or 80 hours. Technical talks or presentations at meetings, single or part day classes or training sessions, seminars or conferences are not included in this definition.

(2) “Associates degree” means a wastewater treatment related degree earned at a 2-year technical college.

(3) “Certificate” means a printed document issued by the department, pursuant to this subchapter, stating that the operator named therein has met the competency requirements for one or more operator levels and subclasses.

(4) “Certified operator” means a person who has meet the requirements of this subchapter and has been issued a certificate by the department to work at a given level and subclasses of wastewater treatment plants.

(5) “Department” means the department of natural resources.

(6) “Direct responsible charge” means having responsibility for providing on-site technical direction in the operations of a wastewater treatment plant.

(7) “Experience” means the daily hands-on operation and maintenance of a wastewater treatment plant. Treatment plant managers providing daily on-site technical supervision of the operator or operators performing those tasks may be eligible for claiming experience.

(a) The first twelve months of claimed experience shall be subclass specific.

(b) Subsequent months of claimed experience may be any general wastewater operational experience.

(c) One year of experience is based on full-time employment at a treatment plant or 1,000 hours of cumulative experience, over a minimum of 12 months, for part-time operators.

(8) “Graduate degree” means an advanced degree, M.S. or Ph.D., from an accredited college or university with graduate studies and emphasis in wastewater treatment or water pollution control engineering.

(9) “Health and safety training” means classes relating to wastewater treatment plant operations and maintenance and includes but not limited to confined space, excavation, hearing conservation, water safety, blood-borne pathogens, CPR- First Aid, mechanical and electrical safety, fall protection, hazardous plant chemicals as well as others.

(10) “Industrial wastewater treatment plant ” means a privately owned wastewater treatment plant for treating liquid wastes resulting from any process of industry, manufacture, trade or business or the development of any natural resources.

(11) "Level" means the basic or advanced classification assigned to a wastewater treatment plant operator pursuant to this subchapter.

(12) "Major contributing industry" means an industrial or commercial facility that is a user of a municipally owned wastewater treatment plant, and has a waste which the department determines has, or may have, a significant impact, either singly or in combination with other wastes, on a wastewater treatment plant or on the quality of effluent from a wastewater treatment plant.

(13) "Mechanical plant" means a plant that is designed and constructed with a series of steel or concrete basins using pumps, pipes and other equipment to actively convey and treat wastewater. Pond, lagoon or natural systems are not part of this definition.

(14) "Operate" means to be in direct responsible charge of a subclass or subclasses of operations at a wastewater treatment plant and a sanitary sewage collection system.

(15) "Operator-in-charge" means the person designated by the owner of the wastewater treatment plant to be in direct responsible charge of a subclass of operations of a treatment plant or of a sanitary sewage collection system and involved in hands-on day-to-day operations.

(16) "Owner" means the state, county, town, sanitary district, city, village, metropolitan sewerage district, corporation, firm, company, institution, association, utility district, school district, sewerage commission or individual owning or operating a WPDES permitted wastewater treatment plant.

(17) "Satellite sewage collection system" means a municipally owned or private sewage collection system that conveys wastewater to another sewerage system which provides the wastewater treatment.

(18) "Sanitary sewage collection system" means the common sanitary sewers, interceptor sewers, pump stations and supporting equipment in a community that receive wastewater from buildings and conveys it to a wastewater treatment plant.

(19) "Subclass" means a letter assigned a treatment plant based upon a particular type of treatment process at the plant and to the letter assigned to a person based on passing a subclass examination for a specific operational process.

(20) "Tertiary phosphorus removal" means the advanced physical and chemical removal of phosphorus to achieve very low phosphorus concentrations not achievable by conventional methods.

(21) "Undergraduate degree" means a Bachelor's degree earned at a 4-year accredited college or university in which at least 240 hours were wastewater treatment related.

(22) “Wastewater treatment plant” means a facility that provides for the treatment of sanitary or industrial wastewater or both. The following types of facilities are excluded from operator certification:

- (a) Facilities defined as private sewage systems in s. 145.01 (12), Stats.
- (b) Pretreatment facilities which discharge to a public sewer system for treatment.
- (c) Industrial wastewater treatment which consists solely of a land disposal system.
- (d) Digesters at agricultural operations that reuse, recycle or landspread the treated wastes.
- (e) Concentrated aquatic production facilities (fish hatcheries) in which no biological treatment process is utilized.

(23) “WPDES permit” means a permit issued to a publicly owned treatment plant under s. 283.31, Stats., for the purposes of controlling pollutant discharge.

NR 114.53 General requirements. (1) Every WPDES permitted treatment plant shall have a designated operator-in-charge holding a current and valid certificate pursuant to this subchapter. The designated operator-in-charge shall be certified at the level and in all subclasses of the treatment plant, except laboratory. Treatment plant owners shall notify the department of any changes in the operator-in-charge within 30 days.

(2) Owners of treatment plants, which includes both the treatment plant and sanitary sewage collection system to it, shall have a designated collection system operator-in-charge for sanitary sewage collection systems. The designated operator-in-charge shall have passed and be certified in the sanitary sewage collection system subclass. For owners of satellite sanitary sewage collections systems, collection system operator certification is voluntary.

(3) All wastewater treatment plants holding a WPDES permit that have a registered or certified laboratory shall have at least one operator that works in the laboratory certified at the basic level in the laboratory subclass.

(4) Upon a change in a wastewater treatment plant’s classifications caused by the addition of a new subclass listed in s. NR 114.56 (4), the operator-in-charge shall have 12 months to pass the necessary subclass examinations and to gain the one year of subclass specific experience.

(5) Upon a change in a wastewater treatment plant’s level of operations from basic to advanced, the operator-in-charge shall have 36 months to obtain advanced certification, provided the person is making earnest efforts towards advanced certification and that the treatment plant is in compliance with all terms and conditions of its WPDES permit.

(6) Owners of basic wastewater treatment plants, in the event of the unexpected loss of the operator-in-charge, may designate an operator-in-training certified in all subclasses of the plant as the operator-in-charge for a period up to twelve months.

(7) Owners of advanced wastewater treatment plants, in the event of the unexpected loss of the designated operator-in-charge, shall ensure the continued proper operation and maintenance of the treatment plant by another advanced certified operator in all subclasses of the plant.

NR 114.54 Examinations and applications. (1) Examinations, education and on-the-job experience shall be used to determine knowledge, skill and the ability of the applicant to perform duties at a wastewater treatment plant. A score of 75% or higher shall be a passing score on each examination. An applicant desiring to be certified to perform duties at a wastewater treatment plant shall submit a completed exam application to the department at least 28 days prior to the established date of the written examination. The applicant shall submit the completed application on an application form provided by the department. Fees as listed in s. NR 114.55 shall accompany the application.

Note: The application form is available on the following website: <http://dnr.wi.gov> or by writing to the Department of Natural Resources, Operator Certification Program, PO Box 7921, Madison, WI 53707-7921.

(2) Written examinations shall be conducted on week days at least 2 times annually in locations specified by the department.

(3) Basic examinations shall consist of 25 to 50 questions specific to the subclass. The wastewater treatment plant advanced examination shall consist of 100 questions with content from all subclasses.

(4) Examinations shall not be issued to applicants who have not properly registered 28 days prior to the examination date, or fail to identify themselves on request.

(5) Examinations shall not be returned to an examinee. Examination results shall be mailed to the examinee within 60 days of the examination date.

(6) Applicants who fail to pass a written examination may apply to the department for reexamination at a subsequent scheduled examination.

(7) The department shall provide study guides pertaining to each subclass.

(8) A wastewater treatment plant operator shall take and successfully complete the general wastewater examination and subclass examinations to become an operator-in-training in each subclass.

(9) A wastewater treatment plant operator shall take and successfully complete the requirements of sub. (8) and meet one-year subclass-specific experience to become a basic level operator in a subclass.

(10) A wastewater treatment plant operator may take the wastewater treatment advanced certification examination to earn four points towards advanced certification according to the table in s. NR 114.57 (1) (c).

NR 114.55 Fees. (1) Fees for certification shall be as follows:

- (a) Each basic examination..... \$25.00
- (b) Advanced examination..... \$50.00
- (c) Advanced certification application..... \$100.00
- (d) Certification renewal..... \$45.00
- (e) Late renewal penalty..... \$25.00
- (f) Reciprocity application..... \$100.00

(2) Fees shall accompany completed application forms. Fees are non-refundable.

(3) Certifications shall be renewed every 3 years. The renewal fee is due no later than the expiration date of the certificate. A late renewal penalty fee shall be assessed for any renewal application postmarked after the expiration date.

NR 114.56 Classification of wastewater treatment plants. (1) Each wastewater treatment plant shall be assigned a basic or advanced rating. An advanced wastewater treatment plant is one that meets any one of the following criteria:

- (a) Is a mechanical plant with an annual average design flow greater than 1.0 MGD.
- (b) Has a biochemical oxygen demand (BOD) limit of 10 mg/L or less.
- (c) Has surface water limits for total phosphorus or total nitrogen and utilizes a biological nutrient removal process.
- (d) Uses a tertiary phosphorus removal process to achieve ultralow phosphorus limits.
- (e) Is a municipal treatment plant that receives wastewater from a major contributing industry.
- (f) Is a municipal treatment plant that produces Class A biosolids.

(2) Wastewater treatment plants that do not meet any of the criteria in s. NR 114.56 (1) shall be classified as a basic facility.

(3) Wastewater treatment plants that utilize special or unique biological, physical, chemical, or other unique treatment methods shall have an operator certified in subclass U.

(4) Thirteen wastewater treatment plant subclasses are established in Table 1.

**Table 1
Wastewater Treatment Plant Categories and Subclasses**

CATEGORY	SUBCLASS	SUBCLASS NAME	DESCRIPTION
<i>Biological treatment</i>	A1	Suspended Growth Processes	Activated sludge and variants
	A2	Attached Growth Processes	Trickling filters, RBCs and biotowers
	A3	Recirculating Media Filters	
	A4	Ponds, Lagoons and Natural Systems	

	A5	Anaerobic Treatment of Liquid Waste	High strength liquid waste treatment system
<i>Solids separation</i>	B	Solids Separation	Clarifiers, membranes, filters, tertiary phosphorus removal, etc.
<i>Solids treatment</i>	C	Biological Solids/Sludge – Handling, Processing and Reuse	Aerobic and anaerobic digestion, thickening, dewatering, land application
<i>Nutrient removal</i>	P	Total Phosphorus	
	N	Total Nitrogen	
<i>Disinfection</i>	D	Disinfection	Chlorination, ultraviolet radiation, ozone
<i>Laboratory</i>	L	Laboratory	Registered or certified on-site laboratories
<i>Special</i>	U	Unique Treatment Systems	Unique, special treatment plants that use biological, chemical or physical methods
<i>Collection System</i>	SS	Sanitary Sewage Collection System	

NR 114.57 Qualifications and level of wastewater treatment plant operators. (1)

Two levels and 13 subclasses of wastewater treatment plant operators are established. Operator subclasses are the same as plant subclasses listed in Table 1. To qualify for certification at a given level and subclass, a person shall meet the appropriate examination, education and experience requirements.

(a) *Operator-in-training.* To qualify for operator-in-training in a specific subclass, a person shall pass the basic general wastewater examination and a basic subclass examination.

(b) *Basic level.* To qualify for basic certification in a specific subclass, a person shall pass the basic general wastewater examination, the specific subclass exam and have one year of satisfactory experience in that subclass.

(c) *Advanced Level.* An advanced certification point system is established in Table 2. To qualify for advanced certification in a given subclass, a person shall have earned a total of 10 points and met the requirements of s. NR 114.57 (1) (b). Of the 10 points, 4 to 6 years of experience accounts for 4 to 6 points. A minimum of 4 points of experience is required. Six points is the maximum number of points that may be given for experience.

**Table 2
Advanced Certification Point System**

TYPE	POINT METHOD	POINTS	MINIMUM
------	--------------	--------	---------

			HOURS
Experience	48 Months Work Experience, Minimum	4	
	60 Months Work Experience	5	
	72 Months Work Experience, Maximum	6	
Degree	4-year Undergraduate Degree or Graduate Degree	6	
	2-year Water/Wastewater Associates Degree	6	
Apprenticeship	State Approved Apprenticeship Program	6	
Exam	100 Question Multiple Choice Exam	4	
Advanced course		2	80
		1.5	60
		1	40
		0.5	20

(2) A person shall submit an advanced certification application provided by the department documenting education, experience and the advanced certification points earned. Diplomas or certificates showing successful education completion shall be attached to the application. Transcripts highlighting wastewater related classwork shall also be attached. Applicants shall be notified of the status of their advanced certification with 90 days of receipt of a complete application.

(3) The department shall establish and update a list of eligible advanced course offerings by September 1 of each year. Trainers shall submit an application provided by the department for approval of advanced courses by no later than June 1 of each year. Trainers of listed courses shall annually renew their course application by June 1 each year and notify the department of any changes in course content. An advanced course of 18-19 hours may be eligible for .5 points if listed by the department.

(4) A general wastewater examination is not required for unique treatment systems (subclass U) or sanitary sewage collection systems (subclass SS) basic certifications.

(5) Upon development and availability of the sanitary sewage collection system subclass SS study guide and examination, and at the time of permit reissuance, collection system operators shall have a permit term of 5 years to obtain collection system certification.

NR 114.58 Certificate issuance, renewal and continuing education. (1) Upon satisfactory fulfillment of the qualifications required by this subchapter, the department shall issue a certificate to a person indicating the certification level and subclasses for which the person has qualified.

(2) All certificates shall expire 3 years from the date of issuance. Certificates may be updated to show additional examinations passed, additional experience gained and changes in certification level and classifications, but the expiration date shall not change. Updating a certificate shall not extend nor change the expiration date. Certificates shall only be renewed subject to the requirements of sub. (3).

(3) A person who desires to renew a certificate shall submit evidence of having met the continuing education requirements under sub. (4) on forms provided by the department. Training or courses must be approved by the department. These may include, but are not limited to courses sponsored by the department, university, technical college, technical sessions at meetings of professional organizations, in-house training and on-line training classes that are wastewater related. Failure to successfully complete and document the required number of hours of continuing education training within the 3-year period shall result in rejection of a certificate renewal application.

(4) Renewal applications shall meet the following continuing education requirements:

(a) Operators-in-training and basic wastewater treatment plant certified operators require 18 hours per 3-year renewal period.

(b) Advanced wastewater treatment plant operators require 24 hours per 3-year renewal period.

(c) Wastewater treatment plant operators may use up to 6 hours of health and safety training per 3-year renewal period.

(d) Operators-in-training and basic wastewater treatment plant operators may use up to 3 hours of supervisor or management training per 3-year renewal period. Advanced wastewater treatment plant operators may use up to 6 hours of supervisor or management training per 3-year renewal period.

(5) A person whose certificate has expired may within one year of expiration, be reinstated by paying the renewal fee, the late penalty fee and fulfilling the continuing education requirements. A person not renewing within the one year period shall have to re-take the basic subclass examinations. To regain advanced certification, the basic examinations must be passed and the person shall have to reapply for advanced level certification.

(6) Certificates may be issued through reciprocity, without examination, to a comparable level and subclass to any person who holds a current wastewater treatment plant operator certificate in any state, territory or possession of the United States, or any country, if in the judgment of the department, the person requesting comparable certification meets the equivalent requirements of this subchapter in examinations, education and experience.

NR 114.59 Sanctions. (1) The department may, on its own motion, make investigations and conduct hearings and may, on its own motion or on a signed and verified written complaint, revoke, suspend or refuse to renew any operator's certificate, or reprimand the operator if the department finds that the holder of the certificate has done any of the following:

(a) Made a material misstatement in the application for certification or any application for a renewal of certification.

(b) Demonstrated incompetence to operate the type of facility or subclass for which the certificate was issued.

(c) Bypassed sewage from a treatment plant without notifying the department as required by the WPDES permit.

(d) Failed to comply with any other provision requiring department notification in the facility's WPDES permit.

(e) Tampered with or manipulated any samples to misrepresent the actual sample results.

(f) Falsified any monitoring, operating or other records submitted to the department.

(g) By intentional or negligent action, caused or significantly contributed to a violation of any provision of chs. 281 or 283, Stats. or any administrative codes, permits or orders adopted or issued under those chapters.

(h) Used deception or any form of dishonesty when writing examinations, or removed examination materials from the examination site.

(2) Notice of revocation of, suspension of or refusal to renew a certificate shall be served on the certified operator and shall state the reasons for revocation, suspension or refusal to renew.

(3) Revocation of, suspension of or refusal to renew a certificate shall take effect on the 10th day after the notice is served, unless the certified operator files a written answer with the department prior to the 10th day. If an answer is filed, the revocation, suspension of or refusal to renew is stayed and the department shall conduct a hearing on the matter within 30 days after receipt of the answer. At least 10 days prior to the date of the hearing, the department shall send a written notice to the operator indicating the date, time and location of the hearing. The final determination of the department, including the basis for the decision, shall be provided in writing to the operator. A suspended operator may not be the operator-in-charge of a facility for the duration of the suspension.

(4) Application may be made for taking the necessary examinations for a new certificate one year after the date of revocation or refusal to renew.

(5) Any order revoking or suspending a certificate is subject to judicial review as provided in ch. 227, Stats.

NR 114.60 Subclass Conversions. (1) Operator wastewater certifications in the subclasses on the effective date of this subsection [LRB inserts date] shall be converted as outlined in Table 3. An operator at Grade 3 or Grade 4 certification in a subclass, except subclasses K or L, on the effective date of this subsection [LRB inserts date] shall have earned 10 points towards advanced certification. Having 10 points, operators shall become advanced in any subclasses that they are Grade 1 or higher. Operators not granted 10 points, shall have all subclasses, except those at Grade T, converted over to basic certification. All subclasses at Grade T shall be converted to operator-in-training, regardless of grade levels held in other subclasses.

(2) Operators that have passed the former advanced general wastewater examination and at least 4 advanced subclass examinations shall be granted 4 points towards advanced certification, equivalent to the 4 points for passing the new advanced examination.

Table 3
Certification Subclass Conversion Table

FORMER SUBCLASS NAME	FORMER SUBCLASS		NEW SUBCLASS NAME	NEW SUBCLASS
<i>Primary treatment</i>	<i>A</i>	→	Solids Separation	B
<i>Trickling filters and rotating biological contractors</i>	<i>B</i>	→	Attached Growth Processes	A2
		→	Solids Separation	B
		→	Biological Solids/Sludge – Handling, Processing and Reuse	C
<i>Activated sludge</i>	<i>C</i>	→	Suspended Growth Processes	A1
		→	Solids Separation	B
		→	Biological Solids/Sludge – Handling, Processing and Reuse	C
<i>Stabilization ponds and aerated lagoons</i>	<i>D</i>	→	Ponds, Lagoons and Natural Systems	A4
<i>Disinfection</i>	<i>E</i>	→	Disinfection	D
<i>Anaerobic digestion</i>	<i>F</i>	→	Biological Solids/Sludge – Handling, Processing and Reuse	C
<i>Mechanical sludge dewatering and treatment</i>	<i>G</i>	→	Biological Solids/Sludge Handling, Processing and Reuse	C
<i>Filtration</i>	<i>H</i>	→	Solids Separation	B
<i>Phosphorus removal</i>	<i>I</i>	→	Total Phosphorus	P
<i>On-site laboratory testing</i>	<i>J</i>	→	Laboratory	L
<i>Special</i>	<i>K</i>	→	Unique Treatment Systems	U

<i>Electroplating and metal finishing</i>	L	→	Unique Treatment Systems	U
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NOTE: The department shall use its discretion converting Special K subclasses that are specific to the newly created subclasses.

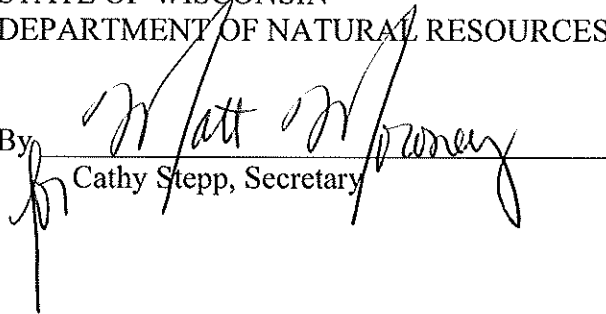
SECTION 19. EFFECTIVE DATE. (1) Except as provided in sub. (2), this rule shall take effect on the first day of the 13th month beginning after publication in the Wisconsin Administrative Register as provided in s 227.22 (2) (intro.), Stats.

(2) SECTION 18 s. NR114.57 (3) shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 20. BOARD ADOPTION. The forgoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 11, 2013.

Dated at Madison, Wisconsin May 16, 2014.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By 
Cathy Stepp, Secretary



August 17, 2015

Deputy Attorney General Andrew Cook
Wisconsin Department of Justice
Room 114 East State Capitol
Madison WI 53702

Subject: Authority For Permit Conditions In WPDES Permit For Kinnard Farms

Dear Deputy Attorney General Cook:

The Department of Natural Resources (Department) requests the assistance of the Department of Justice to aid DNR in properly exercising its authority under s. 227.10(2m), Stats., which requires that any requirement in a condition of a license or permit be "explicitly required or explicitly permitted by a statute or by an administrative rule".

A contested case hearing on the Department permit to Kinnard Farms in Keewaunee County, under the Water Pollutant Discharge Elimination System (WPDES) was held February 11 – 14, 2014 in front of Administrative Law Judge (ALJ), Jeffrey D. Boldt. On October 29, 2014, the ALJ issued his decision which upheld the permit and added as conditions of the permit amended language on the production area discharge limitations, a waste storage impoundment breach analysis, and construction of any improvements required by the breach analysis as approved by the Department. In addition, the ALJ ordered that sections 1.3, 1.3.3, and 3.1.12 of the permit be modified to reflect a maximum number of animal units at the facility. The ALJ further ordered that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site. Additionally, he required that the plan "shall include no less than six groundwater monitoring wells and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading."

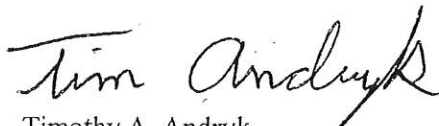
The ALJ's decision requires the Department to adopt permit conditions that were not included in the initial approval by the Department. Further complicating this issue is the overarching legal question: are the permit conditions imposed by ALJ Boldt's decision "explicitly required or explicitly permitted by a statute or by an administrative rule" as is required under s. 227.10(2m), Stats., or is ALJ Boldt requiring the Department of Natural Resources to exceed its authority that is expressly granted by state statute and administrative code?

The Department of Natural Resources requests an interpretation from the Department of Justice on the questions below relating to the authority for the conditions imposed by the ALJ and guidance on proceeding in response to the October 29, 2014 ALJ decision.

1. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to place a limit on the number of animal units in a WPDES permit as ALJ Boldt's decision required?
2. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to require a WPDES permittee to provide a groundwater monitoring plan that includes "if practical, at least two wells that monitor off-site landspreading," as ALJ Boldt's decision required?

Your opinion on these questions and guidance on how to proceed in this situation would be much appreciated.

Sincerely,

A handwritten signature in black ink that reads "Tim Andryk". The signature is written in a cursive style with a large, sweeping initial "T" and a stylized "A".

Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of Natural Resources

Attachment 2



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 18, 2015

Mr. Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of
Natural Resources
Post Office Box 7921
Madison, WI 53707-7921

Re: *Authority for Permit Conditions in
WPDES Permit for Kinnard Farms*

Dear Tim:

In your letter dated August 17, 2015, you ask for assistance concerning a permit issued to Kinnard Farms under the Wisconsin Pollutant Discharge Elimination System ("WPDES") program. As you know, the WPDES program grants DNR the authority to permit certain discharges of pollutants into the waters of the state.

In August 2012, DNR permitted Kinnard Farms to discharge pollutants from livestock operations to cropland within the Kewanee River Watershed and to the groundwaters of the state. The permit also includes certain conditions as explicitly permitted by law. Several interested parties opposed the permit and filed a contested case under Wis. Stat. § 283.63.

Following the receipt of a contested-case petition under Wis. Stat. § 283.63, DNR is required to hold a public hearing. DNR declined, and instead referred the matter to the Department of Administration, Division of Hearings and Appeals, as permitted by Wis. Stat. § 227.43(1)(b), for the assignment of an Administrative Law Judge ("ALJ") to preside over the hearing. Final decisions in cases such as this are governed by Wis. Stat. § 227.46(3), which DNR has implemented by rule under Wis. Admin. Code ch. NR 2.

Mr. Timothy A. Andryk
August 18, 2015
Page 2

Following the contested-case hearing, ALJ Jeff Boldt issued a decision which, among other things, purportedly requires DNR to impose the following additional conditions upon Kinnard's permit: (1) a limitation of the number of animal units in the WPDES permit, and (2) a requirement for at least two wells to monitor the off-site land application of animal waste.

You request assistance concerning these two additional conditions ordered by ALJ Boldt; specifically, you ask whether these additional conditions are lawful in light of 2011 Wisconsin Act 21 ("Act 21"). Among other things, Act 21 imposes the following requirements on agencies, including DNR:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. § 227.10(2m).

Act 21 implicates the two additional conditions ordered by ALJ Boldt because they each constitute a "condition of any license issued by the agency." *Id.* Clearly, a WPDES permit is a license. *See* Wis. Stat. § 227.01(5) (defining "license" to include "all or any part of an agency permit").

Because Act 21 is implicated, the question is whether these two conditions are "explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). I conclude they are not.

In reaching this conclusion, I have reviewed Wis. Stat. ch. 283, which establishes the WPDES program, and specifically Subchapter IV, which governs permits issued under the program. Furthermore, I have reviewed Wis. Admin. Code ch. NR 243, which governs animal feeding operations, and specifically Subchapter II, which imposes requirements on large concentrated animal feeding operations ("CAFOs"), like Kinnard Farms. Nowhere in any of these statutes or rules is DNR explicitly permitted to impose animal-unit maximums or off-site groundwater monitoring wells as a condition of Kinnard's permit.

Mr. Timothy A. Andryk
August 18, 2015
Page 3

In Wis. Stat. § 283.31(3) and (4), DNR is authorized to issue permits with conditions, but none of the authorized conditions explicitly allow DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Furthermore, Wis. Admin. Code §§ NR 243.13, 243.14, and 243.15 impose certain permit requirements and related requirements for nutrient management plans and CAFO facilities, yet these rules do not explicitly permit DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Wisconsin Stat. § 283.31 and Wis. Admin. Code ch. NR 243 must be read consistent with Act 21 to mean that only permit conditions otherwise explicitly permitted or required by statute or by rule are authorized by law. To read these statutes more broadly, and to impose conditions that are not explicitly authorized by statute, would in fact be an improper attempt at promulgating a rule outside of the rulemaking process under Wis. Stat. ch. 227.

Therefore, it is my conclusion that it would be unlawful for DNR to impose the two additional permit conditions discussed above, notwithstanding ALJ Boldt's decision.

Sincerely,

A handwritten signature in black ink, appearing to read "D.P. Lennington", with a stylized flourish at the end.

Daniel P. Lennington
Assistant Attorney General

DPL:ajw

RECEIVED

05-20-2015

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP2465

PETENWELL AND CASTLE ROCK STEWARDS, INC. and
RIVER ALLIANCE OF WISCONSIN, INC.,

Petitioners-Appellants,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Respondent,

DOMTAR A.W. LLC,

Intervenor-Respondent.

ON APPEAL FROM ORDER DISMISSING PETITION FOR
JUDICIAL REVIEW AND AFFIRMING ISSUANCE OF
WATER PERMIT ENTERED IN THE CIRCUIT COURT
FOR DANE COUNTY, THE HONORABLE JUAN B.
COLÁS PRESIDING

BRIEF OF RESPONDENT-RESPONDENT

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ISSUES PRESENTED

1. Wisconsin Stat. § 283.63 provides procedures for administrative and judicial review of the Department of Natural Resources' reissuance of a Wisconsin Pollution Discharge Elimination System permit. This Court and the Wisconsin Supreme Court hold that this procedure provides the exclusive means of review. Petitioners Petenwell and Castle Rock Stewards, Inc. and River Alliance of Wisconsin, Inc. did not pursue the administrative remedy before filing their Petition for Judicial Review. Did petitioners exhaust their administrative remedies?

The circuit court said that exhaustion was not required because it would have been futile. DNR maintains that the circuit court erred and asks this Court to affirm the circuit court's denial of petitioners' Petition for Judicial Review on the alternative ground that they failed to exhaust their administrative remedies.

2. DNR's interpretation of its own rules is controlling if it is reasonable, consistent with the rules' language, and not clearly erroneous. DNR's discretionary decisions will be affirmed if supported by facts of record and correct legal standards. Here, DNR reissued a permit that included a phosphorus limitation calculated according to DNR's correct interpretation of its own rules, and a discretionary determination supported by both facts and law. Should DNR's reissuance of the permit be affirmed?

The circuit court answered yes. This Court should affirm that decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF THE CASE

Intervenor-respondent Domtar A.W. LLC is a pulp and paper manufacturer (R. 5:170). At its facility in Nekoosa, Wisconsin, Domtar discharges wastewater, which includes the pollutant phosphorus, into the Wisconsin River (R. 3:2; 5:170-71). Downstream from Nekoosa, the river flows into Petenwell Lake and Castle Rock Lake (R. 5:288-89). These lakes are considered “flowages” and “reservoirs.” *See* Wis. Admin. Code § NR 102.06(3)(a)44.

Before it may discharge any pollutant into state waters, Domtar must obtain a Wisconsin Pollution Discharge Elimination System (WPDES) permit from the Wisconsin Department of Natural Resources. *See* Wis. Stat. § 283.31(1). A WPDES permit imposes on the permit-holder specific requirements, limitations, and conditions that regulate the discharge. *Id.* at (3), (4). Domtar held a WPDES permit for its Nekoosa facility covering the period from February 1, 2002 to January 31, 2007 (R. 5:1). On April 3,

2006, Domtar applied for reissuance of its permit (R. 5:108-09). DNR granted a reissued permit on December 26, 2012, with an effective date of January 1, 2013 and an expiration date of December 31, 2017 (R. 5:770-817). That permit is the subject of this appeal.

DNR's administrative rules require that a phosphorus water quality based effluent limitation (WQBEL) be included in a WPDES permit when two conditions are met. First, DNR must determine that the discharge from a point source¹ (e.g., the Nekoosa plant) has the potential to cause or contribute to an "exceedance"² of phosphorus criteria³ in either the receiving water (e.g., the Wisconsin River) or downstream waters (e.g., the Petenwell and Castle Rock Lakes). Wis. Admin. Code § NR 217.12(1)(a). Second, DNR

¹"Point source" refers to a "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants may be discharged either into the waters of the state or into a publicly owned treatment works except for a conveyance that conveys only storm water." Wis. Stat. § 283.01(12)(a). In contrast, a "nonpoint source" is "a facility or practice that causes or has the potential to cause" "pollution of waters of the state that does not result from a point source." Wis. Stat. § 281.16(1)(e), (f).

²An "exceedance" is "[t]he amount by which something, especially a pollutant, exceeds a standard or permissible measurement." *The American Heritage Dictionary of the English Language* 618 (5th ed. 2011).

³Wis. Admin. Code § NR 102.06(4)(a) establishes a "total phosphorus criterion" of "40 ug/L" (equivalent to 0.040 mg/L) for "reservoirs that are not stratified." Petenwell and Castle Rock Lakes are subject to this criterion (R. 5:238). The criterion for the Wisconsin River is "100 ug/L" (equivalent to 0.10 mg/L) (R. 5:238). Wis. Admin. Code § NR 102.06(3)(a)44. 0.1 milligrams per liter (mg/L) is equal to 100 micrograms per liter (ug/L).

must find that the technology based effluent limitation (TBEL)⁴ established pursuant to Wis. Stat. § 283.11(3) or § 283.13(2) is insufficient to achieve the applicable phosphorus criterion in the affected waters. Wis. Admin. Code § NR 217.12(1)(b). Once the WQBEL requirement is triggered, DNR “shall” calculate a phosphorus WQBEL “based on the applicable phosphorus criteria . . . at the point of discharge, except the department may calculate the limitation to protect downstream waters.” Wis. Admin. Code § NR 217.13(1)(b).

In the present case, DNR concluded that the Wis. Admin. Code § NR 217.12 conditions were met, and a WQBEL was therefore required for the Domtar permit (R. 5:288-91). The Nekoosa plant is one of many point and nonpoint sources of phosphorus discharges into the upper Wisconsin River.⁵ DNR found that, as of September 20, 2011, the river was “generally at or below the large river phosphorus criteria” (R. 5:288). However, the downstream Petenwell and Castle Rock Lakes were not “meeting the promulgated reservoir phosphorus criteria,” and the

⁴DNR “shall promulgate by rule effluent limitations representing the best available demonstrated control technology, processes, operating methods or other alternatives concerning the discharge of phosphorus if the U.S. environmental protection agency has not promulgated an effluent limitation, effluent standard or prohibition concerning this type of discharge.” Wis. Stat. § 283.11(3)(am).

⁵Domtar is one of more than sixty point sources along the Wisconsin River and its tributaries whose discharges ultimately reach the two lakes (R. 5:288-91). Nonpoint sources contribute as much if not more phosphorus to the lakes than the point sources do (R. 5:289, 435).

established TBEL was insufficient to achieve the phosphorus criterion applicable to them (R. 5:288, 291). The Nekoosa plant is a contributor to the exceedance of phosphorus criteria in the two lakes (R. 5:290-91).

While Domtar's permit application was under review, DNR was pursuing a statutorily mandated study of phosphorus discharges into the upper Wisconsin River basin (R. 5:288, 291, 822). The Clean Water Act requires states to develop a phosphorus total maximum daily load (TMDL) for all "impaired waters."⁶ *See* 33 U.S.C. 1313(d)(A). "A TMDL is the amount of a pollutant a waterbody can receive and still meet water quality standards" (R. 5:820). "Basically it is a pollution 'budget'" (R. 5:820). In line with federal law, state law requires DNR to "conduct a program to monitor the introduction of nutrients from point sources and nonpoint sources into the Wisconsin River from the headwaters of the river to the Castle Rock Flowage dam." Wis. Stat. § 281.14(2).⁷ Wisconsin Stat. § 281.14 directs DNR to tally the amount of phosphorus (and other nutrients) discharged into the river, to study the "biological, physical, and chemical properties" of the affected waters, and to evaluate the

⁶Petenwell and Castle Rock Lakes are on the impaired waters list (R. 5:288, 820).

⁷Enacted in 2009, § 281.14 for the first time provided the funding DNR needed to undertake the TMDL study. *See* 2009 Wis. Act 28, § 283s; 2013 Wis. Act 20, § 284d. DNR had sought this funding for several years. *See* A-App. 142.

efficacy of proposed methods for reducing the nutrient levels throughout the river system.

DNR “intends this study to form the basis for phosphorus TMDLs for multiple water bodies in the basin” (R. 5:288). *See* Wis. Admin. Code § NR 217.16(1). The study will facilitate DNR’s identification of all phosphorus discharges into the Wisconsin River system, and will enable DNR to create a comprehensive plan for reducing phosphorus system-wide so that all water bodies can meet their applicable phosphorus criteria. Ultimately, “the TMDL process [will be] the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs” (R. 5:764).

DNR anticipates that this uncompleted but “ongoing water quality study on the Wisconsin River and its reservoirs . . . will likely result in changes to the recommended phosphorus limitations by [Domtar’s] next permit reissuance [in 2017]” (R. 5:291). With an established TMDL, DNR will be able to calculate a scientifically and legally appropriate phosphorus limit for Domtar that will enable Petenwell and Castle Rock Lakes to meet their phosphorus water quality criteria (R. 5:289).

On February 22, 2012, DNR issued a “Public Notice of Intent to Reissue Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0003620-07-0,” the Domtar permit (R. 5:307-426). In several respects, the

limitations on Domtar's phosphorus discharges were more restrictive in the draft permit than in Domtar's previous permit. The draft permit included a phosphorus WQBEL based on the water quality criterion at the point of the Nekoosa facility's discharge into the Wisconsin River (the "receiving water"), but did not take into account the water quality criterion of the Petenwell and Castle Rock Lakes (the "downstream waters") (R. 5:288-91, 307, 405). Nevertheless, the draft permit was more stringent than its predecessor, which did not include a WQBEL at all (R. 5:2-3). The draft permit also imposed a more stringent TBEL than Domtar had previously had (R. 5:16, 325, 368). In addition to these greater restrictions, the draft permit imposed a "mass limit" on Domtar for the first time (R. 5:2-3, 326, 368). A "mass limit," which caps the amount of phosphorus Domtar can discharge on an annual basis, was required by the rules because of the phosphorus-impaired downstream reservoirs (R. 5:291). *See* Wis. Admin. Code § NR 217.14(1)(a).

DNR received several comments on the draft permit, including comments from Petenwell and Castle Rock Stewards, Inc. and River Alliance of Wisconsin, Inc. (RAW), who are the petitioners-appellants in this case. DNR also received comments from Midwest Environmental Advocates, Inc. (MEA), counsel for PACRS and RAW in this appeal.

Comments from MEA, dated March 23, 2012, were the most extensive. The first of its many comments was that

DNR should have but “did not consider the discharges [sic] impact on the phosphorus-impaired water directly downstream or calculate Domtar’s phosphorus WQBEL to protect the downstream water” (R. 5:474) (emphasis removed).

A letter dated March 22, 2012, from RAW “express[ed] support for the points raised by Midwest Environmental Advocates in their comments on the draft Domtar permit” (R. 5:435). An undated letter from PACRS did not address “specifics of the draft Domtar permit,” but expressed concern about the health of Petenwell and Castle Rock Lakes (R.5:440). PACRS supported

any and all efforts on the part of the DNR to use its permit-granting authority to significantly limit the inputs of both of these pollutants [mercury and phosphorus] into the Wisconsin River upstream of the already-degraded lakes Petenwell and Castle Rock. We ask that limitations for both of these pollutants be set as stringently as possible, without causing unreasonable hardship to the permittee [sic].

(*Id.*).

DNR responded to these comments as follows:

The Department has considered and continues to take seriously the impacts of phosphorus loading from all point sources and nonpoint sources to all reaches of the Wisconsin River including the Petenwell and Castle Rock Flowages. Monitoring and modeling in the Upper Wisconsin River Basin are currently underway with the goal of having an approved water quality management plan with total maximum daily loads within the next five years. The Department believes that the TMDL process is the most economically efficient and expedient method to

attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs.

Note also that pursuant to s. NR 217.3(1)(b), Wis. Adm. Code, “Water quality based effluent limitations for phosphorus shall be calculated based on the applicable phosphorus criteria in s. 102.06 at the point of discharge, except the department may calculate the limitation to protect downstream waters.” While Department guidance⁸ recommends phosphorus WQBELs be based on downstream water quality when the discharge is upstream from a reservoir or lake, the guidance currently does not contain procedures for calculating such limits short of a TMDL that addresses both point and nonpoint source impacts on downstream water quality criteria.

(R. 5:764).

Meanwhile, MEA had shared its concerns about the draft Domtar permit with the U.S. Environmental Protection Agency (R. 5:454-55). EPA told DNR that it would review the draft permit before its issuance. On June 20, 2012, EPA gave DNR its first comments about the phosphorus compliance schedule in the draft (R. 651-54). One week later, PACRS informed the EPA of its concern “that WDNR is not using the authority granted it via the statewide phosphorus rules (NR 102 and NR 217) to limit phosphorus inputs into water bodies,” citing the draft Domtar permit as an example of DNR’s alleged failure to use its regulatory authority (R. 5:656-57). On August 30, 2012, EPA gave DNR more comments about the draft permit’s

⁸See Guidance for Implementing Wisconsin’s Phosphorus Water Quality Standards for Point Source Discharges, Jan. 3, 2012 (A-App. 118-36).

phosphorus compliance schedule (R. 5:705-12). DNR worked out a revised schedule with EPA and incorporated that into the permit (R. 5:713, 762-63). Finally, on December 20, 2012, the EPA informed DNR that it did not object to DNR's reissuance of the Domtar permit (R. 5:760-61).

The permit was reissued on December 26, 2012, with an expiration date of December 31, 2017 (R. 5:772-817). As explained in the "Notice of Final Determination to Reissue Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0003620-07-0," like the draft permit, the final permit included a phosphorus WQBEL calculated on the basis of the applicable phosphorus criteria at the point of discharge (the Wisconsin River) only (R. 5:764, 789-90). Wis. Admin. Code § NR 217.13(1)(b).

The Notice of the Domtar permit's reissuance stated: "As provided by s. 283.63, and ch. 203, Wis. Admin. Code, persons desiring further adjudicative review of this final determination may request a public adjudicatory hearing" (R. 5:768). Wisconsin Stat. § 283.63 sets out procedures for administrative and judicial review of the reissuance of a WPDES permit. Specified persons and entities may seek a contested case hearing before DNR to review a permit decision. Wis. Stat. § 283.63(1). If dissatisfied with the outcome of that hearing, the person or entity may seek judicial review of the DNR's permitting decision pursuant to Wis. Stat. § 227.52. Wis. Stat. § 283.63(2).

Neither PACRS nor RAW sought DNR's review of the Domtar permit under Wis. Stat. § 283.63. Instead, petitioners filed a Petition for Judicial Review of the permit in the Dane County Circuit Court under Wis. Stat. § 227.52 naming DNR as respondent (R. 1). Domtar intervened (R. 3). Domtar moved to dismiss the Petition for Judicial Review on the ground that petitioners had failed to exhaust their administrative remedies as provided by Wis. Stat. § 283.63 (R. 8; 9). DNR did not join this motion (R. 10). The circuit court denied the motion to dismiss, but ultimately dismissed the petition on the merits (R. 16; 28; 29).

This appeal followed.

On March 11, 2015, DNR filed a Motion for Summary Affirmance on the ground that petitioners had failed to exhaust their administrative remedies. This Court denied that motion.

ARGUMENT

- I. **DNR's reissuance of the Domtar permit can be affirmed on the alternative ground that petitioners did not exhaust their administrative remedies before filing their complaint in circuit court.**

As noted above, Wis. Stat. § 283.63 sets out administrative and judicial review procedures specifically designed for WPDES permits. The administrative review provision provides in pertinent part that “[a]ny permit applicant, permittee, affected state or 5 or more persons may secure a review by the department of any permit denial,

modification, termination, or revocation and reissuance, [or] the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit” Wis. Stat. § 283.63(1). Thereafter, DNR shall “provide a notice of public hearing,” shall “hold a public hearing,” and “shall issue its decision on the issues raised by the petitioner within 90 days after the close of the hearing.” *Id.* at (1)(a), (b), (d).

DNR’s decisions “*under this section* shall be subject to judicial review as provided in ss. 227.52 and 227.58.” Wis. Stat. § 283.63(2).

Our supreme court construed Wis. Stat. § 147.20 (1973), the predecessor statute of today’s § 283.63, in *Sewerage Commission v. Department of Natural Resources*, 102 Wis. 2d 613, 307 N.W.2d 189 (1981). There, the court held that the “specified method of review . . . prescribed” by the statute “is exclusive.” *Id.* at 630. The Sewerage Commission had skipped the administrative review stage and filed a declaratory judgment action in the Milwaukee County Circuit Court under ch. 227. The circuit court allowed the declaratory judgment action to proceed and this Court affirmed. The supreme court vacated the rulings of the courts below and remanded to the trial court to dismiss the ch. 227 action because “sec. 147.20 is the exclusive method of administrative and judicial review of the department’s action.” *Id.* at 621, 634.

This Court recently applied the *Sewerage Commission* holding in *Clean Water Action Council of Northeast*

Wisconsin v. Wisconsin Department of Natural Resources, 2014 WI App 61, 354 Wis. 2d 286, 848 N.W.2d 336, *rev. denied*, 2014 WI 122, 855 N.W.2d 697. There, like petitioners here, Clean Water Action Council petitioned for judicial review of a phosphorous limitation in a WPDES permit without first seeking a contested case hearing before DNR. The Court concluded that “*Sewerage Commission* is controlling and requires a contested case hearing under § 283.63 as a prerequisite to judicial review of the DNR’s decision to issue a WPDES permit.” *Id.* ¶ 1. Clean Water Action Council failed to exhaust its administrative remedies. Therefore, the circuit court’s dismissal of Clean Water Action Council’s petition for judicial review was a proper exercise of discretion. *Id.* ¶ 24.

“Whether to apply the doctrine of exhaustion is committed to the circuit court’s discretion.” *Clean Water Action Council*, 354 Wis. 2d 286, ¶ 5. “A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach.” *St. Croix Valley Home Builders’ Ass’n v. Twp. Of Oak Grove*, 2010 WI App 96, ¶ 10, 327 Wis. 2d 510, 787 N.W.2d 454 (citation omitted).

In this case, petitioners did not seek DNR’s review of the Domtar permit under Wis. Stat. § 283.63. Instead, they went directly to the Dane County Circuit Court and filed a petition for judicial review under Wis. Stat. § 227.52.

Domtar moved to dismiss petitioners' petition for judicial review on exhaustion grounds (R. 8). DNR did not join Domtar's motion and informed the circuit court that it did "not necessarily agree with the argument of Domtar" (R. 10:1). Relying on an informal opinion letter from the Attorney General to DNR Deputy Secretary Matt Moroney dated January 19, 2012, the circuit court ruled that § 283.63 did not require petitioners to seek administrative review before filing a petition for judicial review (R. 16:2).

Domtar filed its motion to dismiss before this Court's decision in *Clean Water Action Council*. After the opinion in that case was released, Domtar moved for reconsideration (R. 24). The circuit court conceded that, under *Clean Water Action Council*, "the doctrine of exhaustion of remedies requires a party to seek a contested case hearing [under § 283.63(1)] before seeking judicial review" (R. 28:1). However, the court decided that exhaustion was not required in this case under futility exceptions cited in *Fazio v. Department of Employee Trust Funds*, 2002 WI App 127, 255 Wis. 2d 801, 645 N.W.2d 618, and *League of Women Voters of Appleton, Inc. v. Outagamie County*, 113 Wis. 2d 313, 320, 334 N.W.2d 887 (1983).

The circuit court did not properly exercise its discretion in denying Domtar's motion to dismiss because it did not apply a proper standard of law. The two cases the court relied on to conclude that seeking administrative review would have been futile are inapposite. Because the

circuit court's denial of Domtar's exhaustion motion was premised on an erroneous legal analysis, it was not a proper exercise of the court's discretion. *See Sewerage Comm'n*, 102 Wis. 2d at 621, 634 (reversing and remanding where circuit court misinterpreted § 283.63's predecessor statute); *accord St. Croix*, 327 Wis. 2d 510, ¶ 10.

In *Fazio*, this Court said that exhaustion is not required “where the administrative agency would not have afforded the party adequate relief because the agency did not have the authority to provide the remedy sought.” *Fazio*, 255 Wis. 2d 801, ¶ 11. Here, petitioners' complaint is about the way DNR calculated the phosphorous WQBEL in the Domtar permit. DNR has the authority to either change the WQBEL in the Domtar permit or recalculate it. *See* Wis. Stat. § 283.31(3), (4). Thus, it does not come within *Fazio*'s futility doctrine, which allows a person to skip administrative review where the agency lacks the authority to give him the desired relief.

In *League of Women Voters*, “[t]he attorney for the county and the board of adjustment had made very clear, on the record of this case, his clients' position that no appeal to the board of adjustment would be entertained.” 113 Wis. 2d at 320. On that ground, the supreme court decided that exhaustion was not required because an appeal to the board “would have been futile.” *Id.* Nowhere in the record of the present case is there any suggestion that DNR informed petitioners or anyone else that a request for a contested case

hearing on the Domtar permit would be denied. Therefore, the *League of Women Voters* doctrine does not apply here.

The circuit court based its futility conclusion on a January 12, 2007, letter from the DNR Deputy Secretary to MEA in an unrelated case. There, DNR denied MEA's petition for a contested case hearing to review a WPDES permit (R. 28:1, *referring to* R. 11:138-41). Here, the circuit court assumed that DNR would deny a hearing request in the present case just as it had in the 2007 case. That is an unwarranted extension of *League of Women Voters*, which excused exhaustion on the basis of the agency's declaration that it would deny administrative review in the case before it, not in some unrelated case.

Furthermore, the premise of the circuit court's futility reasoning—that the present case involved the same type of review sought in the 2007 matter—is wrong (R. 28:1). According to the court, “[t]he Department took the position [in the 2007 letter] that the contested case hearing under § 283.63 only permits review of ‘the reasonableness of or the necessity for a term or condition contained’ in the permit” (R. 28:1). Review was denied in the 2007 case (in part) because the petitioner was not seeking the specified type of review. That is not this case. Here, petitioners *are* seeking review of the “reasonableness” of the phosphorous WQBEL in the Domtar permit, which is a “term or condition” of the permit. Wis. Stat. § 283.63(1). Thus, under the plain language of the statute and the reasoning of the 2007 letter,

a contested case hearing would have been available here. Petitioning for such a hearing would not have been futile.

Opposing the Motion for Summary Affirmance DNR filed in this Court, petitioners offered several responses to DNR's exhaustion argument. All of these arguments should be rejected by this Court. DNR will respond to four of those arguments in this section of its brief.

First, petitioners invoked the judicial estoppel doctrine cited in *State v. Gove*, 148 Wis. 2d 936, 437 N.W.2d 218 (1989). Petenwell and Castle Rock Stewards' and River Alliance of Wisconsin's Response in Opposition to DNR's Motion for Summary Affirmance (hereinafter, "Petitioners Response") at 7. "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *Id.* at 944. That doctrine does not apply here. The exhaustion argument would have been advantageous to DNR, but DNR did not advance it. Domtar made the argument, but it was rejected by the circuit court, so the court did not "maintain[] that position." *Id.* DNR now argues on appeal that the circuit court should have adopted the position presented by Domtar. None of the *Gove* factors are satisfied here.

Second, petitioners complain that DNR "failed to cross-appeal on that issue." Petitioners' Response at 7. Here, DNR

is asking this Court to affirm the decision and order of the court below on an alternative ground not relied on by that court. See *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 43, 296 Wis. 2d 880, 724 N.W.2d 208. The failure to file a cross-appeal does not bar DNR “from raising issues to support the judgment.” *Dobberfuhl v. Madison White Trucks, Inc.*, 118 Wis. 2d 404, 407, 347 N.W.2d 904 (Ct. App. 1984).

Third, petitioners implicitly argue that they believed Petenwell and Castle Rock Stewards and River Alliance of Wisconsin were each an “individual” person, who could go directly to court without seeking a contested case hearing under Wis. Stat. § 283.63. Petitioners’ Response at 2. This view was based on the aforementioned Attorney General’s letter of January 19, 2012. In *Clean Water Action Council*, this Court concluded that the letter’s advice was inconsistent with *Sewerage Commission*, and that Clean Water Action Council’s reliance on the letter did not excuse it from exhausting its administrative remedies. *Clean Water Action Council*, 354 Wis. 2d 286, ¶¶ 21-22.

Sewerage Commission has been the law for over thirty years. Rather than following the procedure required under *Sewerage Commission*, CWAC chose to rely on a novel interpretation of that case proffered by the attorney general in an informal opinion. It did so despite the well-established fact that attorney general opinions are not precedential authority. The situation here is one of CWAC’s own making and is not the type of circumstance in which courts have found it would be harsh and unfair to apply the exhaustion doctrine.

Id. ¶ 28; *see also id.* ¶ 31. Similarly, any reliance petitioners may have placed on the January 2012 letter does not excuse them from failing to exhaust their administrative remedies.

Fourth, petitioners argue that this is not a case where further agency review will help focus the issues for the Court because the question at issue is “purely legal.” Petitioners’ Response at 15. In *Clean Water Action Council*, this Court stated that exhaustion was required “regardless of whether the challenge involved questions of fact or law.” *Clean Water Action Council*, 354 Wis. 2d 286, ¶ 15.

The circuit court affirmed DNR’s reissuance of the Domtar permit on the merits. This Court can affirm the circuit court on the alternative ground that petitioners failed to exhaust their administrative remedies.

II. DNR’s reissuance of the Domtar permit should be affirmed because DNR correctly interpreted and reasonably applied the applicable regulations.

A. Standard of review.

“In deciding an appeal from a circuit court’s order affirming or reversing an administrative agency’s decision, we review the decision of the agency, not that of the circuit court.” *Milw. Cty. v. Labor & Indus. Review Comm’n*, 2014 WI App 55, ¶ 13, 354 Wis. 2d 162, 847 N.W.2d 874 (citation omitted). This Court’s review is limited to the administrative record before the court. Wis. Stat. § 227.57(1); *State Pub. Intervenor v. Wis. Dep’t of Natural*

Res., 171 Wis. 2d 243, 249-50, 490 N.W.2d 770 (Ct. App. 1992). Nonetheless, this Court has noted that it values the circuit court's decision and consideration of the questions presented. *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶ 8, 265 Wis. 2d 248, 665 N.W.2d 397.

The scope of judicial review is set by Wis. Stat. § 227.57 and related case law. The agency's decision is presumed to be correct; the burden is on the petitioner to show that it should be overturned. *Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 55, 311 Wis. 2d 579, 754 N.W.2d 95. Grounds for reversal are limited. Pertinent here, the court shall reverse an agency decision if petitioner proves: (1) an erroneous interpretation of law (including agency regulations) where "a correct interpretation compels a particular action" (§ 227.57(5)); (2) the facts found by the agency "compel a particular action as a matter of law" (§ 227.57(7)); and (3) the agency's exercise of discretion exceeded its authority or deviated from agency rule, policy, or practice, or from some constitutional or statutory provision (§ 227.57(8)). However, the "court shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8).

An agency's interpretation of its own regulations is entitled to controlling weight deference because

[a]n administrative agency knows the specific purposes of the regulations it has promulgated. Moreover, an agency has a certain expertise in the area it is called upon to regulate. Thus we believe that an agency is in the best position to interpret its

own regulations in accordance with their underlying purposes.

Plevin v. Dep't of Transp., 2003 WI App 211, ¶ 13, 267 Wis. 2d 281, 671 N.W.2d 355 (citation omitted). This Court has specifically held that DNR's "interpretation and application of its own regulations are entitled to controlling weight deference." *Sierra Club v. Wis. Dep't of Natural Res.*, 2010 WI App 89, ¶ 24, 327 Wis. 2d 706, 787 N.W.2d 855.

Controlling weight deference requires a court to "uphold an agency's interpretation if it is reasonable and is not inconsistent with the language of the regulation or clearly erroneous." *Id.* Indeed, a court will defer to an agency's "interpretation of a rule and sustain its legal conclusion if it is reasonable, even though an alternative view may be equally reasonable." *Castle Corp. v. Wis. Dep't of Revenue*, 142 Wis. 2d 716, 719, 419 N.W.2d 709 (Ct. App. 1987).

B. DNR's interpretation of Wis. Admin. Code § NR 217.13(1)(b) is entitled to this Court's deference because it is reasonable, consistent with the language of the regulation, and not clearly erroneous.

The core question presented in this appeal is whether DNR's interpretation of Wis. Admin. Code § NR 217.13(1)(b) is entitled to this Court's deference. The answer is yes. DNR's interpretation, based on the plain language of the regulation and one of the most basic rules of statutory construction, is reasonable, consistent with the rule's language, and not clearly erroneous. *See Sierra Club*,

327 Wis. 2d 706, ¶ 24. Therefore, the circuit court’s decision affirming the Domtar permit and dismissing the petition for review should be affirmed.

The provision at issue states:

Water quality based effluent limitations for phosphorus *shall be calculated* based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except the department *may calculate* the limitation to protect downstream waters.

Wis. Admin. Code § NR 217.13(1)(b).

Wisconsin courts construe the words “shall” as mandatory and “may” as permissive “unless a different construction is demanded by the statute⁹ in order to carry out the clear intent of the legislature.” *City of Wauwatosa v. Milw. Cnty.*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963). “‘May’ is defined in the dictionary as, *inter alia*, ‘having permission to’ and ‘having liberty to.’ Thus, the use of the word ‘may’ implies a discretionary element.” *Swatek v. Cnty. of Dane*, 192 Wis. 2d 47, 59, 531 N.W.2d 45 (1995) (citations omitted). Further, when “shall” and “may” are used in the same statutory section, “one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings.” *Id.* (citations omitted); accord *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465; *Scanlon*

⁹Administrative regulations are subject to the same rules of interpretation applicable to statutes. *Menasha*, 311 Wis. 2d 579, ¶ 45.

v. City of Menasha, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962); *see also* 3 N. Singer & J. Singer, *Sutherland Statutory Construction*, § 57.11 (7th ed. 2008).

DNR interprets the regulation, as applied to the Domtar permit, to mean this: it was required to (“*shall*”) calculate the phosphorus WQBEL on the basis of the applicable phosphorus criteria for the Wisconsin River (“the point of discharge”). DNR had the further discretion to (“*may*”) calculate the phosphorus WQBEL based on the water quality criteria for Petenwell and Castle Rock Lakes (“downstream waters”) as appropriate. DNR is not *required* in all cases to calculate the WQBEL on the basis of the water quality criteria for the downstream waters. This interpretation is a reasonable application of the shall/may distinction. It is not clearly erroneous. This Court should therefore defer to DNR’s interpretation of the rule.

In an effort to avoid this straightforward reading of the rule, Petitioners cite and discuss several other statutory and regulatory provisions to support their argument that DNR is required to account for the potential phosphorus impact on the downstream waters in its calculation of Domtar’s phosphorus WQBEL . *See* Petitioners’ Brief at 23-29 (citing Wis. Stat. § 283.13(5), § 283.31(3)-(4), and Wis. Admin. Code § NR 102.06, 217.12, 217.15). Petitioners misconstrue the statutory/regulatory framework.

Wisconsin Stat. § 283.31(1) prohibits the discharge of any pollutant into state waters in the absence of a permit

from DNR. Section 283.31(3) states that a DNR permit must require any pollutant discharge to meet several standards, “whenever applicable.” These include: effluent limitations, standards, and prohibitions, and “[a]ny more stringent limitations, including those . . . [n]ecessary to meet federal or state water quality standards.” Wis. Stat. § 283.31(3)(d)1. DNR shall also “establish” and “require compliance with . . . water quality based effluent limitations in any permit . . . if these limitations are necessary to meet applicable water quality standards.” Wis. Stat. § 283.13(5). The statutes do not set water quality standards, do not delineate the circumstances that trigger a WQBEL, and do not explain how a WQBEL is calculated.

Wisconsin Admin. Code § NR 102.06 provides a list of the phosphorus water quality criteria applicable to Wisconsin’s surface waters. Pertinent here, the total phosphorus criterion is 0.1 milligrams per liter (mg/L) for the Wisconsin River, and 0.04 mg/L for Petenwell and Castle Rock Lakes. Wis. Admin. Code § NR 102.06(3)(a)44., 102.06(4)(a). Section NR 102.06 does not explain when a WQBEL is required or how to calculate a WQBEL.

Pursuant to Wis. Stat. ch. 283, DNR promulgated Wis. Admin. Code ch. NR 217, which establishes “effluent standards and limitations, including water quality based effluent limitations, for phosphorus in effluent discharged to surface waters of the state.” Wis. Admin. Code § NR 217.01. Subchapter III of § NR 217 creates the regulatory framework

for determining *when* a WQBEL must be included in a WPDES permit, and *how* a required WQBEL is to be calculated.

Wisconsin Admin. Code § NR 217.12(1) explains *when* a phosphorus WQBEL is required. Before it will include a mandatory WQBEL in a water permit, DNR must determine whether:

(a) The discharge from a point source contains phosphorus at concentrations or loadings which will cause, has the reasonable potential to cause or contribute to an exceedance of the criteria in s. NR 102.06 in either the receiving water or downstream waters; and

(b) The technology based effluent limitation or the alternative treatment technology limitation calculated under s. NR 243.13 is less stringent than necessary to achieve the applicable water quality standard for phosphorus in s. NR 102.06.

A separate provision, Wis. Admin. Code § NR 217.15(1), sets out the analysis DNR must use to determine whether the conditions requiring a WQBEL under § NR 217.12(1)(a) have been met. Neither § NR 217.12 nor § NR 217.15 explains how a required WQBEL is to be calculated.

Instead, § NR 217.13 explains *how* a phosphorus WQBEL is to be calculated. *See* Wis. Admin. Code § NR 217.13(1)(a). It states that a WQBEL “*shall* be calculated based on the applicable phosphorus criteria in s. NR 102.06 at the point of discharge, except the department *may* calculate the limit to protect downstream waters.” *Id.* at (b). Under this provision, the applicable phosphorus

criterion of the receiving water (*i.e.*, “the point of discharge”) must be part of the WQBEL calculation. That is mandatory, as indicated by the use of the word “shall.” Beyond that, the provision allows DNR, in an appropriate case, to calculate the WQBEL based on the phosphorus criterion of the downstream waters in order to protect them. That is discretionary, as indicated by the use of the word “may.” EPA approved § NR 217’s phosphorus rules on July 25, 2012 (R. 2:5).

Petitioners imply that DNR is ignoring the needs of the Petenwell and Castle Rock Lakes by basing its calculation of the WQBEL on the phosphorus criterion of the receiving water alone without considering the criterion of the downstream waters. Petitioners disregard the permit’s imposition of a phosphorus “mass limit” on Domtar, which was included only because the downstream waters are phosphorus-impaired (R. 5:788-89). *See* Wis. Admin. Code § 217.14(1)(a). They also overlook the fact that the reissued permit is more rigorous than Domtar’s previous permit with respect to its phosphorus limitations. *See supra* at 7.

Contrary to petitioners’ arguments, DNR’s interpretation of § NR 217.13(1)(b) is consistent with the overall statutory and regulatory framework governing the discharge of phosphorus. DNR has shown how the applicable statutes and regulations work together. Only § NR 217.13 provides DNR with directions on *how* to calculate a phosphorus WQBEL. *See* Wis. Admin. Code § NR 217.13(1).

None of the other statutes or regulations purport to provide this kind of guidance. The WQBEL calculation procedures set out in § 217.13(1)(b) are clear: DNR must (“shall”) calculate the WQBEL on the basis of the applicable phosphorus criteria “at the point of discharge,” and has the further discretion (“may”) adjust the calculation “to protect downstream waters.” When putting together the Domtar permit, DNR followed these required procedures and applied them correctly.

Petitioners’ interpretation of § NR 217.13(1)(b) is wrong for two reasons. First, it is contrary to the general rule of construction that “shall” denotes a mandatory action and “may” denotes a discretionary action. Second, it ignores the place of this regulation in the broader statutory and regulatory framework. Other than the parties’ disagreement over the meaning of “shall” and “may,” petitioners have not identified any errors in the Domtar permit. There is no ground for reversal of the agency’s decision. *See* Wis. Stat. § 227.57. Therefore, the permit and the circuit court’s dismissal of the petition for judicial review should be affirmed.

C. DNR's calculation of the WQBEL in the Domtar permit was an appropriate exercise of its discretion under Wis. Admin. Code § NR 217.13(1)(b).

During the permitting process, DNR explained that it is in the midst of a multi-year research project leading to the development of a phosphorus TMDL for the upper Wisconsin

River basin (R. 5:288, 291, 822). *See supra* at 8-9. Once established, the TMDL will be applicable to all bodies of water in the basin. Wis. Admin. Code § NR 217.16 explains that, in many circumstances, a new TMDL will displace a previously established WQBEL. For example, “[i]f the phosphorus limitation based on an approved TMDL is *more stringent* than the water quality based effluent limitation calculated under s. NR 217.13, the department shall include the *more stringent* TMDL based limitation in the WPDES permit.” Wis. Stat. § 217.16(4).

DNR stated that the eventual development of the TMDL will “likely result in changes to the recommended limitations by [Domtar’s] next permit reissuance [in 2017]” (R. 5:291). This prediction was stated explicitly in Domtar’s permit (R. 5:790). DNR emphasized its belief “that the TMDL process is the most economically efficient and expedient method to attain phosphorus water quality standards in the Wisconsin River and its flowages and reservoirs” (R. 5:764). Furthermore, acknowledging that § NR 217.13(2)(b) gives it the discretion to account for phosphorus impacts on downstream waters when calculating a WQBEL, DNR noted that it had no “procedures for calculating such limits short of a TMDL that address[] both point and nonpoint source impacts on downstream water quality criteria” (*id.*). In other words, the best way for DNR to calculate a downstream-based WQBEL for Domtar is to complete a TMDL for the entire basin. Even before that

process is completed, the monitoring and modeling already underway will provide a more complete and accurate basis for calculating WQBELs protective of both the Wisconsin River and the downstream waters.

The “court shall not substitute its judgment for that of the agency on an issue of discretion.” Wis. Stat. § 227.57(8).

Discretion . . . contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. . . . “[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.”

McCleary v. State, 49 Wis. 2d 263; 277, 182 N.W.2d 512 (1971) (citation omitted).

DNR’s calculation of the WQBEL in the Domtar permit according to the mandatory requirement of Wis. Admin. Code § NR 217.13(1)(b), and its decision to wait to impose a more accurate limitation after the completion of the TMDL study, was an appropriate exercise of its discretion. DNR explained its reasoning in detail. In its September 10, 2011, and January 10, 2012, memoranda, DNR frankly discussed the difficulty of calculating individual WQBELS and identified the development of a system-wide TMDL as the best hope for reducing phosphorus levels throughout the upper Wisconsin River basin (R. 5:288-91). It reiterated this discussion in its response to the public comments to the draft Domtar permit (R. 5:763-64). Significantly, both petitioner River Alliance of Wisconsin and the Big Eau Pleine Citizens Organization,

commenting on the draft permit, applauded the eventual development of a TMDL (R. 5:435, 437). Even Domtar itself, in its written response to the draft permit, welcomed the development of a TMDL (R. 5:433).

It was within DNR's discretion to consider the impact of Domtar's phosphorus discharge on Petenwell and Castle Rock Lakes when calculating Domtar's WQBEL. It was also within DNR's discretion not to do so and to wait until a system-wide TMDL is developed to adjust Domtar's permissible phosphorus discharge. DNR did not exercise its discretion erroneously by limiting the WQBEL calculation to the "applicable phosphorus criteria . . . at the point of discharge," *i.e.*, the Wisconsin River. Wis. Admin. Code § NR 217.13(1)(b). Therefore, this Court should not substitute its judgment for the DNR's and should affirm the Domtar permit.

D. EPA approved DNR's WPDES regulations and did not object to the Domtar Permit.

Petitioners contend that the WQBEL in the Domtar permit exceeds DNR's authority because it does not meet federal requirements, specifically the Clean Water Act. Petitioners' Brief at 33-36. Petitioners concede that EPA did not object to the Domtar permit, but say it was not required to. Petitioners rely on EPA's discussions with DNR on *two*

*completely unrelated permits*¹⁰ to support its position that EPA would have disapproved the Domtar permit had it been paying better attention. This argument is a non-starter for several reasons.

First, EPA carefully reviewed the Domtar permit, and worked with DNR on its development of the phosphorus WQBEL. On December 20, 2012, days before the Domtar permit was issued, EPA informed DNR in writing that:

The U.S. Environmental Protection Agency has reviewed the National Pollutant Discharge Elimination System Permit (Permit) for the schedule of compliance related to total phosphorus effluent limitations for the Nekoosa Mill Wastewater Reclamation Center that was submitted to EPA on December 11, 2012. Based on our review to date, EPA would not object to issuance of that permit.

¹⁰Petitioners cite to R. 19:77 [which should be R. 19:78] 19:82, A-Ap. 181, 185. These are pages from Notice of Final Determination to Reissue a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0023990-08-0 to the City of Fond du Lac for its Water Pollution Control Plant. The receiving water was Lake Winnebago in Fond du Lac County, and the Fox River was the receiving water (R. 19:77, 82). DNR notes that these are citations to attachments to petitioners' brief in support of its Chapter 227 petition (R. 19). These attachments, which are not part of the administrative record, are beyond the Court's scope of review. *See* Wis. Stat. § 227.57(1). Petitioners also cite to R. 88-89, A-Ap. 190-91. These are pages from a November 20, 2012, letter from EPA to DNR regarding "City of Oshkosh draft WPDES Permit No. WI-0025038-08." The receiving water was the Fox River and the downstream water was Lake Winnebago (R. 19:88-91). The City of Oshkosh is in Winnebago County. The letter refers to a "TMDL approved for the Lower Fox River, which includes the stretch of river from Lake Winnebago to Green Bay," and found that the WQBEL in the draft permit was inconsistent with that TMDL (R. 19:88). Again, these are citations to attachments to petitioners' brief in support of its Chapter 227 petition and are therefore beyond the Court's scope of review (R. 19). *See* Wis. Stat. § 227.57(1).

However, our position could change if any of the following occurs:

- a. Prior to the actual date of issuance of a Proposed Permit, an effluent guideline or standard is promulgated which is applicable to the permit and which would require revision or modification of a limitation or condition set forth in the Draft Permit;
- b. A variance is granted and the Permit is modified to incorporate the results of that variance;
- c. There are additional revisions to be incorporated into the Permit which have not been agreed to by EPA; or
- d. EPA learns of new information, including as the result of public comments, that causes EPA to reconsider its position.

Subject to the above conditions, the permit may be issued in accordance with the Memorandum of Agreement and pursuant to the Clean Water Act.

....

Thank you for your cooperation during the review process and your thoughtful consideration of our comments.

(R. 5: 760-61).

As this letter shows, EPA carefully scrutinized the draft Domtar permit, specifically the sections of the permit dealing with phosphorus effluent limitations, and, with full knowledge of the issues at stake, did not object to its reissuance. Petitioner Petenwell and Castle Rock Stewards complained to EPA about DNR's alleged failure to use its full authority to limit phosphorus discharges by Domtar

(R. 5:656-57). EPA was thus fully aware of this critique during the entire period that it worked with DNR on the draft permit's phosphorus WQBEL (R. 5:438, 604-05, 651-55, 705-13, 760-61). *See supra* at 9-10. Therefore, petitioners' contention that EPA's implicit disapproval of the Domtar permit can somehow be inferred from its criticism of a pair of WPDES permits for different entities in different counties in different water systems (*see supra* n. 10) should be rejected out of hand.¹¹

Second, in addition to approving DNR's decision on the appropriate WQBEL for Domtar's WPDES permit, EPA approved DNR's chosen approach to making WQBEL calculations (R. 2:5). Section NR 217.13(1)(b) gives DNR the discretion to decide how to calculate the required WQBEL, and—by using the mandatory “shall” and the discretionary “may”—does so explicitly. *See supra* at 22-27. By approving that regulation and by not objecting to the WQBEL in the Domtar permit, “EPA effectively determined that the permit complies with [federal law].” *Andersen v. Dep't of Natural Res.*, 2011 WI 19, ¶ 63, 332 Wis. 2d 41, 796 N.W.2d 1.

¹¹Significantly, the non-objection letter in the present case was signed by the same EPA officer who signed the objection letter in the City of Oshkosh case (R. 5:761; R. 19:91). Both letters were addressed to the same DNR officer (R. 5:760; R. 19:88). The two letters were written one month apart (*id.*). Although the letter in the City of Oshkosh case is beyond this Court's scope of review, *see supra* n. 10, DNR notes that the fact that the same person wrote these two letters one month apart confirms that EPA scrutinized both permits, and affirmatively decided to object to one (the Oshkosh permit) and not object to the other (the Domtar permit).

Finally, as explained by our supreme court in *Andersen*, even if the Domtar permit in particular or DNR's permit program in general violates federal law, petitioners have no remedy in state court.

If [they are] entitled to a remedy, the remedy rests with the EPA. For instance, an aggrieved person may seek limited judicial review in federal district court of the EPA's decision not to object to a permit. While such judicial review is available on only two narrow grounds, one of those grounds is particularly relevant to this case: an aggrieved person may claim in federal district court that a proposed permit violates applicable federal guidelines that the EPA failed to consider. In addition, any interested person may seek judicial review in the federal courts of appeals of the EPA's action "in making any determination as to a State permit program" For example, an interested person may seek review of the EPA's decision to withdraw or not to withdraw authorization of a state's permit program. As previously explained, one of the circumstances in which the EPA may withdraw its approval of a state's permit program is when the state issues permits that do not comply with the federal regulations.

Andersen, 332 Wis. 2d 41, ¶ 65 (citations and footnotes omitted).

EPA approved DNR's WPDES permitting rules, reviewed the draft Domtar permit, knew that its phosphorus limitation was calculated on the basis of the Wisconsin River's water quality criterion, worked with DNR to resolve its concerns about the permit, and did not object to the permit's reissuance. Thus, EPA effectively found that the Domtar permit complies with federal regulations and the

Clean Water Act. Moreover, any complaint petitioners might have that the Domtar permit does not comply with federal law must be brought to the EPA, not state court.

CONCLUSION

For the above reasons, DNR asks that the Court deny all of Petitioners' requested relief and affirm DNR's Domtar A.W. LLC WPDES permit decision in its entirety.

Dated this 20th day of May, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,185 words.

Dated this 20th day of May, 2015.



MAURA FJ WHELAN
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CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:


I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of May, 2015.


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