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STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION and CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,
Petitioners-Appellants,

v. APPEAL NO. 2008AP003235

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT DNR MUST IN A PERMIT REVIEW HEARING DETERMINE WHETHER A WASTEWATER DISCHARGE PERMIT ISSUED UNDER STATE LAW PURSUANT TO AN EPA-APPROVED STATE PROGRAM COMPLIES WITH FEDERAL LAW

DEPARTMENT OF NATURAL RESOURCES' BRIEF

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STATE OF WISCONSIN
S U P R E M E C O U R T

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DEPARTMENT OF NATURAL RESOURCES' BRIEF

The Department of Natural Resources asks this Court to reverse the court of appeals, which erroneously required DNR to determine in the permit issuance and hearing process whether a state wastewater discharge permit term, authorized by state rules as part of an EPA-approved program in a permit to which EPA has not objected, meets federal law requirements. The court of appeals decision will potentially result in improperly promulgated and non-federally approved new state rules, and will establish a regulatory review process that is contrary to the proper remedies of petitioning EPA for objections to permits, rule revision or withdrawal of state program approval.

ISSUE PRESENTED

The United States Environmental Protection Agency has approved Wisconsin's program of statutes and rules regulating wastewater discharges as consistent with the federal Clean Water Act, and has authorized DNR to administer the Clean Water Act permitting program pursuant to those state statutes and rules. State statutes provide that state rules relating to wastewater discharges must comply with the federal Clean Water Act. State statutes authorize DNR to issue wastewater discharge permits containing standards set forth in those rules. At the time that the Ft. James wastewater discharge permit was issued, state rules did not require numerical limits or analyses related to phosphorus and mercury that the Council asserts the federal rules required. Is a state administrative permit issuance and hearing process the appropriate forum for disputes over the application of federal law to the state program that governs state permits, in a state program that EPA has approved and determined is consistent with federal law and where EPA has not objected to the permit that does not have the limits or analyses that the Council seeks?[1]

The court of appeals answered: Yes. The court of appeals reversed DNR and the circuit court, and held that DNR must determine whether wastewater discharge permit provisions, which are authorized by state regulations that are part of a state permitting program approved by EPA as consistent with federal law, nevertheless violate federal law.

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[1] The court of appeals decision focuses on whether the direct application of federal law is appropriate for the permit review hearing. Logically extended, the court of appeals decision would require DNR staff, even before lengthy contested-case hearings on permits, to review each and every permit term in relation to federal law, including not only federal statutes and regulations but EPA guidance documents, environmental appeal board decisions and federal court decisions, even though all of those sources would already have been consulted, by EPA and/or DNR, in the course of developing and reviewing the state rules governing the permit terms.

The circuit court answered: No. The circuit court affirmed DNR and held that only EPA may determine whether a state permit term violates federal law, EPA is an indispensable party to any state challenge that a state permit term violates federal law, and EPA may be sued only in federal court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issue presented for review is one of statewide importance and likely to be repeated. Therefore, both oral argument and publication are appropriate.

STATEMENT OF THE CASE

In 2005 DNR issued a public notice of intent to reissue to Ft. James Operating Company a WPDES Permit regulating the discharge of a variety of pollutants into the lower Fox River, along with the proposed permit and permit reissuance fact sheet explaining the proposed permit terms. R.7:331-360, 372-391.[2]

EPA sent a letter stating that it "will not object" to the permit. R.7:311; Pet-App:134.

DNR issued its Final Decision on Permit Reissuance and Response to Comments, and reissued the Permit effective from October 1, 2005 to September 30, 2010. R.7:316-317.

Petitioners, referred to as the Council by the court of appeals and so referred to as the Council here, requested a contested-case permit review hearing under Wis. Stat. § 283.63, on the phosphorus terms in Section

[2] Ft. James Operating Company is now GP Consumer Products, LP. WPDES is officially the Water Pollutant Discharge Elimination System, and in common usage is referred to as the Wisconsin Pollutant Discharge Elimination System.

2.2.1 of the permit based on five claims that the terms violate federal law and one claim that the terms violate state law, and on the mercury terms in Sections 2.2.1 and 2.2.1.3 of the permit based on three claims that the terms violate federal law. R.7:243-254.

DNR granted the contested-case hearing request to hear the phosphorus claims based on state law and denied the request to hear claims based on federal law because DNR's sole permitting authority is state law. DNR also denied the contested-case hearing request on the mercury issues because those issues were not previously raised in the public comment period on the proposed permit. R.7:5-9; Pet-App:129-133.

The Council commenced this action, seeking judicial review of DNR's decision denying the Council's request for a contested-case permit review hearing on its mercury claims that were not raised in the public comment period and its phosphorus and mercury claims that were based on federal law. The Council also sought a declaratory judgment that DNR may not require that issues be raised in the public comment period before they may be addressed in a contested-case permit review hearing (or that the mercury issues were so raised), and that DNR may not issue WPDES permits that do not comply with federal law. R.1:1-38. The Council also sought declarations that two state rules are invalid, but withdrew those claims in its reply brief. R.23:2.

The circuit court dismissed the claims for declaratory judgment and found that DNR properly limited the scope of the contested-case permit review hearing, leaving only the state law phosphorus claims to be addressed in the permit review hearing. R.64:1-7; Pet-App:122-128.

The Council appealed, and the court of appeals issued its decision reversing the circuit court and DNR on April 13, 2010. Pet-App:101-121. The court of appeals upheld the dismissal of the declaratory judgment claims,

but reversed DNR's denial of the Council's hearing request.

DNR petitioned for review of only that part of the court of appeals decision requiring DNR to hold a contested-case hearing on whether the permit terms comply with federal law. This Court granted the petition, and DNR submits this brief asking that this Court reverse the court of appeals and affirm DNR.

ARGUMENT

Wisconsin law requires that state rules governing the terms in state water pollutant discharge elimination permits (referred to in this brief as wastewater discharge permits) comply with federal law. EPA has determined that Wisconsin's statutory and regulatory program for wastewater discharge permits is consistent with federal law. State wastewater discharge permit terms that comply with state rules therefore comply with federal law unless and until EPA finds otherwise. The Council's claims that permit terms that comply with state rules nevertheless fall short of federal law are, therefore, challenges to the state rules themselves and to EPA's determination that the state program is consistent with federal law. The court of appeals decision requiring DNR to hear such challenges in a contested-case permit review hearing would require DNR to second-guess EPA's review of the state program, and would potentially require DNR to replace existing rules with unpromulgated, and non-EPA approved, rules in a permit issuance process. The court of appeals decision disregards the Council's proper remedy, which is to ask EPA to object to the permit, to require Wisconsin to change its program by changing its rules, or to withdraw approval of the state program. Supreme Court review is necessary to prevent the resulting incongruence between federal and state law and overstepping of the bounds of Wisconsin's delegated authority.

I. THE COURT OF APPEALS DECISION IS REVIEWED DE NOVO BUT MINDFUL OF DNR'S 35-YEAR ADMINISTRATION OF THE WPDES PERMIT PROGRAM, WHICH THE COURT OF APPEALS DECISION CONTRAVENES.

The question on review is whether DNR has authority under state law to determine in a contested-case permit review hearing whether wastewater discharge permit terms, which are prescribed pursuant to state rules in a state program that has been approved by EPA as consistent with federal law, and which are part of a permit to which EPA has not objected, nonetheless violate federal law. This is a legal question reviewed *de novo*. *Rusk County Citizen Action Group, Inc. v. DNR*, 203 Wis. 2d 1, 6, 552 N.W.2d 110 (Ct. App. 1996) ("[t]he extent of the DNR's statutory authority is a question of law").

DNR's interpretation of its authorizing statutes is both longstanding and reflective of its experience working with EPA in developing the program comprising the regulations and permits authorized by those statutes, and in issuing WPDES permits consistent with the statutes and regulations, for over 35 years. DNR has administered the WPDES permitting program since EPA approved it in 1974. Note to Wis. Stat. § 283.31, tracing the history of that section to 1973; 1973 Memorandum of Agreement and 1974 EPA Letter to Governor Lucey (Pet-App:333-350). (EPA's state authorization information can be found at http://cfpub.epa.gov/npdes/statestats.cfm.). The court of appeals decision contravenes DNR's longstanding understanding of the WPDES statutes based on that experience.

II. THE COURT OF APPEALS DECISION WILL LEAD TO UNWORKABLE RESULTS.

The answer to the legal question before the Court has the potential to affect the many wastewater discharge permits that DNR issues each year. DNR's website lists 386 industrial dischargers and 680 municipal dischargers with permits; 22 are currently publicly noticed for issuance or reissuance. *See* http://www.dnr.state.wi.us/org/water/wm/ww/permlists.htm.[3] Because these permits are reissued every 5 years, the answer to the question presented may affect hundreds of permits as their 5-year terms expire.

The court of appeals decision in general upsets the federal/state law balance struck by the federal Clean Water Act, s*ee Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d 1282, 1284 and 1297 (5th Cir. 1977) (referring to the "delicate partnership" and "contrapuntal balance" set up by the CWA between EPA and the states), and may in any specific case result in incongruence between state and federal law.

The court of appeals decision also disturbs the system created by the Clean Water Act of continuing checks and balances after a state has been authorized to implement the wastewater permitting program:

> Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement. EPA reviews state water quality standards. 33 U.S.C. § 1313(c). It retains authority to object to the issuance of particular permits, § 1342(d)(2), to monitor the state program for continuing compliance with federal directives, § 1342(c), and even to enforce the terms of state permits when the State has not instituted enforcement proceedings, § 1319(a).

[3] Additionally, hundreds of industrial facilities are covered under general permits under Wis. Admin. Code § NR 205.08.

See U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 634 (1992).

The review required of DNR by the court of appeals—whether permit terms that comply with state rules also comply with federal law—is necessarily a review of the rules not the terms, and only EPA or a federal court may reject promulgated state rules as inconsistent with federal law.

If the Administrative Law Judge deems a rule governing a permit term to be contrary to federal law, and orders DNR to change the permit accordingly, DNR will have to adopt the ALJ's federal law interpretation. The result will effectively be a rule revision that has been neither properly promulgated by DNR through the procedures in Wis. Stat. ch. 227 (*see Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980)), nor approved by EPA through the procedures in 40 C.F.R. pt. 123. And DNR will face a conflict between the ALJ's interpretation and EPA's approval of the state program. DNR asks this Court to forestall such a result by reversing the court of appeals.

III. THE COURT OF APPEALS IMPROPERLY EXTENDED STATE AND FEDERAL LAW REQUIRING THAT STATE RULES COMPLY WITH FEDERAL LAW, TO TERMS IN STATE PERMITS ISSUED PURSUANT TO STATE RULES.

The court of appeals erroneously extended state and federal law requiring that state rules comply with federal law, to terms in state permits issued pursuant to state rules. EPA has approved state statutes and rules that regulate wastewater discharges through a permitting program. The state statutes authorize DNR to administer a wastewater discharge permit program, require that DNR

promulgate rules with standards that comply with federal law, and authorize DNR to issue permits that follow those state rules. *See e.g.*, Wis. Stat. §§ 283.11, 283.13, and 283.31. The court of appeals' conclusion that DNR is authorized to determine whether permit terms, to which EPA has not objected and which follow properly promulgated state rules as part of a program approved by EPA, fall short of federal law upsets the federal/state balance established by law and is not supported by law.

A. EPA determined that Wisconsin DNR has the authority to conduct a state wastewater discharge permit program that implements federal Clean Water Act requirements.

"The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). Effectuating this partnership, the Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), which prohibits discharges of pollutants into the waters of the United States without a permit issued by EPA or by a state pursuant to a formal delegation of authority to that state. 33 U.S.C. § 1342(a).

EPA reviewed DNR regulations and Wis. Stat. ch. 283 and determined that Wisconsin has all of the authority necessary to administer and enforce a wastewater discharge permitting program that mirrors the federal program. DNR Ct.App.Br:R-App:105-122 (Memorandum of Agreement signed by DNR on 12/14/1973 and by USEPA on 12/17/1973); *see also* 33 U.S.C. § 1342(b). EPA thereafter approved the state wastewater discharge statutes and rules implementing federal CWA

requirements through state law. DNR Ct.App.Br:R-App:105-122 (Letter to Governor Lucey from Russell Train, Administrator of EPA dated 02/04/1974). EPA has continued to review and approve Wisconsin's regulatory program since 1974 under 40 C.F.R. §§ 123.62 and 131.21.[4]

B. Wisconsin statutes authorize DNR to promulgate rules setting standards consistent and compliant with federal requirements.

DNR does not implement the federal law. *See Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 52, 268 N.W.2d 153 (1978) ("It should also be pointed out that EPA determinations under the [Clean Water Act] do not automatically become administrative law in Wisconsin. The DNR still makes the rules"). DNR implements the federally delegated program under state law. DNR acts pursuant to state statutes and promulgates state rules authorized by the state statutes.

Wisconsin Stat. § 283.001(2) authorizes DNR "to establish, administer and maintain a state pollutant discharge elimination system . . . consistent with all the requirements of the federal water pollution control act amendments of 1972." Under Wis. Stat. § 283.11(2), "all rules promulgated by" DNR as they relate to wastewater discharge standards "shall comply with and not exceed the requirements of the federal water pollution control act."

Under these statutes, DNR assesses whether the rules that it promulgates comply with federal law in the course of the rule-making process. Throughout this process, both EPA and the public are involved and submit comments. This process is separate from the permit issuance and review processes at issue here. Following

[4] 40 C.F.R. pt. 123, §§ 131.5 and 131.21, all cited in this brief, are reproduced at the end of the Appendix at Pet-App:316-332.

the rule-making process, DNR promulgates rules pursuant to Wis. Stat. §§ 281.15, 283.11, and 283.31, which govern the terms that DNR places in permits.

C. EPA actively participates in DNR's rule-making process.

EPA actively participates in DNR's rule-making process, and DNR affirmatively solicits EPA's comments during that process, as shown in the following examples.

EPA submitted extensive comments on the antidegradation rule package in 1997. Pet-App:136-139.[5] *See also*, Preamble to the 1997 revision to Wis. Admin. Code chs. NR 102, 105, 106, and 207:

> These revisions are proposed to be consistent with and as protective as the U.S. Environmental Protection agency's Water Quality Guidance for the Great Lakes System, published on March 23, 1996 . . . and are part of the triennial review process required by U.S. EPA. States have two years (until March 23, 1997) during which to promulgate regulations that are as protective as and consistent with the Guidance.

EPA submitted comments on DNR's proposed chloride rules in 1998, noting at Pet-App:140,

> Collaboration between our agencies in the development of policies and procedures promotes efficient administration of the WPDES and ensures

[5] DNR asks the court to take judicial notice of the existence of EPA's comments here, and of other official records from EPA and DNR elsewhere in this brief, as "sources whose accuracy cannot reasonably be questioned" under Wis. Stat. § 902.01(2)(b). Judicial notice is appropriate because deciding the legal question before the Court depends not on any evidence in the record before the agency but on construction of statutes independent of the agency proceeding here, and these public official agency documents support the statements in this brief that present the context in which the statutes are to be read.

> continued progress toward the goals of the Clean Water Act (CWA).

EPA submitted comments on proposed revisions of Wis. Admin. Code ch. NR 200 relating to applications for permits and variances in 1999. Pet-App:144-171. Specifically,

> EPA Region V comments were primarily aimed at making sure that the rule captured the requirements of the corresponding federal regulations. Subsequent to receiving the comments, Department staff communicated with EPA staff via a conference call, personal telephone contacts and electronic mail to make sure Department staff fully understood the comments and to determine if the suggested rule modifications satisfied EPA's concerns.

Pet-App:153 (emphasis added).

EPA submitted comments twice on DNR's proposed revision of Wis. Admin. Code ch. NR 243 relating to concentrated animal feeding operations in 2001, noting, "We sincerely appreciate the cooperation you and your staff have shown by changing the proposed chapter in response to our earlier comments" and identifying additional changes that needed to be made to be consistent with federal regulations. Pet-App:172-175.

EPA submitted comments on DNR's proposed revisions of Wis. Admin. Code ch. NR 216 relating to storm water discharge permits in 2003. Pet-App:176-179.

In the course of developing new rules for animal feeding operations in 2005, DNR specifically sought EPA input, "If the WDNR is not correctly interpreting EPA's regulations with regard to the definition of agricultural stormwater discharges, please contact me directly . . . since the Department is in the process of promulgating administrative rules that are in part based on federal regulations." Pet-App:180. EPA submitted comments on the entire proposed rule package that same year, noting, "We look forward to working cooperatively with you and

your staff to resolve our comments before the Wisconsin Natural Resources Board approves and adopts the code." Pet-App:181. EPA was on the Technical Advisory Committee for the rule revision. Pet-App:200.

EPA has been equally extensively involved in the most recent development of rules setting a water quality standard for phosphorus and permit procedures for implementing that standard. Pet-App:136-139; 201-210.

D. EPA reviews promulgated DNR rules through periodic program reviews.

EPA reviews DNR rules after they have been promulgated through periodic program reviews, such as its most recent 2008-2009 review of Wisconsin's WPDES program. Pet-App:211-230 (comprising a draft of the review document currently in development).

E. EPA reviews promulgated DNR rules upon public request.

EPA also reviews DNR rules after they have been promulgated upon public request, as was the case with the mercury and phosphorus rules at issue here.

After DNR issued the Ft. James permit, the Council and the National Wildlife Federation asked EPA to review and disapprove Wisconsin's mercury rule, which is the source of one of the contested terms in the Ft. James' permit. Pet-App:287-292. Due to the concerns regarding the procedures in the rule, which provides for mandatory monitoring before a mercury limit may be imposed, DNR agreed to formally submit the rule to EPA for review. Pet-App:293-301. EPA did so and disapproved the rule in part. *Id.* The Council's counsel has similarly sought EPA's review and disapproval of other Wisconsin rules,

including the phosphorus provisions that it challenges here. Pet-App:302-312.

It remains significant that EPA did not object to the Ft. James permit when it was reissued by DNR. As noted above, when environmental groups continued to challenge the procedures in the mercury rule, DNR submitted the rule to EPA for formal action (as noted in the EPA review letter) and EPA disapproved some, but not all of the procedures. EPA's letter enables DNR to evaluate whether mercury limits are necessary in accordance with EPA's letter and DNR's other general reasonable potential procedures in Wis. Admin. Code ch. NR 106 at the time of permit reissuance in 2010. It would have been improper for DNR at the time of permit issuance in 2005 to ignore very specific state-promulgated procedures for mercury before EPA took formal action to disapprove those procedures.

F. Wisconsin statutes authorize DNR to issue permits with terms that meet standards set by state rules that comply with federal law.

As explained above, Wisconsin statutes provide that DNR's WPDES rules must comply with federal law. Wisconsin Stat. § 283.31 authorizes DNR to issue permits with terms that follow those rules. So, permit terms that comply with the rules and statutes that comprise the program that EPA has determined is at least as stringent as federal law, necessarily comply with federal law consistent with EPA's determination.

G. The court of appeals decision requires that DNR duplicate the rulemaking process for challenged permit terms.

After going through the multi-faceted processes reviewed above for determining and confirming that its rules meet the federal and state statutory requirements for consistency with federal law, DNR would be required by the court of appeals decision to duplicate those efforts to determine that permit terms prescribed pursuant to the state rules also comply with the same federal law. No state law authorizes such a duplication.

H. EPA reviewed and did not object to the permit issued here.

EPA's ability to block DNR from issuing a permit upon its objection plays an important role in the federal/state partnership. If EPA objects, DNR cannot issue the permit unless it addresses the reasons for the objection. Wis. Stat. § 283.31(2)(c).

EPA specifically reviewed and had no objection to the permit issued here. R.7:311, Pet-App:134; *see also* Wis. Stat. §§ 283.31(2)(c) and 283.41 (requiring that DNR notify EPA of a permit and barring DNR from issuing a permit to which EPA objects); 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44 (EPA authority to veto state permits). EPA even asked for additional time to complete its review, indicating that EPA's lack of objection was not just a rubber stamp review of the permit. *See* R.7:330; Pet-App:135.

IV. THE COURT OF APPEALS IMPROPERLY PLACES DNR IN EPA'S SHOES.

Federal law provides for mandatory EPA review of state programs when they are created, and either mandatory or discretionary review of revisions to approved programs thereafter. The court of appeals decision improperly requires DNR to conduct the review relegated by federal law to EPA.

A. The federal/state water pollution prevention program comprises water quality standards and permit requirements and procedures.

The federal/state water pollution prevention program comprises water quality standards and permit requirements and procedures.

40 C.F.R. pt. 131 prescribes the water quality standards (what the Council in its response to the petition for review called the water quality standards program) that a state must incorporate in an approved program.

40 C.F.R. § 123.25 (what the Council in its response to the petition for review called the permitting program) sets out the checklist of permit implementation requirements that an authorized state must meet in order to obtain EPA approval and to maintain an authorized program. That section includes provisions referring to other C.F.R. sections, which state that they are "applicable to state programs." *See* the specific sections in 40 C.F.R. pt. 122 referred to in 40 C.F.R. § 123.25.

A state's regulations set limits derived from the water quality standards in Title III of the Clean Water Act, which are imposed on dischargers through permits issued under Title IV.

Wisconsin's program, which comprises rules setting forth water quality standards and permits containing discharge limits to achieve those standards, mirrors the federal framework. The rules setting forth water quality standards are in Wis. Stat. §§ 283.11-21 and in regulations including Wis. Admin. Code chs. NR 102 and 104-106. The procedures for issuing permits that impose those standards on dischargers are in Wis. Stat. §§ 283.31-63 and Wis. Admin. Code chs. NR 200-205.

B. EPA must formally review and approve revisions of state water quality standards and may determine not to review state permit implementation procedures that it deems are not substantial.

A state obtains initial approval of its wastewater discharge permit program from EPA under 40 C.F.R. §§ 123.21-30. Thereafter, any revision to a state's program follows two different paths of EPA review.

EPA must review and approve a state's revision to its rules setting water quality standards under 40 C.F.R. §§ 131.5 and 131.21. A state obtains input from EPA (and others) in the course of developing its rules and must submit the rules after they have been promulgated to EPA for its review, and EPA must then affirmatively approve or disapprove the water quality standards. *See* 40 C.F.R. § 131.21.

By contrast, a state's revision of its permit implementation procedures may or may not be reviewed by EPA. A state must keep EPA informed of any revision to its permit implementation procedures under 40 C.F.R. § 123.62(a). Under 40 C.F.R. § 123.62(b)(2), EPA undertakes a formal review of such a revision only when EPA determines that the revision is substantial.

Examples of the two different paths of EPA review of state program revisions follow.

In 2009, EPA reviewed and approved revised rules setting water quality standards for toxics in Wis. Admin. Code ch. NR 105, under 40 C.F.R. pt. 131. Pet-App:231-236.

In 2004, EPA received DNR's revised promulgated rules relating to ammonia nitrogen in Wis. Admin. Code chs. NR 102, 104, 105, 106 and 210. EPA reviewed the revisions of water quality standards in chs. NR 102, 104 and 105 as required under 40 C.F.R. § 131.21 and approved the revisions as consistent with federal requirements. Pet-App:237-256. EPA declined to review the revisions to chs. NR 106 and 210, which pertained to implementation of the standards in permits, under 40 C.F.R. § 123.62. Pet-App:237. The inference from EPA's non-review of the latter revisions is that EPA found those revisions not to be substantial.

In 2000, EPA received DNR's revised promulgated rules relating to chlorides. EPA reviewed and approved the revisions of water quality standards as required under 40 C.F.R. § 131.21, and declined to review the revisions relating to publicly owned treatment works authority as not comprising water quality standards. Pet-App:257-264. However, EPA had earlier commented on the proposed implementation procedures in the rule package. Pet-App:265-266.[6]

In 2005, EPA submitted comments on DNR's proposed revisions of rules regulating animal feeding operations, in response to changes in federal regulations, and indicated that it would review the promulgated revised rules under 40 C.F.R. § 123.62. Pet-App:181-199.

[6] Notably, EPA advised DNR that the implementation procedures were not consistent with federal requirements and that EPA would invoke the procedures in 40 C.F.R. § 123.62 for revision if those procedures were adopted. EPA suggested an alternative approach. Pet-App:265-266.

No formal approval is in DNR's files in response to DNR's 2008 query if EPA planned to issue a formal approval of the rules, indicating that EPA determined the revisions not to be substantial. Pet-App:267.

C. EPA may respond in other ways to state permits that include terms pursuant to state rules that did not warrant its review at the time of promulgation.

As with the animal feeding operations rules, EPA generally submits comments during the development of DNR's rule revisions, in fulfillment of its role in the federal/state partnership to assure consistency with federal requirements. *See* Section III.C. above. After promulgation, even when EPA decides that a revision is not so substantial as to warrant a formal review, EPA may respond to a state permit that incorporates such a revision by objecting to the permit, requiring additional revision or withdrawing approval of the program under 40 C.F.R. §§ 123.44, 123.62, and 123.63. Citizens who object to permit terms based on unreviewed rules may ask EPA to take those steps, as they may also do for permit terms based on rules that EPA has reviewed and approved.

D. The court of appeals decision makes DNR do EPA's job of objecting to a state permit or reviewing promulgated state rules.

In this case, EPA had approved the antidegradation rules as they apply to phosphorus (Pet-App:268-286), which governed the terms to which the Council objected in the permit. In this case, EPA had not reviewed the permit implementation rule requiring the taking of 12 samples before setting a mercury limit, a permit term to which the Council also objected. So, the questions are,

with respect to a DNR permit to which EPA has not objected, 1) what should happen when a DNR permit contains a term that follows a state rule setting a water quality standard that EPA has approved, but that the Council asserts violates federal law, and 2) what should happen when a DNR permit contains a term that follows a state rule setting permit implementation procedures that EPA has decided was not so substantial as to warrant review, but that the Council asserts should be reviewed and found to violate federal law?

The court of appeals' answer is that DNR should do EPA's job, because EPA did not object to the permit, and decide 1) whether the already EPA-approved water quality standard rule complies with federal law, and 2) whether the unreviewed permit implementation rule that EPA determined not so substantial as to warrant review should be reviewed and found to violate federal law.

This Court should reverse the court of appeals' assigning of EPA's objection, review and approval roles to DNR.

V. WHEN DNR ISSUES PERMITS IT IMPLEMENTS STATE LAW AND DIRECTLY IMPLEMENTS FEDERAL LAW ONLY IN INSTANCES OF OVERPROMULGATION.

A. The Clean Water Act authorizes EPA approval of state programs with adequate authority to implement federal requirements.

The state program approval provision of the Clean Water Act (33 U.S.C. § 1342(b)) provides that:

(b) State permit programs

> . . . [T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . . . The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:
>
> **(1)** To issue permits which—
>
> **(A)** apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
>
> . . . .
>
> **(2) (A)** To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title [monitoring and recordkeeping]; or
>
> **(B)** To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;
>
> . . . .
>
> **(7)** To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

This language is instructive in that it shows that state programs and regulations do not have to be identical, and that EPA is the entity that determines whether state programs "apply, and insure compliance with" federal requirements.

B. The EPA-approved Wisconsin program authorizes DNR to implement state law, except in instances of overpromulgation.

Wisconsin Stat. § 283.001 provides the broad foundation for the state water pollution prevention program:

> (2) The purpose of this chapter 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.

Wisconsin Stat. § 283.11 provides the foundation for the part of the program that consists of state rules setting water quality standards that meet the federal requirements (Wis. Stat. § 283.11(2)(a)):

> [A]ll 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 U.S.C. § 1251 to 33 U.S.C. § 1387, and regulations adopted under that act.

Finally, Wis. Stat. § 283.31(3) provides the foundation for the part of the program that consists of the permits containing the limits in the state rules:

> (3) The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, other than those prohibited under sub. (2), upon condition that such discharges will meet all the following, whenever applicable:
>
> (a) Effluent limitations.
>
> (b) Standards of performance for new sources.
>
> (c) Effluent standards, effluents prohibitions and pretreatment standards.
>
> (d) Any more stringent limitations, including those:
>
> 1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
>
> 2. Necessary to comply with any applicable federal law or regulation.

The conditions in Wis. Stat. § 283.31(3)(a)-(c) are state standards set by rules under Wis. Stat. § 283.11. The Council appears to hang its hat on the word "federal" in

Wis. Stat. § 283.31(3)(d)1. and 2., and argues that these subdivisions require DNR to directly implement federal law requirements in state permits. To the contrary, the statutory scheme set forth above, the language of the subdivisions themselves taken together with the introductory language in subsection (3), and the placement of the word "federal" only in two subdivisions, indicate that the subdivisions have a much more narrow reach.

Paragraphs (a) to (d) apply only "whenever applicable," Wis. Stat. § 283.31(3)(intro.), namely to certain federal standards that are specifically directed at Wisconsin waters. EPA promulgates such state water-specific standards by overpromulgation for Wisconsin waters through EPA's rule-making process under 40 C.F.R. §§ 131.41(e) and 132.6(f)-(j). Especially instructive for interpreting applicable standards is the table in 40 C.F.R. § 131.21(c), which provides that the promulgated water quality standards in an authorized state are the applicable water quality standards "[u]nless or until" EPA has promulgated a more stringent water quality standard for that state.

C. Subdivisions 283.31(3)(d)1. and 2. refer to EPA's overpromulgation of water quality standards or permitting procedures that apply specifically only to Wisconsin.

Subdivision 1. requires DNR to include in state permits water quality standards set by federal overpromulgation, and subdivision 2. requires DNR to implement other procedural standards set by federal overpromulgation.

A water quality standard establishes criteria for the surface water that will allow the designated uses of the receiving water to be maintained—either a numeric or narrative standard that specifies how much of a pollutant

can be present and still allow the designated use to be achieved. 40 C.F.R. §§ 131.2 and 131.3(i); Wis. Stat. § 281.15(l). In addition, there are also implementation or permit procedures for how to calculate and impose limits in permits for point source dischargers to ensure that water quality standards will be met. *See, e.g.,* 40 C.F.R. pt. 132; Wis. Stat. § 283.31(3)(d); Wis. Admin. Code ch. NR 106. Subdivision 1. of Wis. Stat. § 283.31(3)(d) refers to the former, and subdivision 2. to the latter. *See* also Section IV above.

EPA may promulgate a specific water quality standard for a state water if the state fails to do so under 33 U.S.C. § 1313(c)(4)b. If EPA does promulgate a specific water quality standard applicable to Wisconsin waters, then Wis. Stat. § 283.31(3)(d)1. requires that DNR issue a permit with limits based on that federally promulgated water quality standard for Wisconsin waters. No such federally promulgated water quality standard for Wisconsin waters exists in this case.

If EPA believes that a state's procedures are inconsistent with federal requirements (other than where EPA has expressly addressed water quality criteria and permit implementation procedures together, as for the Great Lakes in 40 C.F.R. § 132.5), then EPA may disapprove and overpromulgate a federal permit procedure that directly applies specifically only to Wisconsin. If so, then Wis. Stat. § 283.31(3)(d)2. requires that DNR issue a permit that includes that overpromulgated provision.[7]

For example, EPA overpromulgated criteria for copper, nickel, endrin and selenium, provisions governing Total Maximum Daily Loads in the Great Lakes Basin, provisions taking into account intake pollutants in water quality based effluent limit calculations for discharges to the Great Lakes Basin, and provisions determining

[7] If EPA finds a state's regulations setting water quality standards or terms in a permit or program procedures inconsistent with federal requirements, EPA may also object to the permit, remove program approval, or require a rule revision, as explained in Section VI.D.

reasonable potential for whole effluent toxicity. EPA took this action on November 6, 2000, 65 Fed. Reg. 66504-66510. Overpromulgation means that EPA disapproved Wisconsin's rules and promulgated federal procedures specifically for Wisconsin discharges to the Great Lakes System. *See* 40 C.F.R. § 132.6(f)-(j).

> D. If subdivisions 283.31(3)(d)1. and 2. mean all federal CWA requirements, there is no need for other state statutes or rules, or for a state program.

To give the subdivisions Wis. Stat. § 283.31(3)(d)1. and 2. the broad meaning urged by the Council would obviate the need for the other parts of subsection (3), and for the delegated program altogether, and there would be no need for DNR to go through the rule-making process to implement the delegated program. DNR could ignore all state regulations and go directly to the federal regulations for its permit terms. There would be no need for any of the other statutory provisions. If "applicable federal law" means all delegable federal standards that apply to the Ft. James permit, as the Council has argued, then state standards are entirely irrelevant.

The Court must construe the statutes so as to avoid such an absurd result and so as not to make other statutory provisions superfluous. *Highland Manor Associates v. Bast*, 2003 WI 152, ¶9, 268 Wis. 2d 1, 672 N.W.2d 709. Limiting the subsections to federal standards set by overpromulgation, where EPA has determined that existing state rules are not adequate to meet federal requirements, preserves the integrity of both the state statutory scheme and the joint state/federal program.

E. No state statute supports the court of appeals decision requiring DNR to bypass EPA and directly implement federal law.

With the exception of overpromulgation, the standards that must comply with federal law are codified in state law, and it is state law that DNR administers. With the exception of overpromulgation, no state statute authorizes or requires DNR to issue permits that directly implement federal requirements. The court of appeals decision causes the exception to swallow the rule that DNR issues permits that implement state rules as part of a state program that EPA has determined is consistent with federal law, and requires DNR to second-guess that determination. DNR's interpretation and administration of the statute preserve its state law authority and its role in the federal/state delegation partnership.

The Council's interpretation would swallow the delegation altogether. EPA approved DNR's water pollution prevention permitting program because DNR's program is consistent with all of the federal requirements that apply to all approved state programs. The program that DNR administers consists of the state standards that achieve that consistency, except for the overpromulgation of Wisconsin waters-specific federal regulations in supercession of the delegation. In sum, the court of appeals decision is devoid of any state statutory support.

VI. CHALLENGES THAT PERMIT TERMS THAT FOLLOW EPA-APPROVED STATE RULES FALL SHORT OF FEDERAL LAW, ARE CHALLENGES THAT THE STATE RULES AUTHORIZING THE PERMIT TERMS DO NOT FOLLOW FEDERAL LAW; THOSE CHALLENGES MAY BE REMEDIED ONLY BY EPA, AND THE COURT OF APPEALS IMPROPERLY HELD OTHERWISE.

As explained in Section III, DNR implements the federally approved program under state law. State statutes authorize DNR to promulgate rules that must comply with federal law, and to apply those state rules to terms in state permits. Under Wis. Stat. § 283.63, a person may object to a permit condition that violates state rules. However, a person who objects to a permit term on the basis that it falls short of federal law even though it follows state rules, is really challenging the rules. DNR properly limited the scope of the contested-case permit review hearing to the former—objections that permit terms violate state rules. A permit review hearing is not the proper forum for challenges to state rules or laws as being inconsistent with federal law. Such challenges may only be remedied by the agency that found the state program to be consistent with federal law, namely EPA. The court of appeals erred in holding otherwise.

A. Permit terms that are authorized by state rules may differ from terms that would be authorized under federal law, but if the state program has been approved by EPA as consistent with federal law, then the terms authorized by the approved program are consistent with federal law, and persons seeking a different outcome are really challenging the state rules or EPA's program approval.

EPA approves, and state statutes require, state rules that comply with the federal Clean Water Act requirements, but neither EPA nor state statutes require that state rules be identical to federal rules.

A state that seeks federal approval to administer the NPDES permit program must demonstrate to EPA that the state's program includes requirements that are as protective as the federal requirements. However, it is neither required nor possible that every state have statutes, regulations, and procedures that are identical to the federal requirements. *See* 40 C.F.R. § 123.25 Note ("Except for paragraph (a)(46) of this section, states need not implement provisions identical to the above listed provisions"). *See also Aminoil U. S. A., Inc. v. Cal. State, etc.*, 674 F.2d 1227, 1229-30 (9th Cir. 1982) (describing a "scheme of cooperative federalism established by the [Clean Water] Act"). Rather, EPA determines through review of state statutes and regulations whether the state regulatory program is sufficient.

There are many provisions in federal law that include general substantive or procedural measures for administration of the Clean Water Act. The operative language in 33 U.S.C. § 1342(b), which requires EPA to approve any state program with adequate authority to

issue permits that comply with federal requirements, is emblematic of the broadly prescriptive nature of the delegation. As a result, there is often room for different approaches to the federal requirements that the state must include in its wastewater discharge permitting program. The Wisconsin program that EPA has found complies with federal law may result in different outcomes than may result from federal rules or other states' rules. If a person objects to that difference, then that person's recourse is to ask EPA to object to a permit or to require different state rules, or to ask DNR or the Natural Resources Board or the legislature to promulgate new rules for EPA to approve.

B. The Council's challenges to this permit's mercury and phosphorus terms are that the state mercury and phosphorus rules setting those terms fall short of federal law requirements.

The Council's objections here to the phosphorus and mercury permit terms are really objections that the state's phosphorus and mercury rules do not go far enough to require what the Council would like to see in state permits. So, the Council asked EPA to review and disapprove Wisconsin's mercury rule, which is the source of the contested mercury term in the Ft. James permit. Pet-App:287-292. EPA reviewed the rule and disapproved it in part. Pet-App:293-301. This decision is reviewable in federal court. *See* 33 U.S.C. § 1369. The mercury term that the Council found unreasonable as contrary to federal law was remedied in response to the Council's appeal to EPA, by EPA's disapproving a regulatory exemption and requiring the issuance of permits without reliance on the disapproved exemption. Pet-App:293-301.

The Council's counsel has also appealed to EPA to review and disapprove other Wisconsin rules, including the phosphorus rules, and to require the promulgation of numerical phosphorus standards other than the narrative limits currently in state law. Pet-App:302-312. Concurrently, DNR has started the rulemaking process for revising its antidegradation procedures based in part upon the Council's appeal to the EPA and EPA's response to that appeal. Wis. Admin. Register No. 651 (April 1, 2010) (publishing scoping statement to begin the rulemaking process for revising Wisconsin's antidegradation procedures).

The appeals to EPA to require changes in Wisconsin's mercury and phosphorus rules confirm that the Council's federal law challenges here to the mercury and phosphorus permit terms are, in fact, challenges to the state rules themselves.

A permit term that follows state rules can only fall short of federal law if the rules prescribing the term fall short of federal law. It would violate state law for DNR to alter a rule in the course of a permit hearing, without following the specific rule-making process in Wis. Stat. ch. 227. *See Wis. Elec. Power Co.*, 93 Wis. 2d at 255-56.

C. The Council here expressly challenged the permit's mercury provision as consistent with a state rule that violates federal law.

In the Council's comments on the proposed Ft. James permit and its request for a contested-case hearing to review the issued permit, the Council clearly attacked the mercury rule (which required 12 monitoring results over 24 months before imposing a mercury limit, regardless whether available information showed the need for a limit earlier), as violating the federal standard. The Council stated that the permit was in compliance with the

state standard, but it was the standard that was not consistent with federal law. *See* Council Ct.App.Br:A-App. 142-145.[8]

EPA reviewed the rule and agreed with the Council. In light of EPA's disapproval, DNR agreed to no longer rely on those portions of the rule that were disapproved. Pet-App:293-301. Absent the decision from EPA, the ALJ had no authority to replace the existing state rule with a new rule allowing the change in the permit term sought by the Council. Rather, the ALJ is required to take official notice of all state administrative rules under Wis. Stat. § 227.45.

D. A claim that a state permit term consistent with state rules falls short of federal law is a challenge to the rules or program, which can be remedied only by EPA or by additional rulemaking.

If the Council objects to DNR's implementation of a state rule because it is inconsistent with that rule, then that objection may be, and will be, heard by the ALJ. If the Council objects to DNR's implementation of a state rule because it objects to the rule—because it believes that the outcome under the state rule does not comply with federal law—then it is using the wrong procedural vehicle to challenge the rule.

A person who believes that a permit condition that complies with a state rule violates federal law, must ask EPA to object to the permit on that basis, or must appeal to EPA to require DNR to change the rule, as happened with the mercury rule. A person who believes that a permit is missing conditions that are not required by state

[8] It is unknown whether the Council sent a letter to EPA at the time of the permit's reissuance asking EPA to object to the permit based on this alleged violation of federal law.

law, but that would be required by federal law, must ask EPA to object to the permit on that basis, or must appeal to EPA to set new standards that DNR must adopt, as in the recent appeal to EPA pertaining to phosphorus. Pet-App:302-312.

Federal statutes and cases, including *Save the Bay, Inc. v. Administrator of E. P. A.*, 556 F.2d 1282 (5th Cir. 1977), establish that someone who believes that a state permit contains a condition that interprets state law inconsistently with federal law—that is consistent with state law but not with federal law—has a variety of remedies, all directed at EPA.

First, the person may ask EPA to object to the permit under 33 U.S.C. § 1342(d)(2).[9] Second, the person may, when EPA issues a statement that it does not object to the state permit, seek judicial review of that decision in federal court on the ground that EPA omitted consideration of a particular violation of CWA requirements—"that a proposed permit contains a violation of applicable federal guidelines that the agency has failed to consider." 556 F.2d at 1296. The federal Administrative Procedures Act provides for this review. 5 U.S.C. § 701. "[I]f [EPA] claims to have attended to the factor during its review, [it] will have to explain in a manner that cannot be labeled arbitrary how it concluded the violation did not warrant veto . . . [or] it will have to reconsider its decision in light of the new factor." 556 F.2d at 1296. Or, a person may claim that unlawful factors tainted EPA's exercise of its discretion.

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[9] That EPA does not often object, or does not review all permits, does not transfer its role as the reviewer of permit compliance with federal law to DNR. EPA has unburdened itself of the duty to administer and implement the NPDES program in Wisconsin, but not of its role as the arbiter of whether Wisconsin permits comply with federal law. Only EPA has the authority to veto a DNR permit, to disapprove a permit term as contrary to federal law, to enforce federal law requirements, or to withdraw approval of the Wisconsin program. DNR has authority only to administer and enforce the state law provisions adopted under state law so as to obtain EPA's approval of the WPDES program.

Third, the person may petition EPA to require revisions to state water quality standards or to promulgate other program revisions. 40 C.F.R. § 123.62 and pt. 131.

Fourth, the person may petition EPA to withdraw approval of the state program, and if EPA denies the request, the person may seek review of the denial. 33 U.S.C. §§ 1342(c)(3) and 1369(b); 40 C.F.R. §§ 123.63 and 123.64.

Fifth, the person may sue EPA to promulgate rules for the state under 33 U.S.C. § 1365(a)(2). *See Florida Wildlife Federation v. Jackson*, No. 4:08-CV-324, 2009 WL 5217062 (N.D.Fla. Dec. 30, 2009) (approving consent decree requiring that EPA develop numeric nutrient standards for Florida waters); 75 Fed. Reg. 4175 (Jan. 26, 2010) (public notice of rulemaking for Florida as required by consent decree).

Under any of these remedies, EPA is the sole decision-maker for determining whether a state rule or a state permit violates federal law. If EPA concludes that state rules comply with federal law or does not object to a state permit, the jurisdiction to challenge those decisions lies in federal court or with EPA.

In this federally approved program, where state statutes authorize DNR to implement state rules that comply with federal law, EPA acts in a supervisory capacity to ensure that state programs across the country comply with federal law. For state ALJs and courts to decide whether state rules in an EPA-approved program do not comply with federal law would be to usurp that Clean Water Act-mandated supervisory role.

Here, for mercury and phosphorus, at the time that the permit was issued, DNR was following a methodology set forth in its rules in a program approved by EPA, and DNR's implementation of that methodology via issuance of the permit was submitted to EPA and EPA did not

object. So, there are two EPA decisions at issue here, EPA's review and approval of DNR's program, and EPA's decision not to object to DNR's permit. The Council cannot challenge either of those EPA decisions in a state permit review hearing or in state court.

The state ALJ and the state court cannot second-guess EPA's approval of the state program, and they should not step in the shoes of EPA and prospectively make the decision for EPA in cases where EPA has not reviewed a rule that is part of the program. Nor can the state ALJ and state court second-guess EPA's determination not to object to the state permit. Both are federal agency decisions, which the ALJ and state court cannot review.

What the Council is really seeking here is additional rulemaking, either voluntarily or as required by EPA, but it cannot do so in a contested-case permit review hearing. If the Council believes that the DNR rule is insufficient, it can petition EPA to overpromulgate or to require DNR to revise the rule, or the Council can petition the Natural Resources Board to initiate rulemaking to be submitted to EPA for approval. The Council cannot use the Ft. James permit review process as a back-door way to obtain a rule or program change.

E. EPA must be a party to any challenge to state rules approved by EPA, but is immune from suit in state court.

The phosphorus rules proposed by DNR, referred to above, went through extensive EPA comment and review early in the rule-making process (Pet-App:136-139), and new phosphorus rules are currently going through legislative review after extensive EPA comment

and review once again (Pet-App:201-210).[10] If and when the phosphorus rules are approved by the legislature, DNR must submit them to EPA for formal approval under 40 C.F.R. §§ 131.20 and 131.21. If EPA formally approves the rules, can a petitioner circumvent or overturn that federal approval when the next permit is issued pursuant to the federally approved state rules and request that an ALJ or state court determine that the rules are inconsistent with federal law? If so, EPA must be a party to that challenge.

Just as federal law prescribes the prerequisites for state administration of the federal NPDES program, so federal law prescribes the manner in which a citizen may petition EPA to require revision of a state rule, object to a state permit, enforce a federal requirement violated by a state permittee, or withdraw state delegation of a federal program. *See* 33 U.S.C. §§ 1365(a)(2), 1369(b), 1319; 40 C.F.R. § 123.62 - 123.64 and pt. 131. Under any of the federal law-prescribed scenarios, EPA is a necessary party, akin to an indispensable party under Wis. Stat. § 803.03.

EPA is the party needed to respond to the Council's claim that a DNR permit that complies with a state rule is not consistent with federal requirements. EPA determines whether a state rule must be revised under 40 C.F.R. § 123.62. EPA reviews a permit, as provided under Wis. Stat. §§ 283.31(2)(c) and 283.41, to assure that "the draft permit meets the guidelines and requirements of the Clean Water Act." R.7:330; Pet-App:135. If the Council contends that the permit does not meet those federal requirements, only EPA can provide relief by disapproving the permit or the regulatory terms included in the permit.

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[10] DNR has also initiated rule revisions to the antidegradation procedures raised in the Council's original petition for review (Wis. Admin. Register April 1, 2010) and EPA has recently announced listening sessions for proposed changes to the national rule governing antidegradation procedures (press release dated July 30, 2010 at Pet-App:313-315).

F. DNR authority in a contested-case permit review hearing is limited to review of compliance with state law.

Under Wis. Stat. § 283.63(1), a party may state that a permit term is unreasonable for any reason, and can use EPA guidelines and documents and other state guidelines and documents to argue that a permit term is not reasonable, or that a different permit term is necessary. But, ultimately, the challenge must be that the term violates state law, and the DNR or ALJ determination as to what is necessary and reasonable may be based only on state law. DNR and the ALJ have authority to implement a federally approved program only because state law allows it.

The Council in its reply brief on appeal at 13 stated that, "EPA's decision not to object does not deprive ALJs or circuit courts of jurisdiction over challenges to state-issued permits that fail to comply with Wisconsin's delegated CWA program." Precisely: the scope of state forum review is compliance with the EPA-approved state program, not with the CWA itself.

VII. THE COURT OF APPEALS ERRONEOUSLY RELIED ON IMPRECISE AND INACCURATE DICTA.

EPA approved Wisconsin's wastewater discharge permitting program because the statutes require compliance with federal law and because the rules comply with federal law. Pet-App:333-334. No state statute authorizes DNR to issue permits that directly implement federal law other than in instances of Wisconsin-specific overpromulgation.

The court of appeals relied in part on non-dispositive language in certain inapplicable cases to support its holding to the contrary. Supreme Court review is necessary to clarify that those cases do not authorize DNR review of whether a permit term that complies with state rules nonetheless falls short of federal law, and do not authorize DNR alteration of a rule so as to comply with federal law, in a contested-case permit review hearing.

In *Froebel v. Meyer*, 217 F.3d 928, 935, 936 (7th Cir. 2000), the court barred a Clean Water Act claim for failure to raise the claim before the ALJ and circuit court, because those tribunals "could have" heard his claims, the federal act "might have provided" a basis for the relief sought, and the ALJ "may have concluded" that DNR was violating the Clean Water Act. The court's analysis is speculative at best, and faulty. The court speculated that Froebel might have a section 402 federal claim, but section 402 (the federal wastewater discharge permitting program) is not effective in Wisconsin because Wisconsin has an approved state wastewater discharge permitting program. Moreover, the court relied on Wisconsin cases of little relevance to the situation here.

In *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 559, 525 N.W.2d 723 (1995), the court barred a constitutional challenge to a tax provision based on claim preclusion, and in so doing stated that the state Department of Revenue and the Tax Appeals Commission "have authority in limited situations to determine whether application of Wisconsin taxing scheme passes constitutional muster." The court did not examine whether that limited authority applied to the challenge at hand. More importantly, the challenge here does not involve a constitutional challenge, which a state court would be free to adjudicate independent of a federal agency.

Similarly, because the Council's challenges do not implicate any federal constitutional claim, *Hogan v.*

Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991) is inapposite.

In *Badger Paper Mills v. DNR*, 154 Wis. 2d 435, 438-39, 452 N.W.2d 797 (Ct. App. 1990), cited in *Froebel*, EPA asked DNR to add Badger Paper Mills to a list of facilities requiring stricter discharge limitations. DNR did so and denied Badger Paper Mills' subsequent request for a contested case hearing on its inclusion on the list. The court dismissed Badger Paper Mills' action for declaratory and injunctive relief seeking an order requiring DNR to grant the hearing, for failure to exhaust. Contrary to the suggestion in *Froebel*, 217 F.3d at 936, DNR would not in *Badger Paper Mills* have necessarily reviewed Clean Water Act requirements. Rather, the Wisconsin court stated that the issues that would have been heard were whether DNR's inclusion of the mills on the list "was invalid, unlawful and beyond DNR's statutory authority," and whether DNR's denial of the hearing request "was arbitrary, capricious and beyond its statutory authority." *Badger Paper Mills*, 154 Wis. 2d at 440. Nothing in the court's holding suggests that those issues could not be decided based only on state statutes.

In *Sewerage Commission of Milwaukee v. DNR*, 102 Wis. 2d 613, 619, 307 N.W.2d 189 (1981), the parties had stipulated that the state court would decide the question of DNR's authority under federal and state law to include certain requirements in the permit. The court noted that the challenge implicated the construction of both federal and state law, *id.* at 627-28, and that full relief in an administrative hearing was available, *id.* at 631, but the court never reached the issue whether the question of DNR's authority could be decided only under state law because the court dismissed the action for failure to exhaust exclusive administrative remedies.

In sum, DNR asks that the Supreme Court clarify that no case authorizes DNR to stand in EPA's shoes and determine in a contested-case permit review hearing whether a state WPDES permit term that complies with

state law as part of an EPA-approved program in a permit to which EPA has not objected, nevertheless falls short of federal law.

CONCLUSION

DNR asks the Supreme Court to reverse that part of the holding by the court of appeals requiring DNR to review a state permit under federal law.

Respectfully submitted this 19th day of August, 2010.

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CERTIFICATION

I 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 9,689 words.

Dated this 19th day of August, 2010.

_____

JoAnne F. Kloppenburg
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I 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 19th day of August, 2010.

_____

JoAnne F. Kloppenburg
Assistant Attorney General

STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION and CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,
Petitioners-Appellants,

v. APPEAL NO. 2008AP003235

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT DNR MUST IN A PERMIT REVIEW HEARING DETERMINE WHETHER A WASTEWATER DISCHARGE PERMIT ISSUED UNDER STATE LAW PURSUANT TO AN EPA-APPROVED STATE PROGRAM COMPLIES WITH FEDERAL LAW

DEPARTMENT OF NATURAL RESOURCES' APPENDIX

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APPENDIX CERTIFICATION

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court and the court of appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of August, 2010.

JoAnne F. Kloppenburg
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 19th day of August, 2010.

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2010 WI App 64

COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3235 **Cir. Ct. No. 2006CV726**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, THOMAS SYDOW, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

PETITIONERS-APPELLANTS,

V.

DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Curt Andersen, John Hermanson, Rebecca Leighton Katers, Christine Fossen Rades, Thomas Sydow, National Wildlife Federation and Clean Water Action Council of Northeastern Wisconsin, Inc. (collectively, the

Council) appeal a judgment affirming a Department of Natural Resources (DNR) decision denying a hearing on a majority of their objections to a state-issued wastewater discharge permit. The Council claims the DNR and circuit court (1) incorrectly interpreted WIS. STAT. § 283.63[1] to require that contested issues be raised during the public comment period to preserve them for consideration during later proceedings; and (2) improperly concluded the DNR lacks authority to determine whether the permit violates federal law. We agree with both contentions and remand for a public hearing on the Council's objections, to be conducted in accordance with the procedures set forth in § 283.63.

BACKGROUND

¶2 On May 27, 2005, the DNR issued a public notice of its intent to reissue a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to Fort James Operating Company in Green Bay. A copy of the proposed permit accompanied the public notice. In lieu of limiting mercury discharges, the proposed permit required mercury sampling under an alternative limitation plan authorized by WIS. ADMIN. CODE § NR 106.145 (May 2005). The proposed permit also included a phosphorus effluent limitation, compliance with which was to be determined as a rolling twelve-month average. The DNR instructed interested citizens to submit written comments or request a public hearing on the proposed permit within thirty days.[2]

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 283.39(2) mandates the DNR "provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit their written views on the tentative determinations with respect to the permit application." WISCONSIN STAT. § 283.49(1)(a) requires the DNR to "provide an opportunity for ... any (continued)

¶3 The Council objected to the proposed phosphorus limitations. It claimed the DNR failed to conduct a "reasonable potential analysis" required by federal law to determine the impact of additional phosphorus discharges on water quality.[3] The comment also alleged state rules permitting expression of phosphorus effluent limitations as a rolling twelve-month average violated federal law. Finally, the Council claimed the DNR violated state law by failing to perform an anti-degradation analysis. The Council did not contest the permit terms governing mercury sampling.

¶4 On August 24, 2005, the DNR issued a final decision on the permit. It determined none of the Council's objections merited further action.[4] The permit was reissued without substantive changes.

¶5 The Council petitioned the DNR for review pursuant to WIS. STAT. § 283.63(1) and requested a public hearing.[5] The Council renewed its earlier

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interested ... person or group of persons to request a public hearing with respect to a permit application."

[3] According to the Council, the proposed permit increased the total volume of wastewater discharged by 19%. The Council noted, "While the 1.0 mg/l effluent limitation for phosphorus has not changed, an increase in volume without a corresponding decrease in concentration results in an increase in the pollutant load."

[4] The DNR agreed the "mass loading of phosphorus discharged to the Fox River increased from an average of 42.6 pounds per day to 69.9 [pounds] per day," but concluded a reasonable potential analysis—which would determine whether phosphorus discharges exceeded water quality standards—could not be performed "due to the lack of water quality criteria for phosphorus." The DNR also rejected the Council's contention that federal law required expression of phosphorus limits as average monthly and maximum daily values, concluding that doing so would be impracticable because state law did not require it. Finally, the DNR concluded its obligation to conduct an anti-degradation analysis was not triggered because the increased phosphorus discharge did not exceed permit limits.

[5] WISCONSIN STAT. § 283.63(1) allows

(continued)

assertions and raised new objections, including that the permit required mercury sampling too infrequently and that a reasonable potential analysis was also required for mercury discharges.

¶6 The DNR denied the petition in part on March 16, 2006. Interpreting ***Village of Thiensville v. DNR***, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986), the DNR determined "that an issue may be raised at a contested case hearing [only] if it had been aired during the public comment period, even if the ultimate petitioners for the contested case hearing were not involved in the discussions." The DNR denied the Council a hearing on its recent objections to the mercury provisions, citing its failure to receive any comments contesting them. However, the DNR concluded the Council adequately preserved its objections to the phosphorus effluent limitations.

¶7 The Council was nonetheless denied a public hearing on many of its challenges to permitted phosphorus discharges. The DNR summarily concluded it lacked authority to resolve any challenges based on federal law. Because all the Council's objections to the phosphorus provisions invoked federal law, the DNR's decision effectively denied the Council a hearing on all claims except its assertion that state law required an anti-degradation analysis for phosphorus.

> [a]ny ... 5 or more persons [to] secure a review by [the DNR] 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).

After receiving a verified petition, § 283.63(1)(b) obligates the DNR to hold a public hearing at which the petitioner may present evidence in support of his or her petition. The DNR must issue its decision within ninety days after the close of the hearing. WIS. STAT. § 283.63(1)(d).

¶8 On April 13, 2006, the Council petitioned for judicial review of the DNR's March 16 decision. In addition, the Council requested a judgment declaring the availability of a WIS. STAT. § 283.63 public hearing is not conditioned upon having raised issues during the public comment period. It also sought judgments declaring the DNR was required to comply with federal regulations and invalidating several state administrative code provisions relating to phosphorus and mercury discharges as conflicting with federal law.

¶9 The circuit court dismissed the Council's petition and affirmed the DNR's decision. Relying on both its interpretation of statutory language and the exhaustion of administrative remedies doctrine articulated in ***Village of Thiensville***, the court concluded any contested issues must be raised during the public comment period. The court also rejected the Council's federal law challenges, reasoning the Environmental Protection Agency (EPA) possessed ultimate authority over the state's issuance of permits, did not object to the permit, and could not be joined as a party.

DISCUSSION

¶10 We have distilled two primary questions from those presented by the Council. The first is whether the DNR's failure to receive submissions disputing the permit's mercury monitoring requirements bars the Council from challenging them in a WIS. STAT. § 283.63 public hearing. The second is whether the DNR correctly limited the scope of the hearing to state law challenges. This question requires us to review the DNR's conclusion that it lacked authority to determine whether state law complies with federal environmental legislation and rules. We consider each issue separately and resolve the remaining contested issues in the final section of this opinion.

1. Public Comment as a Prerequisite to a WIS. STAT. § 283.63 Hearing

¶11 The circuit court offered two alternative rationales for its conclusion that the allegations contained in a WIS. STAT. § 283.63 petition must first be raised during the public comment period. First, the court emphasized statutory language directing the DNR to "consider anew all matters concerning [the challenged administrative action]." *See* WIS. STAT. § 283.63(1)(b). Statutory interpretation is a matter of law we review de novo, regardless whether the analysis was conducted by the circuit court, *see* ***State v. Long***, 2009 WI 36, ¶20, 317 Wis. 2d 92, 765 N.W.2d 557, or an administrative agency, *see* WIS. STAT. § 227.57(5). The court also applied the exhaustion of administrative remedies doctrine as described in ***Village of Thiensville.*** Although the standard of review in deciding whether the exhaustion doctrine applies in a particular case is a murky matter, *see* ***Metz v. Veterinary Exam'g Bd.***, 2007 WI App 220, ¶¶16-18, 305 Wis. 2d 788, 741 N.W.2d 244, we conduct an independent analysis because this case involves application of well-established exhaustion principles to undisputed facts.

¶12 WISCONSIN STAT. § 283.63 provides individuals aggrieved by a wastewater discharge permit one of the few opportunities to challenge the permit after its issuance.[6] Within sixty days of the DNR's action on a permit, "5 or more persons may secure a review by the department of any permit denial, modification, suspension or revocation, [or] the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit ...." WIS. STAT. § 283.63(1).

[6] WISCONSIN STAT. § 283.53(2)(b) allows the DNR, on its own initiative, to modify, suspend or revoke a permit whenever it finds cause based on any information available to it. While we have recognized this statute may provide a remedy for those aggrieved by a DNR permit decision but who fail, for whatever reason, to object within the times set forth in WIS. STAT. ch. 283, aggrieved parties have no right to reconsideration under this paragraph. *See* ***Village of Thiensville v. DNR***, 130 Wis. 2d 276, 280-81, 386 N.W.2d 519 (Ct. App. 1986).

Upon receipt of a petition, the DNR must schedule a public hearing at which "the petitioner shall present evidence to the department which is in support of the allegation made in the petition. All interested persons ... shall be afforded an opportunity to present facts, views or arguments relevant to the issues raised by the petitioners, and cross-examination shall be allowed." WIS. STAT. § 283.63(1)(b). The DNR must "consider anew all matters concerning the permit denial, modification, suspension or revocation." ***Id.***

¶13 The DNR suggests the words "review" and "anew" plainly evince a legislative intent to limit the hearing to matters previously raised but not yet resolved to a commenter's satisfaction through the informal public comment process. The DNR places more weight on these words than they can reasonably bear. "Review," as used in WIS. STAT. § 283.63, does not refer to an issue raised during the public comment period, but to a prior action taken by the DNR—in this case the reissuance of Fort James' permit.[7] "Review" does not limit the § 283.63 hearing to matters previously raised.

¶14 Nor does the legislature's use of the word "anew" manifest, as the DNR claims, an unambiguous legislative intent to restrict the scope of a WIS. STAT. § 283.63 hearing. As the Council cogently observes, the legislature replaced the phrase "de novo" with the term "anew" when removing Latin terms from the statutes. 1979 Wis. Laws, ch. 110, Introduction and § 27. "Anew"

[7] The DNR relies on our statement in ***Village of Thiensville*** that, by its use of the word "review," the legislature "envision[ed] a process repetitive of an earlier process, rather than a process which breaks new ground in terms of its scope." ***Village of Thiensville***, 130 Wis. 2d at 283. The DNR fails to note the context of this statement, which was in response to the Village's argument that the hearing examiner erred in refusing to examine events occurring after the permit modification. ***Id.*** at 282-83. We merely interpreted the statute to require that the validity of the DNR's permitting action, or the reasonableness of a permit provision, must be assessed based upon information or events available to the DNR at the time of its decision.

therefore refers to the standard of review by which the DNR must analyze its prior action concerning a permit denial, modification, suspension or revocation. *See* WIS. STAT. § 283.63(1)(b). "Anew" does not suggest a limitation upon the DNR's ability to review matters not raised before a final permit issues. Consequently, nothing in § 283.63 expressly limits the hearing to matters considered during public comment.

¶15 When interpreting a statute, the context in which it appears is important. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The legislature's desire to achieve significant public participation in the permit process is evident throughout WIS. STAT. ch. 283. WISCONSIN STAT. § 283.39 requires the DNR to give public notice of "each complete application for a permit." Moreover, "[t]he department shall provide a period of not less than 30 days following the date of the public notice during which time interested persons may submit their written views" on a permit application. WIS. STAT. § 283.39(2). WISCONSIN STAT. § 283.43 mandates public access to forms, fact sheets, draft permits and other public documents, and WIS. STAT. § 283.49 allows any interested person to request a public hearing on the application. To the extent it would penalize members of the public for their failure to participate earlier in the process, the DNR's suggestion that the permit scheme contemplates a progressive narrowing of issues is inconsistent with the legislature's goal of encouraging public involvement.

¶16 The DNR has implicitly recognized this legislative goal in regulations facilitating public participation. Public notice of a completed permit application "is intended to inform interested and potentially interested members of the public of a completed application, [the DNR's] tentative determination to issue or deny the permit ... and the public's right to obtain additional information,

submit written comments, or request a public hearing." WIS. ADMIN. CODE § NR 203.02(1) (Nov. 1996). Public informational hearings are intended "to give all interested persons an additional opportunity to make a statement with respect to a proposed permit ... and to have such statement considered in the final determination." WIS. ADMIN. CODE § NR 203.04 (Nov. 1996). Even the DNR's statement of intent with respect to WIS. STAT. § 283.63 hearings reflects a desire for public involvement: "The purpose of this subchapter is to provide adequate procedures to insure as broad a degree of public participation in administrative adjudication of WPDES permits and their conditions as is consistent with procedural due process to the parties involved in the proceeding." WIS. ADMIN. CODE § NR 203.14 (Nov. 1996). These provisions demonstrate an intent to encourage public participation, not to progressively limit it.

¶17 The DNR argues our decision in ***Village of Thiensville*** requires that we accept its interpretation of WIS. STAT. § 283.63. In that case, we considered the scope of review in a § 283.63 hearing where the DNR modified portions of a permit based on events occurring after it was issued. ***Village of Thiensville***, 130 Wis. 2d at 278. Although the opportunity to timely challenge the unmodified portions of the permit had long passed, the Village of Thiensville claimed § 283.63's predecessor statute, WIS. STAT. § 147.20 (1985-86), allowed review of the original permit as a whole, not just its modifications. ***Id.*** at 278-79. A hearing examiner from the Department of Administration's Division of Hearings and Appeals concluded only review of the modified permit terms was appropriate and found them reasonable. ***Id.*** The issue before this court was whether the hearing examiner erred by refusing to review unaltered terms of the original permit. ***Id.*** at 279.

¶18 In ***Village of Thiensville***, we held WIS. STAT. § 147.20(1) (1985-86), barred review and concluded the statute did not "[open] the door to review of unmodified, as well as modified, portions of a modified permit." ***Id.*** We rejected the Village's argument that "a timely review of a modified permit reopens for consideration those unmodified portions of the permit upon which the time for review has passed." *See* ***id.*** While we offered several reasons for this conclusion, the DNR argues only our discussion of the exhaustion of administrative remedies doctrine controls here.[8]

¶19 "The exhaustion doctrine is typically applied when a party seeks judicial intervention before completing all the steps in the administrative process." ***Metz***, 305 Wis. 2d 788, ¶13. It is a doctrine of judicial restraint, drawn by the legislature and the courts, setting the boundary line between administrative and judicial spheres of activity. ***Nodell Invest. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977). Although classic application of the doctrine occurs when a party begins judicial proceedings before completing previously initiated administrative action, *see* ***Metz***, 305 Wis. 2d 788, ¶12, in ***Village of Thiensville*** we extended the doctrine to administrative review of an agency decision:

> Functionally, [Thiensville's interpretation] would result in a hearing examiner from the Department of Administration reviewing permit terms which might well be years old and which might never have been timely challenged at the basic DNR level. ... [I]t is more appropriate for that initial reconsideration to be made by the DNR, rather than by the Division of Hearings and Appeals.
>
> ....

[8] Our other rationales concerned the fact that the Village's interpretation would render certain statutory language superfluous and the existence of the DNR's discretionary review authority under WIS. STAT. § 283.53(2)(b). ***Village of Thiensville***, 130 Wis. 2d at 280-81.

> We are persuaded that the [administrative exhaustion] doctrine is as apt when applied to different administrative agencies as it is in its conventional usage—an agency versus a reviewing court. We believe the spirit of the exhaustion of remedies doctrine is served by allowing the agency with the expertise and experience to retain the right of first review.

Village of Thiensville, 130 Wis. 2d at 281-82 (footnote omitted).

¶20 We do not read ***Village of Thiensville*** as controlling. In that case, the Village attempted to use WIS. STAT. § 283.63 to obtain review of permit terms for which the sixty-day period had long passed. Here, the Council sought review within the sixty-day period.[9] Thus, the Council had no prior opportunity to petition for review of permit terms it considered unreasonable. The DNR apparently believes the Council's prior opportunity came during the public comment period, but nothing in our discussion in ***Village of Thiensville*** supports this position. In fact, ***Village of Thiensville*** does not mention the public comment period. As a result, the facts of this case do not implicate our concern in ***Village of Thiensville*** that the hearing examiner will be "reviewing permit terms which might well be years old and which might never have been timely challenged at the basic DNR level." *See* ***id.*** at 281.

¶21 That the DNR may initially review a petitioner's claims further undermines its assertion of the administrative exhaustion doctrine. WISCONSIN STAT. § 283.63 identifies the DNR as the reviewing department, not the Division of Hearings and Appeals. The administrator of the division must assign a hearing examiner only if the DNR secretary does not conduct the hearing. WIS. STAT. § 227.43(1)(b). Moreover, the DNR secretary may direct an administrative law

[9] The permit reissued on August 30, 2005. The Council filed its petition on October 28, 2005.

judge to conduct the hearing, but certify the record to a DNR official for decision. WIS. STAT. § 227.46(3)(b); WIS. ADMIN. CODE § NR 2.155(2)(a) (Sept. 2004). Because the DNR may initially adjudicate a petitioner's claims, our concern in ***Village of Thiensville***—that the agency with the expertise and experience should retain the right of first review—appears unfounded outside the specific context of that case.[10]

¶22 Neither WIS. STAT. § 283.63's language nor our decision in ***Village of Thiensville*** supports the DNR's position. The availability of a § 283.63 hearing is not dependent on whether the DNR has received notice of the petitioner's claims during the public comment period. The DNR and circuit court improperly denied the Council an opportunity to demonstrate the unreasonableness of the permit terms governing mercury discharges.

2. DNR's Authority to Determine Whether Proposed Permit Terms Comply with Federal Law

¶23 The scope of review in an administrative appeal is identical to that in proceedings before a circuit court. ***City of LaCrosse v. DNR***, 120 Wis. 2d 168, 179, 353 N.W.2d 68 (Ct. App. 1984). The Council sought judicial review of the DNR's conclusion that it had no authority to determine whether proposed permit terms, and the regulations upon which they are based, comply with federal law. "The extent of the DNR's statutory authority is a question of law." ***Rusk County Citizen Action Group, Inc. v. DNR***, 203 Wis. 2d 1, 6, 552 N.W.2d 110 (Ct. App.

[10] The relationship between the DNR and the division of hearings and appeals is more nuanced than ***Village of Thiensville*** suggests. An agency may contract with the division to provide hearing services. WIS. STAT. § 227.43(1m). Where an administrative law judge presides over a hearing, the judge's decision is, by rule, the final decision of the DNR, unless the DNR petitions for judicial review. WIS. ADMIN. CODE § 2.155(1) (Sept. 2004). The DNR may nonetheless review the administrative law judge's decision upon petition by an adversely affected party. WIS. ADMIN. CODE § NR 2.20(1) (Sept. 2004).

1996). We may substitute our own judgment for that of the agency. WIS. STAT. § 227.57(5). However, our review is limited to the record before the agency. WIS. STAT. § 227.57(1). In addition, we afford due weight to the "experience, technical competence, and specialized knowledge of the [DNR], as well as discretionary authority conferred upon it." WIS. STAT. § 227.57(10).

¶24 The DNR claims it lacks authority to determine whether permit conditions established by state regulations comply with federal law. The DNR provided scant justification for its position in its March 16, 2006, decision letter rejecting the Council's hearing petition:

> The sole authority for the [DNR] to administer the WPDES permit program appears in WIS. STAT. chs. 281 and 283, and Wisconsin Administrative Codes adopted pursuant to those authorities. To the extent that a challenge to a WPDES permit term or condition is made pursuant to WIS. STAT. § 283.63, the challenge must be based on Wisconsin law.

The DNR acknowledged in its decision letter that WIS. STAT. ch. 283 directs the DNR to conduct certain activities in accordance with federal law. The DNR makes the same concession on appeal, but argues only the EPA may determine whether permit provisions comply with federal requirements. The DNR's position requires us to analyze the precise balance between federal and state authority struck by federal water pollution legislation.

¶25 The Federal Water Pollution Control Act Amendments of 1972, "joined the Environmental Protection Agency and the fifty states in a delicate partnership charged with controlling and eventually eliminating water pollution throughout the United States." ***Save the Bay, Inc. v. Administrator of EPA***, 556 F.2d 1282, 1284 (5th Cir. 1977). The Amendments prohibited all pollutant discharges except those made pursuant to permits obtained from the EPA under a

National Pollutant Discharge Elimination System (NPDES). Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, Sec. 2, §§ 301(a), 402(a)(1), 86 Stat. 844, 880 (codified as amended at 33 U.S.C. §§ 1311(a), 1342(a)(1)). As an initial matter, the EPA is vested with discretion to issue permits. Section 402(a)(1). However, the Amendments also reserved to states the right to establish their own permit program by submitting a proposal to the EPA. Section 402(b). "The state must demonstrate that it will apply the effluent limitations and the Amendments' other requirements in the permits it grants and that it will monitor and enforce the terms of those permits." ***Save the Bay, Inc.***, 556 F.2d at 1285. Wisconsin obtained EPA approval for its permit program in 1974 and the DNR has administered the program since that time.

¶26 The EPA's involvement in the permit process does not end when its permitting authority is delegated to the state. Section 402(c)(1). The state must submit to the EPA a copy of each application for a state permit. Section 402(d)(1). The EPA then has ninety days to object to the state permit, and may exercise its veto "on the grounds that [the proposed permit terms] are 'outside the guidelines and requirements' of the Amendments." ***Save the Bay, Inc.***, 556 F.2d at 1294. Despite the EPA's continuing supervisory role over state permit programs, "[p]ermits granted under state NPDES programs are state-issued permits, not EPA-issued." ***Id.*** at 1291.

¶27 The legislative history of the Amendments makes clear Congress envisioned the EPA would use its veto power judiciously. As the United States Court of Appeals for the Fifth Circuit noted in ***Save the Bay, Inc.***, the public works committee expected that "after delegation, the Administrator will withhold his review of proposed permits which are not of major significance." ***Id.*** at 1286 (quoting S. REP. NO. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668,

3737)). The conference committee on the legislation likewise believed the EPA would "not take such action except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law." ***Id.*** at 1287 (quoting 118 CONG. REC. 33750 (1972)). As the Fifth Circuit put it, the legislative history suggests "not every permit out of compliance with the guidelines need be vetoed." ***Id.*** at 1294. The broad discretion given the EPA led the court to hold the "EPA's decision not to veto a particular permit takes on a breadth that in our judgment renders ... that decision unreviewable in the federal courts." ***Id.*** at 1295.

¶28 The DNR suggests EPA's failure to object is outcome determinative, at least with respect to the Council's federal law claims. In the DNR's view, "Any permit challenges must be based on state law only, because neither DNR nor the Division of Hearings and Appeals has the authority to overrule the EPA's prior determination that this permit's provisions are not objectionable under federal law." As shown, the EPA's failure to object does not mean it has found no reason to do so. While the lack of objection may indicate the EPA has found no violation of federal law, it may also mean the EPA has found a violation it does not deem substantial enough to warrant a veto, or it may mean the EPA has abdicated its oversight duties altogether. *See* Federal Water Pollution Control Act Amendments of 1972, § 402(d)(3); ***Mianus River Pres. Comm. v. Administrator, E.P.A.***, 541 F.2d 899 (2d Cir. 1976). The state's theory would allow the DNR to promulgate rules and issue permits violating federal law as long as it can successfully skirt the EPA's discretionary review. We reject this contention.

¶29 "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates." ***Oneida County v. Converse***, 180 Wis. 2d 120, 125, 508 N.W.2d 416

(1993). The DNR has been granted broad authority to manage this state's waters, including an obligation to "formulate plans and programs for the prevention and abatement of water pollution and for the maintenance and improvement of water quality." WIS. STAT. § 281.12(1). The stated 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 ... consistent with all the requirements of the federal water pollution control act amendments of 1972 ...." WIS. STAT. § 283.001(2). In addition, the legislature has directed that all rules promulgated by the DNR under ch. 283 "shall comply with and not exceed the requirements of the federal water pollution control act ... and regulations adopted under that act." WIS. STAT. § 283.11(2). The DNR may issue a discharge permit only if "such discharges will meet ... [a]ny more stringent limitations ... [n]ecessary to comply with any applicable federal law or regulation[.]" WIS. STAT. § 283.31(3)(d)2. Collectively, these statutes require the DNR to assess whether proposed permit provisions violate federal law. A contrary interpretation would allow the DNR to determine whether rules or permit terms comply with federal law at the time of their creation, but not when challenged. We decline to interpret the statutes in such an illogical fashion.

¶30 That the Council's desired review will occur in a state administrative hearing under WIS. STAT. ch. 283 is irrelevant. As the DNR concedes, nothing in WIS. STAT. § 283.63 restricts the scope of the hearing to challenges grounded in state law. The DNR argues, however, that the statutory scheme leading up to this section reserves to the EPA the exclusive right to review a permit for consistency with federal law. The statutory scheme merely requires the DNR to provide the EPA with notice of a proposed permit and prohibits the DNR from issuing any permit the EPA has objected to. *See* WIS. STAT. §§ 283.41(1), (2), 283.31(2)(c).

These statutory notice-and-approval sections do no more than that required by federal law and in no way defer to the EPA the exclusive right to determine state compliance with federal law.

¶31 Our conclusion is consistent with case law suggesting state administrative agencies and courts may determine the requirements of, and state compliance with, federal law. In ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 525 N.W.2d 723 (1995), our supreme court held claim preclusion barred the plaintiff's federal claims in a second suit because they could have been, but were not, raised during state administrative proceedings. The court reached the same conclusion in ***Sewerage Commission of Milwaukee v. DNR***, 102 Wis. 2d 613, 627-28, 307 N.W.2d 189 (1981), when noting that, had the petitioners timely challenged their permit, the DNR could have determined whether it complied with federal requirements.[11] Finally, the court has acknowledged that state "agencies would become ineffectual if they lost their authority to review a case every time a [federal] constitutional claim was asserted." ***Hogan v. Musolf***, 163 Wis. 2d 1, 21-22, 471 N.W.2d 216 (1991). In ***Hogan***, the court rejected the plaintiff's attempt to escape application of the administrative exhaustion doctrine, concluding "the Department [of Revenue] and the [Tax Appeals] Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme also violates federal law or the constitution." ***Id.*** at 21.

[11] The DNR makes much of a stipulation in ***Sewerage Commission of Milwaukee v. DNR***, 102 Wis. 2d 613, 627-28, 307 N.W.2d 189 (1981), that authorized the state courts to determine the scope of the DNR's authority. The DNR is unclear what significance the absence of such a stipulation has in this case. The stipulation in ***Sewerage Commission of Milwaukee*** said nothing about the authority of the DNR to determine state compliance with federal law; it merely determined the forum in which that dispute would be litigated.

¶32 The United States Court of Appeals for the Seventh Circuit has also suggested both the DNR and state courts possess authority to measure state regulatory action against the requirements of federal law. In ***Froebel v. Meyer***, 217 F.3d 928, 930-32 (7th Cir. 2000), a state resident brought suit against the DNR and Waukesha County in federal court, alleging the DNR's removal of a dam violated state environmental laws. The Seventh Circuit concluded the plaintiff's claims against the DNR were precluded because he previously challenged the dam removal in a series of state proceedings culminating in this court's decision in ***Froebel v. DNR***, 217 Wis. 2d 652, 579 N.W.2d 774 (Ct. App. 1998). The Seventh Circuit's analysis included its observation that had the plaintiff "asked the Wisconsin administrative or judicial tribunals to entertain his [federal Clean Water Act] claims, ... they could have done so." ***Froebel***, 217 F.3d at 935. In addition, the court expressed "no doubt that Wisconsin cannot give discretion to its administrative agencies to violate federal law, since such a statute would run contrary to the Supremacy Clause." ***Id.*** at 936. Thus, the court "presume[d] that Wisconsin officials and courts would have faithfully applied federal standards if [the plaintiff] had given them the chance." ***Id.***

¶33 We conclude the DNR possesses authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law. Contrary to the DNR's claims, no authority we have reviewed reserves to the EPA the exclusive right to determine state compliance with federal environmental legislation or rules. Our legislature has directed that all rules promulgated, and permits issued, comply with federal law, and the DNR acts within its statutory authority when determining whether they do so.

3. Remaining Contested Issues

¶34 Our formulation of the critical issues has left unresolved several arguments raised by the Council, which we now address.

¶35 The Council argues the circuit court erroneously dismissed its declaratory judgment action for absence of a necessary party under WIS. STAT. § 803.03. According to the Council's description of its request, it merely sought a declaration that the "DNR must impose effluent limits and conditions in *all* WPDES permits that comply with federal law." The circuit court properly dismissed the action. There is no dispute state law already requires the declaration sought by the Council. *See* WIS. STAT. § 283.31(3)(d)2. (authorizing the DNR to issue a discharge permit upon condition that any discharges "comply with any applicable federal law or regulation"). "[D]eclaratory relief is appropriate wherever it will serve a useful purpose ...." ***Lister v. Board of Regents***, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). We discern no useful purpose the Council's desired declaratory judgment would serve. We therefore affirm the dismissal, albeit on other grounds. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

¶36 We need not address whether the circuit court properly dismissed the Council's declaratory judgment action challenging the validity of WIS. ADMIN. CODE §§ NR 106.145 and 217.04(1)(a)2. (May 2005). The Council has supplied no argument on appeal regarding the challenged rules' validity, and notes in its reply brief that these declaratory judgment requests "were not pursued and not before the court when it rendered its decision." *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider

undeveloped arguments); ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (issues not properly raised are waived on appeal).

¶37 We decline to take judicial notice of a February 17, 2009, letter in which the EPA allegedly disapproved portions of WIS. ADMIN. CODE § NR 106.145 (May 2005), as inconsistent with federal law. We agree with the DNR that the letter would have no bearing on whether the DNR properly denied the Council's request for a hearing under state law. The letter would therefore be irrelevant to the resolution of this appeal.

¶38 Finally, the Council claims any requirement that it submit objections during public comment to preserve review is an invalid unpromulgated rule for which the DNR failed to follow rulemaking procedures. Because the Council has not responded to the DNR's argument to the contrary, we deem the matter conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

¶39 We conclude the circuit court incorrectly interpreted WIS. STAT. § 283.63 and hold that the DNR must conduct a public hearing regardless of whether it received comments on the contested matter prior to a final decision on the permit application. We also conclude the DNR has authority to determine whether discharge permit provisions authorized by state regulations comply with federal law. We therefore reverse the circuit court and remand for entry of an order requiring the DNR to conduct a public hearing in accordance with the procedure set out in § 283.63.

By the Court.—Judgment reversed and cause remanded with directions.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH VII | BROWN COUNTY

CURT ANDERSEN,
JOHN HERMANSON,
REBECCA LEIGHTON KATERS,
CHRISTINE FOSSEN RADES,
THOMAS SYDOW,
CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC. and
NATIONAL WILDLIFE FEDERATION
AND
FORT JAMES OPERATING COMPANY,
Petitioners,

-VS-

DEPARTMENT OF NATURAL RESOURCES,
Respondent.

AMENDED
DECISION AND ORDER

CASE NO. 06 CV 726

STATEMENT OF THE CASE

This matter is before the court because the Court of Appeals reversed a decision of a Brown County Circuit Court Judge. The Court of Appeals ruled that it was Fort James Petition for Review to the circuit court that had to be dismissed and then reinstate the petitioners' Petition for Review. The petitioners filed a Petition for Judicial Review per Wisconsin Statute sections 227.52 and 227.53. The petitioners also requested declaratory judgments pursuant to Wisconsin Statute sections 806.04 and 227.40 pertaining to Wis. Stat. section 283.63 and 283.31(3) and (4) and Wis. Adm. Code sections NR 217.04(1)(a)2 and NR 106.145. Accordingly, this decision is to decide the merits of the petitioners' petition and other requests.

I find it helpful the recitation of the Findings of Fact dated November 16, 2006 issued by the Honorable Wm. Atkinson to set out the background of the case. In the Findings of Fact, the court found that:

"1. On August 30, 2005, the Wisconsin Department of Natural Resources ("DNR") reissued Wisconsin Pollutant Discharge Elimination System ("WPDES") permit no. WI-00-1848-07-0 to Fort James Operating Company, Broadway Mill, located in Green Bay, Wisconsin. On October 28, 2005, five individuals, Curt Andersen, John Hermanson, Rebecca Leighton-Katers, Christine Fossen-Rades, Thomas Sydow and James Baldock, through legal counsel at Midwest Environmental Advocates, Inc., served a Petition for Contested Case, WPDES permit No. WI-00-1848-07-0, Fort James Operating Company—Broadway Mill on the Secretary of DNR.

2. Subsequent to the filing of the petition, counsel for the five petitioners and counsel for Fort James exchanged correspondence with DNR officials concerning the sufficiency of the petition.

3. In March 16, 2006, William H. Smith, Deputy Secretary, DNR wrote to counsel for the five petitioners and Fort James, and issued the Department's decision on the issues that were in dispute between the petitioners and Fort James. ("DNR Decision").

4. In response to the DNR Decision, the five petitioners plus the National Wildlife Federation and Clean Water Action Council of Northeastern Wisconsin filed a Petition for Judicial Review and Declaratory Judgment, Case number 06-CV-726 in this Court on April 13, 2006. The petitioners sought review of that portion of the DNR Decision which held that challenges to the mercury provisions of the Fort James' WPDES permit could not be challenged because no one had raised substantive comments on that issue during the public comment phase. The Petition also contended that the WPDES permit conflicted with certain federal regulations and that they were entitled to review on that issue. The petitioners further sought a Declaratory Judgment from this Court seeking a ruling that certain DNR administrative rules were invalid because they purportedly conflicted with federal regulations promulgated under the Federal Clean Water Act."

DECISION

I affirm the DNR decision to partially grant and partially deny petitioners' request for a contested hearing under Wisconsin Statute section 283.63 to review certain issues related to the WPDES Permit that the DNR issued to Fort James Operating Company. I hold that any review is done only on the basis of state law and not federal law. I also deny petitioners' requests for declaratory judgments. I therefore dismiss petitioners' Petition for Review.

The reasons for my decision are as follows:

First, I agree with the DNR someone needed to raise any issues about the permit in the public comment period. The public comment period is outlined in Wisconsin Statute 283.39. The DNR appropriately ordered a public hearing on the phosphorous issue. The petitioners themselves raised issues pertaining to the phosphorous during the public comment period. However, the petitioners did not raise any issues on mercury during the public comment period.

The DNR did receive comments from a citizen regarding mercury. (See Fort James Record Appendix page 031) However, I agree with the DNR that the inquiry about mercury issues was non-specific in its concerns. In its brief, the DNR stated that, "He (Mr. Lavelette) certainly never mentioned the mercury issues that are presented in the request for a hearing." (DNR brief p. 6) The petitioners, not Mr. Lavelette, presented the request for a hearing on the mercury issues.

It is true that Wisconsin Statute section 283.63 itself does not indicate that any issue raised for a review hearing to be raised in a pre-hearing contact. However, the DNR cites Wisconsin Statute 283.63 (1) (b) which provides in part that, "The department shall consider anew all matters concerning permit denial, modification, suspension or revocation." I agree that the intent of the state legislature was that the DNR had to be in a position to again look at all matters as it pertains to the permit. To look at items "anew", the DNR has to be in a position to examine any matters going in to the permit process before any public hearing.

I believe the DNR Deputy Secretary stated this position well when he stated,

> "The Department interprets the division of Hearings and Appeals' interpretation of *Thiensville* to be that the public participation phase of permit re-issuance is an integral part of the permitting process. A process in which issues can be aired before the Department for the first time at a contested case hearing would significantly diminish the benefits envisioned by the Legislature in providing a less formal process for public input. It is during that public participation phase when differing positions that have not yet solidified can be addressed in a process less formal than a trial-like contested case. Further, permit conditions that are still in the draft stage are more easily re-evaluated by the Department, and where appropriate, modified easily and inexpensively."(DNR letter page 3, dated March 16, 2006)

I also agree with the DNR that the exhaustion of remedies doctrine applies in this case. In *Thiensville Village v. DNR.*, 130 Wis. 2d 276, 281-282, 386 N.W.2d 519 (Ct. App. 1986), the court held the exhaustion of remedies doctrine applies not only before a litigant proceeds to court, but also before proceeding before an administrative law judge. The court held it is more appropriate for the DNR to review issues than the Division of Hearings and Appeals. The court stated, "We believe that the spirit of the exhaustion of remedies doctrine is served by allowing the agency with the expertise and experience to retain the right of first review." I believe that the state legislature intended that it is necessary to air issues before the affected administrative agency before proceeding to the Division of Hearings and Appeals. In this case, it was not done by anybody on the issue of mercury.

Therefore, I deny petitioners' argument that the DNR has exceeded its authority when it required that persons submit written or oral objections to a proposed WPDES permit before those persons or other persons may petition the

DNR for a review of a WPDES permit. I deny Petitioners' request that I issue a declaratory judgment that Wis. Stat. per Wis Stat. sec. 806.04 does not require persons to first submit written or oral objections to a WPDES permit prior to requesting an adjudicatory hearing.

Secondly, the petitioners also argue that the DNR may not issue the WPDES permit because various parts of the permit conflict with federal law. Specifically, the petitioners argue that: (1) Per Wisconsin law, the DNR must issue permits that comply with federal law. In this case, the petitioners argue that the issued permit does not comply with Wis. Stat. sec. 283.31(3) and (4) (compliance with applicable federal law); (2) Wisconsin Administrative Code Section NR 217.04(1)(a)2 (water based effluent limits for phosphorous) is an invalid administrative rule because it conflicts federal regulations promulgated under the Clean Water Act; and (3) Wisconsin Administrative Code Section 106.145 (determination of mercury effluent limitation) is an invalid administrative rule because it conflicts with federal regulations promulgated under the Clean Water Act.

I agree that only the United States Environmental Protection Agency ("USEPA") may decide that certain permit provisions do not comply with federal law. The DNR has provided the requisite cites. This is because the USEPA maintains oversight of the Wisconsin administration of the WPDES program. The USEPA has review and ultimate authority over the state's issuance of WPDES permits and may object to the issuance of a permit. In this case the USEPA did not object to the issuance of the permit. The USEPA also approved

the administrative rules of which the petitioners complain. Because of this relationship, the DNR must limit the hearing to challenges based upon state law because the USEPA is not a party to this action. Even if the exhaustion of remedies doctrine did not apply, any federal challenge needs to involve the federal court and, the USEPA, an indispensable party under Wisconsin Statute section 803.03, needs to be involved. The USEPA cannot be sued in state court. Thus the federal law challenges to state law and administrative regulations can not be heard by this court. This court does not have jurisdiction.

CONCLUSION

In conclusion, this court affirms the DNR's March 16, 2006 Order put out in a letter dated March 16, 2006. In its letter, the DNR denied petitioners' challenge to Section 2.2.1 of the permit based upon federal law. The DNR also denied petitioners' challenge to Section 2.2.1.3 of the permit, as it involved the discharge of mercury. I affirm both of these positions. I also deny petitioners' requests for declaratory judgments per Wisconsin Statute sections 806.04 and 227.40. The hearing review shall only be on state law, not federal law.

Dated this 29th day of September, 2008.

BY THE COURT:

Timothy A. Hinkfuss, Circuit Court Judge

On September 29, 2008 I mailed a copy of the foregoing document to:

Attorney Joanne F. Kloppenburg
P.O. Box 7857
Madison, WI 53707

Attorney Elizabeth Lawton
551 W. Main, Ste 200
Madison, WI 53703

Attorney Neil S. Kagan
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Linda M. Schroeder

Linda M. Schroeder, Judicial Assistant

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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TTY Access via relay - 711

COPY

March 16, 2006

Andrew C. Hanson
Melissa Scanlan
Midwest Environmental Advocates
702 E. Johnson Street
Madison, WI 53703

Richard J. Lewandowski
Whyte Hirschboeck Dudek S.C.
One East Main Street, Suite 300
Madison, WI 53703-3300

Subject: Petition for Contested Case, WPDES Permit WI-001848-07-0, Fort James Operating Company--Broadway Mill

Dear Mr. Hanson, Ms Scanlan and Mr. Lewandowski:

On December 9, 2005 I denied the above-referenced Petition. Petitioners then contacted the Department and asked for reconsideration of the denial because of an alleged incorrect assumption by the Department. Subsequently, a series of email correspondence was followed by a more formal exchange of positions by Petitioners and Fort James. What follows is the Department's determination on Petitioners' request for reconsideration of the denial of the contested case hearing. This determination has been reviewed for content and accuracy by several members of the Department's Bureau of Legal Services and by program staff responsible for re-issuance of the WPDES permit to Fort James.

Jurisdiction

The sole authority for the Wisconsin Department of Natural Resources to administer the WPDES permit program appears in Wis. Stats. chs. 281 and 283, and Wisconsin Administrative Codes adopted pursuant to those authorities. To the extent that a challenge to a WPDES permit term or condition is made pursuant to Wis. Stat. § 283.63, the challenge must be based on Wisconsin law.[1]

[1] The Wisconsin Legislature, in Wis. Stat. ch. 283, has directed that certain activities comport with federal law.

The Department has a delegation agreement with the United States Environmental Protection Agency (USEPA) pursuant to which the USEPA accepts WPDES permitting as the legal surrogate for federal permitting under the Clean Water Act. Consequently, any WPDES permit for a discharge to navigable waters of the United States is also a National Pollutant Discharge Elimination System (NPDES) permit pursuant to that delegation.

The USEPA maintains oversight over Wisconsin's administration of the WPDES/NPDES program and has the authority to direct Wisconsin to correct any deficiencies in its laws necessary for the state program to comport with federal law. The USEPA also has review authority over the issuance of WPDES permits. Should such a permit not comport with federal requirements, the USEPA may object to the permit being issued. Under Wis. Stat. § 283.31(2)(b), the Department may not issue a permit to which the USEPA has objected.[2]

Verification

One issue raised by Fort James is whether Petitioners complied with the requirement that appears in Wis. Stat. § 283.63 and Wis. Admin. Code § 203.17 for verification of the Petition. The Department concludes that the Petition was properly verified.

Fort James initially challenged the manner in which the Petition was verified on the grounds that Petitioners had failed to affirmatively attest to the factual allegations contained in the Petition. Subsequently, Fort James questioned whether each of the Petitioners had personally appeared and signed the Petition before the notary public on the day indicated. Addressing the issues in reverse order from how they were initially presented, the Department perceives the issues to be 1) were the signatures of the Petitioners properly notarized, and 2) does notarization of signatures of Petitioners–with no other attestation by Petitioners–qualify as Verification for purposes of the WPDES permit program.

With respect to verification, the suggestion in the Department's December 29, 2005 letter regarding affidavits was intended to address whether the Petitioners had, in fact, appeared before the notary public on the date that appeared in the Petition. The affidavits submitted by Petitioners appear to resolve that issue for the Department, though Fort James is not precluded from investigating this issue further.

The Department concludes that, for purposes of the administration of the WPDES permit program, notarized signatures of petitioners satisfies the verification requirement. This issue would not exist if either the statute or administrative rules clearly stated what is required for proper verification to occur. As is evidenced by the submittals by Petitioners and Fort James, that is not the case. However, the governing regulation, Wis. Admin. Code NR 203.17, sets out the form for petitions and places the verification after the signatures of petitioners. Since the verification follows the petitioners signatures, the most logical interpretation is that it is the signatures that are being verified, which is acceptably accomplished by notarization.

[2] The above-referenced permit was provided to the USEPA by the Department. The USEPA reviewed the permit and did not object to it.

Thiensville and Madison Kipp

The Division of Hearings and Appeals has a long-standing practice of deferring to the Department on jurisdictional matters or matters that can be construed as being jurisdictional in nature. Accordingly, the Department believes that the application of *Thiensville* to the issues in this matter is the responsibility of the Department, not the Division of Hearings and Appeals. This determination is made easier from the Department's prospective because there are no meaningful disputes of fact with respect to what comments had been received by the Department during the public comment phase of the permit re-issuance.

The Department concurs with Petitioners' position that the administrative law judge's interpretation of *Thiensville* in *Madison Kipp* is not binding on the Department. The Department also concludes that 40 CFR §§ 124.13 and 124.19 do not apply to State proceedings and therefore are not binding with respect to how the Department interprets *Thiensville*. However, both the *Madison Kipp* ruling and 40 CFR §§ 124.13 and 124.19 are instructive and the Department has factored them into this determination.

The facts in *Thiensville* and *Madison Kipp* differ from those in this matter. Further, neither the text of *Thiensville* nor the finding of *Madison Kipp* provide an irrefutable resolution regarding the proper interpretation of the law in such a situation as is before the Department. However, inasmuch as both Petitioners and Fort James have had the opportunity to provide their respective positions and have fully taken advantage of that opportunity, the Department is in a position to make its determination.

The Department interprets the Division of Hearings and Appeals' interpretation of *Thiensville* to be that the public participation phase of permit re-issuance is an integral part of the permitting process. A process in which issues can be aired before the Department for the first time at a contested case hearing would significantly diminish the benefits envisioned by the Legislature in providing a less formal process for public input. It is during that public participation phase when differing positions that have not yet solidified can be addressed in a process less formal than a trial-like contested case. Further, permit conditions that are still in the draft stage are more easily re-evaluated by the Department, and where appropriate, modified easily and inexpensively.

The Department, in its December 9, 2005 determination, accepted what it perceived to be the *Madison Kipp* application of *Thiensville*– that petitioners for a contested case hearing had to be the persons who raised the issue or issues during the public comment phase. However, based on the submittals of Petitioners and Fort James, the Department is hereby modifying its interpretation of *Thiensville* as it applies to the Legislative intent regarding the role of the public participation process. We now interpret *Thiensville* to be that an issue may be raised at a contested case hearing if it had been aired during the public comment period, even if the ultimate petitioners for the contested case hearing were not involved in the discussions. This approach does somewhat reduce the possibility that the public participation process will bring all interested parties together and forge a solution. Nevertheless, it recognizes that the most important consideration is whether the issues were fully placed before the Department for re-evaluation while the permit was still in draft form. This interpretation appears to be consistent

with the reasoning of the Court in *Thiensville*, and it essentially adopts the application of 40 CFR §§ 124.13 and 124.19.

Phosphorus

Given the above analysis, the Department finds that the comments made by Midwest Environmental Advocates with respect to phosphorus satisfy the requirement that issues be raised during the public comment period. Accordingly, the Department hereby withdraws its December 9, 2005 denial of the hearing on the phosphorus issues raised in the Petition.

The Petition challenges the reasonableness of Section 2.2.1 of (Wisconsin Pollutant Discharge Elimination System (WPDES) permit No. WI-001848-07-0. By this letter, the Petition is granted with respect to the challenge to Section 2.2.1 to the extent that the challenge is grounded in Wisconsin law. The Petition is denied to with respect to any challenge to this section that is grounded solely in the application of federal law.

Further, to the extent that a challenge is based on the failure of Wisconsin law to comport with federal requirements, the challenge is denied as not being authorized pursuant to Wis. Stat. § 283.63.

Mercury

Petitioners also challenged Section 2.2.1.3 which addresses the discharge of mercury. Neither Midwest Environmental Advocates nor Clean Water Action Council of Northeastern Wisconsin nor any of the Petitioners commented on this section during the public comment period. Petitioners rely on the fact that one person requested additional information regarding mercury, and the Department reflected this in its response to comments. Petitioners characterize the Department's response to comments as showing that their mercury issue was considered by the Department during the public comment phase.

The characterization by Petitioners of the Department's response to comments made during the public comment period is not borne out by the record. The comment referenced by Petitioners was simply a request for additional information on several issues, including mercury. And, the subsequent Department response was a short synopsis of what had appeared in the briefing document that preceded public notice of the permit. Stated simply, neither the comment, nor the response includes any indication that this exchange reflects the type of airing of issues that the Department interprets to be required. Further, the senior staff engineer who wrote the permit was asked whether the public comment caused him to perceive there was an outstanding issue with respect to mercury that needed further consideration. His response was that he took the request for information to be only that. He did, nevertheless, attempt to contact the person who made the request for information, however his letter to the address provided was returned to him as undeliverable.

Conclusion

Upon reconsideration and consistent with the above discussion, the Petition is granted in part with respect to the challenge to Section 2.2.1, provided that the challenge is grounded in Wisconsin law. The challenge to Section 2.2.1.3 is denied.

If you have any questions regarding this decision, please direct them to Attorney Charles Hammer at 266-0911.

If you believe you have a right to challenge this decision made by the Department, you should know that Wisconsin statutes, administrative codes and case law establish time periods and requirements for reviewing Department decisions.

To seek judicial review of the Department's decision, ss. 227.52 and 227.53, Stats., establish criteria for filing a petition for judicial review. Such a petition shall be filed with the appropriate circuit court and shall be served on the Department. The petition shall name the Department of Natural Resources as the respondent.

Sincerely,

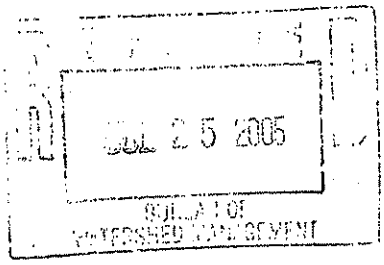
William H. Smith
Deputy Secretary

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 21 2005

REPLY TO THE ATTENTION OF
WN-16J

Russell Rasmussen, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921



Re: Fort James Operating Co.
Green Bay Broadway
Permit No. 0001848

Dear Mr Rasmussen:

The United States Environmental Protection Agency (USEPA) 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:

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, Acting Chief
NPDES Program Branch

cc: Michael Hammers, WDNR

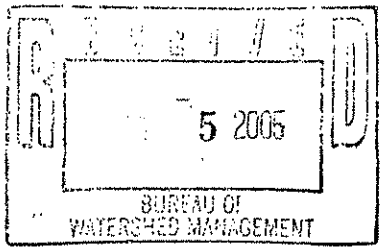
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

JUN 2 8 2005

WN-16J

Russell Rasmussen, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921
Madison, Wisconsin 53707 - 7921



Re: Fort James Operating Co.
Green Bay Broadway
Permit No. WI0001848

Dear Mr. Rasmussen:

We are reviewing the information submitted pursuant to 40 CFR 123.43 for the above-mentioned facility to determine whether the draft permit meets the guidelines and requirements of the Clean Water Act (CWA). We find that our review and the time to submit comments upon, objections to or recommendations to the proposed permit will require additional time. Therefore, under the Memorandum of Agreement and 40CFR123.44 we request the full 90 days to complete our review of this proposed permit.

Sincerely yours

Peter Swenson

Peter Swenson, Acting Chief
NPDES Programs Branch

cc; Michael Hammers, WDNR

U.S.EPA COMMENTS:

"Please note that with most, if not all of these comments, it appears that changes to the language of the proposed rules will be necessary, in order to accommodate our concerns. If you do not agree that a change in the proposed rule language is necessary, please explain how the proposed rule is "as protective as" the Guidance."

1. Comment: NR 106.05 (1)(b). As indicated, it is not clear if these provisions represent an alternative to NR 106.05 (2) and (3) or an addition to these provisions. By "addition" I mean that the provisions of NR 106.05 (2) and (3) represent provisions which will always be invoked to determine if a permit limit is needed, and that in addition to these provisions, those of NR 106.05(1)(b) can be used under additional conditions to further require imposition of a limit. It appears the intent is to establish two options for determining reasonable potential, and that these are "either/or" options. As such, a finding of no reasonable potential under NR 106.05(1)(b) could counter a finding of reasonable potential under NR 106.05(2) and (3). As indicated in the September 6, 1996 correspondence, such an outcome does not appear to be as protective as the provisions of Appendix F, Procedure 5 of 40 CFR Part 132. From earlier discussions we had on this subject, it had appeared that the issue WDNR was trying to address was the need for a permit drafter to develop Tier II values, rather than limitations based upon those values (i.e., you wanted to ensure that the first permit drafter to prepare a permit after adoption of these rule revisions did not have to develop a Tier II value for every pollutant in the universe minus 15 excluded pollutants and those which have Tier 1 criteria.) We do have some flexibility in this regard. This issue is discussed on pages 327-333 of the SID, and it may be useful to explore revisions of NR 106.05(1)(b) in the context of that type of analysis.

   Response: The Department has made some minor changes to s. NR 106.05 (1)(b) in order to clarify the linkage between this section and s. NR 106.05 (2) & (3). We believe that implementation of this section will be consistent with the intent of the GLI.

2. Comment: NR 106.06(6)(b)(c) and (d). We have understood these provisions, generally, to address the issue of pollutants in intake waters, by offering two alternatives - that of paragraph (b) which is intended to be consistent with provisions of Procedure 2 of Appendix F of 40 CFR Part 132, and that of paragraphs (c) and (d) which are intended to be consistent with the provisions of Procedure 3 of that Appendix. While we agree that Procedures 2 and 3 offer two valid approaches for dealing with pollutants in intake waters, it appears that the language in NR 106.06(6)(b)(c) and (d) may be read to invoke an analysis which could fall short of that which is required under Procedures 2 and 3. As such, this language would not be as protective as the Guidance. Additionally, the language seems to allow, with very little ambiguity, the option for an effluent limit to be established in non-attained waters at levels greater than the water quality criterion (e.g., at representative background levels), without invoking processes consistent with Procedures 2 or 3 (or other process consistent with 40 CFR Part 132, Appendix F, Procedure 5). This latter concern may be remedied by changing the language from "or an alternate limitation or requirement may be determined" to "when an alternate limitation or requirement is determined".

   Finally, the relationship between NR 106.06(6) and NR 106.10 is not clear. NR 106.10 appears to allow exception to the provisions of NR 106.06(6) and such exception does not appear to be as protective as the Guidance. Specifically, it appears that noncontact cooling water which

contained intake pollutants which would otherwise fall under the provisions of NR 106.06(6) would be exempted from those provisions.

Response: Modifications to NR 106.06(6)(c) have been made to be responsive to this comment.

3. Comment: NR 106.09. As we have discussed, the WET reasonable potential procedure specified in the rule does not appear as protective as the Guidance. I understand the concern that WDNR has raised relating to the potential for periodic WET monitoring to automatically invoke a permit limit, even though the results of the WET tests reveal no effluent toxicity. On the other hand, we also understand the use of the GLI approach which allows acute dilution factors is of concern to you. We have discussed several options to ensure consistency with the Guidance, and will evaluate your final rules and supporting information to ensure this condition is met.

Response: The Department believes the proposed language in ss. NR 106.08 and 106.09 is as protective as the Guidance. A detailed explanation supporting this position is provided in a letter from Paulette Harder (Director - Bureau of Watershed Management) to Joan Karnauskas (U.S. EPA - Region V)dated January 24, 1997. Copies of the aforementioned letter are available upon request.

4. Comment: NR 106.05(8) I understand that your intent is that this provision be invoked when there is insufficient data to invoke the preceding provisions in NR 106.05, which is eminently acceptable. However, it has been suggested that NR 106.05(8) could be read to establish an alternate "reasonable potential" analysis which would be less protective than 40 CFR Part 132, Appendix F, Procedure 5. While this may appear to be a somewhat tortured reading of this provision, if the first clause of NR 106.05(8) were revised to read "When the provisions of this paragraph cannot be invoked because representative discharge data are not available .." perhaps the intent would be even more clear.

Response: The Department has made the requested change as suggested.

5. Comment: NR 106.07(6) This language appears to imply that a discharger could be deemed in compliance with its permit limit even when effluent values are greater than the WQBEL. For example, if the WQBEL is 9, the LOQ is 15 and we have effluent values of 20 and 6, even if we were give the benefit of the doubt to the discharger, and for purposes of averaging set the 6 equal to zero, the average would be 10, which would be greater than the WQBEL. It appears that NR 106.07(6) could be read to permit such a finding which would not be as protective as the Guidance.

Response: The commenter obviously carefully chose the numbers for the example to make the argument. However, one could change the numbers slightly to make the opposite argument: that Wisconsin's approach is stricter than that suggested in GLI. To illustrate, in the example where the WQBEL is 9 and the LOQ is 15, what if the effluent values were 17 and 14? Using federal guidance (the minimum level approach recommended in the GLI) the average (after assigning a value of zero to the 14) would be 8.5, below the WQBEL, and the discharger would be deemed in compliance. However using the Wisconsin approach, the average would be 15.5, above both the LOQ and the WQBEL and the discharger would be deemed not in compliance. Of course, there are other combinations which could be chosen, including varying where the WQBEL falls in relation to the LOQ, which would illustrate differences in the two approaches. Thus, we believe that the Wisconsin approach is as protective as the GLI.

In comparing the two approaches with situations like the one chosen by the commenter, the Wisconsin approach would result in more findings of non-compliance as the LOQ lowers toward the WQBEL and the minimum level approach would show more non-compliance as the disparity between the LOQ and the WQBEL becomes greater (assuming there is at least one measurement above the LOQ). Intuitively, it makes sense to us, that we should have more certainty in compliance decisions as we are better able to quantify in the region of the WQBEL. If that is true, the Wisconsin approach appears to be superior.

Additionally, the code provisions follow logically from the procedures outlined in the January 26, 1994 Report of the LOD/LOQ Technical Advisory Committee (a group convened in Wisconsin). Since this procedure was devised by and has received approval of a variety of interests, we prefer not to make changes.

6. Comment: NR 106.06(1) 6. NR 106.06(1). Concern has been raised that the March 23, 2007, deadline for elimination of mixing zones for existing dischargers of bioaccumulative chemicals of concern is addressed through a note in the rules, rather than a specific requirement. It would be helpful if Wisconsin were to discuss the process whereby an explicit requirement for the elimination of these mixing zones will be incorporated into the rules, such that the regulated community will have ample time to comply with the requirement, by March 23, 2007.

Response: To satisfy the March 23, 2007 requirement (assuming five year permit terms), the rule for the phaseout of mixing zones for existing dischargers should go into effect in the year 2000 (no later than the year 2001). The Department, should therefore begin the rulemaking process in the beginning of the year in 1999. The rulemaking process begins with a pink sheet submittal to the Natural Resources Board whereby the Department requests permission to initiate rule-making.

7. Comment: NR 106.07(7) As we have noted, the Guidance specifies that when WET limits are used in place of limits derived from Tier 2 values, the existing provisions of 40 CFR 122.44(d)(1)(vi)(C) also apply. To be consistent with the Guidance, language should be incorporated into NR 106.07(7) to clarify this.

Response: The Department has not added further rule language; however, the provisions of 40 CFR 122.44(d)(1)(vi)(C) will be addressed as follows: (1) Permit identifies pollutants to be controlled: this will be accomplished by adding pollutant information to our permit merge; (2) Fact sheet: this information will be included in the briefing memo and will be codified when ch. NR 201 is revised; (3) Indicator parameter limit attains and maintains applicable water quality standards: this will be accomplished via the State of Wisconsin Aquatic Life Toxicity Testing Methods Manual which outlines the requirements for follow-up of WET test failures; (4) Permit contains a reopener clause: It is not necessary to place reopeners clauses in permits. The Department already has broad authority pursuant to s. 147.03(2), Stats., to reopen and modify permits.

8. Comment: NR 207. As we have discussed, the provisions of NR 207 do not appear to be as protective as the provisions of 40 CFR 132. Appendix E. as those provisions would relate to the discharge of BCC's which are not currently subject to permit limits. As such, Wisconsin's proposed regulation does not appear to be as protective as the Guidance, in that certain activities which must be subjected to a review under the Guidance appear to be exempted from such review in Wisconsin's proposal. While we recognize that existing provisions in NR 205 address this issue to a limited extent, as your "Green Sheet" background memorandum explains "the Department will not be able to limit increases in the discharge of a pollutant for an existing permit ... if the substance is

not already limited in the permit". This is clearly not as protective as the Guidance and is an issue which warrants attention as you proceed to public notice of this proposed rule.

Response: The Department has recognized all along that this has been EPA's (and others) primary concern with the proposed rule package. Additional rule language, specific to an increase in loading (discharge) of highly bioaccumulative chemicals of concern (BCCs) in the Great Lakes System, has been added to s. NR 207.02(6). This change should result in the proposed rule package being "consistent with" the GLI. The Department has also included in this subsection, some of the exemptions that were specifically cited in the GLI.

9. Comment: NR 106.17 I did not provide this comment in my September 6, 1996 letter, and apologize for raising it at this late date, however, as we deliberated the issue of whether a 7-year compliance schedule would be as protective as the sum of conditions B.1 and C.1 of Appendix F, Procedure 9 of the Guidance, we failed to address the provisions of B.2, which require that whenever a compliance schedule extends beyond the term of a permit, an interim effluent limit must be imposed. This may be addressed by amending NR 106.17(2)(f) to read "May extend beyond the expiration date of the permit, provided that an interim effluent limit is effective upon the expiration date of the permit".

Response: In response to this comment, s. NR 106.17 (2)(f) has been changed to read, "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."

A note has also been added to the rule following s. NR 106.17 (2)(f). It reads, "Note: An interim permit limit is not necessarily a numeric effluent limitation."

10. Comment: Finally, I would like to note for the record that the record for the PCB criteria for human health and wildlife have been remanded and we have recently proposed revised PCB criteria. Additionally, the acute criterion for selenium has been vacated, and we expect that a revised criterion will be proposed shortly.

Response: Corrections to the PCB criteria in ch. NR 105 have been made accordingly; the acute aquatic life criterion for selenium has also been deleted. For further response, see #7 in ch. NR 105 General Comments.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

WN-16J

AUG 3 1998

Michael D. Witt, Chief
Specialized Discharge Management Section
Bureau of Watershed Management
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: Draft Wisconsin Chloride Code

Dear Mr. Witt:

Thank you for your June 29, 1998, letter in which you asked the United States Environmental Protection Agency (USEPA), Region 5, to comment on the above-referenced draft code. We welcome the opportunity to participate in the development of policies and procedures affecting the Wisconsin Pollutant Discharge Elimination System (WPDES). Collaboration between our agencies in the development of policies and procedures promotes efficient administration of the WPDES and ensures continued progress toward the goals of the Clean Water Act (CWA).

The draft code reflects creative thinking and many hours of hard work by Wisconsin Department of Natural Resources (WDNR) staff and the Chlorides Advisory Committee. Given the relatively high cost of technology designed to remove chlorides from wastewater, we are impressed, in particular, by the innovative approaches to source reduction and control contemplated in s. NR 106.90 of the draft code. We agree that dischargers should explore all options for source reduction and control before committing significant resources to the construction of treatment systems.

We offer the following specific comments on the draft code:

1. We support language in draft s. NR 106.83 which would require the WDNR to evaluate the need to establish effluent limitations for chlorides whenever effluent data indicate that a discharge contains chlorides. Generally, this language is consistent with 40 CFR 122.44(d)(1), a Federal regulation that requires permitting authorities to determine whether pollutants are or may be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion above numeric or narrative water quality criteria. We are concerned, however, that language elsewhere in s. NR 106.83 and in ss. NR 106.88, 106.90, and 106.91 indicates that the

WDNR would refrain from establishing water quality-based effluent limitations (i.e., calculated limitations as defined in s. NR 106.82(1)) if the discharger cannot consistently meet the limitations. Federal regulations at 40 CFR 122.44(d)(1) require water quality-based effluent limitations to be established whenever the permitting authority determines that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion above numeric or narrative water quality criteria. On the subject of establishing water quality-based effluent limitations, we recommend changes to the draft code to ensure that the final code is consistent with 40 CFR 122.44(d)(1).

Permits with water quality-based effluent limitations may include schedules leading to compliance as long as such schedules are allowed under Wisconsin water quality standards or WPDES rules, and the schedules do not exceed the duration of the permit. When compliance schedules exceed one year, 40 CFR 122.47(3) requires the establishment of interim requirements (such as interim or target limitations, source reduction measures, or design and construction milestones) and dates for their achievement.

2. Draft s. NR 106.88(1) indicates that, in drafting a permit for a facility that can consistently meet calculated limitations, the WDNR may establish a schedule leading to compliance with the limitations. Since 40 CFR 122.47(a)(1) requires permits to be written such that compliance is achieved as soon as possible, we recommend a change in this language to provide that compliance schedules may be established only when a facility cannot comply with the limitations on the date of permit issuance.

3. Draft s. NR 106.90 would establish a number of innovative measures for reducing or controlling chlorides in wastewaters. We believe these measures provide a practical means for proceeding toward compliance with water quality-based effluent limitations and the protection of surface water quality. We recommend the addition of language to this section (or a reference to equivalent requirements in other WPDES rules) clarifying certain obligations publicly-owned treatment works (POTW) and users of POTWs must satisfy under the General Pretreatment Regulations for Existing and New Sources of Pollution, 40 CFR 403. (We are available to discuss the meaning of the term, "user," with WDNR staff prior to promulgation of the final code.) More specifically, we recommend adding reference to 40 CFR 403.5(c), which describes the circumstances under which POTWs must establish and enforce local limits on the introduction of pollutants which may cause pass through or interference. In addition, we recommend adding reference to 40 CFR 403.5(a)(1), which prohibits any user from introducing into a POTW any pollutant that may cause pass through or interference.

We understand the WDNR is in the process of developing numeric water quality criteria for chlorides. We believe categorical effluent limitations and water quality standards are the foundation of the Wisconsin program for protecting surface waters from point source discharges. To establish a strong foundation for the program, Section 303(c)(2)(A) of the CWA and 40 CFR 131.11(a) require the WDNR to adopt water quality criteria to ensure that pollutants, including chlorides, do not adversely affect the uses designated under s. NR 104 Wis. Adm. Code. Given

the Federal statutory and regulatory requirements, and in view of the additional clarity numeric criteria provide to the public compared with narrative criteria such at those at ss. NR 102.04(4)(b) and 105.04(1) Wis Adm. Code, we encourage the WDNR to proceed as rapidly as possible toward final adoption of numeric water quality criteria for chlorides.

Thank you for the opportunity to review the draft code. If you have questions or I may be of further assistance, please do not hesitate to contact me.

Sincerely yours,

Eugene I. Chaiken, Chief
NPDES Support and Technical Assistance Branch

Dan Joyce

WISCONSIN
DEPT. OF NATURAL RESOURCES

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

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June 29, 1998

Mr. Eugene Chaiken, Chief
NPDES Support and Technical Assistance Branch
Region 5 EPA
77 W. Jackson Blvd.
Chicago, IL 60604-3590

SUBJECT: Draft Wisconsin Chloride Code

Dear Gene:

Enclosed is draft 2 of our proposed Wisconsin Chloride Code for regulating the discharge of chloride to surface waters of the state of Wisconsin. Recognizing that chloride discharges cannot be economically reduced through end-of-pipe treatment processes, our proposed chloride policy departs from the traditional permitting approach, and seeks to obtain chloride reductions through the implementation of source reduction measures.

We are requesting that you provide written comments on our proposed policy by July 27th. I would also like to arrange either a meeting or a conference call prior to that time. Please let my staff member, Dan Joyce know what your schedule looks like for the second and third weeks of July. Dan can be reached at 608-266-0289. Thanks for your help.

Sincerely,

Mike

Michael D. Witt, Chief
Specialized Discharge Management Section
Bureau of Watershed Management

Enclosure

cc: Steve Jann - Reg. 5, EPA w/Encl.
Sredeevi Yedavalli - Reg. 5, EPA w/Encl.
Chloride Workgroup
Al Shea - WT/2
Bob Weber - WT/2
Duane Schuettpelz - WT/2
Bob Masnado - WT/2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 22 1999

REPLY TO THE ATTENTION OF: **WT-15J**

Mr. Thomas J. Mugan
Environmental Engineer
Wisconsin Department of Natural Resources
Bureau of Watershed Management
P.O. Box 7921
Madison, WI 53707-7921

JAN 25 1999

Dear Mr. Mugan:

Thank you for the opportunity to contribute comments on the State of Wisconsin's proposed rule revisions to Wisconsin Administrative Code, Chapter NR 200, relating to applications for discharge permits and water quality standards variances. Staff in the Standards and Applied Sciences Branch reviewed the requirements for filing applications for water quality variances as well as some of the monitoring requirements. Stephen Jann and other members of the NPDES Support and Technical Assistance Branch reviewed and provided comments on the application requirements for discharge permits. Our Office of Regional Counsel also reviewed the package and deferred commenting to our NPDES Support and Technical Assistance Branch.

The comments on the requirements for filing applications for water quality variances are as follows:

NR 200.24 (1): 40 CFR Part 132, App. F, Procedure 2 (2) (2) (a) requests that the permittee show the variance will conform to the State's antidegradation procedures. Please add this to this section.

40 CFR Part 132, App. F, Procedure 2 (2) (2) (b) requests that the permittee characterize the extent of any increased risk to human health and the environment associated with granting the variance compared with compliance with water quality standards. Please include this in this section.

Please consider adding a statement to this section requesting that the permittee confirm the variance will not jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of such species' critical habitat as requested under 40 CFR Part 132, App. F, Procedure 2 (A) (2).

The comments relating to the application for discharge permits come from the EPA's NPDES Support and Technical Assistance Branch and are as follows:

Existing Rule:

NR 200.02(7): Delete rest of the definition beginning with the following sentence: "Point source" shall not include defused surface discharge . . .

NR 200.03(1)(a): Delete the word "Direct".

NR 200.03(f): Add the following sentence: Unless application for a permit is required by NR 216.

Proposed Rule:

NR 200.03(3)(I): Add storm water associated with industrial activity to this Section.

NR 200.06(4): Additional information requirements are listed at 40 CFR Part 122.21(f)(6) and (7) please add them to this Section.

NR 200.065(b): Table-1 lists minimum monitoring requirements for different types of facilities. In addition, to the listed pollutant major and minor municipal wastewater facilities must also report quantitative data for every outfall for the pollutants listed at 40 CFR Part 122.21(g)(7)(I). Certain municipalities are required pursuant to 122.21(j) to provide results of WET tests. Therefore, please modify Table-1 to reflect these changes.

We recommend WET testing requirements be added for the facilities that fall under Primary Industry Category.

NR 200.065(h)(1): This cannot be done to pollutants required by Federal regulations.

NR 200.065(h)(3): Please delete the phrase "from similar facilities".

NR 200.065(h)(3): Please add a subsection to this paragraph: (I) Department may require additional information as necessary to process the permit. This language must be included for facilities subject to 40 CFR 122.21(g)(13).

My staff with monitoring expertise reviewed the monitoring requirements and raised several questions that you may want to address or clarify in the proposed rule. They are:

- Surface water is defined as only lakes and streams. Does Wisconsin have no discharges into wetlands? It seems likely that wetlands would be impacted as well.

- The remaining comments refer to the tables on pages 8 and 9: Why do minor facilities have to monitor for arsenic, cadmium, chromium, lead, nickel, and zinc but not major facilities? I would think both groups should do so. These metals may be covered under the reference to s. NR 215.03, ch NR 105, or ch NR 102 but I don't know what these lists contain.

- Why isn't BOD and/or COD a parameter for all discharger types? One of the major problems associated with wastewater is BOD. This could be covered under their reference to NR 215.03, ch NR 105, or ch NR 102. However, these same references are made for primary industry process wastewater and BOD and COD are still listed separately.

- Why aren't temperature and pH also required for all discharger types?

- What is meant by the column entitled "Number of monitoring results?" Normally, dischargers are required to monitor daily, weekly, monthly, or some combination of these, depending on parameter.

If you or your staff have any questions, please do not hesitate to contact me at (312) 886-6090. Should you have specific questions on the comments for discharge permits please contact Sreedevi Yedavalli at (312) 353-7314. I look forward to working with you in the future.

Sincerely yours,

Joan M. Karnauskas, Chief
Standards and Applied Science

Sincerely yours,

Eugene Chaiken, Chief
NPDES Support and Technical Assistance Branch

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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June 7, 1999

Mr. Eugene Chaiken – WN – 16J
EPA Region V
77 W. Jackson Blvd.
Chicago, IL 60604

Subject: NR 200 Revisions

Dear Mr. Chaiken: Gene

I have attached a copy of the "Green Sheet" package which requests that the Natural Resources Board adopt the proposed code revisions at the June 29 – 30 Board meeting in Kenosha. Once the Board adopts rules, they are sent to the Legislature for review. Assuming things go smoothly, I expect the NR 200 revisions to become effective in September or October.

Thank you for your comments on the draft rule. To see how the Department considered your comments and others, check the responsiveness summary, which starts on page 3 of the Background Memo.

If you have questions, please contact me by mail or at (608)266-7420 (phone) or *mugant@dnr.state.wi.us* (e-mail).

Sincerely,

Tom Mugan

Thomas J. Mugan, Environmental Engineer
Bureau of Watershed Management

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June 7, 1999

Ms. Joan Karnauskas – WT – 16J
EPA Region V
77 W. Jackson Blvd.
Chicago, IL 60604

Subject: NR 200 Revisions

Dear Ms. ~~Karnauskas~~ Joan:

I have attached a copy of the "Green Sheet" package which requests that the Natural Resources Board adopt the proposed code revisions at the June 29 – 30 Board meeting in Kenosha. Once the Board adopts rules, they are sent to the Legislature for review. Assuming things go smoothly, I expect the NR 200 revisions to become effective in September or October.

Thank you for your comments on the draft rule. To see how the Department considered your comments and others, check the responsiveness summary, which starts on page 3 of the Background Memo.

If you have questions, please contact me by mail or at (608)266-7420 (phone) or *mugant@dnr.state.wi.us* (e-mail).

Sincerely,

Tom Mugan

Thomas J. Mugan, Environmental Engineer
Bureau of Watershed Management

Form 1100-1
Rev. 5-91

NATURAL RESOURCES BOARD AGENDA ITEM Item No. _____

SUBJECT: Adoption of Order WT-39-98 - revision of Chapter NR 200, Wis. Adm. Code, pertaining to applications for discharge permits and water quality standards variances.

FOR: JUNE 1998 **BOARD MEETING**

TO BE PRESENTED BY: Tom Mugan - WT/2

SUMMARY:

What are the rule changes and why? - NR 200 sets forth requirements for filing wastewater discharge permit applications, prescribes the form of those applications and specifies time limits for Department action on them. The Department proposes revisions to that rule as summarized in the following paragraphs. These are the changes:

1. A statement, in general terms, of the type of information the Department may require permittees to submit on application forms and more specifically the effluent monitoring requirements for various categories and sizes of dischargers. This will generally not result in changes to what the Department currently requires case-by-case but serves to formalize the process. It should result in improved consistency.

2. The creation of a new subchapter to set forth requirements for filing applications for water quality variances. Currently, the Department conveys information requests by letter after an applicant notifies the Department of it's intent to apply for a variance. State Statutes require the Department to specify by rule these requirements.

What are the key issues/controversies? - There has been little controvery with this package, since the changes for permit applications formalize current practices and the variance application requirements closely reflect what is currently required by letter.

What was the last action of the Board? - In December 1998 the Board authorized a public hearing on these changes. The Department held a hearing in Madison in January, 1999. Some changes were made to the rule based on comments from the Rules Clearinghouse, EPA and the public. The Department made one other correction which clarifies that testing must be performed by certified labs using approved analytical methods, as already required in other codes.

RECOMMENDATION: Request adoption of proposed changes to NR 200.

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:

Bureau Director, Al Shea — Date 5/26/99

Administrator, Susan L. Sylvester — Date 5/26/99

Secretary, George E. Meyer — Date 5/26/99

cc: Judy Scullion - AD/5
Dan Graff - LS/5
Al Shea - WT/2
Susan Sylvester - AD/5
Carol Turner - LS/5
Tom Mugan - WT/2 (5 copies)
Bob Weber - WT/2
Regional Water Media Leaders

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: May 4, 1999

TO: Natural Resources Board

FROM: George Meyer George

SUBJECT: Background Memo on Proposed Revisions to Chapter NR 200

1. Why Revisions to this Rule are Being Proposed

NR 200 sets forth requirements for filing wastewater discharge permit applications, prescribes the form of those applications and specifies time limits for Department action on them. In its current version, the Code states generally that applicants need to complete application forms supplied by the Department.

Since promulgation of Chapters NR 105 and 106 protecting water quality from discharges of toxic and organoleptic substances in 1989, the Department has required pollutant testing or projecting effluent quality as part of permit applications to adequately implement those rules. Over the years these testing requirements have become more standardized to the point where it is now appropriate to codify the requirements.

Variances to water quality standards are allowed pursuant to s. 283.15, Stats. That section of the Statutes, which is consistent with federal requirements for variances, specifies how a permittee wishing to apply for a variance must do so, time lines for applying, what a permittee must do to demonstrate that a variance is appropriate, and the conditions under which the Department may grant variances. It also directs the Department to specify by rule the information to be included in the application for a variance. The Department now has sufficient experience processing variances that we believe we can specify the information requirements in such a way that requests for additional information will be minimized. We believe NR 200 is the appropriate place for listing these requirements.

2. Summary of the Proposed Rule Changes

The changes state in general terms the type of information the Department may require permittees to submit on application forms and more specifically the standard effluent monitoring requirements for various categories and sizes of dischargers.

The proposal also creates a new subchapter setting forth requirements for filing applications for water quality variances. Since justification for variances are site specific, we do not use an application form for variance requests. Currently, the Department conveys information requests by letter after an applicant notifies the Department of it's intent to apply for a variance. The information requested is that which is necessary for the Department to evaluate whether or not a permittee can demonstrate that attainment of a water quality standard is not feasible for at least one of 6 grounds listed in s. 283.15, Stats.

Other minor clean-up changes are also being proposed.

3. Effects on Existing Policy

Changes to the existing code will generally not change what the Department currently requires in permit applications but serves to formalize what has become common Department practice. It should result in improved consistency.

The proposed new subchapter on variance applications will also not change what the Department currently requires but will standardize requirements, based on what the Department has learned through experience.

4. Comment Summary

To solicit public input, a Notice of Public Hearing was published in the Wisconsin Administrative Register #516, dated December 31, 1998. Copies of the proposed rule were also sent to interested persons and organizations. The Department conducted a public hearing on January 20,1999 in Madison and accepted written comments until February 1, 1999. No oral comments from the public were received at the hearing. Four members of the public, the U.S. EPA and the Legislative Council Rules Clearinghouse submitted written comments. The comments are discussed in detail in the attached Responsiveness Summary.

5. Information on Environmental Analysis

The Department has made a preliminary determination that an environmental assessment is not necessary for the rule changes contained in this green sheet package.

6. Small Business Analysis

Because these code changes merely formalize what the Department commonly requires under more general authority, there should be minimal impact on small businesses.

ATTACHMENT 1 - RESPONSIVENESS SUMMARY

To solicit public input, a Notice of Public Hearing for the proposed changes to ch. NR 200 was published in the Wisconsin Administrative Register, #516, dated December 31, 1998. Copies of the proposed rule were also sent to interested persons and organizations. The Department conducted a public hearing on January 20, 1999 in Madison and accepted written comments until February 1, 1999. No oral comments from the public were received at the hearing. However, members of the public submitted a number of written comments. U.S. EPA and the Legislative Council Rules Clearinghouse also submitted comments.

The written comments, as well as Department Responses, are shown in the following paragraphs.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE COMMENTS - DATED JANUARY 13, 1999

Comments Resulting in changes: A number of comments and some questions were made on; 1) The form, style and placement of material in the rule, 2) Adequacy of references to related statutes, rules and forms and 3) Clarity, grammar, punctuation and use of plain language.

Response: The Department considered all of the comments and questions and made a number of changes, including:

a. To avoid repetition, sections of the rule which apply to both permit applications and variance applications were separated into a third subchapter. These sections include Purpose, Definitions, Use of Information and Analytical Methods and Laboratory Requirements.

b. Addresses of Departmental offices, which are subject to change during reorganizations, were removed from rule and placed into notes to allow expedient updating.

c. A number of definitions which were used only once in the rule were defined where the terms were used, instead of in the definitions section.

d. Time deadlines for Department action on variance applications, specified in statute, were inserted as a note.

e. The Department withdrew proposed changes which would have expressed time deadlines for the Department to review and make determinations on permit applications in calendar days rather than business days as stated in s. 227.116, Stats. The change was originally proposed to avoid confusion, since the same section of the rule specifies in calendar days the length of time prior to expiration that a permittee must submit a reissuance application and the minimum length of the public comment period.

Comments Not Resulting in Changes: After considering two of the Clearinghouse comments, the Department decided to not make changes as follows:

a. *Comment:* The Clearinghouse suggested that it might not be clear what is meant by "industrial facility or activity".

Response: We have searched in vain for a good definition of "industrial". The Department is reluctant to formulate a definition without a complete understanding of the impacts such a definition might have on other program elements, such as pretreatment. One alternative is to define industrial facility as a non-municipal facility and essentially, that is what the implication in the rule is. There are really only two types of surface water discharges covered by the regulation, municipal and industrial. The others are sub-types. Since the Applicability and exclusions section describes the scope of the rule, it should be clear that if a covered entity is not a municipal facility, it is an industrial facility. Therefore, no further attempts have been made to define industrial.

b. *Comment*: The Clearinghouse said it appears that the substantive provisions of s. NR 200.24, Application Completeness are more appropriately placed in NR 200.22.

Response: The Department disagrees. Section 283.15, Stats., provides for a step-by-step process where the Department, before deciding if the application is complete, may request additional case-specific information after reviewing the initial application submittal. The initial submittal is the information which the statute requires the Department to specify in this rule and it makes sense that this information stand its own section (NR 200.22). This approach also parallels that of subch. II for permit applications, which has a separate section called Incomplete application. In both cases, the application completeness determination is an important step, since it defines the start date for counting the number of days within which the Department must review and make its determination. Therefore, we left it in a separate section (NR 200.24).

ENVIRONMENTAL PROTECTION AGENCY COMMENTS (LETTER DATED JANUARY 22, 1999)

Comments: EPA, Region V comments were primarily aimed at making sure that the rule captured the requirements of the corresponding federal regulations. Subsequent to receiving the comments, Department staff communicated with EPA staff via a conference call, personal telephone contacts and electronic mail to make sure Department staff fully understood the comments and to determine if suggested rule modifications satisfied EPA's concerns.

Responses: The following changes were made to the proposed rule:

1. Pursuant to requirements at 40 CFR Part 132, Appendix f, Procedure 2(c)(2)(a) and (b), the Department added to the information that must be included in a variance application requirements that a permittee must show that the variance will conform with Wisconsin's antidegradation procedures, specified in NR 207, and must characterize the extent of increased risk to human health and the environment associated with granting a variance.

2. The definition of "point source" was modified to be more consistent with current federal and statutory regulations.

3. To Table 1, the Department added whole effluent toxicity as a required parameter for testing for major municipal dischargers to be consistent with federal regulations.

4. Other minor wording changes.

WISCONSIN PAPER COUNCIL (LETTER FROM EDWARD WILUSZ DATED JANUARY 27, 1999)

Comment: The definition of "noncontact cooling water without additives" found at NR 200.02(7) should be amended to be consistent with the noncontact cooling water exclusion in NR 106.10(1). The relevant language in NR 106.10(1) reads: "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."

Response: In reviewing the language at s. NR 106.10(1), the department has determined that, in specifying application monitoring requirements, there is not sufficient reason to distinguish between non-contact cooling waters with additives and those without. Since only the additives may be examined for the establishment of water quality based limitations for toxic and organoleptic substances, results of effluent monitoring for the additional metals listed with the secondary industry process discharge type would not be useful in determining permit conditions for non-contact cooling water discharges containing additives. However, ch. NR 205 defines both "cooling water" and "noncontact cooling water" and this distinction needs to be clearly reflected in ch. NR 200. Therefore, Table 1 has been changed so that the 4th discharge type is now given as "Secondary industry process discharge or cooling water discharge or both" and the 5th discharge type is now given as "Noncontact cooling water discharge". The definitions of "Noncontact cooling water with additives" and "Noncontact cooling water without additives" were eliminated and the definitions of "Cooling water" and "Noncontact cooling water", contained in ss. NR 205.03(10) and (21), were inserted into NR 200.

KAEMPFER AND ASSOCIATES, INC. (FAX COMMUNICATION FROM CHRIS KAEMPFER DATED FEBRUARY 1, 1999)

Comment: Table 1 should be revised to change "ammonia nitrogen" to "ammonia" or ammonia reported as nitrogen. There is no substance named ammonia nitrogen.

Response: Although usage of the term ammonia nitrogen is not uncommon in the wastewater field, the Department agrees that, chemically, there is no such thing as ammonia nitrogen. Terminology has been discussed with the coordinator of the ammonia rule-making team and we believe we agreed to consistently use the term "ammonia". This change has now been reflected in the proposed NR 200, Table 1.

ALLIANT ENERGY (LETTER FROM KATHLEEN STANDEN DATED FEBRUARY 1, 1999)

Comment: Proposed NR 200.24(1)(o) [now changed to NR 200.22(1)(p)] requires the permittee to perform a financial impact analysis. " Alliant Energy recommends that NR 200.24(1)(o)2. be clarified

to make it clear the profitability and other financial health indicators being referred to here apply only to the facility or business unit in question, and NOT to the profitability and financial health of the entire parent corporation." Ms. Standen cited comparable rules in the Air Management program and also EPA's *Interim Economic Guidance for Water Quality Standards Workbook*.

Response: First of all, any such change would need to be made in the statutory language, not in the rule specifying what information permittees must include in a variance application. Putting this limitation on what information should be supplied by the permittee might result in an incomplete picture of the company as a whole and limit the Department's decision-making.

Regarding the concept being promoted, we agree in principle that it is important to consider the financial impacts to each business unit for its impact on the local community. If a large corporation closes down or downsizes a certain part of its business, the impact on a local community could be important, regardless of the financial health of the company as a whole. On the other hand, it would be short sighted to completely ignore the financial condition of the parent company. Under the current statutory language, the Department is free to make a reasonable decision based on each individual set of circumstances. The fact that the EPA guidance recognizes the importance of evaluating the effect on the local facility supports that idea. Therefore, we believe there is no reason to pursue a statutory change.

Comment: Alliant Energy proposes that a seventh criteria [ground for a variance] be added, that the discharge would not cause significant harm to the environment or the public health. Ms. Standen indicates that this type of variance has precedent in the Wisconsin air emission rules.

Response: Again, this would require a statutory change. The reason for including the six grounds for a variance in NR 200 is merely to inform the permittee what demonstrations it might want to make in the application.

What Ms. Standen seems to be suggesting sounds a lot like the site-specific criteria option in s. NR 105.02(1). In addition, this comment has been shared with the Department staff person coordinating rule-making for thermal discharges and a similar option is included in a recent draft of NR 102 for discharges of heat. Therefore, the Department believes there are mechanisms available in the administrative rules for adjusting effluent limitations based on environmental conditions at the site and there is no need to make adjustments to NR 200.

Comment: The public noticed version of NR 200.065(1)(g)1. allows the permittee to apply, under certain conditions, data collected within the last three years to fulfill these testing requirements. We recommend that NR 200.065(1)(g)1. be revised to read, "The discharge was performed since the last permit application and there were no process changes, process chemical changes, or introduction of new products which may contain new chemical constituents never consumed before and not listed in NR 215.03 and 215.06." Data taken more than three years ago is valid under these conditions.

Response: We agree that data more than 3 years old may, under certain conditions, be representative of the current discharge. However, we believe some outside limit on the length of time is appropriate. Since the maximum term of a permit is five years, we believe that is a reasonable choice. We have changed the wording as follows: "An applicant for permit reissuance may apply test

data collected during the current permit term to fulfill these requirements if: 1) No more than 5 years has elapsed since the monitoring; and 2) No operational or process changes have occurred since the monitoring.

MUNICIPAL ENVIRONMENTAL GROUP (LETTER FROM AMY TUTWEILER DATED FEBRUARY 1, 1999)

Comment: The variance process which will now result once the new NR 200 is in place will shorten the time for permittees to prepare supporting materials. To address this concern, we request that the DNR provide permittees with water quality based effluent limitations as soon as the limits are available and preferably 60 to 90 days before the permit is public noticed.

Response: It is true that, because of the way s. 283.15, Stats., is written, once necessary application instructions are codified, the process will be shortened by up to 60 days. We agree that providing permittees with the greatest notice of permit limitations is advantageous, especially when it appears that one or more limitations may pose compliance problems. In most cases, the Department already supplies permittees with effluent limitations when they are available as the permit is being drafted. We intend to continue this practice and will continue to stress to staff the importance of this early notification. We hope our plan to provide "preliminary limits" to permittees with permit applications will provide even longer notice in the future. However, codifying a requirement for such advance notice is beyond the scope of this rule making.

TECHNICAL CORRECTION

One of the Clearinghouse comments already discussed suggested that defined terms used only once would be more useful if they were removed from the definition section and defined where they are used in the rule. As Department staff were reviewing which definitions this comment applied to, many of which related to laboratory data issues, we realized that the proposed modified code does not specify that laboratories performing effluent testing must be certified under chapter NR 149 or that they must use analytical methods approved in chapter NR 219.

The Department believes it is important to clarify these requirements in NR 200 and has added a new section, s. NR 200.014 Analytical Methods and Laboratory Requirements, patterned after the language provided in s. NR 219.02 and NR 106.14.

Section NR 219.02 requires that; 1) approved methods, listed in chapter NR 219, be used for permit applications and permit-required reports and 2) that laboratories be certified under ch. NR 149. Chapter NR 106, which details how the Department must use data it normally obtained through permit applications to determine if effluent limitations for toxic and organoleptic substances are needed in permits, also requires use of approved methods and specifies certain other laboratory requirements at s. NR 106.14.

While the requirements stated in this new section are already contained in these other rules, the Department is concerned that, if not stated again in the code specifically relating to applications, there could be misunderstanding among permittees or their consultants. These changes are consistent with what the Department currently requires in the applications.

FISCAL ESTIMATE
DOA-2048 N(R10/94)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

1997 Session

LRB or Bill No./Adm. Rule No.
NR 200

Amendment No. if Applicable

Subject
Wastewater Discharge Permit Application Requirements

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
☐ Create New Appropriation

☐ 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
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
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 Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

SUMMARY OF RULE - Wisc. Admin. Code Ch. 200 sets forth requirements for filing wastewater discharge permit applications, prescribes the form of those applications, and specifies time limits for Department action on them. The Department proposes revisions to NR 200 that will:

1) State in general terms the type of information the Department may require permittees to submit on application forms and more specifically the standard effluent monitoring requirements for various categories and sizes of dischargers. This will generally not result in changes to current requirements but will serve to formalize what has become Department practice.

2) Create a new subchapter to set forth requirements for filing applications for water quality variances. Currently, the Department conveys information requests by letter after an applicant notifies the Department of its intent to apply for a variance. This will not result in changes to current Department requirements but will standardize requirements, based on what the Department has learned through experience.

FISCAL IMPACT - None. The changes should result in no fiscal impact because the changes merely formalize current Department practice administered under more general authority.

Long-Range Fiscal Implications
None.

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Joe Polasek, 266-2794	266-2794	10-16-98

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Pet-App. 157

FISCAL ESTIMATE WORKSHEET

1997 Session

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R10/94)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.	Amendment No.
NR 200	

Subject
Wastewater Discharge Permit Application Requirements

I. One-Time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
None.

II. Annualized Costs:	Annualized Fiscal impact on State funds from: Increased Costs	Decreased Costs
A. State Costs by Category State Operations - Salaries and Fringes	$	$
(FTE Position Changes)	(FTE)	(- FTE)
State Operations - Other Costs		
Local Assistance		
Aids to Individuals or Organizations		
TOTAL State Costs by Category	$ 0	$ 0
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	$	$
FED		
PRO/PRS		
SEG/SEG-S		
III. State Revenues: Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Rev.	Decreased Rev.
GPR Taxes	$	$
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

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Joe Polasek, 266-2794	266-2794	10-16-98

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ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
RENUMBERING, RENUMBERING AND AMENDING, AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to renumber NR 200.02(2) to (6) and (8) to (10); to renumber and amend NR 200.02(7) and 200.08; to amend ch. NR 200 (title), 200.01, 200.03(1)(a) and (3)(f), 200.05 (intro.), (1)(b) and(4)(intro.), 200.07(2), (3) and (4) and 200.09; and to create NR 200 subch. I (title), 200.02(2), (5), (6), (7), (8), (10), (15), (16), (17) and (18), 200.027, NR 200 subch. II (title), 200.03(3)(i), 200.06(4), 200.065, 200.10(5) and NR 200, subch. III relating to applications for discharge permits and water quality standards variances.

WT-39-98

Analysis prepared by the Department of Natural Resources

Statutory authority: ss. 227.11(2), 283.15(2)(b)1. and 283.31, Wis. Stats.

Statutes interpreted: ss. 227.116, 283.15, and 283.37, Wis. Stats.

This action will add language to ch. NR 200 to specify effluent monitoring and other application requirements for various categories of dischargers to reflect what has become common practice by Department staff. Other minor clean-up changes will also be made. New subchapters will be created to; 1) specify application requirements for variances to water quality standards to reflect statutory language and staff experience and 2) to define terms and conditions that apply throughout the chapter.

SECTION 1. Chapter NR 200 (title) is amended to read:

CHAPTER NR 200

APPLICATION FOR DISCHARGE PERMITS AND WATER QUALITY STANDARDS VARIANCES

SECTION 2. Subchapter I (title) of ch. NR 200 [precedes NR 200.01] is created to read:

SUBCHAPTER I - PURPOSE, DEFINITIONS AND GENERAL PROVISIONS

SECTION 3. NR 200.01 is amended to read:

NR 200.01 PURPOSE. The purpose of this chapter is ~~to~~:

(1) To set forth the requirements for filing applications for the discharge permits required by s. 283.31, Stats., to prescribe the form of such applications pursuant to s. 283.37, Stats., and to specify the number of business days within which the department will publish a public notice

indicating its intended action on a Wisconsin pollutant discharge elimination system permit application or request for modification pursuant to s. ~~227.0105~~ 227.116, Stats. Section ~~283.37~~ 283.31, Stats., requires a permit for the lawful discharge of any pollutant into the waters of the state, which include groundwaters by the definition ~~set forth~~ in s. 283.01(13), Stats. The federal water pollution control act of 1977, P.L. 95-217; 33 USC 466 et. seq., requires a permit for the lawful discharge of any pollutant into navigable waters. Therefore in Wisconsin, permits are required for discharges from point sources to surface waters of the state and additionally to land areas where pollutants may percolate, seep to, or be leached to groundwaters. This includes the land application of sludge.

(2) To set forth the requirements for filing applications for variances to water quality standards allowed by s. 283.15, Stats.

SECTION 4. NR 200.02(1) is amended to read:

NR 200.02(1) "Business days" means each day except Saturday; Sunday; January 1; the third Monday in January, which shall be the day of celebration for January 15; the last Monday in May, which shall be the day of celebration for May 30; July 4; the first Monday in September; the 4th Thursday in November; December 24; December 25; December 31; and the day following if January 1, July 4 or December 25 falls on Sunday~~; after 12 noon on Good Friday, in lieu of the period specified in s. 757.17, Stats; and December 24 and 31~~.

SECTION 5. NR 200.02(2) to (10) are renumbered NR 200.02(3), (4), (9), (11), (12), (13), (14), (19) and (20) and NR 200.02(13), as renumbered, is amended to read:

NR 200.02(13) "Point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, outfall, 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 this state or into a publicly owned treatment works~~. "Point source" shall not include diffused surface drainage or any ditch or channel which serves only to intermittently drain excess surface water from rain or melting snow and is not used as a means of conveying pollutants into waters of the state. "Point source" shall not include uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity, unless the particular storm runoff discharge has been identified by the department as a significant contributor of pollution.~~,except for a conveyance that conveys only storm water.

SECTION 6. NR 200.02(2), (5), (6), (7), (8), (10), (15), (16), (17) and (18) are created to read:

NR 200.02(2) "Cooling water" means water which has been used primarily for cooling but which may be contaminated with process waste or airborne material. Examples are the discharge from barometric condensers or the blowdown from cooling towers.

(5) "Limit of detection" means the lowest concentration level that can be determined to be statistically different from a blank.

(6) "Limit of quantitation" means the level above which quantitative results may be obtained with a specified degree of confidence.

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Note: The limit of quantitation is 10/3 or 3.333 times the limit of detection.

(7) "Major municipal discharge" means a point source discharge with an average daily volume equal to or greater than one million gallons per day of either municipal wastewater from a publicly owned treatment works or of domestic wastewater from a privately owned treatment works.

(8) "Minor municipal discharge" means a point source discharge with an average daily volume less than one million gallons per day of either municipal wastewater from a publicly owned treatment works or domestic wastewater from a privately owned treatments works.

(10) "Noncontact cooling water" means water used for cooling which does not come into contact with any raw material, intermediate or finished product, or waste and has been used in heat exchangers, air or refrigeration compressors, or other cooling means where contamination with process waste is not normally expected.

(15) "Primary industry" means an industrial facility or activity that is encompassed by one of the industrial categories listed in 40 CFR 122, Appendix A.

(16) "Results" includes measurements, determinations and information obtained or derived from tests.

(17) "Secondary industry" means an industrial facility or activity that is not classified as a primary industry.

(18) "Surface waters" means waters of the state except wells and other groundwater. Cooling lakes, farm ponds and facilities constructed for the treatment of wastewaters are also excluded from this definition.

SECTION 7. NR 200.027 is created to read:

NR 200.027 ANALYTICAL METHODS AND LABORATORY REQUIREMENTS. (1) Methods used for analysis of samples shall be those specified as approved in ch. NR 219. Where more than one approved method exists, the department may require the applicant to repeat testing using a more sensitive approved method if results are reported as not detected.

(2) The applicant shall submit, with all monitoring results, appropriate quality control information, as specified in the permit application or s. NR 200.22(1)(f).

(3) The applicant 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 current WPDES permit specify otherwise. The applicant shall appropriately identify all results greater than the limit of detection but less than the limit of quantitation.

(4) Except for those tests excluded in s. NR 219.06, laboratory testing shall be performed by a laboratory registered or certified under ch. NR 149.

SECTION 8. Subchapter II (title) of ch. NR 200 [precedes NR 200.03] is created to read:

SUBCHAPTER II - APPLICATION FOR DISCHARGE PERMITS

SECTION 9. NR 200.03(1)(a) and (3)(f) are amended to read:

NR 200.03(1)(a) ~~Direct discharge~~ Discharge of any pollutant to any surface water.

(3)(f) 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.

SECTION 10. NR 200.03(3)(i) is created to read:

NR 200.03(3)(i) Discharges of storm water permitted under ch. NR 216.

SECTION 11. NR 200.05 (intro.), (1)(b), and (4) (intro.) are amended to read:

NR 200.05 REPORTING OF NEW DISCHARGES. Pursuant to s. ~~147.14~~ 283.59, Stats.:

(1)(b) If the new or increased discharge will not result in exceeding or violating any effluent limitations of the permit, the permittee shall give notice in the form of a letter addressed to the ~~Department of Natural Resources, WPDES Permit Section, Box 7921, Madison, Wisconsin 53707 and to the appropriate district office~~ department. The letter shall refer to the number and expiration date of the existing permit, describe the proposed expansion, production increase, or process modification, and include a statement that no effluent limitation of the permit will be exceeded or violated. The letter of notification shall be signed in accordance with s. NR 200.07(4).

Note: The letter required in par. (b) may be mailed to the appropriate regional office or to the Department of Natural Resources, Bureau of Watershed Management, Box 7921, Madison, Wisconsin 53707.

(4)(intro.) Any person discharging, or intending to commence discharging, into a publicly or privately owned treatment works who is or will become subject to the discharge reporting requirements of s. ~~147.025(4)~~ 283.37(4), Stats., shall give notice of the following, to the department and owner or operator of the treatment works, using the form prescribed in ch. NR 202, at least 180 days prior to:

SECTION 12. NR 200.06(4) is created to read:

NR 200.06(4) The department may require an applicant to report on application forms any information the department needs to correspond with the applicant or assemble the permit components or conditions appropriate for the particular discharge including:

(a) General facts about the applicant or facility, including coverage under other environmental permits, sources of wastewater and information on the treatment system for which a permit is requested.

(b) Data available to the applicant through information searches or measurements taken by the applicant.

(c) Information obtained by the applicant as a result of requirements in previous permits.

(d) Information on results of testing, including quality control information, obtained by the applicant through investigations, such as pilot studies or effluent or ambient monitoring.

SECTION 13. NR 200.065 is created to read:

NR 200.065 APPLICATION MONITORING REQUIREMENTS FOR DISCHARGES TO SURFACE WATERS. (1) EXISTING DISCHARGES. An applicant for permit issuance or reissuance with an existing discharge to surface waters shall monitor as follows and report the monitoring results on application forms:

(a) Samples shall be as representative of normal effluent quality as possible.

(b) Minimum monitoring requirements for each type of point source that conveys a wastewater discharge are specified in Table 1.

Table 1 - Minimum monitoring requirements

Wastewater discharge type	Number of monitoring tests	Pollutants required to be monitored
Major municipal discharge	1	Pollutants listed in s. NR 215.03 excluding asbestos, 2-chloroethyl vinyl ether and dioxin; pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1
	4	Copper, ammonia, phosphorus and hardness
	1	Chloride and whole effluent toxicity
Minor municipal discharge	4	Copper, ammonia, phosphorus and hardness
	1	Chloride, arsenic, cadmium, chromium, lead, nickel and zinc
Primary industry process discharge	1	Pollutants listed in s. NR 215.03[1] excluding asbestos, 2-chloroethyl vinyl ether and dioxin; pollutants listed in ch. NR 105[1], Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102[1], Table 1
	4	Copper, ammonia, phosphorus and hardness
	3	Mercury

	1	BOD_5 (five-day biochemical oxygen demand), COD (chemical oxygen demand), chloride, total residual chlorine, oil and grease, pH, total suspended solids, temperature (summer and winter) and total phenols
	1	Fecal coliform and pollutants listed in s. NR 215.06 excluding TOC (total organic carbon) when the applicant believes the pollutant is present in the discharge for reasons other than its presence in the intake water
Secondary industry process discharge or cooling water discharge, or both	4	Copper, ammonia, phosphorus and hardness
	1	BOD_5 (five-day biochemical oxygen demand), COD (chemical oxygen demand), chloride, total residual chlorine, oil and grease, pH, total suspended solids, temperature (summer and winter), arsenic, cadmium, chromium, lead, mercury, nickel, zinc
	1	Any of the following pollutants that the applicant believes is present in the discharge for reasons other than its presence in the intake water: Pollutants listed in ss. NR 215.03, 215.05 and 215.06 excluding 2-chloroethyl vinyl ether, dioxin, asbestos and TOC (total organic carbon); pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1
Noncontact cooling water discharge	1	Ammonia, BOD_5 (five-day biochemical oxygen demand), chloride, oil and grease, pH, phosphorus, total suspended solids and temperature (summer and winter)
	1	Any of the following pollutants that the applicant believes is present in the discharge for reasons other than its presence in the intake water: Pollutants listed in ss. NR 215.03, 215.05 and 215.06 excluding 2-chloroethyl vinyl ether, dioxin, asbestos and TOC (total organic carbon); pollutants listed in ch. NR 105, Tables 1 through 9 excluding bis(chloromethyl) ether, dichlorodifluoromethane, dioxin and trichlorofluoromethane; and pollutants listed in ch. NR 102, Table 1

[1] Primary industries are required to test only those GC/MS fractions that are specified in 40 CFR 122, Appendix D, revised Table 1.

(c) Persons collecting multiple samples for a pollutant shall allow at least a 24 hour interval between consecutive samples.

(d) The department may require the applicant to monitor 11 times for chloride for major municipal discharges or minor municipal discharges when the source of wastewater is from hard water communities, or for industrial process wastewater discharges from dairies, canneries, meat processors, water utilities that utilize ion-exchange water softening and other industrial categories expected to have high chloride levels.

(e) The department may require the applicant to monitor 4 times for the metals arsenic, cadmium, lead, nickel and zinc for major municipal discharges or minor municipal discharges when levels of those metals measured in the wastewater treatment system sludge from a facility are abnormally high compared with other similar facilities in the state.

(f) The department may require the applicant to monitor for the dioxin and furan congeners listed in s. NR 106.16(2) for a major municipal discharge or minor municipal discharge when sources of wastewater include a pulp or paper mill or both, a leather tannery, a petroleum refinery or an organic chemical manufacturer or for a primary industrial discharge if the industry is a pulp or paper mill or both, a leather tannery, a petroleum refinery or an organic chemical manufacturer.

(g) The department may require monitoring for any other pollutant not specified in Table 1 if its presence could be reasonably expected based on wastewater sources.

(h) An applicant for permit reissuance may apply test data collected to fulfill current permit required monitoring or data collected for other reasons to fulfill these requirements if:

1. No more than 5 years have elapsed since the monitoring; and

2. No operational changes have occurred since the monitoring.

(i) Unless the monitoring is required by federal regulations, the department may exempt applicants from some or all of the monitoring requirements in this subsection for reasons including, but not limited to, any of the following:

1. Parameters such as flow, hardness or pH measured in the discharge or receiving water would result in proposed effluent limitations for a pollutant much greater than anticipated discharge levels for that pollutant, based upon measurements from similar discharges.

2. Proposed effluent limitations for a pollutant would be much greater than anticipated discharge levels for that pollutant, based on previous measurements made since significant facility changes have occurred.

3. Previous monitoring from similar facilities indicate the absence of significant quantities of a pollutant or class of pollutants.

(2) NEW DISCHARGES. The department may require a person applying for a new discharge permit to conduct pilot studies or other tests or provide effluent data from similar facilities to project pollutant levels in the proposed discharge.

SECTION 14. NR 200.07(2) to (4) are amended to read:

NR 200.07(2) Application forms may be obtained ~~from the district offices of~~ by contacting the department ~~or the Department of Natural Resources, WPDES Permit Section, Box 7921, Madison, Wisconsin 53707~~.

Note: Persons may obtain application forms by writing to the department regional office or the Department of Natural Resources, Bureau of Watershed Management, Box 7921, Madison, Wisconsin 53707 or by calling one of those offices. Persons requesting an application form should say they wish to apply for a WPDES permit and provide their name, address, telephone number and a brief description of the facility which will generate the wastewater discharge.

(3) Application forms shall be filed with the ~~Department of Natural Resources, WPDES Permit Section, Box 7921, Madison, Wisconsin 53707, or appropriate district office~~ department at the address provided on the application.

(4) ~~Application~~ Persons submitting application forms or electronic permit application agreements ~~submitted~~ to the department shall ~~be signed as follows:~~ sign the form or agreement and certify to the accuracy of the information pursuant to s. NR 205.07(1)(g).

~~(a) In the case of a corporation, by a principal executive officer of at least the vice president, or by his or her authorized representative responsible for the overall operation of the point source for which a permit is sought,~~

~~(b) In the case of a partnership, by a general partner,~~

~~(c) In the case of a sole proprietorship, by the proprietor, or~~

~~(d) In the case of a publicly owned treatment works, by a principal executive officer, ranking elected official, or other duly authorized employe.~~

SECTION 15. NR 200.08 is renumbered NR 200.024 and NR 200.024(1), as renumbered is, amended to read:

NR 200.024 USE OF INFORMATION. (1) Data submitted in the applications or as part of additional information submittals shall be used as a basis for issuing discharge permits or variances. ~~The department may request additional information relating to the discharges from the applicant's facility. Such additional information shall be submitted in accordance with s. NR 200.09.~~

SECTION 16. NR 200.09 is amended to read:

NR 200.09 INCOMPLETE APPLICATION. The department may require an applicant to submit data necessary to complete any deficient application, may require any additional data other than that requested in the application or may require the applicant to submit a complete new application where the deficiencies are extensive or the appropriate form has not been used. Within 60 days of the date of receipt of a request from the department for additional data, the applicant shall submit the data. A permit may not be issued until a complete application is submitted to the department. A permit application will not be considered complete until the requirements of s. 23.11, Stats., and ~~s. NR 150.04~~ ch. NR 150 are met, and all required information is submitted.

SECTION 17. NR 200.10(5) is created to read:

NR 200.10(5) The time deadlines in sub. (2) are not applicable if the department determines, pursuant to s. 283.53, Stats., that the permittee is not in substantial compliance with all the terms, conditions, requirements and schedules of compliance of the expiring permit.

SECTION 18. NR 200, Subchapter III is created to read:

SUBCHAPTER III - APPLICATION FOR WATER QUALITY STANDARDS VARIANCES

NR 200.20 GENERAL. (1) When the department issues, reissues or modifies a permit to include a water quality based effluent limitation under s. 283.13(5), Stats., the permittee may apply to the department for a variance from the water quality standard used to derive the limitation.

(2) In order to obtain a variance, a permittee shall demonstrate, by the greater weight of credible evidence, that attaining the water quality standard is not feasible because of one or more of the following:

(a) Naturally occurring pollutant concentrations prevent the attainment of the standard.

(b) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the standard, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating water conservation requirements.

(c) Human caused conditions or sources of pollution prevent the attainment of the standard and cannot be remedied or would cause more environmental damage to correct than to leave in place.

(d) Dams, diversions or other types of hydrological modifications preclude the attainment of the standard, and it is not feasible to restore the water body to its original condition or to operate the modification in a way that would result in the attainment of the standard.

(e) Physical conditions related to the natural features of the water body, such as the lack of proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses.

(f) The standard, as applied to the permittee, will cause substantial and widespread adverse social and economic impacts in the area where the permittee is located.

NR 200.21 TIME DEADLINE FOR FILING VARIANCE REQUESTS. A permittee who wishes to apply for a variance shall submit an application for a variance within 60 days after the department issues, reissues or modifies the permit.

NR 200.22 INFORMATION TO BE INCLUDED IN AN APPLICATION FOR A VARIANCE. (1) A permittee applying for a variance shall supply the following information:

(a) Facility name, address and WPDES permit number.

(b) The name, address and telephone of a facility contact person.

(c) The date the permit was issued, reissued or modified which gives rise to the request for a variance.

(d) Each water quality standard, pollutant and corresponding effluent limitation for which a variance is being requested.

(e) Results of monitoring data for the pollutant for which the permittee is seeking a variance which represents the past and current levels of effluent quality. Monitoring shall conform with the following.

1. The submittal shall specify sample location, sample type, sampling dates, analysis dates and laboratory name and certification number.

2. Data quantity shall be sufficient to allow appropriate statistical treatment to characterize effluent quality over time.

3. Samples shall be collected on days when contributions from industrial, commercial or other processes or sources of wastewater are expected to be at normal levels.

4. Results of monitoring shall be summarized in tabular or graphical format or both.

5. Any changes, such as changes in contract lab or method of analysis or treatment or process changes that occurred which may have affected results or could explain data trends shall be noted and an explanation provided.

6. In addition, for this data to be considered to be representative, the permittee shall supply information to demonstrate that:

a. Sample results fall above the limit of quantitation for the analytical method used or that the most sensitive approved analytical method listed for the pollutant in ch. NR 219 was used with proper technique to produce the results.

b. Proper laboratory quality control procedures were used to generate the data. To make this demonstration, the permittee shall supply, for several representative analytical runs, the raw data for samples, calibrations, calibration verifications and quality control steps. The raw data for quality control steps shall include results of replicate samples, identity of samples used for replicate samples, matrix spikes, matrix spike concentrations used, reagent blanks, method blanks and quality control limits. Raw data, replicate sample, matrix spike and quality control limit have the meanings specified in s. NR 149.03.

c. Proper sampling quality control procedures designed to minimize sample contamination were used. This demonstration shall include a description of sampling procedures and submittal of results of field blanks. A field blank is a volume of reagent grade water which is handled in such a way so as to duplicate as closely as possible the exposure of a water sample to potential sources of contamination during sampling, preservation and transportation to the laboratory.

(f) Changes which could be made to enhance treatment or source reduction of flows coming to the treatment facility or which would reduce the level of toxicity or the discharge of the pollutant for which the permittee is seeking a variance. This information shall include the following:

1. An estimate of capital and operating costs for the changes and a reasonable schedule for planning and accomplishing the work.

2. If the source of the pollutant is believed to be from dissolution of metals from water supply distribution piping materials:

a. Information on past and current water supply treatment practices which may increase or decrease the corrosive nature of the water supply including what changes have been made and when.

b. Data on the water supply stability or corrosivity, using one of various methods of determination, for the raw and treated water supply.

c. Other potential water sources or methods of water supply treatment as an alternative.

(g) Information which establishes the significance of industrial and commercial wastewater sources versus domestic wastewater sources of the pollutant for which a variance is requested. This may include an approximate mass-balance calculation of treatment system loadings from all sources.

(h) For facilities which monitor the treatment system sludge pursuant to requirements in ch. NR 204 or 214 for the pollutant for which a variance is requested, results of the most recent 3 years of sludge testing, along with volumes disposed of so as to perform an approximate mass balance of the pollutant entering and leaving the plant.

(i) If a variance is being requested for whole effluent toxicity in conjunction with a specific chemical pollutant or if whole effluent toxicity failures have been experienced and they are believed to have resulted from the pollutant for which the variance is being requested, evidence which points to the pollutant as the cause of the whole effluent toxicity failures.

(j) Effluent limitations which the permittee believes it can currently achieve.

(k) Effluent limitations which the permittee believes it can achieve at some later date during the term of the variance and the corresponding schedule which would be followed to meet these limitations.

(l) Whether the permittee believes it can meet the effluent limitations that give rise to the variance request at any time during the term of the permit.

(m) A detailed discussion of evidence and reasons why the permittee believes a variance is warranted based on one or more of the grounds listed in s. NR 200.20(2).

(n) Demonstration that the variance requested conforms with antidegradation requirements specified in ch. NR 207.

(o) Characterization of the extent of any increased risk to human health and the environment associated with granting the variance so as to allow the department to decide if such increased risk is consistent with protection of the public health, safety and welfare.

(p) For variance requests based on s. NR 200.20(2)(f), the permittee shall conduct a financial impact analysis which shall include an estimate of the capital, operation and maintenance and financing costs, translated into an annualized cost, of potential changes identified in par. (g) compared with an analysis of financial affordability. The analysis of financial affordability shall include:

1. For publicly owned systems, an estimate of how much annual municipal revenue would need to increase, taking into account any offsetting state shared revenues if the most cost-effective pollutant control option was implemented and how this would affect user fees if user fees were used to finance the costs. This analysis shall also compare projected user fees with user fees in similar communities. If industrial or commercial contributions comprise a significant source of the pollutant, information requested in subd. 2 shall also be provided.

2. For privately owned systems or if the most cost-effective pollutant control option for a publicly owned system involves additional regulation of privately owned contributors as the impacted parties, an estimate of how implementing the most cost-effective pollutant control option would affect profitability and other financial health indicators of the private entity.

3. An analysis of the socioeconomic impacts to the community where the entity is located.

Note: Permittees may find helpful a United States Environmental Protection Agency publication titled *Interim Economic Guidance for Water Quality Standards - Workbook*, EPA-823-B-95-002, March 1995. Information on ordering EPA publications can be found on the World Wide Web at http://www.epa.gov/.

(2) In addition to the information required in sub. (1), the permittee may, within the 60-day time limits specified in s. NR 200.21, submit to the department any other information to support the request for a variance.

NR 200.23 SIGNATURE OF AUTHORIZED REPRESENTATIVE. Pursuant to s. NR 205.07(1)(g), a person submitting an application for a variance shall include a signed statement by an authorized representative that certifies to the accuracy of the information.

NR 200.24 APPLICATION COMPLETENESS. When the department receives an application for a variance:

(1) The department may request additional information from the permittee within 30 days after receiving the application. The permittee shall provide the additional information within 30 days of receipt of the department's request. An application is not complete until the additional information is provided to the department.

(2) If the permittee does not provide information as required under s. NR 200.22 or sub. (1), the department shall deny the application.

NR 200.25 TIME PERIODS FOR DEPARTMENT ACTION ON APPLICATIONS. The department shall adhere to the time deadlines specified in s. 283.15, Stats., in making determinations of application completeness and tentative and final decisions on variance requests.

Note: These time deadlines are as follows: (1) Public notice of receipt of an application for a variance within 30 days after receipt of the information specified in s. NR 200.22 or 200.24(1), if applicable. (2) Public notice of a tentative decision within 120 days after receipt of the information specified in s. NR 200.22 or 200.24(1), if applicable. (3) Final decision within 90 days after expiration of the 30-day public notice comment period under sub. (2).

The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

The 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.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
George E. Meyer, Secretary

(SEAL)

22

M128
duplicate

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

APR 20 2001

Mr. Al Shea, Director
Bureau of Watershed Management
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

OPTIONAL FORM 99 (7-90)
FAX TRANSMITTAL # of pages ▶ 4

To Tom Baumann	From Steve Jann
Dept./Agency WDNR - Runoff Mgt.	Phone # 312 886 2446
Fax # 608 267 7664	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

Subject: Repeal and Recreation of the Wisconsin Administrative Code, Chapter NR 243

Dear Mr. Shea:

Thank you for inviting the United States Environmental Protection Agency (USEPA), Region 5, and others to comment on the second notice of the proposed repeal and recreation of the Wisconsin Administrative Code, chapter NR 243. On review, we have concluded that the second notice responds in an appropriate fashion to most of the comments we provided in response to the first notice. We provided these comments in a May 5, 2000, letter to you. We sincerely appreciate the cooperation you and your staff have shown by changing the proposed chapter in response to our earlier comments.

With the second notice, we observed that the proposed chapter does not establish all elements of the legal authority Wisconsin needs to administer the Wisconsin Pollutant Discharge Elimination System (WPDES) program for the concentrated animal feeding operations (CAFOs) described in clause (b) in the first paragraph of Appendix B to 40 CFR part 122. Pursuant to 40 CFR §§123.1(g)(1) and 123.25(a)(4), Wisconsin legal authority needs to:

1. Prohibit all discharges from the CAFOs described in clause (b) in the first paragraph of Appendix B to 40 CFR part 122, unless the discharges are in compliance with WPDES permits, and

2. Establish an obligation for owners or operators of these CAFOs to apply for WPDES permits if they discharge or propose to discharge.

Under the federal regulations, Wisconsin's prohibition against unpermitted discharge by the CAFOs described above needs to automatically apply as a matter of state law or administrative code. The prohibition may not be expressed such that it applies only after a CAFO becomes subject to a notice of discharge or direct enforcement under proposed s. NR 243.24(3). Furthermore, the duty to apply for a permit needs to be expressed in a manner that requires the CAFO owner or operator to initiate the permit application process rather than wait for the

Wisconsin Department of Natural Resources (WDNR) to find cause to provide an application to the owner or operator, as s. NR 200.04(3) appears to contemplate. (Of course, on discovery of an unpermitted discharge from a CAFO described in clause (b) in the first paragraph of Appendix B to 40 CFR part 122, the WDNR can use either of the mechanisms under proposed s. NR 243.24(3) to modify the design or operation of the CAFO such that the facility no longer is a CAFO point source and, accordingly, no longer needs a WPDES permit.)

In the comments we provided last May, we encouraged the WDNR to coordinate its effort to recreate chapter NR 243 with the effort by the Wisconsin office of the United States Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), to revise its conservation practice standard for nutrient management. We now understand that the Wisconsin office of the USDA-NRCS will publish a revised nutrient management standard before the WDNR intends to ask the Wisconsin Natural Resources Board for approval to publish chapter NR 243 as a final rule. For the reasons described in the enclosure to our May 5, 2000, letter, we strongly encourage the WDNR to incorporate the revised nutrient management standard in the version of chapter NR 243 that it will submit to the Board for final approval.

Our comments and recommendations on other aspects of the second notice are provided as an enclosure. If you have any questions, do not hesitate to contact me.

Sincerely yours,

Jo Lynn Traub

Jo Lynn Traub
Director, Water Division

Enclosure

cc: Ms. Carol Holden, Wisconsin Department of Natural Resources
Mr. Russ Rasmussen, Wisconsin Department of Natural Resources
Mr. Tom Bauman, Wisconsin Department of Natural Resources

Comments and Recommendations on the
Proposed Repeal and Recreation of Chapter NR 243
(Second Notice)

Water Division
Region 5
United States Environmental Protection Agency

1. In light of 40 CFR §123.25(a)(6) and Appendix B to 40 CFR part 122, Table 2 in chapter NR 243 needs to be revised as follows:

	BEEF CATTLE	
1000	Steers or Cows (~~1000 lbs to Market~~ over 600 lbs)	1.0
~~1250~~	~~Steers or Cows (600 to 1000 lbs)~~	~~0.8~~
2000	Calves (under 600 lbs)	0.5
	DUCKS	
5000	Per Bird ~~(Wet Lot)~~	0.2
~~100000~~	~~Per Bird (Dry Lot)~~	~~0.01~~

2. In light of 40 CFR §§412.13(b), 412.15(b), and 412.25(b), we recommend revising NR 243.13(2)(c) as follows: "Rain causes the discharge, and the discharge is from ..."

3. We recommend revising NR 243.13(5) as follows: "Any other condition needed to obtain compliance with water quality standards in chs. NR 102 to ~~104~~ 105, 207, and 140 ..."

4. We recommend revising NR 243.14(3) as follows: "OTHER NUTRIENTS. Manure and wastewater application rates specified in the manure management plan shall take into account the nutrients in the soil prior to landspreading and the nutrient levels from other sources, including commercial fertilizer, biosolids, legume credits, and other sources of manure nutrients , ..."

5. We recommend revising NR 243.13(4) as follows: "PERMIT CONDITIONS. (a) WPDES permits shall contain soil and manure sampling ..."

6. With regard to NR 243.14(5), please be advised that, for CAFOs subject to 40 CFR part 412, the effluent limitations guidelines and new source performance standards in 40 CFR part 412 apply to discharges or potential discharges from manure stacks. If a discharge from a manure stack in compliance with s. NR 243.13(2) would cause, have a reasonable potential to cause, or contribute to a violation of a water quality standard, then 40 CFR §122.44(d) requires the establishment of a water quality-based effluent limitation for said discharge.

7. With regard to s. NR 243.16, please be advised that, for CAFOs subject to 40 CFR part 412, the effluent limitations guidelines and new source performance standards in 40 CFR part 412 apply to discharges of "industrial wastes" such as milkhouse wastewater, egg wash water, and silage leachate. If a discharge of "industrial waste"in compliance with s. NR 243.13(2) would cause, have a reasonable potential to cause, or contribute to a violation of a water quality standard, then 40 CFR §122.44(d) requires the establishment of a water quality-based effluent limitation for said discharge.

8. Where "industrial wastes" such as milkhouse wastewater, egg wash water, or silage leachate are applied on land separate from or mixed with manure, the USEPA, Region 5, expects that the "industrial wastes" will be subject to a landspreading plan which establishes controls in accordance with s. NR 243.14 or any more stringent conditions established in or pursuant to chapters NR 213 or 214.

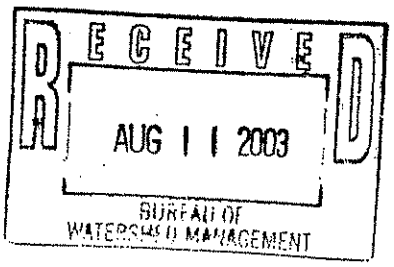
9. We recommend revising s. NR 243.24 such that, in addition to the method for making a determination already described in s. NR 243.24, the WDNR can make a determination of a Category I unacceptable practice based on information obtained from the owner or operator through the exercise of authority Wisconsin established pursuant to the Clean Water Act, Section 402(b)(2)(B).

From: Brianc Bell/R5/USEPA/US
To: eric.rortvedt@dnr.state.wi.us, peter.flaherty@dnr.state.wi.us
cc: Barbara Wester/R5/USEPA/US, Rebecca Harvey/R5/USEPA/US, James Filippini/R5/USEPA/US
Date: Thursday, August 07, 2003 12:24PM
Subject: EPA Comments on Proposed NR 216 Revisions

Eric - the purpose of this email message is to transmit comments from Region 5 to WDNR regarding to proposed changes to NR 216 (see attachment). During telephone calls on July 28 and August 1, Babara Wester and I discussed our comments on the draft rule with yu and Peter Flaherty. This message is intended to followup on those comments.

Attachments:(Click the filename to launch)

NR 216 Draft Comments.wpd



August 7, 2003

EPA Region 5 Comments on Draft NR 216

Comments on Introductory sections (NR 216.001 - NR 216.005)

NR 216.001: Change "maximum extent practicable" to a more general standard. MEP is not applicable to industrial facility permits.

NR 216.003(2): we discussed DNR's rationale for adding this provision to respond to the recent ALJ decision.

Comments on Municipal Storm Water Discharge Permits (NR 216.01 - 216.10)

NR 216.021(4): Include the phrase "unless the municipal separate storm sewer system is"after "decennial census"to clarify there are some MS4s that could be exempted from permit coverage.

NR 216.023(d): Reference to "non-point source impaired water" is inconsistent with provision in 40 C.F.R. 122.32(d)(2): "If you discharge any pollutant(s) that have been identified as a cause of impairment **of any water body** to which you discharge, storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established 'total maximum daily load'(TMDL) that addresses the pollutant(s) of concern [emphasis added]."

NR 216.024: We discussed that the proposed regulations do not have an equivalent to 40 C.F.R. 122.32(e) because the DNR program is designed to put into place the designation criteria outlined in Fact Sheet 2.1 (p.2) (Potential Designation by the NPDES Permitting Authority - Required Evaluation), essentially by making the designation criteria into the exemption criteria (since everyone is covered, as opposed to having targeted coverage, as the rules suggest).

NR 216.024(d): See comment on NR 216.023(d) above.

NR 216.03: We note that the federal deadline for facilities to be covered under the Phase II permit requirements was March 10, 2003. We recommend that the rules reflect this federal regulatory deadline. The fact that facilities under these draft regulations would not have effective permit coverage until a year or more after the federal deadline could create legal vulnerabilities for the state program.

NR 216.06: The draft regulations in section 216.06 provide permit coverage without requiring the regulated facility to meet all of the federal permit requirements, as such **the draft regulations in these two sections are less stringent than the federal program.** Under these draft regulations, an MS4 could turn in a list of programs already being carried out without having to show its actual or planned activities to "develop, implement, and enforce" the six minimum control measures in their storm water management plan required by the fed permit requirements. We discussed and strongly recommend that the permittees be held to the application requirements and five year time frame for putting the completed bmps in place, as set out in 40 C.F.R. 122.34. As such, NR 216.06(1) - (4) should be deleted. The introductory language can be used in the revised NR 216.07. Also, language regarding existing programs can be used as a note in the revised section NR 216.07 as MS4s should assess which programs already meet or partially meet the requirements of 122.34.

NR 216.07: The draft regulations allow the permittee to acquire permit coverage without having met the federal requirement of having the six bmps in place **prior to permit coverage.** The permittee should be responsible for providing the necessary plans and time frames (within the program requirements) for

putting the bmps in place.

NR. 216.07(1): you may wish to add a note, especially in light of our discussion, that the permittee can tailor the public education and outreach requirement depending upon the specific circumstances. See 40 C.F.R. 122.34(b)(1)(ii).

NR. 216.07(2): to better track the federal requirement, you should indicate that the public involvement and participation program should at a minimum comply with state/tribal/locally applicable (as appropriate) public notice requirements. See 40 C.F.R. 122.34(b)(2).

NR 216.07(7)(3): The federal regulations at 40 C.F.R. 122.34(b)(3)(ii)(B) require that the regulatory authority "To the extent allowable under State, Tribal or local law, effectively prohibit through ordinance, or other regulatory mechanism, non-storm water discharges into your storm sewer system and implement appropriate enforcement procedures and actions[.]" This section seems a bit vague, as it references generally "The implementation and enforcement of a legal authority to prevent illicit discharges." (NR 216.07(3)(b)).

NR 216.07(7)(4): This section should reference that it applies to construction sites of 1 acre or more, or sites less than one acre that are part of a larger common plan of development and sale. See 40 C.F.R. 122.34(b)(4)(i). This section should also control waste that could cause water quality impacts and include procedures for receipt and consideration by the public. See 40 C.F.R. 122.34(b)(4)(ii)(C) and (E)

NR 216.07(7)(4)(a): The federal regulations require not only a program to enforce construction storm water runoff controls, but also **expressly require sanctions**. We are unclear if the draft program is intended to include sanctions. See 40 C.F.R. 122.34(b)(4)(ii)(a).

NR 216.07(7)(5): This section should reference that it applies to construction sites of 1 acre or more, or sites less than one acre that are part of a larger common plan of development and sale. See 40 C.F.R. 122.34(b)(5)(i).

NR 216.07(6): The federal regulations specifically require that there be a training component, which does not appear to be part of the draft regulation. See 40 C.F.R. 122.34(b)(6)(i).

NR 216.07(7)(c) and (d): Remove references to "known" municipal storm sewer system outfalls. The federal regulations at 122.34(b)(3)(ii)(A) require mapping of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls."

NR 216.07(9): The compliance schedule, because it is open-ended, is less stringent than the federal regulations. The compliance schedule provision in the draft regulations should reference the 5-year time frame for implementing the storm water management plan. See 40 C.F.R. 122.34(a).

NR 216.08: The draft regulations vastly expand the universe of waivers from what is provided in the federal regulations, allowing any facility for any reason to opt out at DNR's discretion. The waiver provision is inconsistent with the federal regulations which provide waivers in very limited circumstances, see 40 C.F.R. 122.32(c)-(e).

Comments on Industrial Storm Water Discharge Permits (NR 216.20 - NR 216.32)

NR 216.21(2)(b)(3)(a): "add "located on the site of such operations" at the end of the last sentence to reflect the provision in 40 C.F.R. 122.26(b)(14)(iii).

NR 216.21(2)(b)(2m)[make sure this numbering is correct]:

NR 216.27(3)(a): change "individual" to "individual(s)"

Comments on Construction Site Storm Water Discharge Permits (NR 216.41 - 216.55)

NR 216.42): This section should reference the 1 acre or more requirement/less than one acre where it is part of a larger development or sale or reference definition of construction site in NR 216.002.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

June 3, 2005

Jo Lynn Traub-Director, Water Division
US EPA-Region V
77 West Jackson Boulevard
Chicago, IL 60604-3590

Subject: CAFO Duty to Apply and the Agricultural Stormwater Exemption

Dear Jody:

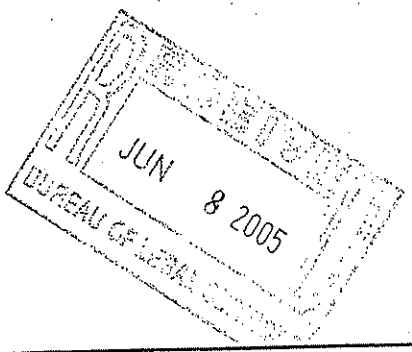
Based on discussions with other states and inquiries involving the recent second circuit court decision regarding federal CAFO rules (Waterkeepers Alliance, Inc. American Farm Bureau Federation, et.al. v. USEPA), the Department is concerned about certain arguments made regarding application of the agricultural stormwater exemption. Specifically, some states and agricultural groups have argued that discharges of manure or process wastewater associated with an unpermitted CAFO's land application activities can qualify for the agricultural stormwater exemption and wouldn't trigger a duty to apply if the CAFO implemented any level of nutrient management planning practices.

Clearly, not all nutrient management planning practices are equally protective of water quality. It is not just the issues that a nutrient management plan addresses (e.g., timing, balancing nutrient applications with crop need), but how the plan addresses these issues. For large CAFOs, it is especially important that there be a WDNR reviewed and approved plan to insure that appropriate nutrient management practices are in place to protect water quality. As we have learned over the years, even the practices identified in the state's Natural Resource Conservation Service (NRCS) Standard 590 for Nutrient Management, the state's non-WPDES technical standard for nutrient management, are not always protective of water quality and could result in runoff events, fish kills and well contaminations. This was especially clear this last February and March when we documented a number of runoff events, fish kills and private well contaminations from land application practices that appear to have met Wisconsin's most recent version of the 590 Standard (11/04). We believe that if a CAFO isn't covered by an NPDES permit and in compliance with the permit (including a WDNR approved nutrient management plan), any discharges from land application activities are considered unpermitted point sources discharges, not agricultural stormwater runoff, and constitute a violation of the NPDES permit program.

If the WDNR is not correctly interpreting EPA's regulations with regard to the definition of agricultural stormwater discharges, please contact me directly at (608) 264-6278, since the Department is in the process of promulgating administrative rules that are in part based on federal regulations. Thank you for your consideration.

Sincerely,

Todd Ambs, Administrator
Division of Water



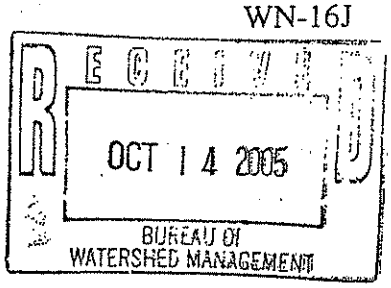
cc: Robin Nyffeler – LS/5
Russ Rasmussen – WT/2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

WN-16J

OCT 07 2005



Mr. Gordon Stevenson, Chief
Runoff Management Section
Bureau of Watershed Management
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53703

Dear Mr. Stevenson:

I am writing with regard to the proposed repeal and recreation of Wisconsin's administrative code for animal feeding operations (AFOs). The United States Environmental Protection Agency (USEPA), Region 5, understands that the State proposed to repeal and recreate the code principally in response to the 2003 changes to the pertinent federal regulations, 40 CFR parts 122 and 412 and § 123.36. Thank you for taking this action.

USEPA, Region 5, has reviewed the proposed code. Our comments and suggestions are enclosed. We look forward to working cooperatively with you and your staff to resolve our comments before the Wisconsin Natural Resources Board approves and adopts the code. We will review the code after it has been recreated. We will conduct this subsequent review under 40 CFR §§ 123.25, 123.36, and 123.62. By working closely together with you and your staff in the weeks ahead we hope to be able to approve the code after it has been recreated.

Thank you for the opportunity to review the proposed code and thank you for your ongoing efforts to protect Wisconsin's waters from the manure and wastewater generated by AFOs.

Sincerely yours,

Peter Swenson, Acting Chief
NPDES Programs Branch

Enclosures

cc: Mr. Tom Bauman, WDNR

Enclosure

1. In proposed s. NR 243.03(3) *Wisconsin Administrative Code* (*Wis. Adm. Code*), the term "crop equipment storage" should be replaced with "material handling equipment maintenance and storage." 40 CFR § 122.26(b)(14) and proposed s. NR 243.13(7) *Wis. Adm. Code*.

2. The definition of saturated soil in proposed s. NR 243.03(52) *Wis. Adm. Code* may be difficult to apply in practice. Wisconsin should define the term in a practical manner. Please see the attached tables from the United States Department of Agriculture (USDA), Soil Conservation Service, (1972) and the USDA, Ohio Natural Resources Conservation Service (NRCS), (2003) for examples showing how to define or apply the term in a practical manner.

3. Wisconsin has properly defined the term "new source concentrated animal feeding operation" in proposed s. NR 243.115(2) *Wis. Adm. Code*. However, the notes following sub. (1) and sub. (2) are confusing given the way in which the term is defined. Wisconsin should revise the notes to eliminate the possibility for confusion, particularly as it relates to animal feeding operations (AFOs) that are newly-constructed after April 14, 2003, and later add animals to become Large concentrated animal feeding operations (CAFOs).

4. The United States Environmental Protection Agency (USEPA), Region 5, assumes that Wisconsin form 3400-25 or form 3400-25A requires a permit applicant to supply all of the information required under 40 CFR § 122.21(i). If the assumption is incorrect, then Wisconsin will need to revise one or both of the forms or proposed s. NR 243.12 *Wis. Adm. Code* accordingly.

5. In the note that follows proposed s. NR 243.12(1)(b) *Wis. Adm. Code*, Wisconsin should replace the word "poultry" with "chickens or ducks" since turkey operations, including those with a non-liquid manure handling system, were CAFOs before the effective date of the forthcoming recreated code.

6. Proposed s. NR 243.12(2)(a) 3. and 4. *Wis. Adm. Code* allow certain plans and specifications to be submitted during the term of the permit. To ensure that there is no misunderstanding about the time for compliance with production area effluent limitations and adequate storage requirements, the allowances in proposed par. 3. and 4. should be revised so they are conditioned

by the requirements in SECTION 2. INITIAL APPLICABILITY of the proposed code package. 40 CFR part 412 and § 122.42(e)(1).

7. Proposed s. NR 243.12(2)(a) 4. *Wis. Adm. Code* refers to runoff control systems. Comments 8. and 27., below, pertain to the use of runoff control systems as a means for possibly achieving compliance with production area effluent limitations that are based on the federal Effluent Limitations Guidelines and New Source Performance Standards for the CAFO point source category, 40 CFR part 412.

8. Wisconsin needs to revise proposed s. NR 243.13(2)(a) 1. and 2. *Wis. Adm. Code* to strike the references to "facility" and "facilities" at least as the words would apply to Wisconsin Large CAFOs that are subject to 40 CFR part 412, subparts C and D. This required change will establish that the exception to the discharge prohibition applies only when, among other conditions, the discharge consists of an overflow from a *structure* (e.g., a tank, pond or lagoon, or pit) that is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. 40 CFR § 412.2(g).

9. The word "bedding" needs to be added to the second sentence in proposed s. NR 243.13(7) *Wis. Adm. Code*. 40 CFR § 122.23(b)(5).

10. On February 28, 2005, the United States Court of Appeals for the Second Circuit vacated provisions of the federal regulations which allow permit authorities to: (a) issue permits to CAFOs without including the terms of nutrient management plans in permits, (b) without reviewing plans, and (c) with plans remaining at the CAFO and thus unavailable to the public. *Waterkeeper Alliance, et al., v. USEPA*, 2005 WL 453139 (2nd Cir.). USEPA, Region 5, evaluated proposed s. NR 243.14(1) *Wis. Adm. Code* in the context of the *Waterkeeper* decision. This subsection provides, in part, that CAFOs shall submit their nutrient management plans to the Wisconsin Department of Natural Resources (WDNR) for review and approval. We find that the subsection conforms to *Waterkeeper* decision items (b) and (c), as summarized above, and will not prevent Wisconsin from administering its program in conformance with decision item (a).

11. Proposed s. NR 243.14 *Wis. Adm. Code* needs to be revised to incorporate the requirements of 40 CFR § 122.42(e)(1)(iii), (vi), and (vii)[1]. To address 40 CFR § 122.42(e)(1)(vi), Wisconsin should require CAFOs to employ conservation practices that reduce erosion from land application areas at least to the tolerable rate (T). Separately, proposed s. NR 243.14 *Wis. Adm. Code* needs to be revised to require Large CAFOs to: (a) annually analyze manure and process wastewater for nitrogen and phosphorus content and (b) use the results of manure, process wastewater, and soil analyses to determine application rates for manure and process wastewater. 40 CFR § 412.4(c)(3).

12. Where manure or process wastewater will be surface applied and subsurface drains are not present within the land application area, Wisconsin protocols should require soil samples to be collected from a shallow depth (i.e., from one to two inches). This recommendation is consistent with Sharpley, *et al.*, (2003) who stated that, "[i]t is generally recommended that soil samples be collected to plow depth, usually 6 to 8 inches for routine evaluation of soil fertility. However, it is the surface inch or two in direct contact with runoff that is important when using soil testing to estimate P loss. Consequently, different sampling procedures may be necessary when using a soil test to estimate the potential for P loss."

13. Proposed s. NR 243.14(2)(c) *Wis. Adm. Code* provides, in part, that process wastewater may be applied to frozen ground in accordance with the requirements of s. NR 214.17(2) to (6) *Wis. Adm. Code.* s. NR 214.17(4)(d) *Wis. Adm. Code* provides in relevant part that "3. [t]he volume of liquid waste landspread shall be limited to prevent runoff ..." It also provides that "5. [t]he maximum daily volume of liquid waste applied shall be limited to ... 6,800 gallons per acre per day" when the soil is frozen.

When soil is frozen but not covered with snow, the maximum daily volume in s. NR 214.17(4)(d) 5. *Wis. Adm. Code* is not reasonably likely to prevent runoff of process wastewater. This conclusion is based on a comparison of the 6,800 gallons per acre (gal/ac) volume in par. 5

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[1] This comment does not apply to protocols for appropriate testing of soil, given that such protocols exist within the Wisconsin Natural Resources Conservation Service Practice Standard for Nutrient Management, code 590, a document that is incorporated by reference in proposed s. NR 243.14(1)(b) *Wis. Adm. Code.* Also, the comment does not apply to protocols for appropriate testing of process wastewater that is not mixed with manure, given that Wisconsin proposes to establish protocols elsewhere in the code.

with the rates in USEPA (2004), Appendix L, tables 1a and 1b[2]. Thus, the volume in par. 5 is not reasonably likely to ensure compliance with s. NR 214.17(4)(d) 3. or proposed s. NR 243.14(2)(b) 1. *Wis. Adm. Code* ("manure or process wastewater may not ... run off the application site ..."). Wisconsin needs to revise proposed s. NR 243.14(2)(c) *Wis. Adm. Code* to provide that the hydraulic rate at which process wastewater may be applied on ground that is frozen but not covered with snow shall be limited to prevent runoff. Alternatively, Wisconsin needs to replace the reference to the 6,800 gal/ac volume with the rates in USEPA (2004), Appendix L, tables 1a and 1b, or similar. If Wisconsin selects the former option as the basis for a pertinent provision in the recreated code, then USEPA, Region 5, will look for the State to establish a policy providing that permits will express the standard in an appropriate numeric fashion (i.e., in units of gal/ac based on USEPA (2004), Appendix L, tables 1a and 1b, or similar).

14. Proposed s. NR 243.14(2)(c) *Wis. Adm. Code* provides, in part, that process wastewater may be applied to snow-covered ground in accordance with the requirements of s. NR 214.17(2) to (6) *Wis. Adm. Code*. USEPA, Region 5, reserves comments on this provision.

15. Proposed s. NR 243.14(2)(d) *Wis. Adm. Code* requires a permittee to consider several factors when making decisions about the times at which manure and process wastewater may be applied on land. The probability, intensity, and form of predicted upcoming precipitation are among the factors.

When manure or process wastewater is surface applied before rain, s. NR 243.14(2)(d) *Wis. Adm. Code* will not prevent runoff of pollutants to surface waters. In other words, it will not ensure compliance with proposed s. NR 243.14(2)(b) 1. *Wis. Adm. Code*. Wisconsin needs to revise proposed sub. (2)(d) to prohibit surface application of manure or process wastewater on land that is upslope from waters of the United States and conduits to such waters when the National Weather Service predicts a high probability (e.g., 50 percent or greater chance) of rain, in an amount likely to cause runoff, for the period extending 24 hours after the conclusion of an intended land application event. 40 CFR § 123.36 and USEPA (2003), section 4.1.2.4. Revising the proposed code in this manner should prevent fish kills that can result when significant rain

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[2] Table 1a contains an error. For Hydrologic Soil Group D soils, the correct rate is 550 gal/ac.

falls soon after manure or process wastewater has been surface applied. Please see Appendix M or page O-6 in USEPA (2004) for technical information that Wisconsin should use to establish an appropriate prohibition.

16. Illinois, Indiana, Michigan, Minnesota, and Ohio have concluded that there is a high or very high risk of phosphorus movement to surface waters where the soil test phosphorus level (Bray P1) falls within the range or exceeds the value shown below.

State	Soil Test P Level (parts per million)	Risk Rating
Illinois	> 150	Very high
Indiana	100 ≤ soil test P ≤ 200	High
Michigan	75 ≤ soil test P ≤ 150	High
Minnesota	> 75 ppm (from zero to 300 feet from waters)	Very high
	> 150 ppm (farther than 300 feet from waters)	Very high
Ohio	100 ≤ soil test P ≤ 150	High

(Keller 2004, Indiana Water Pollution Control Board 2004, Creal 2004, Raudys 2005, Koncelik 2005). Illinois prohibits manure and process wastewater application on land where the soil test phosphorus level is greater than 150 parts per million (ppm). Where the soil test phosphorus level is between 100 and 150 ppm, Ohio limits applications of manure and process wastewater to a rate that does not exceed the phosphorus removed by the next crop. Michigan limits applications to a rate that does not exceed the phosphorus removed the next two crops where the soil test is between 75 and 150 ppm. Where the soil test phosphorus exceeds either of the pertinent levels provided in the above table, Minnesota requires any application of manure or process wastewater and land management practices to achieve a very low or low rating under the Minnesota phosphorus index or meet table 2 in the Minnesota NRCS (2001) practice standard for nutrient management. (Illinois, Michigan, and Minnesota do not allow CAFO owners or operators to use the phosphorus index an alternative method for assessing the risk of phosphorus movement to waters.) USEPA, Region 5, (Skinner 2005) disapproved Indiana's technical standards for nutrient management because the standards allowed multi-year applications of manure and process wastewater phosphorus on land determined by the State to be at high risk of phosphorus movement to waters based on soil test phosphorus levels.

In light of the information provided above, Wisconsin needs to explain why soil test phosphorus levels between 100 and 150 ppm do not produce a high risk of phosphorus movement to surface

waters in Wisconsin. Alternatively, Wisconsin could (and should) revise proposed s. NR 243.14(5)(a) 2. *Wis. Adm. Code* to provide that applications of manure and process wastewater may not exceed the phosphorus removal of the following growing season's crop when the soil test phosphorus level is between 100 and 200 ppm.

17. Wisconsin needs to revise proposed s. NR 243.14(5)(a) 3. *Wis. Adm. Code* to provide that the application of manure and process wastewater is prohibited on fields with soil test phosphorus levels greater than 200 ppm. 40 CFR § 123.36 and 68 *Federal Register* pp. 7211 and 7210, February 12, 2003 ("... in some instances phosphorus levels are so high, ... that any application of manure, litter, or process wastewater would be inconsistent with appropriate agricultural utilization of nutrients and would lead to excessive levels of nutrients and other pollutants in runoff ...," "...[n]or would applications be made on sites determined inappropriate based on a high potential for phosphorus runoff to surface water").

18. As an alternative to proposed s. NR 243.14(5)(a) *Wis. Adm. Code*, proposed sub. (5)(b) provides that a permittee may use a department approved method for assessing and minimizing the risk of phosphorus delivery to waters. USEPA, Region 5, has no objection to Wisconsin providing an alternative to the requirements in proposed sub. (5)(a), comments 16. and 17. notwithstanding. However, as proposed sub. (5)(b) does not establish a method for assessing the risk of phosphorus delivery and it does not establish a standard for the maximum rate at which manure and process wastewater phosphorus may be applied on land. Wisconsin needs to establish such a method and such rates if it wishes to provide an alternative to proposed sub. (5)(a). 40 CFR § 123.36. The State has discretion to establish the method and rates as provisions in ch. NR 243 *Wis. Adm. Code* or as formal policy. USEPA (2003), section 4.1.3. If Wisconsin elects to establish the method and rates as policy, then the policy will need to be established coincident with the recreation of ch. NR 243 *Wis. Adm. Code* and be submitted to this office for approval under 40 CFR §§ 123.36 and 123.62.

19. Proposed s. NR 243.14(6) and (7) *Wis. Adm. Code* include technical standards for surface application of manure in the winter. USEPA, Region 5, finds that the sub. (6) and (7) technical standards will minimize nutrient movement to waters where waters of the United States, sinkholes, open tile line intake structures, and other conduits to waters of the United States (hereinafter collectively "waters") are upslope from the land application area. In addition, we

find that the standards will minimize nutrient movement to waters where nutrients need to be applied in the winter to grow a winter crop.

20. Except as qualified by comments 19. and 21., USEPA, Region 5, reserves comments on the proposed s. NR 243.14(6) and (7) *Wis. Adm. Code* standards as they pertain to surface application of the following materials in the winter: (a) beef cattle, heifer, calf, and turkey manure and (b) swine manure when the manure has been removed from storage following agitation.

21. Proposed s. NR 243.14, table 5, *Wis. Adm. Code* provides maximum rates for emergency surface application of liquid manure on frozen ground. Certain of the rates are expressed in units of gal/ac while others are expressed as pounds of P_2O_5 per acre. USEPA, Region 5, used table 10-7 in MidWest Plan Service (1993) to convert the latter rates to units of gal/ac. Following the conversion, we prepared the following table showing the most restrictive of Wisconsin's proposed table 5 rates.

	0% ≤ slope ≤ 2%	**2% < slope ≤ 6%**
Dairy pit	4,000 gal/ac	3,500 gal/ac
Dairy lagoon	7,000 gal/ac	3,500 gal/ac
Beef pit	3,333 gal/ac	3,333 gal/ac
Beef lagoon	7,000 gal/ac	3,500 gal/ac
Swine pit	2,400 gal/ac	2,400 gal/ac
Swine lagoon	7,000 gal/ac	3,500 gal/ac

When Hydrologic Soil Group B, C, or D soils are frozen but not covered with snow, the rates in the above table are not reasonably likely to prevent runoff of liquid manure. Furthermore, the rates for liquid manure application on land with a slope that is equal or less than two percent are not reasonably likely to prevent runoff when dairy, beef, or swine manure is removed from a lagoon and applied on Hydrologic Soil Group A frozen soils. These conclusions are based on a comparison of the rates in the above table with the rates in USEPA (2004), Appendix L, tables 1a and 1b. Thus, under most scenarios involving surface application of liquid manure on soil that is frozen but not covered with snow, the rates in proposed s. NR 243.14, table 5, *Wis. Adm. Code*

are not reasonably likely to ensure compliance with proposed s. NR 243.14(2)(b) 1. *Wis. Adm. Code*. Wisconsin needs to revise proposed s. NR 243.14(7) *Wis. Adm. Code* to provide that the hydraulic rate at which liquid manure may be applied on ground that is frozen but not covered with snow shall be limited to prevent runoff. Alternatively, Wisconsin needs to replace most of the rates in proposed table 5 with the rates in USEPA (2004), Appendix L, tables 1a and 1b, or similar. If Wisconsin selects the former option as the basis for a pertinent provision in the recreated code, then USEPA, Region 5, will look for the State to establish a policy providing that permits will express the standard in an appropriate numeric fashion (i.e., in units of gal/ac based on USEPA (2004), Appendix L, tables 1a and 1b, or similar).

22. Proposed s. NR 243.14(6) *Wis. Adm. Code* includes technical standards for surface application of solid manure in the winter. USEPA, Region 5, used Appendix L in USEPA (2004) to evaluate the standards as they affect the movement of nutrients and manure pollutants in runoff from melted snow where waters are downslope from the land application area and a crop will not be grown in the winter or nutrients need not be applied in that season to grow a winter crop. For the purpose of step 1 in Appendix L, we established 18 pounds per acre as a "standard" for the mass of total nitrogenous (and carbonaceous) biochemical oxygen demand (BOD) that would be permitted in runoff from one inch of precipitation from such land[3]. For the purpose of step 3, we established antecedent moisture condition III and 3 °C as the design conditions for soil moisture and temperature, respectively. Based on the evaluation, we find that the technical standards in proposed s. NR 243.14(6) *Wis. Adm. Code*:

a. will minimize movement of nutrients to waters where layer or broiler manure has been surface applied on Hydrologic Soil Group A soils,

b. will minimize movement of nutrients to waters where layer or broiler manure has been surface applied on Hydrologic Soil Group B soils under no-till or contour farming practices, and

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[3] Eighteen pounds per acre is the product of 160 milligrams per liter (mg/L) total BOD times the volume of water, 13,650 gallons, that will run off an acre of land after one inch of water has been applied to Hydrologic Soil Group D soils under good hydrologic and saturated soil moisture conditions. One hundred sixty mg/L is the concentration of total BOD that publicly-owned treatment works would need to meet on a maximum daily basis if they are to have a reasonable chance of achieving secondary treatment standards on a monthly average basis.

c. will not minimize movement of nutrients to waters where layer or broiler manure has been surface applied on Hydrologic Soil Group B, C, or D soils before February 1, except where the manure has been applied on Group B soils under no-till or contour farming practices.

As a result of this finding, and subject to comments 19. and 22. b., above, Wisconsin needs to revise proposed s. NR 243.14(6) *Wis. Adm. Code* to (a) prohibit surface application of layer and broiler manure on Hydrologic Soil Group B, C, and D soils in the winter or (b) include management practices that will minimize nutrient movement to waters when layer or broiler manure is surface applied on Hydrologic Soil Group B, C, or D soils in the winter.

23. Proposed s. NR 243.14(7) *Wis. Adm. Code* includes technical standards for surface application of liquid manure in the winter. The standards:

a. prohibit surface application on frozen ground,
b. prohibit surface application on snow from February 1 through March 31, and
c. prohibit surface application on more than one inch of snow before February 1.

Technical standards as summarized in a. through c., above, will minimize nutrient movement to waters. However, under proposed s. NR 243.14(7)(d) *Wis. Adm. Code*, the Wisconsin standards will not apply if an emergency exists as defined in that subsection. In emergencies, proposed sub. (d) provides that surface application can occur as long as the application is approved by the State and conforms to (a) the restrictions in proposed s. NR 243.14, table 5, *Wis. Adm. Code* or (b) State-approved restrictions other than those in table 5. Separately, proposed sub. (e) provides that the standards summarized in a. through c., above, do not apply to existing source CAFOs before 2010.

In light of proposed sub. (d), USEPA, Region 5, used Appendix L in USEPA (2004) to evaluate the technical standards in table 5 as the standards affect the movement of nutrients and manure pollutants in runoff from melted snow where waters are downslope from the land application area and a crop will not be grown in the winter or nutrients need not be applied in that season to grow a winter crop. For the purpose of step 1 in Appendix L, we established 18 pounds per acre as a "standard" for the mass of total nitrogenous (and carbonaceous) BOD that would be permitted in runoff from one inch of precipitation from such land. For the purpose of step 3, we

established antecedent moisture condition III and 3 °C as the design conditions for soil moisture and temperature, respectively. Based on the evaluation, we find that the technical standards in table 5 will minimize nutrient movement to waters when (a) swine manure is removed from storage without agitation and surface applied on any snow-covered soil or (b) mature dairy cow manure is surface applied on snow-covered Hydrologic Soil Group A soils. Furthermore, we find that the technical standards in table 5 will not minimize movement of nutrients to waters when mature dairy cow manure is surface applied on Hydrologic Soil Group B, C, or D soils. As a result of this finding and subject to comment 19., above, Wisconsin needs to revise proposed s. NR 243.14(7) *Wis. Adm. Code* to (a) prohibit all surface applications of mature dairy cow manure on Hydrologic Soil Group B, C, and D soils in the winter or (b) include management practices that will minimize nutrient movement to waters when mature dairy cow manure is surface applied on Hydrologic Soil Group B, C, or D soils in the winter.

Proposed s. NR 243.14(7)(d) 3. *Wis. Adm. Code* provides that the State may approve sites and restrictions for emergency applications of liquid manure on frozen or snow-covered ground other than the restrictions in proposed s. NR 243.14, table 5, *Wis. Adm. Code*. USEPA, Region 5, finds that this provision does not conform to 40 CFR § 123.36 because it does not establish a technical standard for emergency applications of liquid manure on frozen or snow-covered ground. Wisconsin needs to strike this provision from the code or timely submit a policy to this office for approval showing how the Department will implement the provision such that nutrient movement will be minimized. USEPA (2003), section 4.1.3.

Proposed s. NR 243.14(7)(e) *Wis. Adm. Code* provides that existing source CAFOs which do not have 180 days of manure storage capacity may surface apply liquid manure on frozen or snow-covered ground before January 1, 2010. USEPA, Region 5, has two recommendations for strengthening this provision. Wisconsin should:

a. Exclude AFOs that increase animal numbers to become Large CAFOs after the effective date of the recreated code. Wisconsin should require these CAFOs to comply with technical standards for surface application of liquid manure upon permit issuance or by December 31, 2006, whichever is later.

AFOs that increase animal numbers to become Large CAFOs typically engage in planning, design, and construction activities before they become Large CAFOs. Aspects

addressed include facility design to optimize or improve the production process and establish adequate storage so it is not necessary to surface apply manure and process wastewater when fields are unavailable due to cropping, soil moisture or temperature, or weather. USEPA, Region 5, believes it is reasonable and appropriate to require such CAFOs to comply with technical standards for surface application of liquid manure in the winter upon permit issuance or by December 31, 2006, whichever is later.

b. Require other existing source Large CAFOs to comply with the technical standards for liquid manure surface application in the winter as expeditiously as practicable but in no case later than three years after the effective date of the recreated code.

USEPA has determined that the capacity to develop nutrient management plans, including plans for adequate storage and appropriate agricultural utilization of nutrients, will be available nationwide before December 31, 2006. 68 *Federal Register* 7228, February 12, 2003. Capacity to develop plans for Large CAFOs may already exist in Wisconsin. At the same time, USEPA, Region 5, recognizes that Wisconsin is establishing new standards for surface application of liquid manure in the winter with the new standards being more stringent (and better) than those now in existence in the state. Our recommendation concerning the compliance deadline for other Large CAFOs balances the fact that federal regulations require implementation of nutrient management plans by December 31, 2006, with the fact that Wisconsin has discretion to establish technical standards that minimize nutrient movement to waters including discretion to establish reasonable schedules for compliance with the standards. To develop the recommendation, USEPA, Region 5, referred to the Clean Water Act, section 301(b)(2)(E) and (F), 33 United States Code (USC) § 1331(b)(2)(E) and (F), for guidance. In this section, Congress required compliance with effluent limitations guidelines for conventional and other pollutants as expeditiously as practicable but in no case later than three years after the effective date of the guidelines.

24. To communicate an appropriate intention that proposed s. NR 243.14(10) *Wis. Adm. Code* would provide authority for the Department to impose more stringent, but not less stringent, practices, the first sentence in sub. (10) should be revised to read, "... to implement practices in addition to or that are more stringent than ~~in place of~~ the requirements ..."

25. Proposed s. NR 243.142(5)(b) *Wis. Adm. Code* needs to be revised to provide that the sampling of manure and process wastewater must be consistent with the requirements of the CAFO's Wisconsin Pollutant Discharge Elimination System (WPDES) permit. 40 CFR § 122.42(e)(3).

26. Proposed s. NR 243.15(1)(a) 3. *Wis. Adm. Code* needs to be revised as follows: "Owners and operators of large CAFOs shall, at a minimum, design and construct reviewable facilities or systems that are part of the production area and meet the production area requirements in s. NR 243.13, provide adequate storage under s. NR 243.14(9), and meet accepted management practices. All proposed plans and specifications, including the operation and maintenance plan, shall include a written explanation regarding the ability of the proposed facility or system to meet the production area requirements in ss. NR 243.13 and 243.17(3) and provide adequate storage under s. NR 243.14(9). 40 CFR § 122.42(e)(1)(i).

27. Proposed s. NR 243.15(2) *Wis. Adm. Code* provides as follows: "Runoff control systems in the production area shall be designed to comply with the applicable standards in s. NR 243.13 using permanent runoff control systems that are consistent with accepted management practices such as wastewater treatment strips, sediment basins, waste storage facilities, roof runoff management, grassed waterways and clean water diversions."

The federal Effluent Limitations Guidelines and New Source Performance Standards prohibit the discharge of manure, litter, or process wastewater pollutants from production areas at Large CAFOs that are subject to 40 CFR part 412, subparts C and D. An exception arises when, subject to additional conditions, a discharge is caused by precipitation and consists of an overflow from a structure that is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. 40 CFR §§ 412.2(g), 412.31(a)(1), 412.32(a), 412.33(a), 412.35(a), 412.43(a), 412.44(a), and 412.45(a). (A separate and distinct exception arises when the production area effluent limitations are based on voluntary alternative performance standards under 40 CFR § 412.31(a)(2).)

In comment 8., above, USEPA, Region 5, identified a change in language that is required for proposed s. NR 243.13(2)(a) 1. and 2. *Wis. Adm. Code* to conform to the federal Guidelines and Standards. Provided that it makes the change, as required, Wisconsin should advise Large

CAFOs that certain accepted management practices referenced in proposed s. NR 243.15(2) *Wis. Adm. Code*, including wastewater treatment strips and grassed waterways, are not structures as the word is used in s. NR 243.13(2)(a) 1. and 2. *Wis. Adm. Code* (and 40 CFR § 412.2(g)) and, thus, are not likely to ensure compliance with the revised standard in s. NR 243.13(2)(a) *Wis. Adm. Code*. (The recommended advisory also applies to feed storage facilities and associated runoff control systems, the design and construction of which may be approved by the State under proposed s. NR 243.15(9) *Wis. Adm. Code*.) Wisconsin should further advise Large CAFOs that approval of a runoff control system does not constitute a defense in an enforcement action for violation of permit effluent limitations applicable to production area discharges.

28. Proposed s. NR 243.15(3)(d) *Wis. Adm. Code* should be revised as follows: "... and shall be designed to achieve compliance with the applicable standards in ss. NR 243.13 and 243.14(9)." This change will make sub. (d) consistent with sub. (a) and it will reinforce the proposed s. NR 243.14(9) requirement for adequate storage of process wastewater.

29. To reinforce that composting facilities require containment and adequate storage for any process wastewater generated at the facilities, the last sentence in proposed s. NR 243.15(8) *Wis. Adm. Code* should to be revised as follows: "..., the department may still apply additional design and operation requirements contained in ch. NR 502 as needed to protect water quality and shall apply additional design and operation requirements as needed to meet the ~~production area~~ requirements in ss. NR 243.13 and 243.14(9).

30. Proposed s. NR 243.16(c) *Wis. Adm. Code* should be revised as follows: "..., an assessment of the ability of the facility or system to meet the production area requirements in s. NR 243.13, the adequate storage requirement under s. NR 243.14(9), and accepted management practices.

31. To ensure that the Wisconsin technical standards for nutrient management will apply to land application of combined wastes, the third sentence in proposed s. NR 243.18 *Wis. Adm. Code* should be revised as follows: "The department may apply ~~other~~ additional requirements such as ..."

32. Wisconsin needs to revise proposed s. NR 243.19(1)(a) *Wis. Adm. Code* to expressly require CAFOs to have a depth marker for their open surface liquid impoundments with such markers

clearly indicating the capacity necessary to contain the runoff and direct precipitation from the 25-year, 24-hour rainfall event. 40 CFR § 412.37(a)(2).

33. Wisconsin needs to revise proposed s. NR 243.19(2)(b) *Wis. Adm. Code* to require CAFOs to generate and keep records: (a) on expected crop yields, (b) explaining the basis for determining manure and process wastewater application rates, and (c) showing calculations on the total nitrogen and phosphorus to be applied to each field, including source other than manure and process wastewater. 40 CFR § 412.37(c).

34. Consistent with the substance in proposed ch. NR 243, subchapter III, *Wis. Adm. Code*, s. NR 243.21 should be revised as follows: "... through the issuance of a permit or notice of discharge under s. 281.16 and ch. 283, Stats. or by taking direct enforcement action."

35. A discharge that consists entirely of manure appears not to be contemplated within the definition of "contaminated runoff." As a result, proposed s. NR 243.26(4)(a) 2. *Wis. Adm. Code* needs to be revised as follows: "Addresses discharges of manure and contaminated runoff from the production area in a manner that is consistent with accepted management practices and that treats or contains all manure and contaminated runoff ..."

36. The federal Effluent Limitations Guidelines and New Source Performance Standards do not apply to Medium and Small CAFOs. However, permits issued to such CAFOs need to include technology-based effluent limitations for production area discharges with such limitations reflecting the best practicable control technology currently available, best conventional pollutant control technology, and best available technology economically achievable. 33 USC § 1342(a) and 40 CFR § 122.44(a)(1). USEPA has promulgated factors that must be considered in the course of establishing such limitations. 40 CFR § 125.3(d).

Proposed s. NR 243.26(4)(a) 2. *Wis. Adm. Code* provides that permits issued to Medium and Small CAFOs shall address contaminated runoff from the production area in a manner that is consistent with accepted management practices and treats or contains all contaminated runoff for storm events up to and including the 25-year, 24-hour storm event. USEPA believes that, in many cases, Wisconsin will find it appropriate to develop effluent limitations for production area discharges from Medium and Small CAFOs which are based on containment technology. Wisconsin has discretion to establish effluent limitations based on a technology other than

containment. USEPA (2003), section 4.1.1. In any event, Wisconsin needs to revise proposed s. NR 243.26(4)(a) 2. *Wis. Adm. Code* to explicitly provide that the State will consider the factors in 40 CFR § 125.3(d) when it establishes technology-based effluent limitations applicable to production area discharges from Medium and Small CAFOs.

37. USEPA, Region 5, supports the requirement in proposed s. NR 243.26(4)(a) 4. *Wis. Adm. Code* that a permit issued to a Medium or Small CAFO must require implementation of a nutrient management plan. 40 CFR § 122.42(e). There appears to be a typographical error in sub. 4. Wisconsin should correct the error by replacing the reference to s. NR 243.13 with a reference to s. NR 243.14 *Wis. Adm. Code.*

38. Wisconsin needs to revise proposed s. NR 243.26(4)(a) *Wis. Adm. Code* to incorporate references to: proposed s. NR 243.13(5)(b), s. NR 243.142(5), and s. NR 243.17(2) *Wis. Adm. Code.* 40 CFR § 122.42(e).

References

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Natural Resources Conservation Service. 2003. *Waste Utilization*. Conservation Practice Standard No. 633. United States Department of Agriculture. Columbus, Ohio.

Natural Resources Conservation Service. 2001. *Nutrient Management.* Conservation Practice Standard No. 590. Saint Paul, Minnesota.

Table 10-6 Rainfall limits for estimating antecedent moisture conditions. (From U.S. Soil Conservation Service 1972.)

ANTECEDENT MOISTURE CONDITION CLASS	5-DAY TOTAL ANTECEDENT RAINFALL (INCHES)	
	DORMANT SEASON	GROWING SEASON
I	Less than 0.5	Less than 1.4
II	0.5–1.1	1.4–2.1
III	Over 1.1	Over 2.1

Table 10-7 Conversi-

Class I Dry
Class II Average
Class III Saturated

Raudys, L. 2005. *State of Minnesota General Livestock Production Permit.* NPDES/SDS Permit No. MNG920000. Minnesota Pollution Control Agency. Saint Paul, Minnesota.

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Skinner, T. 2005. *September 12 letter to Thomas Easterly, Commissioner, Indiana Department of Environmental Management.* United States Environmental Protection Agency, Region 5. Chicago, Illinois.

Soil Conservation Service. 1972. *National Engineering Handbook, Section 4, Hydrology.* United States Department of Agriculture. Washington, D.C.

United States Environmental Protection Agency. 2004. *Managing Manure Nutrients at Concentrated Animal Feeding Operations.* EPA-821-B-04-006. Washington, D.C.

United States Environmental Protection Agency. 2003. *NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations.* EPA-833-B-04-001. Washington, D.C.

Table 1. Available Water Capacity (AWC) Practical Soil Moisture Interpretations for Various Soils Textures and Conditions to Determine Liquid Waste Volume Applications not to exceed AWC.

This table shall be used to determine the AWC at the time of application and the liquid volume in gallons that can be applied not to exceed the AWC. To determine the AWC in the upper 8 inches use a soil probe or similar device to evaluate the soil to a depth of 8 inches.

Available Moisture in the Soil	Sands and Loamy Sands	Sandy Loam and Fine Sandy Loam	Very Fine Sandy Loam, Loam, Silt Loam, Silty Clay Loam, Clay Loam, Sandy Clay Loam	Sandy Clay, Silty Clay, Clay
< 25% Soil Moisture	Dry, loose and single-grained; flows through fingers.	Dry and loose; flows through fingers.	Powdery dry; in some places slightly crusted but breaks down easily into powder.	Hard, baked and cracked; has loose crumbs on surface in some places.
Amount to Reach AWC	20,000 gallons/ac	27,000 gallons/ac	40,000 gallons/ac	27,000 gallons/ac
25-50% or Less Soil Moisture	Appears to be dry; does not form a ball under pressure.	Appears to be dry; does not form a ball under pressure.	Somewhat crumbly but holds together under pressure.	Somewhat pliable; balls under pressure.
Amount to Reach AWC	15,000 gallons/ac	20,000 gallons/ac	30,000 gallons/ac	20,000 gallons/ac
50 - 75 % Soil Moisture	Appears to be dry; does not form a ball under pressure.	Balls under pressure but seldom holds together.	Forms a ball under pressure; somewhat plastic; slicks slightly under pressure.	Forms a ball; ribbons out between thumb and forefinger.
Amount to Reach AWC	10,000 gallons/ac	13,000 gallons/ac	20,000 gallons/ac	13,000 gallons/ac
75% to Field Capacity	Sticks together slightly; may form a weak ball under pressure.	Forms a weak ball that breaks easily, does not stick.	Forms ball; very pliable; slicks readily if relatively high in clay.	Ribbons out between fingers easily; has a slick feeling.
Amount to Reach AWC	5,000 gallons/ac	7,000 gallons/ac	11,000 gallons/ac	7,000 gallons/ac
100% Field Capacity	On squeezing, no free water appears on soil, but wet outline of ball on hand.	On squeezing, no free water appears on soil, but wet outline of ball on hand.	On squeezing, no free water appears on soil, but wet outline of ball on hand.	On squeezing, no free water appears on soil, but wet outline of ball on hand.
Above Field Capacity	Free water appears when soil is bounced in hand.	Free water is released with kneading.	Free water can be squeezed out.	Puddles: free water forms on surface

Nyffeler, Robin T - DNR

From: Bauman, Thomas S - DNR
Sent: Wednesday, March 14, 2007 4:31 PM
To: Bauman, Thomas S - DNR; 'Jann.Stephen@epamail.epa.gov'; Mayer, Shelly - Raw Milk; 'pat.murphy@wi.usda.gov'; Crass, Dave; 'drframe@facstaff.wisc.edu'; 'jpolenske@aol.com'; 'tthrall2@yahoo.com'; 'billnick@charter.net'; 'agjohnson@mail.co.marathon.wi.us'; 'pzimmerman.fbcenter@wfbf.com'; 'mkewhlr@chorus.net'; 'LFischer@widba.com'; VandenBrook, Jim P - DATCP
Cc: Porter, Sue M - DATCP; Kent, Paul; apotts@andersonkent.com; 'amywinters@capitol-strategies.net'; 'koepkefarm@netwurx.net'; 'Laura'; 'rkarau@ruder.com'; 'Tarkowski Genifer'
Subject: NR 243 UPDATE

Importance: High

For those of you who have not heard, NR 243 cleared its last round of legislative review last week and is now final. NR 243 will go into effect in May. The DNR website dedicated to the revisions (http://dnr.wi.gov/org/water/wm/nps/rules/nr243/nr243.htm) has been updated with, among other information, a version of the final rule. A fact sheet on the revisions as well as a sample Animal Unit Calculation Worksheet is also out on the website.

I would personally like to thank members of the Technical Advisory Committee who dedicated a great deal of time and effort to the revision process. I no longer have active e-mail address for Jeff Opitz or Walter Meinholz, so if any of you see them before I do, please pass along my thanks to them as well. In addition, please pass along a thank you to the people represented by your organizations who took the time and made the effort to comment on the proposed rule in writing, by attending hearings or by attending Natural Resources Board meetings dealing with NR 243.

The next challenge that lies ahead is implementation of the revisions. If your organization would like a presentation given to your members on the revisions, please free to contact me. In addition, we will be undertaking other informational efforts to update current and potential future permittees on the revisions.

Thank you once again!

Tom Bauman
Coordinator, Agricultural Runoff Program
Runoff Management Section
Bureau of Watershed Management
Wisconsin Department of Natural Resources
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Pet-App. 200

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 18 2010

REPLY TO THE ATTENTION OF:

R-19J

Matthew Frank, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Frank:

I am writing to express the U.S. Environmental Protection Agency's appreciation for the important steps that Wisconsin is taking to improve water quality by reducing phosphorus levels. As EPA understands it, those actions include: (1) establishing water quality criteria for phosphorus; (2) issuing a 25-page rule to implement the criteria in Wisconsin Pollutant Discharge Elimination System (WPDES) permits; and (3) rule amendments to strengthen and improve the State's program for managing runoff from nonpoint sources. EPA understands that the Department plans to ask the Wisconsin Natural Resources Board to adopt these criteria and rules at a June 23, 2010 meeting.

Nutrients, including phosphorus, are among the greatest remaining sources of water pollution in Wisconsin and the Nation. For this reason, EPA supports the Department's decision to ask the Board to approve the final criteria and rules. This letter does not, however, communicate an approval decision. Water quality criteria and revisions to State National Pollutant Discharge Elimination System programs become effective for the purpose of the Clean Water Act upon approval by EPA. After the criteria and WPDES rule are issued, please send them to EPA so we may perform a review under the Clean Water Act and implementing regulations.

EPA is pleased that the Department and EPA, including the Office of Water, were able to work through virtually all of the comments that EPA had on the March 2010 proposed criteria and WPDES rule. However, we note that our comment regarding s. NR 217.17(1)(c) 3. has not been resolved. This rule provision would allow the Department to consider the likely future approval of a total maximum daily load when setting a compliance schedule for an effluent limit established under s. NR 217.13. We believe that the adaptive management section in the WPDES rule likely provides the flexibility that the Department is seeking through s. NR 217.17(1)(c) 3.

Thank you for your commitment to protect Wisconsin's waters. Do not hesitate to contact me if you would like to discuss this matter.

Sincerely,

Susan Hedman
Regional Administrator

cc: Mr. Bruce Baker, WDNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 30 2010

REPLY TO THE ATTENTION OF: WQ-16J

Todd L. Ambs, Administrator
Division of Water
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Ambs:

On March 18, 2010, the Wisconsin Department of Natural Resources (WDNR) published proposed amendments to chapters NR 106 (establishment of phosphorus water quality standards for Wisconsin surface waters) and NR 217 (effluent standards and limitations for phosphorus) of the Wisconsin Administrative Code. U. S. Environmental Protection Agency, Region 5 has reviewed the proposed amendments for consistency with the requirements of sections 303(c) and 402(b) of the Clean Water Act (CWA). Our comments are enclosed.

As proposed, Wisconsin's phosphorus criteria satisfy the requirement of section 303(c)(2)(A) of the CWA, that States must adopt water quality criteria to protect the uses of surface waters under their jurisdiction. EPA notes that Wisconsin is not proposing nitrogen criteria at this time, but is expecting to begin work on nitrogen criteria in the Summer/Fall of 2010 with a planned adoption date of 2012-2013. EPA recommends that, along with the phosphorus criteria, Wisconsin also adopt a statement that parallels 40 CFR § 131.10(b), similar to the following:

> "The water quality standards of downstream waters shall also be considered and phosphorus criteria may be modified as necessary on a case-by-case basis to ensure that the criteria provide for the attainment and maintenance of the water quality standards of downstream waters."

Wisconsin's proposed code includes authorization for a variance by rule for lagoon systems serving populations under 2,000 that would be unable to comply with limits necessary to attain the phosphorus standard, based on a finding that compliance would result in widespread and substantial social and economic impacts for such communities. To date, EPA has not seen any record to support the finding in the proposed code. Without data and analysis supporting this finding, EPA cannot approve this variance provision. Communities that can demonstrate that complying with phosphorus limits would result in widespread and substantial social and economic impact would continue to be able to seek a variance under Wisconsin's existing variance provisions. Alternatively, WDNR could prepare documentation supporting such finding at any time and submit it with individual variances to satisfy the requirements of 40 CFR § 131.10(g).

The proposed phosphorus water quality standards do not include the frequency and duration parameters that WDNR will use in determining which waters will be listed under Section 303(d) of the

CWA. EPA recommends that WDNR include these duration and frequency parameters in the phosphorus water quality standards.

EPA has a number of legal and technical comments on the proposed procedures for implementing the criteria. We are commenting in part because the State has proposed to express its policy preferences in an administrative code, a choice that we understand will create statewide legal rights and obligations. The comments notwithstanding, EPA generally supports the concept that where attainment with the water quality standards can be achieved at lower cost through an integrated program of point source and non-point source load reductions than is possible through point source reductions alone, such integrated approaches may be pursued. We suggest that Wisconsin review EPA's comments carefully and consider making decisions on a permit-by-permit or watershed basis based on the facts of the situation, rather than through an administrative code. EPA is concerned that neither Wisconsin nor EPA have sufficient experience with integrating point source and non-point source nutrient control to establish statewide legal rights and obligations at this time. EPA welcomes the opportunity to discuss further with WDNR and other Wisconsin stakeholders ways to better integrate efforts to control nutrients and thereby improve water quality.

The comments in this letter on Wisconsin's phosphorus water quality standards for surface waters and the enclosed comments on procedures for implementing the standards are EPA's preliminary technical review of Wisconsin's proposed codes. These comments do not constitute an approval or disapproval action by EPA under either section 303(c) or 402(b) of the CWA. EPA will make approval/disapproval decisions following adoption of codes by Wisconsin and submittal of the adopted codes to EPA. EPA encourages WDNR to use the time between now and final submission of the phosphorus water quality standards to continue its preparation of technical support materials that compile in one place the full documentation of the scientific basis for the criteria. This will make the rule more transparent to the public and facilitate EPA's review of the final rule.

We commend WDNR on reaching this milestone in the adoption of phosphorus water quality standards and permitting procedures, and we recognize WDNR's extensive effort over the past years in developing the standards and procedures. State adoption of protective water quality standards for nutrients is a high priority for EPA, and consequently EPA greatly appreciates the important action that Wisconsin has taken in support of that goal.

Do not hesitate to contact me if you would like to discuss EPA's comments, or your staff may contact Brian Thompson, the review coordinator, at (312) 353-6066.

Sincerely,

for Tinka G. Hyde
Director, Water Division

Enclosure

cc: Jim Baumann, WDNR

EPA COMMENTS ON PROPOSED AMENDMENTS TO CHAPTERS NR 217 (EFFLUENT STANDARDS AND LIMITATIONS FOR PHOSPHORUS) OF THE WISCONSIN ADMINISTRATIVE CODE PUBLISHED BY THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES ON MARCH 18, 2010

1. s. NR 217.10 Wis. Adm. Code. This section contains the applicability statement for ch. NR 217, Subchapter III. It provides that the Subchapter is applicable to four specified categories of point sources including, but not limited to, publicly and privately owned wastewater facilities and treatment works. The term "privately owned wastewater facilities and treatment works" is not defined in the rule. A similar term, "privately owned treatment works," is defined in 40 CFR § 122.2 to mean "any device or system (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a publicly-owned treatment works" (POTW). EPA is concerned that the Wisconsin term may be interpreted, consistent with federal regulations, such that dischargers who own or operate their own wastewater facilities or treatment works, such as commercial and industrial sources which discharge process wastewater, are generally excluded from ch. NR 217, Subchapter III. Such an exclusion would be inconsistent with 283.13(15) Wis. Stats., 33 U.S.C. § 1311(b)(1)(C) and 40 CFR § 122.44(d) (made applicable to States by 40 CFR § 123.25(a)(15)). Wisconsin should properly define the term in the rule or explain in a note or the rule record its intent that non-domestic dischargers are subject to ch. NR 217, Subchapter III.

   Separately, Wisconsin needs to revise s. NR 217.10 to provide that (1) concentrated aquatic animal production facilities (40 CFR § 122.24), aquaculture projects (40 CFR § 122.25), and silvicultural point sources (40 CFR § 122.27); (2) production area overflows from Large concentrated animal feeding operations (CAFOs); and (3) production area discharges from Medium and Small CAFOs, are subject to ch. NR 217, Subchapter III. In the alternative, Wisconsin could add a note to s. NR 217.10 to clarify that these point sources are subject to 283.15(15) Wis. Stats.

2. s. NR 217.11(2) Wis. Adm. Code defines the term "new source" in a manner that is not consistent with the definition at 40 CFR § 122.2 (made applicable to States by 40 CFR § 123.2). (It also defines the term inconsistent with 283.01(8) Wis. Stats. and s. NR 205.03(20) Wis. Adm. Code.) Wisconsin should revise the definition to provide that it applies solely for the purpose of ch. NR 217 Wis. Adm. Code. Alternatively, Wisconsin could add the term "new discharger" to the rule, define that term in accordance with 40 CFR § 122.2, and revise the definition of "new source" in accordance with 40 CFR § 122.2.

3. ss. NR 217.12(1)(a), NR 217.15(1)(a), and NR 217.15(1)(c) Wis. Adm. Code. To match the language in 40 CFR § 122.44(d)(1)(i) and (ii), Wisconsin needs to revise the noted rules to provide that a water quality-based effluent limitation (WQBEL) will be set when the Department determines that a discharge will cause, has the reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion.

4. s. NR 217.13(1)(b) Wis. Adm. Code. This rule contains factors that the Department shall consider to determine whether a discharge may affect a downstream water. Wisconsin should develop guidance to which staff should refer as they consider the factors.

5. s. NR 217.13(2)(d) Wis. Adm. Code provides that, where data are available for more than one year in the last five, the Department may use all of the years of data to calculate the upstream concentration. This rule seems to suggest that the Department need not or may not use data that are older than five years. The Department should use data that are representative, even if the data are older than five years. Wisconsin should create a note, state in the record, or revise the rule to explicitly provide that the Department may use representative data that are older than five years.

6. ss. NR 217.13(3) and (7) Wis. Adm. Code identify circumstances when limits would be set equal to criteria. These rules do not conform to 40 CFR § 122.45(d) (made applicable to States by 40 CFR § 123.25(a)(16)). For continuous dischargers, this regulation provides that, unless impracticable, limits shall be set as average weekly and average monthly values for POTWs and maximum daily and average monthly values for other dischargers. So as to not preclude the establishment of limits in accordance with federal regulations, Wisconsin should revise the noted rules to provide that the wasteload allocation will be set equal to criteria. Please see chapter five of the *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2-90-001, March 1991) for considerations that may be relevant when establishing WQBELs.

7. s. NR 217.13(4) Wis. Adm. Code provides that the Department shall set effluent limits consistent with model results for discharges to the Great Lakes. It further provides that the Department may set interim limits prior to the availability of such model results. EPA has two comments on this rule. First, the Department needs to add language to the first sentence to establish that limits based on model results will conform to any mixing zone granted under ch. NR 102 and any applicable approved wasteload allocation. Second, the Department needs to add language to the second sentence to establish that a permit with an interim limit will include a final WQBEL where a discharge will cause, has a reasonable potential to cause, or contribute to an excursion beyond water quality criteria. (*See* 33 U.S.C. § 1311(b)(1)(C) and 40 CFR § 122.44(d).)

8. s. NR 217.13(4) Wis. Adm. Code provides that the allowable load shall be divided among the various discharges, when the Department determines that more than one discharge may affect the quality of the same receiving waters. Wisconsin should supplement this language to establish an affirmative requirement that the Department will determine whether more than one discharge may affect a body of water.

9. Please revise s. NR 217.13(8)(a) Wis. Adm. Code as follows: "The new source of phosphorus is allocated as part of the wasteload allocation or reserve capacity in an EPA approved TMDL."

10. ss. NR 217.14(2) and (3) Wis. Adm. Code provide that concentration-based limits shall be expressed as 30-day rolling averages. 40 CFR § 122.45(d) provides, in part, that

limitations for continuous dischargers shall be expressed as monthly averages. Wisconsin should amend its Enforcement Management System to establish policy and procedures through which the State will evaluate 30-day rolling averages to determine compliance and calculate penalties in the event of noncompliance.

11. s. NR 217.15(1)(c) Wis. Adm. Code identifies procedures that Wisconsin will use to set phosphorus WQBELs for permittees who do not have such limits. The rule does not contemplate cases where phosphorus discharge data are not available. Wisconsin needs to revise the rule to contemplate such cases. Where a permit authority knows, based on a permit application or other information, that a discharge contains a pollutant for which a water quality criterion exists, 40 CFR § 122.44(d) mandates that the permit authority determine whether the discharge will cause, has a reasonable potential to cause, or contribute to an excursion beyond the criterion. The mandate applies in cases where discharge analytical data do not exist.

12. s. NR 217.16(1) Wis. Adm. Code. This rule provides that the Department may include in a permit a limit based on an approved total maximum daily load (TMDL) instead of a limit calculated in accordance with s. NR 217.13. This rule does not pose a problem to the extent that a limit based either on an approved TMDL or s. NR 217.13 Wis. Adm. Code is a WQBEL. Nevertheless, Wisconsin needs to add language to establish that the level of water quality to be achieved by the limitations in a permit is derived from, and complies with, the water quality standards in ch. NR 102 Wis. Adm. Code. *See* 40 CFR § 122.44(d)(1)(vii)(A). In addition, the State needs to add language to establish an affirmative requirement that limits will be set consistent with the assumptions and requirements of any approved TMDL. *See* 40 CFR § 122.44(d)(1)(vii)(B).

13. When an issued permit contains a WQBEL calculated in accordance with s. NR 217.13 Wis. Adm. Code, s. NR 217.16(1) appears to allow the State to modify or reissue the permit to include a less stringent limit based on an approved TMDL. A permit that would be modified or reissued in this fashion would be subject to the antibacksliding provisions in 33 U.S.C. § 1342(o) and § 122.44(l). If antibacksliding is recognized in ch. 283 Wis. Stats. or the applicable administrative codes, then Wisconsin should explain in a note or the record for the rule that a permit modified or reissued in the manner contemplated here is subject to the State's antibacksliding provision. If antibacksliding is not so recognized, then Wisconsin must revise s. NR 217.16(1) to expressly provide that a permit which is modified or reissued to contain a less stringent limit is subject to 33 U.S.C. § 1342(o) and 40 CFR § 122.44(l).

14. s. NR 217.17(1)(a) Wis. Adm. Code provides that a schedule of compliance may be established when necessary and will lead to compliance as soon as possible. Other proposed provisions of ch. NR 217, Subchapter III, seem to cast doubt on whether the "necessity" and "as soon as possible" standards apply to all schedules. s. NR 217.17(4)(c) 4. Wis. Adm. Code is an example. 40 CFR § 122.47(a)(1) (made applicable to States by 40 CFR § 123.25(a)(18)) provides that a schedule may be provided only when appropriate and any schedule must achieve compliance as soon as possible. In a note, Wisconsin needs to explain that the "necessity" and "as soon as possible" standards

in s. NR 217.17(1)(a) apply in each place in ch. NR 217, Subchapter III, wherein a compliance schedule is contemplated or may be inferred.

15. s. NR 217.17(1)(c) 3.Wis. Adm. Code. In determining whether a compliance schedule is appropriate and determining the length of the schedule, this rule provides that the Department may consider the likelihood that a TMDL will be developed and approved within the permit term and whether the WLA for the facility will likely be less stringent than a WQBEL calculated under s. NR 217.13. A compliance schedule based solely on time to develop a TMDL is not appropriate under 40 CFR § 122.47. *See* "Compliance Schedules for Water Quality-Based Effluent Limitations," May 10, 2007, memorandum from James A. Hanlon, Director, Office of Wastewater Management, EPA (attached). Wisconsin needs to remove paragraph (1)(c)(3) from s. NR 217.17. To the extent that Wisconsin develops and EPA approves a TMDL during a permit term, and the TMDL would justify a less stringent limit, the State could modify the permit to incorporate the TMDL-based limit, provided that the modified limit conforms to antibacksliding provisions and is derived from and complies with the water quality standards in ch. NR 102.

16. Wisconsin needs to incorporate the provisions of 40 CFR § 122.47(a)(3) and (4) into s. NR 217.17(3) Wis. Adm. Code. Wisconsin should add a note to clarify that the provisions of 40 CFR § 122.47(a)(3) and (4) apply in each place in ch. NR 217, Subchapter III, where a compliance schedule is contemplated or may be inferred. s. NR 216.16(2) Wis. Adm. Code is an example.

17. s. NR 217.17(3) Wis. Adm. Code identifies certain of the actions or operations which may be included in a compliance schedule. The State should supplement this list to include preparation of preliminary and final designs for new or modified treatment technology, the initiation of construction, and the completion of construction.

18. ss. NR 217.17(3)(b) and (4)(c) 1. Wis. Adm. Code provides that a compliance schedule may include instream monitoring. In the case of (3)(b), the stated purpose is to better develop WQBELs. While the State may write a permit to require such monitoring and a permit may be modified or reissued to incorporate a WQBEL that is better than the WQBEL in an initial permit (provided that the future limit conforms to the balance of ch. NR 217, Subchapter III, and antibacksliding provisions), the monitoring contemplated in these rules does not fit within the meaning of "compliance schedule" in 33 U.S.C. § 1362(17) and 40 CFR § 122.2 because is not an action or operation which will lead to compliance with the effluent limitation in a permit as initially issued. Wisconsin needs to strike these provisions from s. NR 217.17. The State could establish the authority to require such monitoring elsewhere in the code.

19. s. NR 217.17(3)(c) Wis. Adm. Code provides that a compliance schedule may include development and implementation of a local pollutant trading program that applies to the receiving water. The program contemplated within this rule does not fall within the meaning of "schedule of compliance" in 33 U.S.C. § 1362(17) and 40 CFR § 122.2 because it is not an action or operation leading to compliance with an effluent limitation.

Wisconsin needs to strike this rule from the code or revise it to provide that a compliance schedule may include implementation of one or more trades that apply to the permittee, provided that such trade is established and incorporated into the permit so that it is enforceable.

20. s. NR 217.17(4) Wis. Adm. Code is titled "Adaptive Management Option." The substance of the rule focuses on the time a permittee will have to comply with a phosphorus WQBEL and the steps a permittee will take to achieve compliance.

While the rule allows the State to find that the phosphorus water quality criterion in s. NR 102.06 Wis. Adm. Code is not likely to be met without the control of phosphorus from non-point sources, EPA does not see companion provisions which will produce the needed non-point source reductions. To the extent that the State may contemplate issuing the noted finding, EPA recommends that the State first (1) establish a TMDL for the waterbody and (2) make the determination and finding, and promulgate the targeted performance standards, as required under s. NR 151.004 Wis. Adm. Code. In addition, we urge the State to first exercise the authority provided in ss. NR 243.26(2), 216.21(2), and 216.51(3) to designate animal feeding operations, commercial sources, and land disturbing activities as point sources subject to the permit program.

21. s. NR 217.17(4)(c) Wis. Adm. Code contains a list of mandatory interim requirements, and dates for their achievement, when the adaptive management option is employed. Wisconsin should assess requests for a schedule of compliance, and identify the compliance actions or operations which are appropriate, on a case-by-case basis. Separately, the State needs to revise the rule to provide that the list contained therein is not exhaustive. To illustrate this point, treatment equipment which is not "readily" affordable may nevertheless need to be installed to achieve compliance.

22. s. NR 217.17(4)(c) 3. Wis. Adm. Code provides that a compliance schedule shall include the installation of treatment equipment that is readily affordable. The rule does not define the meaning of the words, "readily affordable." Under 33 U.S.C. §1311(b)(1)(C) and 40 CFR § 122.44(d), NPDES permits must include effluent limitations as required for the discharge to meet water quality standards. Unless Wisconsin grants a variance to the criterion and EPA approves the variance under 40 CFR § 131.21, compliance is required even when the equipment needed to comply is not readily affordable. Wisconsin needs to revise s. NR 217.17(4)(c) Wis. Adm. Code to provide that a compliance schedule shall include the installation of the treatment equipment as needed to achieve compliance with the WQBEL as soon as possible. *See* 40 CFR § 122.47(a)(1).

23. s. NR 217.17(4)(c) 4. c. Wis. Adm. Code provides that the Department may impose a WQBEL for phosphorus in the third permit term as an "interim numerical limitation," and may allow five years to achieve compliance with the limitation. Interim limitations, as provided in s. NR 217.17(3), are not WQBELs. Wisconsin must revise this rule to provide that the WQBEL will be established in the first permit term. *See* 33 U.S.C. § 1311(b)(1)(C) and 40 CFR § 122.44(d).

24. s. NR 217.17(4)(a) 2. Wis. Adm. Code provides that the Department may issue a finding that a permittee would need to install expensive technology to meet WQBELs. According to the rule, such a finding would justify a compliance schedule under (c). Whether a pollution control technology is expensive or not is not, by itself, a sufficient basis to justify a compliance schedule. However, a compliance schedule may be provided to adjust sewer use rates or securing financing for design and construction of a technology. Wisconsin needs to revise s. NR 217.17(4)(a) 4. c. and (c) accordingly.

Introduction

This review covers the accomplishments of the Wisconsin Department of Natural Resources (DNR) in implementation of its Clean Water Act and Safe Drinking Water Act programs as specified in the Environmental Performance Partnership Agreement (PPA) for the period of Federal Fiscal Year 2008 and 2009.

As described in the following sections, Wisconsin DNR is addressing numerous difficult and important environmental challenges, with some notable successes. EPA and Wisconsin DNR share the belief that the issues DNR is working on are important to the continued health of Wisconsin's citizens and the environment they so value. However, there are important areas where the accomplishments that we document this year fall short of the commitments in the PPA. Our discussions over the past several years point to the loss of State staff in critical areas and the continuing inability to fill vacancies, even where federal funding is available to cover the cost of the positions, as the major factor causing this slippage. EPA has written to Wisconsin DNR to express concerns about staffing deficiencies, most recently on July 30, 2009, addressing certain Clean Water Act programs. Though not repeated here, those concerns should be considered a part of this review. Earlier EPA wrote about staffing deficiencies in the Safe Drinking Water Act program; those concerns are updated and reiterated in the drinking water program discussion in this evaluation. EPA continues to urge Wisconsin DNR to fully utilize the federal resources it has available to it to fill critical vacancies.

Monitoring and Assessment Program

General Overview:
Wisconsin DNR and EPA have continued to emphasize several key water quality monitoring and assessment issues during the past several years. These are development/implementation of a comprehensive monitoring strategy, continued development of biological criteria and assessment methods, and data/information management. These activities are reflected in the Environmental Performance Partnership Agreement (PPA).

Wisconsin DNR accomplished several significant items in their monitoring program over the past several years as outlined below. Wisconsin DNR completed an update to their comprehensive monitoring strategy and continues implementation of that strategy. Wisconsin DNR is also making progress on developing bioassessment methods for a number of water body types including streams, rivers, and lakes. Wisconsin DNR developed a consolidated assessment and listing methodology, which will lead to the submission of an Integrated Report in 2010 rather than separate Section 303(d) and 305(b) reports. Additionally, Wisconsin DNR and EPA continue to work together to ensure that Wisconsin DNR's Assessment Database (ADB) submission maintains compatibility with the national ADB.

Accomplishments:

Water Quality Monitoring:
Wisconsin DNR is using the supplemental Section 106 funds for three purposes: 1) enhancing the citizen monitoring program by co-funding a position to lead the program; 2) developing

biological criteria and evaluating how best to use biological assessment information in decision making; and 3) conducting additional monitoring to support listing decisions for the 303(d) list.

In the PPA, Wisconsin DNR agreed to work with EPA on implementation of the national probabilistic surveys. In 2007, Wisconsin DNR participated in the National Lakes Assessment (NLA) and completed 31 site visits at 29 lakes. Additionally, Wisconsin DNR analyzed the zooplankton, diatoms, and phytoplankton samples as part of the NLA. Wisconsin DNR is also participating in the National Rivers and Streams Assessment (NRSA). Wisconsin DNR elected to have the non-wadeable sites done through in-kind services in which there were 19 site visits in 2008 and 1 site visit in 2009. The remaining sites are expected to be wadeable sites, and Wisconsin DNR will complete these sites (34 sites with 2 revisits) by October 1, 2009. Wisconsin DNR is analyzing macrobenthic samples and periphyton samples from all 59 site visits and will provide the results to EPA. Of these 59 site visits, 4 are revisits and 3 are on tribal lands. The tribes agreed to have Wisconsin DNR assist in some fieldwork and analyze there macrobenthic and periphyton samples. Wisconsin DNR has also participated in conference calls for the National Coastal Assessment to be conducted in 2010.

Biological Criteria and Assessment Methods:
Wisconsin DNR's monitoring strategy calls for continued development of bioassessment methods over time. Continued efforts are being made to develop macroinvertebrate indices and to develop appropriate methods for assessing other biological assemblages for various waterbodies (e.g., lakes, wetlands).

Data Information and Management:
Wisconsin DNR has successfully transmitted numerous physical and chemical data to EPA's national STORET warehouse via the Water Quality Exchange. EPA would like to know the status of submitting biological and habitat data as we thought this was to occur during 2008.

EPA encourages States to make use of the national ADB for storing water quality assessment information reported through Section 305(b) and Section 303(d) reports (or Integrated Reports). Wisconsin DNR used the most recent version of ADB as a basis for their expanded database (Waterbody Assessment Display and Reporting System, "WADRS") used to document assessment information. To ensure that WADRS maintains comparability with ADB, Wisconsin DNR and EPA will continue to work together on XML schemas, quality assurance/quality control and other issues as they arise. EPA encourages Wisconsin DNR to make their 305(b) report and 303(d) list as compatible as possible in preparation for the 2010 Integrated Report. We look forward to receiving the ADB-compatible files and geo-referencing/GIS information for all assessment units in April 2010.

Areas for Improvement/Continued Focus:

EPA is interested in working with Wisconsin DNR to identify appropriate biological assessment methods for waterbodies to capture impairments based on a range of stressors. EPA continues to recommend multi-metric indices for at least two assemblages (e.g., fish, macroinvertebrates) for

assessing aquatic life use attainment and for developing standards, identifying causes/sources of impairment, etc.

Water Quality Standards (WQS) Program

General Overview:
Wisconsin's most significant efforts in the WQS program include revisions to Wisconsin's water quality criteria, completion of a long-term effort to develop and adopt new temperature criteria, development and adoption of nutrient criteria, revision of Wisconsin's antidegradation policy and implementation procedures, and completion of a triennial review of Wisconsin's water quality standards. Wisconsin completed its criteria revision work, made substantial progress towards completing temperature and nutrient criteria, and began work on antidegradation. Wisconsin accomplished this on top of a large variance workload and in the face of significant resource constraints. Each of these activities and specific commitments from the PPA are discussed below.

Nutrient Criteria:
In the PPA, Wisconsin was to adopt nutrient criteria for lakes and streams by December, 2009. Wisconsin DNR has made substantial progress towards adoption, however, challenging implementation questions raised by the Phosphorus Advisory Committee (PAC) prevented Wisconsin DNR from moving forward at the pace needed to meet the 2009 adoption due date. Wisconsin DNR will need to revise its nutrient criteria plan by August 2009 to reflect that the dates have slipped. We commend Wisconsin DNR for taking on implementation issues. EPA continues to provide technical and programmatic support of Wisconsin DNR's rulemaking efforts, including participation and input at the PAC meetings. Wisconsin DNR continues as a valuable and experienced participant in EPA's nutrient Regional Technical Assistance Group (RTAG). EPA has funded Wisconsin DNR travel on multiple occasions to RTAG meetings (as travel restrictions have otherwise impeded out-of-state travel). Unlike previous RTAG meetings, the next meeting (late 2009 or early 2010) will likely require States to cover their own travel. The focus of the meeting will be on the pressing issue of criteria implementation.

GLI Clearinghouse:
Wisconsin DNR met its commitment to send EPA completed templates and fact sheets for revisions to aquatic life and human health criteria for upload to the GLI Clearinghouse.

Thermal Criteria:
Wisconsin has completed the technical work to support a comprehensive revision to its water quality standards for temperature, along with implementation provisions. In the PPA, Wisconsin DNR was to submit proposed rules to the Wisconsin Natural Resources Board (NRB) for public hearing in December 2007, with final rulemaking by the end of 2008. Although these commitments were not met, Wisconsin DNR made considerable progress. The NRB approved the proposed thermal water quality standards in May 2009 and directed Wisconsin DNR to work closely and expeditiously with EPA to reach a common understanding of the permitting process for municipal dischargers. The NRB also directed Wisconsin DNR to communicate directly with interested parties to keep them informed on the dialogue with EPA. Wisconsin DNR and EPA

have worked together to develop alternative language that both organizations consider satisfactory. Wisconsin DNR and EPA will present the revised language to Wisconsin stakeholders in late August or early September. Once adoption is completed, the rule will be submitted to EPA for review and approval.

Bacteria Criteria:
Wisconsin DNR did not meet its commitment to adopt EPA's recommended pathogen criteria by September 2007. However, given that EPA is on track to revise the national recommended criteria by 2012, EPA believes it is acceptable for Wisconsin to delay revising its criteria until EPA publishes its next generation of pathogen criteria.

In the interim, EPA encourages Wisconsin DNR to attend an upcoming stakeholder meeting in Chicago on October 6-7, to provide input on the development of EPA's new recreational water quality criteria. At the meeting, EPA will provide an update on the progress of activities in the Critical Path Science Plan and an overview of the steps it has taken to develop new recreational water quality criteria. EPA will also outline a plan to keep stakeholders informed as criteria development continues, and the Agency will seek stakeholder input on key issues and possible elements of new criteria.

Although Wisconsin DNR's BEACH Act grant work is not part of PPA, Wisconsin DNR should be commended for its exemplary beach monitoring and notification program, for its support of the work that local health departments have done to promote healthy beaches within the state, and for promoting the use of beach sanitary surveys at all Wisconsin coastal beaches.

Disapproved Great Lakes Criteria/Toxics Criteria Update:
Wisconsin DNR had a commitment to complete rule revisions by July 2008, and to submit the rules to EPA for review and approval within 30 days of final adoption. The revised rules were published in the Wisconsin Administrative Register in November 2008, were certified by the Wisconsin Attorney General in December 2008, and were submitted to EPA in May 2009. EPA approved all criteria revisions on July 1, 2009, with one exception. EPA was unable to act on Wisconsin's revised chronic selenium criterion for aquatic life for "Limited Forage Fish" waters, as that criterion was based on toxicity studies that exposed fish to selenium through the water column. Currently available data indicate that toxicity to fish occurs as a result of dietary exposure to selenium. EPA plans to act on this criterion once EPA finalizes its revised national aquatic life criteria recommendations for selenium, which are currently under review. Also as part of the rulemaking, Wisconsin adopted and EPA approved revised human health criteria for 13 substances that have had EPA criteria updates since 1997. Wisconsin is to be commended for its efforts to keep its water quality criteria current.

Designated Uses and Tiered Aquatic Life Uses (TALU):
In the PPA, Wisconsin DNR had a commitment to finalize a Phase 1 use rule and begin a Phase 2 use rule. Rules have not been submitted to EPA for review and approval. Wisconsin DNR also had a commitment to continue working with EPA on moving towards a TALU-based system of aquatic life uses. EPA sponsored technical workshops on TALU; Wisconsin DNR participated in those workshops.

Antidegradation:
Wisconsin began staff work to revise Wisconsin's antidegradation policy and implementation procedures. Wisconsin DNR staff also participated in antidegradation discussions during the monthly EPA/State WQS conference calls and shared information with EPA staff working on Region 5's Antidegradation Review project.

Triennial review of WQS:
Wisconsin DNR proposed priorities for their next triennial review, took comment on the priorities, and compiled those comments.

Variances from WQS:
As expected, Wisconsin issued a large number of mercury variances. These were all submitted to EPA for review and approval and approved within 60 days. Wisconsin also seems to be issuing variances for chlorides and ammonia that are not being submitted to EPA for review and approval. EPA and Wisconsin DNR staff has had some discussion of this issue. EPA understands that Wisconsin DNR will submit future variances to EPA for review and approval. EPA and Wisconsin DNR staff will also explore mechanisms for reducing the administrative burden associated with processing variances.

Areas for Improvement/Continued Focus:

EPA's highest immediate priorities are adoption of nutrient criteria for lakes and rivers, and adoption of thermal criteria. Also, new variances issued by Wisconsin DNR for chlorides or ammonia should be submitted to EPA for review and approval, consistent with Section 303(c) of the Clean Water Act.

Longer-term priorities should include review and revision of Wisconsin's antidegradation policy and implementation procedures; completion of a triennial review of Wisconsin's water quality standards based on the priorities already identified through the scoping process; and development and deployment of a biologically-based system of TALU for Wisconsin surface waters. Wisconsin DNR has an existing strategy for accomplishing TALU. EPA encourages Wisconsin DNR to meet with the Region to update the strategy for development of biological indicators, quantitative biological criteria, and TALU-based aquatic life uses.

In addition, EPA encourages Wisconsin DNR to improve its ability to meet the requirements of 40 CFR 131.20(c) to submit rule revisions within 30 days of the final State action to adopt and certify the revised standards. For the recent criteria revisions, it took Wisconsin DNR over four months after the Wisconsin Attorney General certified the rule revisions to submit them to EPA.

Non Point Source Program

Accomplishments:

Reporting:
In Fiscal Year 2008, Wisconsin DNR submitted its semi annual (electronically) and annual reports on schedule.

The following chart shows a comparison of the loading reductions (WQ14a, b, and c) and wetland restorations that are achieved through the Non Point Source (NPS) program from all Region 5 States and Wisconsin DNR during FY 2008:

	Sediment Reduction (tons/yr)	Phosphorous Reduction (lbs/yr)	Nitrogen Reduction (lbs/yr)	Wetland Areas Restored/Created (acres)
Region Wide Estimated Result	1,418,342	1,525,908	1,843,990	3,951
Wisconsin Reported results	903,702	884,079	546,267	216

As the chart indicates, Wisconsin DNR has been a major contributor to the NPS program.

Social Indicators Project:
Wisconsin DNR has actively participated in the development of the Regional social indicators component of the Region 5 State NPS Evaluation Framework. This includes developing effective measures of the impact of education and outreach in influencing behavioral change which results in reduced NPS loadings. The University Extension representatives are part of the team (co-leading with Purdue University) that developed and are now testing the social indicators. Work this year has been in pilot testing of the indicators. Wisconsin currently has 4 pilots. An on-line system for collecting and analyzing these data is also being tested by the group and the pilot project participants.

Wisconsin DNR accountability projects:
Wisconsin has had no new accountability projects completed since our last review.

Wisconsin's NPS Success Stories:
Wisconsin continues to submit success stories to the Region. A recent success story was accepted by HQ and published on EPA's website.

West Branch of the Sugar River: Livestock grazing along three segments of the West Branch Sugar River resulted in the destruction of in-stream habitat. Therefore, Wisconsin added these segments to its 1998 303(d) list of impaired waters for not supporting their designated uses. Dane County began working to restore the fishery in the early 1980s. The restoration efforts reduced non-point source pollution from sheet and rill erosion, restricted cattle access to streams and riparian areas, and improved management of animal waste from barnyards and feedlots. After nearly 30 years and $1 million in private, local, state and federal watershed restoration activities, Wisconsin removed all three segments from its 2004 303(d) impaired waters list. These segments of the West Branch Sugar River are the first to be delisted in Wisconsin as result of environmental restoration.
http://www.epa.gov/nps/success/state/wi_sugar.htm

Areas for continued discussion

State Non Point Source Management Plan:
A major focus for the 319 program remains the revision of the State's non-point source management plan. EPA staff will be working closely with WDNR in the revision process. It is important to complete the revision prior to the FFY2010 funding cycle in order to continue to be eligible for Funding under section 319. The annual work planning process will need to be looked at in terms of timeliness, completeness of submittal and overall coordination between the Region and WDNR

TMDL Program:

Accomplishments:

For Fiscal Year 2008, Wisconsin DNR submitted 6 TMDLs addressing 6 impairments (WQ-12), which is well below the Fiscal Year 2008 goal.

It is worth noting that the slow TMDL development pace should not reflect on the quality of the TMDLs developed by WDNR. The TMDL program is currently working on draft TMDLs for the Rock River and Green Bay AOC/Lower Fox River watersheds. These projects are extremely complex and the WDNR TMDL program is doing a great job managing the projects, considering the limited number of TMDL FTE. The Green Bay AOC TMDL effort has gained national recognition for innovation in watershed TMDL development.

Areas for Improvement:

Over the last few years the WDNR TMDL program struggled to meet the required pace of TMDL development. EPA agreed to decrease WDNR's annual TMDL commitment with the expectation that the program would ramp up in the near future. In 2008, WDNR submitted only 6 TMDLs, far short of the 60 TMDLs per year pace. To assist Wisconsin DNR increase its level of TMDL production, U.S. EPA will continue to offer the following support functions:

- Provide contract and/or technical assistance to support their TMDL/Modeling efforts.
- U.S. EPA will work with Wisconsin DNR to identify additional candidates for EPA Headquarters funded pilot/case study for Integrated Watershed TMDLs/Plans
- U.S. EPA will consider requests for other Federal TMDLs.

The Wisconsin 2008 303(d) List was submitted to EPA in September 2008, 5 months beyond the April 1, 2008 statutory deadline. Due to WDNR TMDL program resource issues, WDNR has not been able to respond to EPA comments on the final list in a timely fashion, delaying EPA's approval of the 2008 list, which is still pending. EPA recognizes that TMDL program vacancies are the main reason development of the 303(d) list has fallen to the bottom of WDNR's priority list. Not since 2002 has a state in Region 5 gone this far beyond the statutory deadline for 303(d) list submittal and approval.

Action Item: Wisconsin DNR will send EPA a draft of the States full Integrated Report Assessment Methodology.

Action Item: WDNR will send EPA a draft of the Integrated Report and Categories 4 and 5 for review in the development of the 2010 list pending EPA's approval of the 2008 list.

Action Item: In 2009, WDNR is expecting another slow year, perhaps submitting only 6 TMDLs. WDNR should continue working on the Rock River and Green Bay AOC/Lower Fox River TMDLs with the goal of submitting the TMDLs by September 1, 2010.

Action Item: In 2010, the agencies will kick off development of TMDLs for the Fox-Wolf basin as part of the Great Lakes Restoration Initiative. The agencies will also continue to discuss TMDL development for the Milwaukee River watershed. EPA will also like to discuss the development of federal TMDLs for toxics in Lake Michigan.

National Pollutant Discharge Elimination System (NPDES) Program & Enforcement

Accomplishments

Permit Backlog and Quality
Wisconsin's overall percent of permits is currently at 97%, which is well above the national target of 90%. EPA appreciates WDNR's efforts in reissuing the backlogged general permits. The percent of minor permits current is at 90%. Although the overall percent of permits current is well above 90%, EPA is concerned that the percent of major permits current has fallen to 67%.

A summary of these statistics provided by USEPA follows which is based on data from ICIS for major and minor individual permits and data WDNR provided for non-storm water general permits:

	Total	Expired	Current	Percent Current
Majors	129	43	86	67%
Minors	740	73	667	90%
Facilities Covered Under Non-SW GPs	2556	0	2556	100%
Wisconsin Total	3425	121	3309	97%

Based on data WDNR provided on July 21, 2009:

CAFOs				
	Total	**Expired**	**Current**	**Percent Current**
CAFOs	184	24	160	87%

Nutrient Monitoring: To support the implementation of nutrient criteria and to encourage nutrient control, generally, Region 5 has requested that the states require certain continuous point source dischargers to monitor nutrients in their effluents. Such monitoring should also lead to a greater understanding of appropriate averaging periods for nutrient limits and seasonal differences in nutrient discharges, and will provide critical information in support of Total Maximum Daily Load development.

Mercury
EPA has approved certain elements of Wisconsin's regulations that implement the Final Water Quality Guidance for the Great Lakes System (Great Lakes Guidance), 40 C.F.R. Part 132. EPA disapproved other elements and overpromulgated the pertinent federal elements as replacements. The federal overpromulgation remains binding in Wisconsin as a matter of federal law until such time as EPA may approve appropriate amendments to the Wisconsin Administrative Code and remove the federal overpromulgation. 40 C.F.R. §§ 132.6 and 123.62(b) (4). EPA has also approved in part and disapproved in part Wisconsin's statewide mercury rule at NR 106.145. WDNR and EPA need to continue to work to assure that issued permits include conditions consistent with 40 CFR 132, including those related to mercury intake pollutants, and mercury reasonable potential, and with NR 106.05.

Concentrated Animal Feeding Operations (CAFO) Rule
In November 2008, EPA revised the NPDES regulations for CAFOs in response to the Second Circuit Court of Appeals decision regarding the regulations EPA published in 2003. EPA regulations required that states revise their approved NPDES programs to conform to the new federal CAFO requirements, including making any necessary regulatory revisions, by December 2009, or December 2010 if statutory changes are needed. On July 16, 2009, Region 5 requested that states evaluate their current NPDES programs for CAFOs using a checklist developed by EPA's Office of Water, and to provide their complete assessments by August 28, 2009. EPA asked that the assessments include estimated schedules for any necessary rulemaking or legislative action. WDNR is currently conducting this evaluation.

Ballast Water
Wisconsin has public noticed a proposed state ballast water permit that would set numeric standards for the discharge of organisms with ballast water and limit the discharges of other pollutants and sediments.

CWA Section 316
Wisconsin has developed a guidance to assist in the development of permit limits for cooling water intake structures in compliance with section 316(b) under best professional judgment. Wisconsin has been revising their thermal rules and has proposed rules that would consolidate all thermal regulations in Chapter 106 and has ensured that the regulations implementing section 316(a) are consistent with federal regulations.

Construction Stormwater Regulation

Authority for Erosion and Sediment Control at Public Buildings Transferred from the Wisconsin Department of Commerce to the Department of Natural Resources

On June 29, 2009, Wisconsin enacted legislation whereby the authority for regulating erosion and sediment control at commercial buildings and places of employment will be transferred from the Department of Commerce (Commerce) to the Department of Natural Resources (DNR). Commerce will retain the authority to regulate one- and two- family dwellings. The transfer becomes effective on January 1, 2010. Region 5 will review future revisions to DNR and Commerce rules to ensure they comply with federal regulations as well as updates to the memorandum of agreement between the agencies.

Storm Water Fly-in Meeting

On July 15-16, 2009, Regional Water Directors, their staff and Headquarters officials came to Chicago to discuss and preliminarily agree on priorities for the Regions and Headquarters moving forward on storm water policy and program implementation. Prominent in the discussions were recommendations from the October 2008 National Research Council (NRC) report on the national storm water program. Follow-up items from the meeting included:

- Office of Water is to work with Regions on developing a portal for regions and states to share permit language and other information about permits
- OWM to revisit and consider amending the November 2002 Guidance on storm water permits and TMDLs
- OWM to evaluate the development of a national statement on maximum extent practicable (MEP)
- OW to Assess the expansion of Region 1's BMP curves to a national level
- All participants supported revisiting the MS4 regulation by expanding the area of coverage and establishing a performance standard for post construction.

Among the NRC report recommendations were to more directly address storm water flow issues and area hydrology in storm water permits. Several approaches for addressing flow/hydrology in permits were discussed, including better defining post-construction performance goals. In NR 151 Wisconsin has established post-construction performance standards that address stream channel protection and hydrology:

- Peak Discharge Rate. This standard requires that BMPs be used to maintain or reduce the peak runoff discharge rate of the 2 year-24 hour design storm, to the MEP.
- Infiltration. This performance standard requires that, to the MEP, a portion of the runoff volume be infiltrated:
  - Residential – 90 percent of pre-development infiltration volume or 25 percent of the 2 year-24 hour design storm. No more than 1 percent of the project site is required.
  - Non-residential – 60 percent of predevelopment infiltration volume or 10 percent of the 2 year-24 hour design storm. No more than 2 percent of the project site is required.

Watershed Permit Pilot Projects

Another prominent recommendation in the NRC report addressed watershed-based approaches for storm water discharge permitting. The report recommended moving from the current "piecemeal" permitting system to a watershed-based permitting system. The report identified potential benefits to moving toward a watershed-based approach, including:

- Storm water Management Programs and Pollution Prevention Plans could be better tailored to the needs/ characteristics of the watershed;

- Some efficiencies may be achieved for the State (e.g., a "lead permittee" could potentially coordinate/oversee storm water programs and performance in the watershed);
- Regulated entities may achieve some efficiencies (e.g., coordinated education and outreach programs, coordinated monitoring activities).

Because the conversion to watershed-based approaches for storm water permitting would be a major change, involving numerous technical and legal issues, the report recommended that some watershed permitting pilot projects be undertaken. In follow-up to the report, EPA Headquarters put out a memo to the Regions asking for nominations for watershed pilot projects. The Milwaukee Metropolitan Sewerage District (MMSD) suggested the Milwaukee area be included as a pilot. Due to the resource and policy implications associated with doing a watershed-based permitting pilot, this issue will need to be discussed further among EPA, WDNR, and MMSD.

Combiner Sewer Overflows (CSOs)
WDNR is in the process of renewing the MMSD permit. EPA and WDNR are discussing the CSO provisions for inclusion in the reissued including water quality-based permit limits and internal diversions/bypasses.

NPDES Compliance Monitoring

The WPDES Inspection Strategy for 2004 through July, 2008 called for WDNR to inspect 100% of all permitted majors at least once per year. This is in contrast with the EPA's National Compliance Monitoring Strategy (CMS) which allowed states an option to conduct inspections at 70% of Majors, if they offset the reduction in Major coverage with an inspection of 2 minors for every Major that was not inspected. While WDNR did not conduct an inspection at every NPDES Major as planned, they easily met National alternative CMS standards. In FY08, WDNR inspected 74% of majors and 37% minors, which met the commitment.

Inspections Conducted Oct. 1, 2007 to September 30, 2008

Facility Type	Universe	Number Facilities Inspected	Total # of Inspections (some inspected more than once)	Percent of the Universe
Majors	129	96	145	74.4%
Pretreatment POTWs	26	4	NA	15.3%
Minors (non-POTW and POTW (excludes CAFOs, Laboratories, and Storm Water)	740	274	NA	37%

Pretreatment:
Inspection frequencies and other oversight activities in the Pretreatment Program are outlined in WDNR's PPA with EPA which called for WDNR to conduct Publicly Owned Treatment Works (POTW) audits once every five years in conjunction with other compliance inspections. EPA

records for FY2008 indicate that approximately 15% of the evaluations were completed during the period. Industrial Users subject to Department controls are inspected at least twice during each five year period along with the ongoing review of semi-annual periodic compliance reports.

Storm Water

MS4-Neither the PPA or the Wisconsin Inspection Strategy for 2008 addressed MS4 evaluations. Wisconsin has 2 Phase 1 permitted communities (Madison and Milwaukee) and 74 communities covered by individual or group permits, and 141 communities covered by Wisconsin general MS4 permit. During FY2008, WDNR conducted 0 inspections of Phase I communities and 18 inspections of other communities covered under individual/group permits and the general MS4 permit. The national CMS guidance memorandum issued October 17, 2007, required that Phase I permittees be evaluated within five years of the issuance of the memo. Phase II permittees should be evaluated within seven years, but priority should be given to those permittees within impaired watersheds

Industrial Storm Water – EPA's CMS requires that WDNR inspect 10% of their Industrial Storm Water universe. WDNR has approximately 5000 industrial sites subject to storm water regulation. According to WDNR, 261 facilities were inspected in FY 2008. EPA conducted 2 inspections at Kohler Generator Plant and Kohler.

Construction Storm Water - EPA's CMS requires that WDNR inspect five percent of permitted construction storm water sites that have disturbed areas between one and five acres in size each year. WDNR should inspect annually 10% of permitted sites that have disturbed areas of greater than five acres. WDNR inspected 1,052 of their permitted construction sites FY 2008. EPA conducted 2 federal construction storm water inspections.

Concentrated Animal Feeding Operations (CAFO): Wisconsin has approximately 178 large CAFOs. In FY 2008, WDNR inspected 10.6% of their permitted CAFOs. According, to WDNR's WPDES Inspection Strategy they are scheduled to inspect CAFOs twice per 5 years (at 24 and 48 months). During FY2008, WDNR conducted inspections at 19 Large CAFOs and 0 at Medium CAFOs.

Sanitary Sewer Overflows (SSO) – While there is no specific commitment for inspecting SSO facilities, some evaluations related to SSOs were conducted during the period. EPA's ICIS database does not reflect any inspections coded as SSO evaluations.

Compliance Monitoring and Enforcement Data - Enforcement actions, inspection rates, and ICIS-NPDES entry rates are significant measures of program health. The introduction and operation of the ICIS-NPDES national database has made it difficult to monitor all state actions. ICIS was implemented in August 2008. In addition, information for WDNR Wet Weather Programs has not made it into EPA's database from WDNR's database System for Wastewater, Application, Monitoring Permits (SWAMP). WDNR enters wet weather related data such as CAFO data into a sub-database of SWAMP called Event Tracker. While the information that is entered into the main SWAMP database is compatible with EPA's ICIS, the sub-databases such as Event Tracker and Case Tracker are not compatible. As a result, inspections and enforcement

actions, both informal and formal, for CAFOs and other wet weather programs are not reflected in ICIS.

Prior to August, 2008, information from SWAMP had been downloaded into PCS, which meant that WDNR manually downloaded inspection information from Event Tracker each month. A grant was provided to develop software to establish compatibility between the SWAMP system and ICIS.

> **Action Item:** Enforcement and inspection data should be entered into the national database. WDNR and EPA should develop a mechanism for entering the data.

NPDES Enforcement

Wisconsin Significant Noncompliance Rates (SNC)

SNC rates for Majors has been a key measure of program success, based on the 106 program PART Review. EPA has committed to maintaining this rate measured on a national level as a three year rolling average. The current national three year rolling average is 22.9%. Wisconsin's SNC evaluated on a three year rolling average is a very healthy 5.4%. In addition while the three year rolling average rate was very good, the annual SNC rate for FY2008 showed significant improvement over prior years. Over the last three years evaluated the rate dropped from 7.7% to 6.2% to the FY2008 rate of 2.3%.

FY06	Percentage	# of majors/# in SNC
1st Quarter	3.0	130/4
2nd Quarter	3.9	130/5
3rd Quarter	3.0	130/4
4th Quarter	1.5	130/2
FY06 Quarterly Average SNC	**2.85**	**130/3.75**
FY06 Annual SNC Rate	**7.7**	**130/10**
FY07		
1st Quarter	1.0	130/1
2nd Quarter	1.5	130/2
3rd Quarter	2.3	130/3
4th Quarter	3.0	130/4
Current FY07 Quarterly Average SNC	**1.95**	**130/2.5**
FY07 Annual SNC Rate	**6.2**	**130/8**
FY08		
1st Quarter	1.5	130/2
2nd Quarter	1.0	130/1
3rd Quarter	0.0	130/0
4th Quarter	1.0	130/1
Current FY08 Quarterly	**0.86**	**130/1**

Average SNC		
FY08 Annual SNC Rate	**2.3**	**130/3**
3-Year Rolling Annual Average SNC Rate	**5.4**	**130 / 7**

Combined Sewer Overflows (CSOs):
EPA continues to include CSO control as a national enforcement priority. While Region 5 has a significant portion of the CSO community universe within the Region, only two are located in Wisconsin. EPA's national strategy for CSO has the goal that all CSO communities with service populations of greater than 50,000 has approved CSO long term control plans and that those plans be implemented under a enforceable document such as a federal judicial consent decree or a state stipulation or in case where the implementation schedule is shorter than five years, a permit. While both CSO communities located in Wisconsin have implemented CSO plans that have been approved by the state, further action may be needed to meet water quality standards. For the purposes of the intent of the national goals, Region 5 considers Wisconsin's CSO communities addressed.

Sanitary Sewer Overflows (SSOs):
EPA also includes SSO control as a national enforcement priority. The current strategy requires EPA to address 100% of large SSO systems and 50% of systems with permitted capacities of between 10 MGD and 100 MGD, and their associated satellite collection systems. Systems must have adequate capacity, and enforceable mechanisms in place to ensure that ongoing preventative maintenance and cleaning programs are being implemented. WDNR and EPA are working together to identify those systems that are the most likely to be experiencing chronic SSOs.

The only large-capacity system in the State, Milwaukee Metropolitan Sewerage District, and its 28 satellite communities are subject to several state judicial stipulations which address many of the ongoing SSO concerns in the system. EPA and WDNR are working together to resolve the remaining issues resulting from wet weather flows. Wisconsin DNR participated in one inspection on 8/6/08 with EPA at Sheboygan.

- The second part of the national strategy for SSO abatement during 2008 included the initial phases of evaluating half of the sanitary systems with permitted treatment capacities between 10 and 100 MGD. EPA and WDNR worked together to identify several medium-size systems that had a history of SSO issues. In FY 2008, EPA evaluated SSO conditions at Fond du Lac, Sheboygan and Waukesha. In FY 2009, EPA evaluated SSO conditions at Brookfield and Green Bay. EPA also issued an Information Request to Manitowoc. EPA anticipates that further action will be needed at Waukesha and Brookfield to ensure that the necessary system evaluation and capital improvement work is done under an enforceable schedule. EPA will coordinate with WDNR to ensure that both systems are addressed.

Action Item: EPA and WDNR will resolve issues to fully address SSO evaluations of Waukesha and Brookfield by September 30, 2009.

Compliance Maintenance Annual Report (CMAR) Program:
CMAR is an electronic annual reporting form used by WDNR for collection systems owned by a municipality or utility that does not own a wastewater treatment facility. In FY 2008 approximately 300 satellite systems were covered by a general permit for bypassing and overflows. The 300 satellite systems are to submit information from the previous calendar year that contains:

- The type of annual maintenance activities performed on the collection system;
- CMOM activities they are doing;
- The occurrence of Sanitary Sewer Overflows (SSO's);
- An assessment of the overall performance of the collection system (performance indicator graphs are then generated); and
- The financial management practices in place to ensure repairs, replacements, and upgrades are implemented.

Storm Water Program
During FY2008, WDNR initiated enforcement actions on 54 construction storm water sites and 6 enforcement actions on industrial facilities

MS4s
During FY2008, WDNR did not initiate any MS4 enforcement actions.

CAFOs
A goal from EPA's national CAFO enforcement strategy was to ensure that 75% of large CAFOs obtain permits by 2010. EPA has focused its resources and work with states with relatively low permit rates for CAFOs. All of Wisconsin's known large and medium size CAFOs are covered under an individual permits. EPA applauds DNR's work in this priority sector. During FY2008, WDNR issued 1 notice of violations to CAFOs. In FY2008, WDNR referred 1 CAFO to the Wisconsin Department of Justice (WDOJ), seeking injunctive relief and/or penalties.

Pretreatment:
During FY2008, WDNR initiated enforcement actions on 0 Pretreatment programs.

State Review Framework (SRF):
WDNR and EPA conducted the first round of the SRF. In the new PPA, Wisconsin agreed to follow-up on outstanding state review issues by December 31, 2009.

1. Issue Memo for Content of Inspection Reports: WDNR will issue memos to describe expectations for content of inspection reports and their provisions to the permittees. This information is to be incorporated as guidance into the next update of the State's Inspection Strategy

2. Update State Inspection Strategy: WDNR will update their Inspection Strategy to include guidance for content of inspection reports and their provision to permittees.

   The WPDES Inspection Strategy was sent to the field staff as a working draft as of June 15, 2009. The field staff will provide comments and the final Inspection strategy should be in place by September of 2009. Round 2 of SRF is planned for the first quarter of FY 2010.

3. Incorporate Inspection Report Performance Expectations into Standards: Incorporate performance expectations regarding inspection report content into standards of WDNR regional managers.

4. In the new PPA, WI agreed to follow up on outstanding state review issues this would include entering CAFO and storm water inspection data into ICIS.

Ground Water and Drinking Water

Specific Performance Highlights and Accomplishments

Drinking Water Compliance
During 2008, 89.9% of the Wisconsin population served by community water systems (CWS) received drinking water that met all health-based standards. The Wisconsin DNR committed to 91% in the 2007/2008 PPA. During 2008, 91.7% of Wisconsin CWSs were in compliance with all health-based standards, above the state commitment of 90%.

The total number of violations reduced from 5,044 to 2,483 from 2003 through 2007. The decrease reflects a significant drop in the number of monitoring and reporting violations, mainly at non-community water systems, which may be indicative of the success of an expanded county contract program to collect drinking water compliance samples at these water systems.

Radium Enforcement
In 2004, there were 43 CWSs in Wisconsin whose drinking water exceeded the maximum contaminant level (MCL) for radium. As of July 2009, only 3 have not returned to compliance. Wisconsin DNR has elevated these three cases to the state Department of Justice where signed settlements with penalty have been agreed to for these systems to return to compliance on an enforceable schedule.

Drinking Water Security
Wisconsin continues to be a leader in securing drinking water facilities and preparing emergency response. Their mutual aid assistance and training and technical assistance efforts are excellent. Notable accomplishments include:

- Wisconsin DNR worked in collaboration with numerous water utilities and water professional organizations to assist in the development and launching of the Wisconsin Water and Wastewater Agency Response Network (WisWARN). WisWARN provides a network

where water and wastewater agencies can locate emergency assistance in the form of personnel, equipment, materials and other associated services. The objective is to provide rapid, short term deployment of emergency services to recover from any emergency including but not limited to: natural disasters, e.g. tornados, floods, ice storms, earthquakes, lightning or regional electrical outages and manmade disasters, e.g., significant accidents, vandalism, hazardous materials release, riots; or terrorist attacks. Wisconsin DNR's efforts in this area will enhance emergency preparedness and response capabilities for water utilities.

- Wisconsin DNR is working on a study to develop quality control criteria and increase Laboratory proficiency of the hollow fiber Ultrafiltration method. The study is being conducted in conjunction with the development of the EPA region-specific Laboratory Response Plans. The goal is to develop procedures of collecting large volumes of drinking water (approximately 100 L) and developing quality control criteria for Enterococcus faecelis, Ricin and other biological pathogens.

- Wisconsin DNR is assisting state representatives in pandemic influenza preparedness by participating on a task force that is writing and emergency response plan for a Pan-Flu outbreak. Additionally Wisconsin DNR staff will be participating in a pandemic tabletop exercise.

- Wisconsin DNR is contacting all public municipal water systems in the state (through a contractor) to complete an emergency preparedness and response survey. The survey will provide information on system readiness for emergency response and equipment types and locations for the mutual aid system (WisWARN). Having the information in advance will expedite utilities abilities to obtain assistance when needed.

New Drinking Water Regulation Primacy

Wisconsin DNR submitted primacy applications for ten of fifteen new requirement areas associated with the reauthorization of the Safe Drinking Water Act (SDWA). The state has adopted, and U.S.EPA Region 5 has approved program updates for:

- New Public Water System Definition
- Administrative Penalty Authority
- Consumer Confidence Reports
- Interim Enhanced Surface Water Treatment Rule
- Stage 1 Disinfectants/Disinfection By-Products Rule
- Lead and Copper Rule Minor Revisions
- Public Notification Rule
- Radionuclides Rule

- Arsenic Rule

State regulations for the Long-Term 1 Enhanced Surface Water Treatment Rule became effective January 1, 2008 in Wisconsin and Wisconsin DNR applied for primacy on February 16, 2009. U.S. EPA Region 5 is reviewing the application.

Wisconsin DNR has submitted a draft primacy application for the Filter Backwash Recycling Rule and U.S. EPA Region 5 is reviewing it to determine if current authorities are sufficient to implement it in Wisconsin.

WDNR will miss its target dates for state adoption of the Long-Term 2 Enhanced Surface Water Treatment Rule (LT2), the Stage 2 Disinfection/Disinfectants By-Products Rule (Stage 2 D/DBPR), and the Ground Water Rule (GWR). We hope to see these three rules adopted no later than September 2010 with a primacy application sent to U.S. EPA Region 5 as soon as possible. A primacy extension agreement is also in place for the Lead and Copper Rule Short-Term Revisions.

During the course of the last decade, Wisconsin DNR expanded Public Water Supply System (PWSS) program primacy coverage while state resource to the program decreased, and state restrictions limited access to federal funds available to support the PWSS program.

Ground Water Coordination and Research
The Wisconsin DNR uses a small portion of CWA Section 106(b) funds to support the Ground Water Coordinating Council (GCC) and ground water research. Since authority to regulate groundwater in Wisconsin is spread across several agencies, the GCC serves to increase efficiency and facilitate the effective functioning of state agencies in activities related to groundwater management. Important research is supported through this mechanism, which identifies emerging issues that lead to more effective management of the ground water resource.

Major groundwater quality concerns identified in Wisconsin by the GCC include microbial agents, nitrates, arsenic, radionuclides, volatile organic compounds, and pesticides. GCC is also concerned about the overall availability of good quality groundwater for municipal, industrial, agricultural, and domestic use and for adequate baseflow to lakes, streams, and wetlands.

Area of Concern/Continued Focus

Limited Control of Wisconsin DNR to Hire, Train, and Approve Travel for Critical Staff and Management
The 1996 reauthorization of the SDWA made Public Water System Supervision (PWSS) programmatic growth inevitable. This federal legislation put in place a process to improve the quality of public drinking water by:

- Improving source water protection
- Improving water infrastructure
- Improving data collection used in regulation development

- Strengthening surface water treatment
- Improving sanitary surveys
- Protecting the public from the by-products of disinfection practices
- Reducing exposure to arsenic and radionuclides
- Improving the public's right-to-know about the quality of their drinking water
- Determining when disinfection of ground water was necessary
- Improving water operator education
- Strengthening technical, financial and managerial expertise of water systems

The Wisconsin DNR has made great progress in improving drinking water through implementing the SDWA. Unfortunately, their efforts to use available federal funds to deliver services that execute public drinking water improvements have been hampered by intractable state hiring and acquisition processes, and meager travel and training allocations. These spending controls are in place due to state budgetary shortfalls, but often prevent the Wisconsin DNR from using available federal funds to implement the PWSS program in the most timely, effective and efficient manner.

Wisconsin DNR management has adapted well to work around these constraints to maintain effectiveness and has found ways to manage the implementation of the core PWSS program successfully up to now. Yet continued success becomes increasingly difficult to envision as responsibilities to maintain the core PWSS program continue to grow. In 2009 and 2010, Wisconsin DNR will begin implementing three major National Primary Drinking Water Regulations: the GWR, the Stage 2 D/DBPR, and the LT2.

Wisconsin DNR must carefully maintain sufficient staff to conduct and evaluate work done internally and under contract. Strong programmatic and technical expertise must be maintained to oversee the implementation of the PWSS program. Otherwise, the quality of the program will erode over time as retirements and attrition continue.

One Example - A critical data base coordinator was lost to the program in 2008 and Wisconsin DNR cannot get approval to replace her. This undermines the ability of the program to use data for decision-making and management purposes, and that function is fundamental to efficient and effective program implementation. We are concerned that vital programming to improve data system capability is being deferred. New regulation implementation lags waiting for DWS reprogramming and beta testing.

Substantial federal resources are available to Wisconsin to support the PWSS program if state constraints are eased. Wisconsin DNR uses the PWSS Program Management set-aside from the annual Drinking Water State Revolving Loan Fund (DWSRF) Capitalization Grant to stabilize reductions in program funding from state accounts. Almost $10 million has been set-aside for PWSS program management in Wisconsin since DWSRF program inception, of which only about half has been expended. An additional $2.13 million, originally intended for PWSS program management use from 2000 and 2001 DWSRF capitalization grants, was turned back to the loan fund in 2008, banked for a day when Wisconsin DNR will be allowed to hire the staff they indicate they need.

Current PWSS staffing levels are insufficient to implement the program successfully into the future. Existing staff and new hires must be allowed to gain the expertise to perform their work effectively. State government must allow the Wisconsin DNR greater latitude to use federal funds to manage the PWSS program.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 01 2009

REPLY TO THE ATTENTION OF:

WQ-16J

Todd L. Ambs, Administrator
Division of Water
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Mr.Ambs:

U.S. Environmental Protection Agency has completed its review of Wisconsin's revised water quality rules at Chapter NR 105. The revised rules were submitted to EPA by the Wisconsin Department of Natural Resources on May 4, 2009. This submission, with certification of the Wisconsin Attorney General received by EPA on March 17, 2009, satisfies the requirements of the federal regulations at 40 CFR 131.6 for a submittal of new or revised water quality standards by a state to EPA. The revisions submitted by Wisconsin consisted of the following:

- Section 1. NR 105, Table 2, acute aquatic life criteria for total recoverable copper and total recoverable nickel;
- Section 2. NR 105, Table 2A, hardness ranges for acute aquatic life criteria for copper and nickel;
- Section 3. NR 105, Table 5, chronic aquatic life criteria for endrin and selenium;
- Section 4. NR 105, Table 6, chronic aquatic life criteria for total recoverable copper and nickel;
- Section 5. NR 105, Table 8, Human threshold criteria for antimony, cadmium, chlorobenzene, total chromium, chromium +3, chromium +6, total cyanide, 1,2-dichlorobenzene, ethylbenzene, hexachlorocyclopentadiene, and toluene; and,
- Section 9. NR 105, Table 9, Human cancer criteria for arsenic, 3,3'-dichlorobenzidine, and 1,3-dichloropropene.

Pursuant to section 303(c)(3) of the Clean Water Act (CWA) and federal regulations at 40 CFR 131.21, EPA is required to review and approve new and revised state water quality standards before they can become effective for CWA purposes. EPA approves the revisions to the human health non-cancer criteria for antimony, cadmium, chlorobenzene, total chromium, chromium +3, chromium +6, total cyanide, 1,2-dichlorobenzene, ethylbenzene, hexachlorocyclopentadiene, and toluene, at Section 5, Chapter NR 105, Table 8, and the revisions to the human health cancer criteria for arsenic, 3,3'-dichlorobenzidine, and 1,3-dichloropropene at Section 9, Chapter NR 105, Table 9. With the exception of the chronic aquatic life criterion for selenium for waters designated by Wisconsin as "Limited Forage Fish"

aquatic life use, EPA approves, subject to consultation with U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA), the revisions to the acute aquatic life criteria for total recoverable copper and total recoverable nickel at Section 1, Chapter NR 105, Table 2; the revisions to the hardness ranges for acute aquatic life criteria for copper and nickel at Section 2, NR 105, Table 2A; the revisions to the chronic aquatic life criteria for endrin and selenium at Section 3, Chapter NR 105, Table 5; and the revisions to the chronic aquatic life criterion for total recoverable copper and nickel at Section 4, Chapter NR 105, Table 6.

EPA is unable to act on Wisconsin's revised chronic selenium criteria for "Limited Forage Fish" Section 3, Chapter NR 105, Table 5, at this time. Unlike the revised chronic selenium criteria that Wisconsin adopted for other aquatic life uses expected to have fish species present, Wisconsin calculated this criterion based on toxicity studies that exposed test organisms to selenium through the water column. Currently available data indicate that toxicity to fish occurs as a result of dietary exposure to selenium. Consequently, a water column exposure-based criterion may not protect aquatic life uses for Limited Forage Fish waters. EPA's national selenium criterion is currently under review. EPA will act on this criterion once EPA finalizes its aquatic life criteria recommendations for selenium.

Consistent with section 7 of the ESA and federal regulations at 50 CFR Part 402, EPA is required to consult with FWS on any action that may affect federally-listed threatened and endangered species. EPA's approval of new and revised State water quality standards under section 303 of the CWA is an action requiring consultation. EPA has initiated, but not completed, informal consultation with FWS regarding these amendments to Wisconsin's surface water quality rules for aquatic life. EPA's approval of the aquatic life criteria revisions is, therefore, subject to the results of the consultation under section 7(a)(2) of the ESA. EPA's approval of the human health criteria is not subject to consultation under the ESA since EPA lacks discretion to alter this approval based on effects on listed species.

EPA has concluded that proceeding with approval of Wisconsin's aquatic life criteria revisions pending completion of consultation is consistent with section 7(d) of the ESA. EPA's approval decisions do not foreclose either the formulation by FWS, or the implementation by EPA, of any alternatives that might be determined in the consultation to be needed to comply with section 7(a)(2). By approving the standards subject to the results of consultation under section 7(a)(2) of the ESA, EPA has explicitly stated that it retains its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. Moreover, EPA has included in the record the basis for the conclusion that approval of the state's water quality standards revisions will not result in any impacts of concern prior to the conclusion of consultation.

If you have any questions regarding this letter, please do not hesitate to contact me at (312) 353-2147, or Francine Norling of my staff at (312) 886-0271.

Sincerely,

Tinka G. Hyde
Director, Water Division

cc: Louise Clemency, USFWS, Green Bay Field Office
Bob Masnado, WNDR

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 21, 2009

Ms. Tinka Hyde, Director, Water Division
U.S. EPA, Region V
77 W. Jackson Boulevard
Chicago, IL 60604

Subject: Request for Approval of Revisions to Chapter NR 105, Wisconsin Administrative Code

Dear Ms. Hyde:

In accordance with s. 281.15 of the Wisconsin Statutes and Chapter 40, Part 131 of the Code of Federal Regulations, the Department requests U.S. EPA, Region V to approve revisions to ch. NR 105 (Surface Water Quality Criteria and Secondary Values for Toxic Substances) of the Wisconsin Administrative Code. The changes to ch. NR 105 included revisions of water quality criteria for sixteen substances and new criteria for two others.

To assist your staff during their review, relevant background information pertaining to this code change has already been submitted to David Pfeifer of the Region V office. The proposed code change went to public hearing in January of 2008, and was approved by the Natural Resources Board on June 24, 2008. The Wisconsin Assembly held a hearing on August 20, 2008, at which time no objections were received from the Senate nor the Assembly. As a result, the new rules were published in the Wisconsin Administrative Register on November 30, 2008 and were effective on December 1, 2008.

We appreciate your consideration of this request. Should you have further questions regarding this matter, please contact Jim Schmidt at (608) 267-7658.

Sincerely,

Todd L. Ambs, Administrator
Division of Water

Attachment:
Certification from State Attorney General – Dated December 22, 2008

e-cc
Russ Rasmussen - WT/3
Jim Schmidt – WT/3
Robin Nyffeler – LS/8
Robert Masnado - WT/3
David Pfeifer - EPA, Region V

CY1
3/18/09
S

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
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March 17, 2009

Francine Norling
US EPA Region V, Water Division
77 West Jackson Blvd
Chicago, IL 60604-3590

Dear Ms. Norling:

Here is the Attorney General certification statement regarding the rule revisions to Wisconsin's toxics criteria. Please include this certification statement with the other materials submitted to the USEPA regarding Wisconsin's toxics revisions.

If you have any questions or need other information under 40 CFR 131.6 for USEPA's review of the revised criteria, please contact James W. Schmidt at 608-267-7658. Thank you.

Sincerely

Robin T. Nyffeler
Bureau of Legal Services
Department of Natural Resources

CC: Jim Schmidt – WT/3
Bob Masnado – WT/3

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 22, 2008

Lynn Buhl
Regional Administrator
United States Environmental Protection Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Re: Certification of Proper Adoption of Revisions to Wisconsin's Toxic Criteria

Dear Ms. Buhl:

On December 1, 2008, the Wisconsin Department of Natural Resources promulgated revised criteria for toxics. The revised criteria are established in chapter NR 105, Wisconsin Administrative Code. Pursuant to 40 CFR 131.6(e), the Department has asked that I certify to you that these revisions were duly adopted pursuant to Wisconsin law.

The revisions to the criteria in chapter NR 105 of the Wisconsin Administrative Code were promulgated in conformance with the rule-making procedures set forth in chapter 227 of the Wisconsin Statutes. The Department published a hearing notice in the Wisconsin Administrative Register and held public hearings on January 3, 7 and 14, 2008. The revised rules were approved and adopted by the Wisconsin Natural Resources Board on June 24, 2008 and transmitted to the Legislature. The Wisconsin Assembly held a hearing on August 20, 2008 and neither the Senate nor Assembly objected to the rules. The rules were published in the Wisconsin Administrative Register on November 30, 2008 and were effective on December 1, 2008.

I certify that the rules revisions that modified the toxics criteria were adopted in accordance with procedures under state law.

Sincerely,

J.B. Van Hollen

J.B. Van Hollen
Attorney General

JBVH:PKW:drm

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 30 2004

REPLY TO THE ATTENTION OF: WQ-16J

Scott Hassett, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Hassett:

On April 6, 2004, the United States Environmental Protection Agency (USEPA) received your letter transmitting Wisconsin's revised water quality standards at Chapters NR 102, 104, 105, 106, and 210 of the Wisconsin Administrative Code. The revised water quality standards included revisions to the total ammonia nitrogen acute and chronic standards at NR 105.05 and NR 105.06, respectively. The revised rules were adopted by the Wisconsin Natural Resources Board on October 23, 2003. They were published in the Wisconsin Administrative Register in February 2004, became effective on March 1, 2004, and were certified by the Wisconsin Attorney General in a letter to USEPA on April 27, 2004.

The revisions to NR 106 and 210 pertain to the calculation of water quality-based effluent limits in Wisconsin Pollutant Discharge Elimination System (WPDES) discharge permits. Consequently, these provisions are subject to the oversight provisions of Section 402 of the Clean Water Act (CWA) and Federal regulations at 40 CFR 123.62. This letter addresses only those provisions of Wisconsin's water quality standards (NR 102, 104 and 105) subject to review and approval by USEPA under Section 303 of the CWA and Federal regulations at 40 CFR 131.21.

As specified in the Federal regulations at 40 CFR 131.21, USEPA is required to review and approve new and revised State water quality standards. USEPA has reviewed the information submitted by the Wisconsin Department of Natural Resources (WDNR) in support of the revised rule, and determined that Wisconsin's revisions comply with the requirements of Section 303(c) of the CWA, and Federal regulations at 40 CFR 131. USEPA also reviewed the information provided by the WDNR and determined that Wisconsin's revisions comply with the procedural requirements of Federal regulations at 40 CFR 131.20. Finally, as stated previously, the revised rules were certified as to legality by the Wisconsin's Attorney General's office in a letter dated April 27, 2004.

Consistent with Section 7 of the Endangered Species Act (ESA) and Federal regulations at 50 CFR Part 402, USEPA is required to consult with the United States Fish and Wildlife Service (USFWS) on any action that may affect Federally-listed threatened and endangered species.

Pursuant to the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (the "MOA") governing consultation with USFWS, the approval of new and revised State water quality criteria under Section 303 of the CWA is an action requiring consultation. USEPA and the Services have recently entered into consultations at the national level on the CWA 304(a) criteria recommendations (66 Fed. Reg. 11202; February 22, 2001). Since USEPA and the Services have entered into informal consultation on the national 304(a) criteria, USEPA may proceed with approving State-adopted water quality criteria that are identical to or more stringent than USEPA's guidance, subject to the completion of the national 304(a) consultations.

Wisconsin adopted acute and chronic ammonia nitrogen water quality criteria to reflect Wisconsin fish species and stream classifications. The Wisconsin criteria are identical to or more stringent than the USEPA's 1999 ammonia criteria for the following equivalent use classifications: **Acute Criteria;** Cold Water Category 1&4 (salmonids present), Warm Water Sport Fish, Warm Water Forage, and Limited Forage Fish (salmonids absent). **Chronic Criteria;** Cold Water (all periods), Warm Water Sport Fish and Warm Water Forage Fish (periods with Early Life Stages Present), Warm Water Sport Fish and Warm Water Forage Fish (periods with Early Life Stages Absent).

For lower quality waters (Limited Forage Fish and Limited Aquatic Life), the WDNR calculated ammonia criteria based on species expected to be present in waters that fall into these use classifications. USEPA has determined that the procedures used by the WDNR for this recalculation are consistent with the USEPA's *Guidelines for Deriving Water Quality Criteria for the Protection of Aquatic Life (1985)* and the criteria derived by WDNR provide adequate protection of aquatic life in these waters.

USEPA approves Wisconsin's revisions to its water quality standards at NR 102, 104 & 105 pursuant to Section 303(c) of the CWA and Federal regulations at 40 CFR 131.21, subject to the results of consultations under Section 7 of the ESA and the conditions noted below. As such, the national consultation on ammonia will provide Section 7 coverage for USEPA's approval of the ammonia nitrogen water quality criteria at NR 105 that are equal to or more stringent than USEPA's criteria recommendations. Consultation on Wisconsin's ammonia criteria for Limited Forage Fish and Limited Aquatic Life waters is not needed, as USEPA has determined that approval of this criteria will have no effect on listed species (see Enclosure for detailed discussion). USEPA 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, and has included in the record the basis for the conclusion that there are not impacts of concern during the interim period until the consultation is completed (Clean Water Act and Endangered Species Memorandum of Agreement Oversight Panel, April 23, 2004) (see Enclosure).

Wisconsin's revised water quality criteria contained in 105.06, Table 2C include five categories

of cold water aquatic life uses. Wisconsin's criteria for categories one and four are identical to USEPA's criteria recommendations and are hereby approved. Categories two, three and five are intended to be implemented on a site-specific basis based on information provided by a permittee for a specific waterbody. As such, consistent with Wisconsin's rules at NR 105.02(1), implementation of these categories for specific waterbodies in Wisconsin constitute site-specific criterion modifications subject to review and approval by USEPA in accordance with Section 303(c) of the CWA and 40 CFR 131.21.

If you have any questions regarding this action, please contact me, or either Tom Poleck or Candice Bauer of my staff. Mr. Poleck can be reached at (312) 886-0217 and Ms. Bauer at (312) 886-4012.

Sincerely yours,

for Jo Lynn Traub
Director, Water Division

Enclosure

cc: Janet Smith, USFWS, Green Bay Ecological Services Office
Todd Ambs, WDNR
Duane Schuettpelz, WDNR
Rick Reichardt, WDNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF: WQ-16J

MEMORANDUM

DATE: SEP 30 2004

SUBJECT: Endangered Species Act Section 7(d) Determination for EPA's Approval of Revisions to Wisconsin's Revised Ammonia Nitrogen Water Quality Standards Rule at Chapters NR 104, 105, 106, and 210 of the Wisconsin Administrative Code[1]

FROM: Linda Holst, Chief
Water Quality Branch
Dm for L.H. 9/30/04

TO: The Record

This memorandum documents the U.S. Environmental Protection Agency's (EPA) determination that EPA's decision to approve Wisconsin's ammonia nitrogen water quality standards at Chapters NR 104 and 105 of the Wisconsin Administrative Code subject to the results of consultation under Section 7 of the Endangered Species Act (ESA) is consistent with section 7(d) of the ESA.

Section 7(a)(2) requires that federal agencies, in consultation with the Services, insure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. Upon initiation of consultation, Section 7(d) of the ESA prohibits irreversible or irretrievable commitments of resources that have the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would not violate Section 7(a)(2) of the ESA. To this end, EPA should include in the record an evaluation of the anticipated effects of the approval action on listed species and the basis for the conclusion that there are not impacts of concern during the interim period until the consultation is completed (see the April 23, 2004 memo, "*National Consultation on 304(a) Recommended Criteria for Ammonia*" from the U.S. EPA, the U.S. FWS, and the U.S. NMFS, (the "Ammonia Memo")).

Consistent with Section 7 of the ESA and Federal regulations at 50 CFR Part 402, USEPA is

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[1] This memorandum only pertains to the revisions to NR 104 & 105. The revisions to NR 106 and 210 pertain to the calculation of water quality-based effluent limits in Wisconsin Pollutant Discharge Elimination System (WPDES) discharge permits. Consequently, these provisions are subject to the oversight provisions of section 402 of the Clean Water Act (CWA) and Federal regulations at 40 CFR 123.62. This letter addresses only those provisions of Wisconsin's water quality standards (NR 102, 104 and 105) subject to review and approval by USEPA under section 303 of the CWA and Federal regulations at 40 CFR 131.21.

required to consult with the United States Fish and Wildlife Service (USFWS) on any action that may affect federally-listed threatened and endangered species. Pursuant to the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* (the "MOA") governing consultation with USFWS, the approval of new and revised State water quality criteria under Section 303 of the CWA is an action requiring consultation. USEPA and the Services have recently entered into consultations at the national level on the CWA 304(a) criteria recommendations (66 Fed. Reg. 11202; February 22, 2001). Since USEPA and the Services have entered into informal consultation on the national 304(a) criteria, USEPA may proceed with approving State-adopted water quality criteria that are identical to or more stringent than USEPA's guidance, subject to the completion of the national 304(a) consultations (see the "Ammonia Memo").

Wisconsin adopted acute and chronic ammonia nitrogen water quality criteria to reflect Wisconsin fish species and stream classifications. The Wisconsin criteria are identical to or more stringent than the USEPA's 1999 ammonia criteria for the following equivalent use classifications: **Acute Criteria:** Cold Water Category 1&4 (salmonids present), Warm Water Sport Fish, Warm Water Forage, and Limited Forage Fish (salmonids absent). **Chronic Criteria:** Cold Water (all periods), Warm Water Sport Fish and Warm Water Forage Fish (periods with Early Life Stages Present), Warm Water Sport Fish and Warm Water Forage Fish (periods with Early Life Stages Absent).

For lower quality waters (Limited Forage Fish and Limited Aquatic Life), the WDNR calculated ammonia criteria based on species expected to be present in waters that fall into these use classifications. USEPA has determined that the procedures used by the WDNR for this recalculation are consistent with the USEPA's *Guidelines for Deriving Water Quality Criteria for the Protection of Aquatic Life (1985)* and the criteria derived by WDNR provide adequate protection of aquatic life in these waters.

USEPA approves Wisconsin's revisions to its water quality standards at NR 102, 104 & 105 pursuant to Section 303(c) of the CWA and Federal regulations at 40 CFR 131.21, subject to the results of consultations under Section 7 of the ESA and the conditions noted below. As such, the national consultation on ammonia will provide Section 7 coverage for USEPA's approval of the ammonia nitrogen water quality criteria at NR 105 that are equal to or more stringent than USEPA's criteria recommendations. Consultation on Wisconsin's ammonia criteria for Limited Forage Fish and Limited Aquatic Life waters is not needed, as USEPA has determined that approval of this criteria will have no effect on listed species (see detailed discussion below). USEPA 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, and has included in the record the basis for the conclusion that there are not impacts of concern during the interim period until the consultation is completed (see "Ammonia Memo"). By approving the standards "subject to the results of consultations under Section 7 of the Endangered Species Act

(ESA)," EPA has explicitly stated that it retains its discretion to take appropriate action if the consultation identifies deficiencies in the standards requiring remedial action by EPA. EPA retains the full range of options available under Section 303(c) of the CWA for ensuring water quality standards are environmentally protective.

Wisconsin's revised water quality criteria contained in 105.06, Table 2C include five categories of cold water aquatic life uses. Wisconsin's criteria for categories one and four are identical to USEPA's criteria recommendations and were approved. Categories two, three and five are intended to be implemented on a site-specific basis based on information provided by a permittee for a specific waterbody. As such, consistent with Wisconsin's rules at NR 105.02(1), implementation of these categories for specific waterbodies in Wisconsin constitute site-specific criterion modifications subject to review and approval by USEPA in accordance with Section 303(c) of the CWA and 40 CFR 131.21.

The rest of this document provides information to support the USEPA's determination that approval of the revisions of Wisconsin's ammonia nitrogen water quality standard at NR 104 & 105 pending completion of ESA consultation will not lead to impacts of concern while the consultation is underway.

Analysis of Impacts of Concern

In making its decision to approve Wisconsin's revised ammonia criteria submission subject to the results of the national consultations, EPA Region 5 evaluated whether or not the approval was likely to result in impacts of concern on federally-listed species or their critical habitat. Since the water quality standards revision in question affect the surface water quality criteria for ammonia, only listed aquatic species are likely to be affected by these revisions. Of the listed aquatic species, recently published information suggests that mussels are "sensitive to ammonia relative to other invertebrates and fishes"(Augspurger et al. 2003)[2]. For this reason, our analysis focused on the effect of the approval on listed freshwater mussels (Table 1). This analysis compared available water quality information in the vicinity of extant populations of listed mussel species (U.S. Fish and Wildlife Service Recovery Plans and U.S. FWS, pers. comm.) to screening values derived utilizing a data set in which mussels are well represented (CMC_{FM} in Augspurger et al. 2003, as modified by C. Bauer). We used the CMC_{FM} and CCC_{FM} (Augspurger et al. 2003) as acute and chronic screening values, or approximations of the ammonia concentration that may protect mussels from ammonia toxicity, in the absence of a determination by the national consultation.

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[2] Augspurger, T., Keller, A.E., Black, M.C., Cope, W.G., and Dwyer, F.J. 2003. *Water Quality Guidance for Protection of Freshwater Mussels (Unionidae) from Ammonia Exposure.* Environmental Toxicology and Chemistry, Vol. 22, No. 11, pp. 2569-2575.

Table 1. Listed freshwater mussels in Wisconsin and the approximate location of extant populations.

Species	Waterbody	Segments of Interest
Higgins' eye pearlymussel	Lower Wisconsin River	Crawford, Grant, Iowa, Pierce, Richland and Sauk Counties
Higgins' eye pearlymussel	St. Croix River	Pierce, Polk and St. Croix Counties
Higgins' eye pearlymussel	Mississippi River	Buffalo, Crawford, Grant, LaCrosse, Pierce, Trempealeua and Vernon Counties
Winged mapleleaf mussel	St. Croix River	Polk County

Description of Augspurger CMC_{FM} calculation:
Region 5 utilized the CMC_{FM} calculated by Augspurger et al. (2003) that included acute ammonia toxicity tests for juvenile and adult mussel life stages (Augspurger et al. 2003)[3] as a screening value that approximate the water quality conditions that protect mussels from acute ammonia exposures over a range of pH values (ranging from approximately 11 mg N/L at pH=7 to 0.4 mg N/L at pH=9).

Augspurger et al. (2003) estimated that a chronic ammonia criteria (CCC_{FM}) that would be protective of mussels (at pH = 8 and temperature = 25°C) would likely be between 0.3 and 0.7 mg N/L ammonia. The Augspurger CCC_{FM} is an estimate of the ambient concentration of ammonia below which chronic effects should not occur. It is an estimate because it was calculated using an acute to chronic ratio, a procedure in which the known ratio of acute to chronic endpoint levels for organisms with both acute and chronic data are applied to the overall acute screening value to estimate a chronic screening value. When the chronic screening value is used to evaluate ambient data, average, rather than maximum pH is used because of the longer exposure period associated with chronic toxicity. In Wisconsin waters with listed mussels, average pH over the year is approximately 8[4]. While these waters could on occasion reach temperatures slightly greater than 25°C, our calculations for these waterbodies indicate that average summertime temperatures (specifically, the highest monthly median temperature calculated at 17 sites) are generally around 24-25°C (range: 20.2°C in Pine River near Richland Center to 25.3°C by the Mississippi River Lock & Dam #9). 25°C is also used by the WDNR as a default value in their regulation calculations for all streams in the summer. As such, the

[3] The authors miscalculated the GMAV for *Lampsilis*, so the corrected value of 4.85 was utilized to determine a corrected Augspurger CMC_{FM} value of 2.57 at pH=8.

[4] Average pH for all of the monitoring data used in this analysis for the waters where listed mussels are located was 8.0 (398 samples from 17 sites). See Table 4.

Augspurger CCC_{FM} estimate or 0.3-0.7 mg N/L can serve as an estimate of the levels of ammonia, that if not exceeded, will protect mussels from chronic ammonia toxicity in the summer, when the potential for ammonia toxicity is greatest (see 1999 Update of Ambient Water Quality Criteria for Ammonia).

Any further extrapolation of the data presented in Augspurger et al. (2003) to the levels of ammonia needed to ensure the protection of mussels (or in this case, listed mussels) is best completed through the joint national consultation and review of EPA's ammonia criteria recommendations which is currently underway (Clean Water Act and Endangered Species Memorandum of Agreement Oversight Panel, April 23, 2004)

Change in acute and chronic ammonia criteria over a range of pH and temperature: Acute and chronic ammonia criteria are expressed by equations in Wisconsin's regulations (see NR 105.05 and NR 105.06) that take into account the effect of temperature and pH on ammonia toxicity. The new Wisconsin acute criteria for their major aquatic life use categories are presented in Tables 2. Table 3 contains similar data for Wisconsin's chronic ammonia criteria.

Table 2. Wisconsin's new acute total ammonia nitrogen criteria (mg N/L) over a range of pH.

pH –>	6.5	7.0	7.5	8.0	8.5	9.0
Cold Water Category 1 & 4[(1)]	32.61	24.11	13.28	5.62	2.14	0.88
Cold Water Category 2 & 3[(2)]	40.64	30.01	16.59	7.01	2.67	1.11
Cold Water Category 5, Warm Water Sport Fish, Warm Water Forage, and Limited Forage Fish[(3)]	48.73	35.99	19.89	8.41	3.20	1.32

(1) Identical to USEPA's 1999 salmonid present CMC
(2) More stringent than USEPA's 1999 salmonid absent CMC
(3) Identical to USEPA's 1999 salmonid absent CMC

Table 3. Wisconsin's chronic ammonia criteria over a range of pH and temperature.

30-day CCC in mg/L @ pH of:	7.5	8.0	8.5
Cold Water (all periods), Warm Water Sport Fish (ELS[1] Present) and Warm Water Forage Fish (ELS Present):[2]			
@ 25° C	2.22	1.24	0.55
@ 14.5° C or less	4.36	2.43	1.09
Warm Water Sport Fish (ELS Present), and Warm Water Forage Fish (ELS Absent):[3]			
@ 25° C	2.22	1.24	0.55
@ 7° C or less	7.09	3.95	1.77
Limited Forage Fish (ELS Present):			
@ 27° C or less	5.54	3.09	1.38
Limited Forage Fish (ELS Absent):			
@ 25° C	6.69	3.73	1.67
@ 7° C or less	21.34	11.90	5.33

(1) ELS = Early Life Stages
(2) Identical to USEPA's 1999 early life stages present chronic criteria
(3) Identical to USEPA's 1999 early life stages absent chronic criteria

Ambient water quality information:

Total ammonia nitrogen data (mg N/L) were obtained from 17 ambient water quality monitoring stations on waters with extant listed mussel populations for 1996-2001 (from STORET). Wisconsin and Minnesota station identification numbers and location descriptions can be found in Table 4.

Results for ambient water quality analysis:
A total of 424 ambient water monitoring records of ammonia concentrations and corresponding pH values were obtained for these 17 locations. Average ammonia concentrations and pH for each station are summarized in Table 4. Comparison of the ammonia concentrations in this data set to the Augspurger CMC_{FM}, determined using the corresponding recorded ambient pH at the site, indicated that ambient concentrations of ammonia did not exceed the Augspurger CMC_{FM}. While analysis of this data set indicates that maximum ambient ammonia concentrations and pH can be higher than the average for a site (1.39 mg N/L and pH 8.85, St. Croix River, Lake St. Croix, Mid Channel 2 - see Table 4), generally high levels of ammonia and high pH do not co-occur (the sample with 1.39 mg Ammonia-N/L had a pH of 7.23).

Ambient concentrations of ammonia in areas where we analyzed ambient water quality monitoring information (from 1996 - 2001) are below a level that Augspurger et al. (2004)

estimated to cause acute toxicity to freshwater mussels (i.e., the Augspurger CMC_{FM}). Additionally, fewer than 0.5% of the total ammonia concentrations in the ambient water quality data assessed in this determination were greater than the estimated Augspurger CCC_{FM} of 0.7 mg/l. Even if the more stringent low end of the 0.3 - 0.7 range is used (i.e., 0.3 mg/l) only 6% of the ambient ammonia concentrations were greater. Based on this analysis, it is not likely that listed mussels experience acute or chronic ammonia toxicity (as estimated by Augspurger et al. 2003), because ammonia concentrations are variable over time and are not likely to be sustained at high levels over the appropriate averaging period (30 days). Elevated ammonia concentrations over a 30-day period are unlikely to occur in the areas what we analyzed with listed mussels during the summer period, when aquatic life is most sensitive to the effects of ammonia, because of the high biological uptake and transformation of ammonia in surface waters at this time of year.

Table 4. Average ammonia, pH and temperature at each monitoring station calculated using ambient water quality monitoring data from STORET as reported by Wisconsin and Minnesota from 1996-2001.

				Ammonia				pH			Temperature		
County, State	Waterbody	Station ID	Agency	Average (mg N/l)	Max (mg N/l)	Assoc pH(2)	n(3)	Avg	Max	n	Avg (°C)	Max (°C)	Highest Average (°C)(4)
St. Croix, WI	St. Croix R., Lake St. Croix Mid Channel 1	563097	WDNR	0.16	0.63	6.86	45	7.61	8.81	48	17.8	27.8	21.6
St. Croix, WI	St. Croix R., Lake St. Croix Mid Channel 2	563098	WDNR	0.18	1.39	7.23	41	7.63	8.85	33	19.0	28.9	21.6
Washington, MN	St. Croix R., from RR bridge at Hudson, WI	SC-17	MPCA	0.07	0.11	8.00	9	7.85	8.40	8	12.1	23.5	23.5
Washington, MN	St. Croix R., downstream of MN-212 bridge in Stillwater	SC-23	MPCA	0.05	0.10	8.10	9	7.96	8.60	8	11.8	24.0	24.0
Dakota, MN	Miss. R. , at Lock & Dam #2 at Hastings	UM-815	MPCA	0.14	0.54	8.00	17	8.31	8.70	17	13.5	26.0	24.3
Pierce, WI	Miss. R., at Lock & Dam #3 Redwing, MN	483027	WDNR	0.13	0.44	7.60	36	7.88	8.60	35	10.6	26.5	25.6
Buffalo, WI	Miss. R. , at Lock & Dam #4 at Alma	63029	WDNR	0.08	0.37	7.20	36	7.80	8.60	34	10.6	26.0	25.0
Buffalo, WI	Buffalo R. near Alma - to Miss. R.	63001	WDNR	0.09	0.29	6.80	38	7.77	8.70	39	10.6	26.0	23.3
Trempealeau, WI	Black R. near Galesville - to Miss. R.	623001	WDNR	0.06	0.33	7.40	66	7.60	8.74	105	10.5	28.0	22.7
Winona, MN	Miss. R., at Lock & Dam #5, 3 miles SE of Minneiska	UM-738	MPCA	0.06	0.13	8.00	8	8.31	8.70	8	13.2	25.5	25.5
Winona, MN	Miss. R., at Lock & Dam #6 at Trempealeau, WI	UM-714	MPCA	0.06	0.17	7.90	8	8.24	8.80	8	15.5	25.5	25.3
Houston, MN	Miss. R. under US-14 bridge at LaCrosse, WI	UM-698	MPCA	0.07	0.18	7.70	8	8.26	8.90	8	13.1	25.5	25.5
Vernon, WI	Miss. R., Lock & Dam #8 at Genoa	633038	WDNR	0.09	0.35	7.60	40	8.05	9.20	36	12.3	26.9	25.7
Vernon, WI	Miss. R., Victory Wisc. Pool 9	633082	WDNR	NA	NA	NA	NA	8.29	9.30	26	18.5	26.2	24.2
Crawford, WI	Miss. R., Lock & Dam #9	123016	WDNR	0.10	0.32	7.60	40	7.99	9.10	38	12.6	27.1	26.3
Richland, WI	Pine R. at STH 14, Richland Center - to Wisconsin R.	533029	WDNR	0.04	0.08	8.28	12	8.27	8.40	12	15.2	21.6	20.2
Iowa, WI	Avoca Lake near Wisconsin R.	253167	WDNR	0.02	0.05	7.70	11	8.27	8.78	11	20.5	24.7	NA

(1) WDNR = Wisconsin Department of Natural Resources, MPCA = Minnesota Pollution Control Agency
(2) pH associated with the maximum ammonia obtained from all sample results.
(3) n = number of samples
(4) Highest average for the years analyzed of all calculated monthly averages. Other values based on the average or maximum of all individual sample results.

Summary of National Pollutant Discharge Elimination System (NPDES) Permitting:

WDNR must insure that state-issued NPDES permits authorizing discharges of ammonia comply with all applicable water quality standards consistent with 40 CFR 122.44(d). As such, permitted discharges authorized by the WDNR must limit levels of ammonia discharge through the inclusion of permit limits when there is a reasonable potential for a discharge to exceed the ammonia criteria as set forth in chs. NR 102 to 105 after mixing in accordance with NR 106, Subchapter IV. According to NR 106.06(3)(c), effluent limitations shall equal the final acute value as determined in NR 105.05 or the secondary acute value as determined in NR 105.05(4). These values may be exceeded within the 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 mixing of the effluent with the receiving water in the zone of initial dilution is rapid and meet six conditions that require extensive mixing zone analyses. The WDNR also determines on a case-by-case basis the appropriate monitoring frequencies required for ammonia in permits (NR 106.32). In addition to the water quality based effluent limitations for ammonia, the WDNR may establish whole effluent toxicity (WET) testing requirements and limitations pursuant to NR 106.08 and 106.09. For example, WET testing is required if existing aquatic life toxicity test data indicate a potential for an effluent from a point source discharge to adversely impact the receiving water aquatic life community (NR 106.08(2)(a)). These provisions, applied properly, would serve to minimize any potential impacts of dischargers on listed species.

Questions regarding the implementation of Wisconsin's water quality standards at NR 102 to 105 or application of mixing provisions in NR 106.06 in individual NPDES permits should be addressed on a case-by-case basis at the time the permit is being issued or renewed. When available, site-specific information (knowledge of the discharge concentrations, mixing characteristics of the area, and proximity to mussel beds) should be evaluated when permits are written or renewed to help assess if any potential impacts of concern to listed species are likely. If site-specific information is available, this information should be presented to WDNR for consideration in their permit issuance decisions. In any situation where a party has questions regarding proper application of Wisconsin's water quality standards in a permit or the likelihood that a permitted discharge will lead to impacts of concern to listed species prior to completion of consultation, this issue should be identified to WDNR as expeditiously as possible, and no later than five working days prior to the close of the public comment period on the draft permit[5]. If issues on a permit are identified to WDNR and USEPA by USFWS within this time frame, USEPA will work with WDNR and USFWS to resolve these issues in accordance with the permit coordination procedures in the MOA.

To facilitate future analysis of the impacts of concern of individual NPDES discharges on listed

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[5] As described in the "Coordination Procedures Regarding Issuance of State or Tribal Permits" section of the MOA.

mussels in Wisconsin, USEPA worked with the WDNR to identify ammonia discharges in the vicinity (within approximately 5 miles) of areas with extant listed mussel populations[6]. Additional information on these identified discharges was also gathered from Envirofacts/PCS and WDNR (see Appendices A and B). We believe that the information in Appendices A and B can be used to prioritize future efforts to evaluate the potential for these discharges of ammonia to lead to impacts of concern on extant populations of listed species in Wisconsin. Such analysis on these or other permits should occur, as needed, at the time when individual permits are renewed.

Analysis of Limited Forage Fish and Limited Aquatic Life Use Classifications

The Wisconsin water quality regulations (NR 102.04(3)(d)) contain a use category called Limited Forage Fish Communities (Intermediate Surface Waters). "This subcategory includes surface waters of limited capacity and poor water quality or habitat. These surface waters are capable of supporting only a limited community of forage fish or other aquatic life". NR 102.04(3)(e) defines Limited Aquatic Life (Marginal surface waters) as: "This subcategory includes surface waters of severely limited capacity and naturally poor water quality or habitat. These surface waters are capable of supporting only a limited community of aquatic life". USEPA has determined that the adopted ammonia criteria for these waters will have no effect on listed species, primarily due to the fact that none of the waterbodies with listed mussels are designated as these lower quality use categories. Specifically, the St. Croix River is designated as Cold Water use, and the lower Wisconsin River and the Mississippi River are designated as Warm Water Sport Fish use.

Where any of these LFF or LAL waterbodies have any type of connection to waters with listed mussel populations (i.e., the Mississippi River, St. Croix River, and Lower Wisconsin River), it is likely that there are several branches, creeks, rivers and other tributaries between the mussel locations and the LFF or LAL waterbodies. In the case that a waterbody with a less stringent criteria directly discharges to a waterbody with listed mussel species, these connecting waterbodies must all meet the more stringent aquatic life use ammonia criteria (identical to USEPA's 1999 criteria recommendations) at the confluence with these higher use waters. In

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[6] The U.S. EPA's Permit Compliance System (PCS) was queried to identify all permittees that reported discharges of ammonia nitrogen (loadings > 0 between January 2000 and May 2004) in Wisconsin. Furthermore, all municipalities with the potential to discharge ammonia were identified. For most of the dischargers identified, no PCS data exists since these systems are either newly permitted for ammonia, are in the process of being permitted, or were determined to not need a permit based on the criteria of NR 106.05. Permit limits were obtained from the WDNR. Locations of listed mussels were obtained from the U.S. FWS Recover Plans for the Higgin's Eye Pearlymussel and the Winged Mapleleaf Mussel. GIS maps were created showing approximate locations of mussels and permittees as well as ambient sampling locations (discussed below). The list of permittees was refined to a final list of those that discharge or have the potential to discharge ammonia within 5 miles of extant listed mussel populations (see Table 5). Permitted discharges within approximately 5 miles of identified mussel populations were considered to take into account the uncertainty associated with the location of endangered mussels (i.e., more listed mussels may be present in the vicinity of the known location) and to encompass a sufficiently large area to ensure that actions taken that could increase ammonia concentrations can be assessed for their potential to affected listed species.

addition, given the volume and flow of these waterbodies, sufficient mixing, dilution, uptake, and/or transformation of ammonia would occur such that there will be no effect of the LFF or LAL criteria on listed species. As such, we have determined that Wisconsin's LFF and LAL ammonia criteria will have no effect on listed species and no consultation is required.

Analysis of Waters Impaired Due to Ammonia

Based on the State's most recent 303(d) list (from 2002) and by searching EPA's Enviromapper web site (`http://www.epa.gov/waters/enviromapper/`), only three waterbodies are listed as impaired for ammonia and these waterbody are not located near any extant listed mussel populations (see Table 7). Only one, Honey Creek, is upstream from any listed mussel locations and this segment is over 50 miles upstream. Therefore, implementation of TMDL's for ammonia will not take place in waters where listed species are present and will not lead to impacts of concern while consultation are underway.

Table 7. Wisconsin waterbodies determined to be impaired with ammonia as a listed pollutant from Wisconsin's 2002 303(d) list.

Waterbody Name	State Basin Name	County	Priority	State List ID	Stream Miles	Pollutant	Impairment
Dutchman Creek	Lower Fox	Brown	Medium	WI12160037	0-7	Ammonia, Phosphorous	Aquatic toxicity, DO
Honey Creek (dwn White Mound Lake)	Lower Wisconsin	Sauk	Medium	WI125390048	1	Ammonia, BOD, temp.	Aquatic toxicity, DO, temp.
Livingston Branch	Sugar Pecatonica	Iowa	Low	WI932700547	0-11	Ammonia, phosphorous, BOD	Aquatic toxicity, DO

Conclusion

EPA's current water quality criteria guidance for ammonia was determined absent toxicity data for unionid mussels. Recent work by Augspurger et al. (2003) makes it possible to derive screening values that approximate the acute and chronic levels of ammonia that would protect freshwater mussels from ammonia toxicity. Using screening values based on Augspurger et al. (2003) in the analyses described above, we have concluded that impacts of concern to listed species are unlikely to occur prior to the completion of the consultation. However, this conclusion can be reviewed on a case-by-case basis through the permit coordination procedure if issues on an individual permit are raised prior to the final issuance of a permit.

Further extrapolation of the data presented in Augspurger et al. (2003) to the protection of listed mussels is best completed through the national consultation process. The national consultations methodology includes an extensive literature search of aquatic toxicity data and a robust analysis of surrogate toxicity to identify an appropriate toxicity value for Federally-listed endangered and

threatened species. The use of a large surrogate data set and robust assessment protocol are necessary in accounting for variability between related species and taxa. At the conclusion of the national consultation, any activities identified as being necessary to comply with Section 7 (a)(2) of the ESA will be completed.

There are, moreover, substantial procedural and substantive safeguards to ensure that implementing activities that occur do not allow increased loadings that would cause impacts of concern to listed species pending completion of consultation. For example, NPDES permits are issued under the CWA for a five-year term, and increases in discharges of ammonia would not be authorized unless and until a permit was reissued or modified under the applicable procedures, which include public notice and comment, as well as permit coordination pursuant to the MOA (66 Fed. Reg. 11202; February 22, 2001).

Appendix A. Basic Facility information for identified permitted (for ammonia) dischargers within 5 miles of an extant listed mussel population.

NPDES #	FACILITY NAME	COUNTY NAME	PERMIT EXPIRE DATE	MUSSEL WATERBODY	RECEIVING WATER NAME	MAJOR / MINOR	INDUSTRIAL / MUNICIPAL
WISCONSIN FACILITIES							
WI0020974	Ferryville Wastewater Treatment Facility	Crawford	9/30/04	Mississippi River	Triburary, Sugar Creek--1 mi to Miss.	Minor	M
WI0036854	Valley Ridge Clean Water Commission WWTF	Crawford	9/30/04	Mississippi River	Mainstem, Mississippi River	Minor	M
WI0022276	Wauzeka Wastewater Treatment Facility	Crawford	9/30/04	Wisconsin River	Tributary, Kickapoo River	Minor	M
WI0029289	Kieler Sanitary District #1 WWTF	Grant	6/30/09	Mississippi River	Tributary, Sinnipee Creek	Minor	M
WI0003107	Milk Specialties Co., Inc.	Grant	12/31/06	Wisconsin River	Tributary, Crooked Creek	Minor	I
WI0060151	Avoca Wastewater Treatment Facility	Iowa	3/31/06	Wisconsin River	Tributary, Morrey Creek	Minor	M
WI0024261	Holmen Wastewater Treatment Facility	La Crosse	6/30/06	Mississippi River	Tributary, Halfway Creek	Minor	M
WI0029581	La Crosse, City of	La Crosse	6/30/04	Mississippi River	Sidechannel, Mississippi River	Major	M
WI0022403	Prescott Wastewater Treatment Facility	Pierce	6/30/04	Mississippi River	Mainstem, Mississippi River	Minor	M
WI0004201	WDNR St. Croix Falls Hatchery	St. Croix	12/31/06	St. Croix River	Mainstem, St. Croix River	Minor	M
WI0024279	Hudson Wastewater Treatment Facility	St. Croix	3/31/07	St. Croix River	Mainstem, St. Croix River	Minor	M

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Appendix B. Facility ammonia discharge and flow information for identified permitted (for ammonia) dischargers within 5 miles of an extant listed mussel population. Data from the U.S. EPA's Permit Compliance System (PCS) / Envirofacts (www.epa.gov/enviro) with additional data and verification from the WDNR.

NPDES #	FACILITY NAME	COUNTY NAME	PCS DATA	Max Ammonia Permit Limit (mg/l)	Maximum Ammonia-N (mg/l)[1]	Average Ammonia-N (mg/l)[1]	n[2]	Design Avg. Flow (MGD)	Waterbody 7Q10 (MGD)
WI0020974	Ferryville Wastewater Treatment Facility	Crawford	N	June-Oct. 11.0[3] Nov-May 6.4 April-May 2.6	NA	NA		0.01	4.65
WI0036854	Valley Ridge Clean Water Commission WWTF	Crawford	N	Calculated Limit = 52[3]	0.06	NA, application sample results < 0.06[3]	4	0.06	4,731.04
WI0022276	Wauzeka Wastewater Treatment Facility	Crawford	N	Calc. Limit daily = 40[3]	10.00	NA, application sample results from 8.3-10.0	4	0.05	100.83
WI0029289	Kieler Sanitary District #1 WWTF	Grant	N	10[3] (new permit limit)	NA	NA		0.09	0.00
WI0003107	Milk Specialties Co., Inc.	Grant	N	NA	<1	< 1		0.22	3.49
WI0060151	Avoca Wastewater Treatment Facility	Iowa	N	May-Oct. 2.1[3] Nov-Apr 20	NA	NA		0.06	0.90
WI0024261	Holmen Wastewater Treatment Facility	La Crosse	N	May-Oct 3.5[3] Nov-Apr 13.2	2.28	0.19	169	0.81	2.07
WI0029581	La Crosse, City of	La Crosse	N	Nov-Apr 29[3][4]	25.70	13.59	35	20.00	4,356.18
WI0022403	Prescott Wastewater Treatment Facility	Pierce	N	NA	5.20	NA, application results from 0.8-5.2	4	0.48	2,061.75
WI0004201	WDNR St. Croix Falls Hatchery	St. Croix	N	NA	0.50	NA, application results from 0.04-0.5	4	3.60	710.95
WI0024279	Hudson Wastewater Treatment Facility	St. Croix	N	NA	<0.5	<0.5		2.20	771.70

(1) Actual discharge monitoring levels presented where available; otherwise permit limits are presented.
(2) n = number of individual sample results
(3) Information from permit application.
(4) Calculated daily maximum value which is two times the calculated acute criteria. Limits based on chronic criteria were not used because of the large dilution potential.
NA = None Available

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

March 22, 2004

Thomas Skinner
Regional Administrator
USEPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Subject: Adoption of Water Quality Standards for Ammonia

Dear Mr. Skinner:

The Wisconsin Department of Natural Resources recently promulgated water quality standards for ammonia nitrogen by revising chapters NR 104, 105, 106, and 210 of the Wisconsin Administrative Code. The revised rules were approved and adopted by the Wisconsin Natural Resources Board on October 22, 2003. They were published in the Wisconsin Administrative Register in February 2004 and became effective on March 1, 2004. Enclosed is a copy of the order showing the revisions and the published chapters.

In accordance with 40 CFR 131.21, we are seeking your concurrence with the revised rules. As required by 40 CFR 131.6(e) the Department has asked the State Attorney General to certify that these revisions were duly adopted pursuant to Wisconsin law. This certification will be provided via separate correspondence.

If you have any questions, please contact Duane Schuettpelz, Bureau of Watershed Management, at 608-266-0156. We would like to thank your staff, especially David Pfeifer, for their assistance in developing the rule revisions.

Sincerely,

Scott Hassett
Secretary

Encl.

C: w/encl: Linda Hoist, Chief
Water Quality Branch, WQ-16J
USEPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

C: w/o encl: Duane Schuettpelz—WT/2; Rick Reichardt—WT/2

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

March 22, 2004

The Honorable Peggy A. Lautenschlager
Attorney General
Department of Justice
Room 114 East, State Capitol
Madison, WI 53702

Subject: Certification Letter to EPA

Dear Attorney General Lautenschlager:

The Department of Natural Resources is requesting approval from the U.S. Environmental Protection Agency (EPA) of our new ammonia rules. The new ammonia rules create a water quality standard for ammonia and establish implementation procedures for imposing water quality based effluent limits for ammonia in WPDES permits. Enclosed is a copy of the rule, which is comprised of revisions to chs. NR 104, 105, 106, and 210. As required by 40 CFR 131.6(e), we request that you submit a letter to EPA to certify that the rule was adopted in accordance with Wisconsin law. We have enclosed a suggested letter from your office to EPA. For your convenience we have also enclosed a disc containing a copy of the letter to facilitate placing it on your letterhead.

If you have questions, please contact Rick Reichardt, Bureau of Watershed Management (267-7894). Thank you for your assistance.

Sincerely,

Scott Hassett
Secretary

Encl.

SUGGESTED REPLY

Thomas Skinner
Regional Administrator
USEPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604

Subject: Certification of Proper Adoption of State Water Quality Standards for Ammonia

Dear Mr. Skinner:

The Wisconsin Department of Natural Resources recently promulgated rules creating a water quality standard for ammonia in the Wisconsin Administrative Code. The revised rules were approved and adopted by the Wisconsin Natural Resources Board on October 22, 2003. They were published in the Wisconsin Administrative Register in February 2004 and were effective on March 1, 2004. Pursuant to 40 CFR 131.6(e), entitled "Minimum requirements for water quality standards submission", the Department has asked that I certify to you that these revisions were duly adopted pursuant to Wisconsin law.

The revisions to chapter NR 104, NR 105, NR 106, and NR 210 of the Wisconsin Administrative Code, which were transmitted to you under separate cover, were conducted in conformance with the rule-making procedures set forth in chapter 227 of the Wisconsin Statutes. The Department published hearing notices and held four public hearings during July 15—22, 2003. After holding a hearing in front of the Senate Committee on the Environment and Natural Resources, the Wisconsin Legislature adopted the rule revisions.

I certify that the rule revisions to the Wisconsin Administrative Code creating a water quality standard for ammonia were adopted in accordance with state law.

Sincerely,

Peggy A. Lautenschlager
Attorney General

C: Linda Hoist, Chief
Water Quality Branch, WQ-16J
USEPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

8 2000

REPLY TO THE ATTENTION OF

W-15J

SEP 29 2000

RECEIVED

OCT 09 2000

OFFICE OF THE SECRETARY

Susan L. Sylvester, Administrator
Division of Water
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Dear Ms. Sylvester:

On June 22, 2000, the United States Environmental Protection Agency (USEPA) received a request from George Myers for review and approval of Wisconsin's new water quality standards for chlorides. Wisconsin Attorney General certification of the chloride water quality standards was received on July 7, 2000. The revisions to Wisconsin's rules submitted for review and approval include the following: addition of an acute criterion of 757 mg/L for chloride for the protection of aquatic life to Table 1 of Chapter NR 105; addition of a chronic criterion for chloride of 395 mg/L for the protection of aquatic life to Table 5 of Chapter NR 105; addition of a new subchapter containing procedures for regulating chloride discharges to surface waters, including a chloride-specific variance procedure, to Chapter NR 106; and, addition of chloride to the list of nonconventional pollutants in Chapter NR 215. Wisconsin also revised Chapter NR 211 to broaden the authority of publicly owned treatment works to regulate domestic sources of chloride, however this change is not a revision to Wisconsin's water quality standards under section 303 of the Clean Water Act, and is therefore beyond the scope of this review and approval.

As specified in 40 CFR 131.21, USEPA is required to review and approve State water quality standards. USEPA has reviewed the information submitted in support of the revised rules and hereby approves the revised rules pursuant to Section 303 of the CWA and Federal regulations at 40 CFR 131.21. Please be advised that any variances to the chloride criteria granted by Wisconsin under Chapter NR 106 must be approved by USEPA before they become effective, consistent with recent changes to the Federal regulations.

Consistent with Section 7 of the Endangered Species Act, USEPA is required to consult with the United States Fish and Wildlife Service (USFWS) on any action it takes that might affect federally-listed threatened and endangered species. Approvals of new and revised State water

quality standards under 303 of the CWA is an action requiring consultation. To date, USEPA has initiated, but not completed consultation with USFWS. For this reason, USEPA is approving the new and revised water quality standards referenced above subject to the results of consultation under Section 7 of the Endangered Species Act. USEPA prepared a biological evaluation of Wisconsin's revised water quality standards which is enclosed. Based on this evaluation, Wisconsin's chloride rules appear unlikely to adversely affect federally-listed threatened and endangered species in Wisconsin.

If you have any questions regarding this action, please contact me or David Pfeifer of my staff. Mr. Pfeifer may be reached at (312) 353-9024.

Sincerely yours,

Joel Karnauskas for

JoLynn Traub, Director
Water Division

cc: USFWS, Green Bay Field Office
Dan Joyce, WDNR

encl.

Biological Evaluation

Federal Action:

Approval of chloride criteria and implementation procedures in Wisconsin.

Species or Critical Habitat

There are fifteen federally-listed threatened and endangered species in Wisconsin that could be affected by the proposed action. They include the Canada lynx, gray wolf, bald eagle, Kirtland's warbler, piping plover, Higgins' eye pearlymussel, winged maple leaf mussel, Hine's emerald dragonfly, Karner blue butterfly, dwarf lake iris, eastern prairie fringed orchid, Fassett's locoweed, northern wild monkshood, Pitcher's thistle and prairie bush clover.

Summary of Revisions to Wisconsin's Water Quality Standards:

The changes to Wisconsin's water quality standards resulting from this rule revision include the following:

- Tables 1 and 5 of Chapter NR 105 (Wisconsin's acute and chronic criteria for the protection of aquatic organisms respectively) were revised to include an acute criterion of 757 mg/L and a chronic criterion of 395 mg/L for chlorides;

- A new subchapter was added to Chapter NR 106 (Wisconsin's procedures for calculating water quality-based effluent limits derived from the water quality criteria contained in Chapter NR 105) containing the procedures for regulating the discharge of chlorides to surface waters in Wisconsin;

- A new subchapter was added to Chapter NR 211 (provides publicly-owned treatment works with the authority to regulate non domestic sources of pollutants) expanding the authority of POTWs to regulate domestic sources of chlorides; and,

- Addition of chlorides to the list of nonconventional pollutants contained in Chapter NR 215, which contains lists of toxic, conventional and nonconventional pollutants.

The net effect of these changes is to standardize the way that chlorides are treated in the context of Wisconsin's surface water management program so that the Wisconsin Department of Natural resources will be better able identify and control impacts on Wisconsin waters resulting from chlorides.

Anticipated Impacts of Revisions on Threatened and Endangered Species in Wisconsin:

- Effects on nonaquatic species:

Nonaquatic threatened and endangered species in Wisconsin include: Canada lynx, gray wolf, Kirtland's warbler, Karner blue butterfly, dwarf lake iris, eastern prairie fringed orchid, Fassett's locoweed, northern wild monkshood, Pitcher's thistle and prairie bush clover The revisions to Wisconsin's water quality standards are not anticipated to have any effect whatsoever on these species, because the water quality standards apply only to surface waters in the State of Wisconsin.

- Effects on aquatic-dependent species:

Aquatic-dependent threatened and endangered species in Wisconsin include: the bald eagle and piping plover. Typically, these species are affected when a pollutant bioaccumulates in prey organisms to a level that causes toxic effects on these species due to consumption of contaminated prey. Chlorides do not bioaccumulate, so there should be no direct impacts on aquatic-dependent species. Such species may benefit from the revised water quality standards because the new chlorides criteria should provide better protection for prey organisms and the forage of prey organisms.

- Effects on aquatic species:

Aquatic threatened and endangered species found in Wisconsin include: Higgins' eye pearlymussel, winged maple leaf mussel, and Hine's emerald dragonfly. No unionid mussel toxicity data were used in the calculation of either the acute or chronic chlorides criteria. An AQUIRE search was performed and identified a single data acute data point for a unionid clam expressed as a range of 1000 to 4500 mg/L. We also consulted with Anne Keller who indicated that she was aware of five NACl acute tests involving the following species: Villosa vibex, Lampsilis claibornensis, Utterbackia imbecillis, Lampsilis teres and Epioblasma triquetra. The LC50s for these species appear to cluster at around 2000 mg/l. Given these data, it appears that Wisconsin's acute criterion of 757 mg/L chlorides should be protective of threatened and endangered mussels in Wisconsin. There are no data available for comparison to the chronic criterion, however the acute to chronic ratios for the sensitive invertebrates in the data set are both less than four. If a similar acute to chronic ratio is applied to the available mussel data, the resulting value is greater than Wisconsin's chronic criterion of 395.1 mg/L. Based on this evaluation, EPA concludes that Wisconsin's chloride criteria are probably protective of the Higgin's eye pearlymussel and the winged maple leaf mussel.

With respect to protection of the Hine's emerald dragonfly, none of the insects for which there are acute data are among the four most sensitive species upon which the criterion is based. The available acute date for aquatic insects ranged from 3795 mg/L for Cricotopus trifascia, to 6222 mg/L for Culex sp. Species for which data were available include, in addition to those mentioned: Chironomus attenuatus and Hydroptila angusta. Since the LC50 for the most sensitive aquatic insect is approximately five times the acute criterion, Wisconsin's acute criterion should be protective of the Hine's emerald dragonfly. If the acute to chronic ratio of four for invertebrates (based on the cladoceran data) is applied to the most sensitive aquatic insect LC50 of 3795 mg/L, the resulting

estimate of chronic toxicity is approximately 950 mg/L, suggesting that Wisconsin's chronic criterion should also be protective of the Hine's emerald dragonfly.

Determination

It is EPA's determination based on the data available that approval of Wisconsin's new chloride criteria and implementation procedures is unlikely to adversely affect threatened and endangered species in Wisconsin and should have either a beneficial or benign effect on listed Wisconsin species.

USFWS Concurrence

USFWS _____ does _____does not concur with the determination that this action is unlikely to adversely affect threatened and endangered species.

_____

USFWS Field Office Supervisor

Please indicate below whether or not you concur with our finding of "not likely to adversely affect" threatened and endangered species for this action.

USFWS Concurrence

_____ Concur

_____ Not Concur

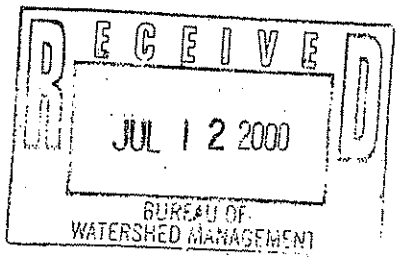
_____

Russ Peterson, Field Supervisor

Interim

Joyce

JUL 05 2000



R-19J

George E. Meyer, Secretary
Wisconsin Department of Natural Resources
Box 7921
Madison Wisconsin 53707-7921

Dear Mr. Meyer:

The United States Environmental Protection Agency (USEPA) received your letter dated May 24, 2000, transmitting Wisconsin's newly adopted water quality standards for chlorides. USEPA's review period began on June 22, 2000. USEPA will notify you of a decision to approve Wisconsin's revised water quality standards within 60 days or to disapprove within 90 days. Please be advised that, as of the date of this letter, USEPA has not yet received Attorney General certification of these rules and cannot approve them until certification is received.

If you have any questions regarding this letter or USEPA's review, please contact me or have your staff contact David Pfeifer of my staff. Mr. Pfeifer may be reached at (312) 353-9024.

Sincerely,

/s/ original signed by
Francis X. Lyons
Francis X. Lyons
Regional Administrator

cc: Dan Joyce, WDNR
Duane Schuettpelz, WDNR

bcc: ORA
ORA Reading File
F. Lyons (ORA)
Shirley Dorsey (ORA)
Joan Karnauskas (WD)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

APR 09 1999

Duane Schuettpelz
Chief, Wastewater Permits and Pretreatment Section
Wisconsin Department of Natural Resources
Box 7921
Madison, Wisconsin

WT-15J

Dear Mr. Schuettpelz:

The United States Environmental Protection Agency (USEPA), Region 5, has completed its review of Wisconsin's proposed water quality standards for chlorides as well as the proposed procedures for implementing the criteria in Wisconsin Pollutant Discharge Elimination System permits. The staff of the Wisconsin Department of Natural Resources (WDNR) are to be commended for their work in developing water quality criteria for this too often ignored pollutant. Wisconsin's aquatic resources will benefit from the work of the WDNR staff and the members of the Chlorides Advisory Committee.

The criteria for chlorides in the proposed water quality standards are consistent with the requirements of the Clean Water Act (CWA) and Federal regulations. No changes or modifications are required for this part of the proposed water quality standards.

The implementation procedures, as written, are not consistent with the CWA and Federal regulations. Specifically, Section 301(b)(1)(C) of the CWA and Federal regulations at 40 CFR 122.44(d)(1) require all National Pollutant Discharge Elimination System (NPDES) permits to contain effluent limits as necessary to ensure attainment of water quality standards. The proposed approach whereby water quality-based effluent limits would not be established even after the WDNR concludes that a discharge will cause, have a reasonable potential to cause, or contribute to excursions beyond water quality criteria for chlorides is in direct conflict with the requirements of the CWA and Federal regulations. If this part of the implementation procedures is adopted as proposed, the USEPA, Region 5, would invoke the procedures for revision of the Wisconsin NPDES program at 40 CFR 123.62. Under these procedures, the USEPA will approve or disapprove the revision to the Wisconsin NPDES contemplated in any final implementation procedures. As written, this part of the implementation procedures is not approvable. It is not legal under the CWA to not impose water quality-based effluent limits where the presence of a pollutant has a reasonable potential to cause or contribute to an exceedance of a water quality standard. Chlorides, when present at levels above Wisconsin's criteria, will result in toxicity to exposed aquatic organisms in violation of Wisconsin's water quality standards. Source reduction activities by themselves are not sufficient to ensure that

water quality standards will be met. Source reduction activities may be an important part of an overall strategy for achieving water quality standards, whether as part of a compliance schedule or a variance. In either case, source reduction is implemented as a means of achieving water quality standards and not as an end to itself.

Wisconsin may wish to consider a variance provision specifically tailored to certain chloride discharges, as an alternative to the approach taken in the proposed rules. A streamlined variance procedure contained in the rule would address concerns about the environmental and economic impact of end of pipe treatment of chlorides in a manner that is consistent with the CWA and Federal regulations. Suggested rule language that would be acceptable to USEPA, Region 5, is enclosed for your consideration.

Thank you again for the opportunity to comment on Wisconsin's proposed chloride rules. If you have any questions regarding these comments, please contact David Pfeifer of my staff. Mr. Pfeifer may be reached at (312) 353-9024.

Sincerely yours,

Joan M. Karnauskas
Chief, Standards and Applied Sciences Branch

Rebecca L. Harvey
Chief, NPDES Support and Technical Assistance Branch

Enclosure

cc: Steve Jann, NPDES
Kathy Mayo, SASB
Gary Prichard, ORC
William Morrow, OST

Nyffeler, Robin T - DNR

From: Bauman, Thomas S - DNR
Sent: Wednesday, August 13, 2008 11:31 AM
To: Jann.Stephen@epamail.epa.gov; Gluckman.Matthew@epamail.epa.gov
Subject: NR 243

Steve/Matt,
Is EPA planning to issue any formal "approval" of revisions to NR 243 that were finalized in July 2007? I know we've discussed this briefly in the past but I can't recall where we left the issue. Let me know if there is anything I need to do. Thanks!

Tom Bauman

Coordinator, Agricultural Runoff Program
Runoff Management Section
Bureau of Watershed Management
Wisconsin Department of Natural Resources
(☎) phone: (608) 266-9993
(☎) fax: (608) 267-2800
(✉) e-mail: thomas.bauman@dnr.state.wi.us

RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 132

[FRL-6896-9]

RIN 2040-AD66

Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule

Monday, November 6, 2000

***66502** AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA published the final Water Quality Guidance for the Great Lakes System (the Guidance) on March 23, 1995. Section 118(c) of the Clean Water Act (CWA) requires the Great Lakes States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin to adopt within two years of publication of the final Guidance (i.e., March 23, 1997) minimum water quality standards, antidegradation policies and implementation procedures that are consistent with the Guidance, and to submit them to EPA for review and approval. Each of the Great Lakes States made those submissions.

Today, EPA is taking final action on the Guidance submission of the State of Wisconsin. EPA's final action consists of approving those elements of the State's submission that are consistent with the Guidance, disapproving those elements that are not consistent with the Guidance, and specifying in a final rule the elements of the Guidance that apply ***66503** in the portion of Wisconsin within the Great Lakes System where the State either failed to adopt required elements or adopted elements that are inconsistent with the Guidance.

DATES: 40 CFR 132.6(f), (h)-(j) is effective on December 6, 2000.40 CFR 132.6(g) is effective on February 5, 2001. To the extent this action, or portion thereof, is subject to judicial review pursuant to section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b), it is considered issued for purposes of judicial review as 1 p.m., Eastern Standard time on November 20, 2000, as provided in 40 CFR 23.2.

ADDRESSES: The public docket for EPA's final actions with respect to the Guidance submission of the State of Wisconsin is available for inspection and copying at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 by appointment only. Appointments may be made by calling Mery Jackson-Willis (telephone 312-886-3717).

FOR FURTHER INFORMATION CONTACT: Mark Morris (4301), U.S. EPA, Ariel Rios Building, 1200 Pennsylvania Avenue., NW, Washington, DC 20460 (202-260-0312); or Mery Jackson-Willis, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 (312-353-3717).

SUPPLEMENTARY INFORMATION:

I. Discussion

A. Potentially Affected Entities

Entities potentially affected by today's action are those discharging pollutants to waters of the United States in the Great Lakes System in the State of Wisconsin. Potentially affected categories and entities include:

Category	Examples of potentially affected entities
Industry	Industries discharging to waters within the Great Lakes System as defined in 40 CFR 132.2 in Wisconsin.
Municipalities	Publicly-owned treatment works discharging to waters within the Great Lakes System as defined in 40 CFR 132.2 in Wisconsin.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding regulated entities likely to be affected by these final actions. This table lists the types of regulated entities that EPA believes could be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility may be affected by this final action, you should examine the definition of "Great Lakes System" in 40 CFR 132.2 and examine 40 CFR 132.2 which describes the part 132 regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Background

On March 23, 1995, EPA published the Guidance. See 60 FR 15366; 40 CFR part 132. The Guidance establishes minimum water quality standards, antidegradation policies, and implementation procedures for the waters of the Great Lakes System in the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin. Specifically, the Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and provides methodologies to derive numeric criteria for additional pollutants discharged to these waters. The Guidance also contains minimum implementation procedures and an antidegradation policy.

Soon after being published, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance.American Iron and Steel Institute, et al. v. EPA (AISI), 115 F.3d 979 (D.C. Cir. 1997). The Court vacated the human health criterion for polychlorinated biphenyls (PCBs) and the acute aquatic life criterion for selenium, and the provisions of the Guidance "insofar as it would eliminate mixing zones for [bioaccumulative chemicals of concern (BCCs)] and impose [water quality-based effluent limitations (WQBELs)] upon internal facility waste streams."115 F.3d at 985. On October 9, 1997, EPA published a document revoking the PCB human health criteria pursuant to the Court's decision.62 FR 52922. On April 23, 1998, EPA published a second document amending the 1995 Guidance to remove the BCC mixing zone provisions from 40 CFR part 132 (found in procedure 3.C. of appendix F) and to remove language in the Pollutant Minimization Program provisions (procedure 8.D. of appendix F) that might imply that permitting authorities are required to impose WQBELs on internal waste streams or to specify control measures to meet WQBELs.63 FR 20107. On June 2, 2000, EPA published a third document withdrawing the acute criteria for selenium.65 FR 35283.

40 CFR 132.4 requires the Great Lakes States to adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System consistent with the Guidance or be subject to EPA promulgation.40 CFR 132.5(d) provides that, where a State makes no submission to EPA, the Guidance shall apply to discharges to waters in that State upon EPA's publication of a final rule indicating the effective date of the part 132 requirements in that jurisdiction.

On July 1, 1997, the National Wildlife Federation filed suit alleging that EPA had a non-discretionary duty to promulgate the Guidance for any State that failed to adopt standards, policies and procedures consistent with the Guidance. National Wildlife Federation v. Browner, Civ. No. 97-1504-HHK (D.D.C.). EPA negotiated a consent decree providing that the EPA Administrator must sign, by February 27, 1998, a Federal Register document making 40 CFR part 132 effective in any State in the Great Lakes Basin that failed to make a submission to EPA by that date under 40 CFR part 132. However, all of the Great Lakes States made complete submissions to EPA on or before the February deadline. On March 2, April 14, April 20 and April 28, 1998, EPA published in the Federal Register documents of its receipt of each of the States' Great Lakes Guidance submissions and a solicitation of public comment on the National Pollutant Discharge Elimination System (NPDES) portions of those submissions. 63 FR 10221; 63 FR 18195; 63 FR 19490; 63 FR 23285.

40 CFR 132.5(f) provides that, once EPA completes its review of a State's submission, it must either publish notice of approval of the State's submission in the Federal Register or issue a letter notifying the State that EPA has determined that all or part of its submission is inconsistent with the CWA or the Guidance, and identify any changes needed to obtain EPA approval. If EPA issues a letter to the State making findings of inconsistencies, the State then has 90 days to make the necessary ***66504** changes. If the State fails to make the necessary changes, EPA must publish a document in the Federal Register identifying the approved and disapproved elements of the submission and a final rule identifying the provisions of the Guidance that will apply to discharges within the State.

On November 15, 1999, the National Wildlife Federation and the Lake Michigan Federation filed suit alleging that EPA had a non-discretionary duty to take action on the Great Lakes States' Guidance submissions. National Wildlife Federation v. Browner, Civ. No. 99-3025-HHK (D.D.C.). EPA negotiated a consent decree providing that EPA must sign a Federal Register document by July 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Pennsylvania; and Federal Register documents by September 29, and October 31, 2000, taking the action required by 40 CFR 132.5 on the Guidance submissions of the States of New York and Wisconsin, respectively. Today's Federal Register document fulfills EPA's obligations under that Consent Decree with respect to the State of Wisconsin. EPA has completed its final actions with respect to the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Pennsylvania. EPA notes that Wisconsin's Guidance submission may contain provisions that revise its NPDES program or water quality standards in areas or with respect to regulated entities not covered by the Guidance. EPA is not taking action at this time to either approve or disapprove any such provisions.

EPA has conducted its review of the Wisconsin's submission in accordance with the requirements of section 118(c)(2) of the CWA and 40 CFR part 132. Section 118 requires that States adopt policies, standards and procedures that are "consistent with" the Guidance. EPA has interpreted the statutory term "consistent with" to mean "as protective as" the corresponding requirements of the Guidance. Thus, the Guidance gives States the flexibility to adopt requirements that are not the same as the Guidance, provided that the State's provisions afford at least as stringent a level of environmental protection as that provided by the corresponding provision of the Guidance. In making its evaluation, EPA has considered the language of each State's standards, policies and procedures, as well as any additional information provided by the State clarifying how it interprets or will implement its provisions.

Where EPA has promulgated a final rule that identifies a provision of the Guidance that shall apply in Wisconsin, EPA explains below its reasons for concluding that Wisconsin failed to adopt requirements that are consistent with the Guidance. Additional explanation of EPA's conclusions are contained in EPA's correspondence with Wisconsin (identified in relevant sections below) where EPA initially identified inconsistencies in the State's submission, as well in documents prepared for Wisconsin entitled, "Wisconsin Provisions Being Approved as Being Consistent With the Guidance,""Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance" and "Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter."Notice of the availability of EPA's correspondence with Wisconsin was published in the Federal Register and EPA has considered all public comments received regarding any conclusions as to whether Wisconsin had adopted provisions consistent with the Guidance.

In this proceeding, EPA has reviewed the State's submission to determine its consistency with 40 CFR part 132. EPA has not

reopened part 132 in any respect, and today's action does not affect, alter or amend in any way the substantive provisions of part 132. To the extent any members of the public commented during this proceeding that any provision of part 132 is unjustified as a matter of law, science or policy, those comments are outside the scope of this proceeding.

With regard to those elements of the State submission being approved by EPA, EPA is approving those provisions as amendments to Wisconsin's NPDES permitting program under section 402 of the CWA and as revisions to Wisconsin's water quality standards under section 303 of the CWA. Today's document identifies those approved elements. Additional explanations of EPA's review of and conclusions regarding Wisconsin's submission, including the specific State provisions that EPA is approving, are contained in the administrative record for today's actions in documents prepared for Wisconsin entitled, "Wisconsin Provisions Being Approved as Being Consistent With the Guidance,""Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance" and "Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter."

C. Today's Final Action

On June 13, 2000, EPA issued a letter notifying the Wisconsin Department of Natural Resources (WDNR) that, while the State of Wisconsin had generally adopted requirements consistent with the Guidance, EPA concluded that portions of the standards, policies and procedures adopted by the State were not consistent with corresponding provisions of the Guidance. On June 22, 2000, EPA published in the Federal Register a notice of and solicitation of public comment on its June 13, 2000 letter.65 FR 38830. EPA has completed its review of all public comments on the June 13, 2000, letter and has determined that, with the exceptions described below, Wisconsin has adopted requirements consistent with all aspects of the Guidance. Specifically, Wisconsin has adopted requirements consistent with, and EPA is therefore approving those elements of the State's submissions which correspond to: the definitions in 40 CFR 132.2; the water quality criteria for the protection of aquatic life, human health and wildlife in Tables 1-4 of part 132, with three exceptions as described below; the methodologies for development of aquatic life criteria and values, bioaccumulation factors, human health criteria and values and wildlife criteria in appendices B—D; the antidegradation policy in appendix E; and the implementation procedures in appendix F, with three exceptions described below. As explained more fully below, Wisconsin has not adopted requirements consistent with (1) the acute and chronic aquatic life criteria in Table 1 of part 132 for copper and nickel, and the chronic aquatic life criterion in Table 2 of part 132 for endrin and selenium, (2) the provisions governing total maximum loads in procedure 3 in appendix F to 40 CFR part 132, (3) the provisions governing consideration of intake pollutants in determining reasonable potential and establishing WQBELs in paragraphs D and E of procedure 5 in appendix F to 40 CFR part 132, and (4) the provisions for determining reasonable potential for whole effluent toxicity set forth in paragraph D of procedure 6 in appendix F to 40 CFR part 132.

EPA's June 13, 2000, letter concluded that some of the provisions that EPA is now approving authorized the State to act consistent with the Guidance, but provided inadequate assurance that the State would exercise its discretion consistent with the Guidance. Subsequent to that letter, WDNR provided additional materials, including an Addendum to its Memorandum of ***66505** Agreement (MOA) with EPA regarding the State's approved NPDES program in which WDNR commits to always exercise its discretion under those provisions in a manner consistent with the Guidance. Pursuant to 40 CFR 123.44(c)(3) and 123.63(a)(4), the State is required to comply with commitments made in its MOA or risk EPA objection to permits and even program withdrawal. These materials have demonstrated to EPA that the State will implement its program (with the exceptions identified below) consistent with the Guidance. The specific provisions that EPA is approving, and EPA's full rationale for approving these provisions, are set forth in the documents entitled "Wisconsin Provisions Approved as Being Consistent With the Guidance,""Analysis of Whether Wisconsin Has Adopted Requirements Consistent With the Guidance" and "Analysis of Steps Taken By Wisconsin in Response to EPA's 90-Day Letter."

EPA has determined that Wisconsin's acute and chronic aquatic life criteria for copper and nickel in Wis. Adm. Code NR 105, Tables 2 and 6 are not consistent with those in Tables 1 and 2 of part 132; and chronic aquatic life criterion for endrin in Wis. Adm. Code NR 105, Table 5 is not consistent with that in Table 2 to 40 CFR part 132. With respect to copper and nickel, Wisconsin acknowledged in an October 11, 2000, letter to EPA that it made mathematical errors which resulted in criteria that were higher than (less protective than) criteria that Wisconsin believes would have been consistent with the

Guidance had the errors not been made. Wisconsin also acknowledged that it did not consider certain toxicological data incorporated into the Guidance criterion in deriving its chronic aquatic life criterion for endrin, which in turn resulted in a criterion that is less stringent than that required by the Guidance. Wisconsin intends to initiate rulemaking to correct these errors, but will be unable to complete that rulemaking before October 31, 2000, which is the date by which EPA is required under its Consent Decree with the National Wildlife Federation and the Lake Michigan Federation to take final action on Wisconsin's submission.

Based upon the above, EPA finds that Wisconsin has failed to adopt acute and chronic aquatic life criteria for copper and nickel consistent with those in Tables 1 and 2 of part 132, and has failed to adopt a chronic aquatic life criterion for endrin consistent with that in Table 2 to 40 CFR part 132, as required by 40 CFR 132.3. EPA, therefore, disapproves Wisconsin's acute and chronic aquatic life criteria for copper and nickel in Wis. Adm. Code NR 105, Tables 2 and 6, and chronic aquatic life criterion for endrin in Wis. Adm. Code NR 105, Table 5, to the extent they apply to waters of the Great Lakes System, and has determined that the acute and chronic aquatic life criteria for copper and nickel in Tables 1 and 2 of part 132 and the chronic aquatic life criterion for endrin in Table 2 to 40 CFR part 132 shall apply to the waters of the Great Lakes System in the State of Wisconsin.

As noted above, Wisconsin intends to initiate rulemaking to adopt criteria that are consistent with those in the Guidance for these three parameters. EPA will work closely with WDNR to insure that these criteria will be consistent with the Guidance. WDNR will then submit its criteria to EPA for review pursuant to section 303(c) of the CWA, and, if EPA approves those revisions, EPA will revise its regulations so that the Guidance criteria will no longer apply to the waters within the Great Lakes System in the State of Wisconsin.

EPA is also disapproving Wisconsin's failure to adopt and submit to EPA a chronic aquatic life water quality criterion for selenium.40 CFR 132.3(b) mandates that each Great Lakes State adopt numeric water quality criteria that are consistent with the chronic water quality criteria for the protection of aquatic life contained in Table 2 of part 132 (or with site-specific modifications of those criteria adopted in accordance with the Guidance). Table 2 contains a chronic water quality criterion for selenium of 5 micrograms per liter (MUg/L). Currently, Wisconsin's water quality standards do not contain a chronic aquatic life criterion for selenium. The absence of any water quality criterion in Wisconsin's standards to ensure the protection of aquatic life from chronic adverse effects due to selenium is inconsistent with the Guidance.

EPA did not identify the omission of the selenium criterion from the State's submission in its June 13, 2000, letter to the State, but subsequently became aware of this deficiency very near the close of this proceeding. Because the absence of the selenium criterion is clearly inconsistent with the Guidance, and in light of EPA's obligation under the consent decree in National Wildlife Federation v. Browner, Civ. No. 99-3025-HHK (D.D.C.), EPA has taken final action on the entirety of the State's submission, including the omission of the chronic aquatic life criterion for selenium. EPA recognizes however, that it has not previously notified the State of EPA's conclusion regarding the selenium criterion, and provided the 90-day period contemplated in EPA regulations for the State to take corrective action. To provide the State with this opportunity, EPA has established an effective date for the selenium criterion in today's rule of 90 days from today. If Wisconsin corrects this deficiency and adopts a selenium criterion consistent with the Guidance during this period, EPA will take action to withdraw the selenium criterion prior to its effective date. If the State does not take corrective action in this time frame, the selenium criterion in today's rule will go into effect 90 days from today. As with the other aspects of today's rule, if the State subsequently cures this deficiency and adopts a criterion for selenium that is approved by EPA, EPA will amend today's rule to remove the selenium criterion.

EPA also has determined that procedure 3 in appendix F to 40 CFR part 132 shall apply with regard to development of total maximum daily loads (TMDLs) for the Great Lakes System in the State of Wisconsin. EPA has made this determination because Wisconsin simply has not adopted specific requirements for developing TMDLs in the Great Lakes System that correspond to those in procedure 3 of appendix F. Wisconsin has enacted a statutory requirement at Wis. Stat. 283.83(3), and has adopted a regulatory requirement at Wis. Adm. Code NR 106.11, that generally require WDNR to develop TMDLs. Wisconsin also has adopted at Wis. Adm. Code NR 212 detailed regulatory requirements for how WDNR must develop TMDLs for a number of pollutants that are not subject to the Guidance (see Table 5 of 40 CFR part 132). However, Wisconsin has not

adopted similar, detailed provisions governing development of TMDLs for pollutants that are subject to the Guidance (i.e., all pollutants other than those in Table 5 of 40 CFR part 132).

Given the complete absence of any specific requirements governing development of TMDLs in the Great Lakes System in Wisconsin for pollutants subject to the Guidance, it is necessary for EPA to specify that the provisions of procedure 3 of appendix F to 40 CFR part 132 apply in the Great Lakes System in the State of Wisconsin. EPA notes that this promulgation has no effect on the chemical-specific reasonable potential procedures at Wis. Adm. Code NR 106.05 and 106.06(1) , (3)-(5), & (7)-(10) which EPA approves as being consistent with the reasonable potential procedures in paragraphs A through C and F of procedure 5 in appendix F to 40 CFR part 132. These State procedures, therefore, apply in the ***66506** Great Lakes System in the State of Wisconsin for purposes of developing wasteload allocations in the absence of a TMDL and developing preliminary effluent limitations in making chemical-specific reasonable potential determinations.

EPA also has determined that two provisions in Wisconsin's rules, Wis. Adm. Code NR 106.06(06) and Wis. Adm. Code NR 106.10(1), are inconsistent with procedure 5 in appendix F to 40 CFR part 132. Section 301(b)(1)(C) of the CWA requires all NPDES permits to include effluent limitations more stringent than technology-based limits when necessary to meet State water quality standards in the receiving waterbody. To implement this requirement, EPA has established a two-step water quality-based permitting approach. A discharge of pollutants must first be evaluated to determine whether it will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard (i.e., whether the discharge poses "reasonable potential").40 CFR 122.44(d)(1)(i) and (ii). If reasonable potential exists, then the discharge must be subject to water quality-based effluent limitation that will ensure "the level of water quality to be achieved by limits on point sources * * * is derived from, and complies with all applicable water quality standards."40 CFR 122.44(d)(1)(vii)(A). Procedure 5 of the Guidance implements, and elaborates on, these requirements. It requires the permitting authority to characterize pollutant levels in a discharge, and determine whether those levels, if left uncontrolled, would cause, or have the reasonable potential to cause, or contribute to a violation of water quality standards. See procedure 5.A-C. If the permitting authority makes an affirmative reasonable potential determination, it must impose water quality-based effluent limitations ("WQBELs") to ensure compliance with water quality standards. See procedure 5.F.2.

One of the principal issues considered in the development of the Guidance was the appropriate approach for establishing wasteload allocations for point sources (upon which WQBELs are based) where the "background" levels of the pollutant in a waterbody exceed applicable water quality criteria for that pollutant. The proposed Guidance included a requirement to set the wasteload allocation at zero, in the absence of a multiple source TMDL, for any pollutant discharged into a waterbody already exceeding water quality criteria for that pollutant. See procedures 3A.C.4 and 3B.C.3 (58 FR 21046, April 16, 1993). This "high background" provision was not included in the final Guidance because the Agency concluded that a multitude of factors would need to be considered in establishing wasteload allocations and WQBELs in this situation. See Supplemental Information Document for the Water Quality Guidance for the Great Lakes System (EPA, 3/23/95) ("SID") at 285. Possible permitting approaches discussed in the SID ranged from prohibiting the discharge of the pollutant altogether to allowing no greater than discharge at the criteria itself (i.e., "criteria end-of-pipe"). See SID at 339.

EPA also addressed "high background" pollutants by establishing specialized provisions for discharges of pollutants contained in a facility's intake water ("intake pollutants") in paragraphs D and E of procedure 5. Where a facility removes water with high background pollutant levels and then subsequently discharges the same level of pollutants back into the same waterbody, the discharge does not pose environmental concerns comparable to where a facility introduces pollutants into the waterbody for the first time.

Procedure 5.D allows a finding that a water quality-based effluent limit is not needed for a particular pollutant that originates in the intake water and simply passes through the facility and is discharged without any adverse effect (that would not have occurred had the intake pollutant stayed in-stream). Among other things, eligibility for this finding under the Guidance requires a showing that:

i. The facility withdraws 100 percent of the intake water containing the pollutant from the same body of water into which the discharge is made;

ii. The facility does not contribute any additional mass of the identified intake pollutant to its wastewater;

iii. The facility does not alter the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream;

iv. The facility does not alter the identified intake pollutant concentration, as defined by the permitting authority, at the edge of the mixing zone, or at the point of discharge if a mixing zone is not allowed, as compared to the pollutant concentration in the intake water, unless the increased concentration does not cause or contribute to an excursion above an applicable water quality standard; and

v. The timing and location of the discharge would not cause adverse water quality impacts to occur that would not occur if the identified intake pollutant were left in-stream.

If an intake pollutant does not meet the above five criteria and effluent limitations are needed, paragraph E of procedure 5 allows a facility to discharge the same mass and concentration of pollutants that are present in its intake water (i.e., "no net addition"), provided the discharge is to the same body of water and certain other conditions are met. Under the Guidance, an intake pollutant is from the same body of water if the intake pollutant "would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee."Procedure 5.D.2.b. EPA determined that allowing discharge at background levels, even though above applicable criteria, would be both environmentally protective and consistent with the requirements of the CWA where a pollutant is simply being moved from one part of the waterbody to another that it would have reached in any event. However, if the pollutant is from a different body of water, "no net addition" limitations are not available because, in such a case, the facility is introducing a pollutant to a waterbody for the first time (i.e., the pollutant would not be introduced to the waterbody but for the discharge). Because the waterbody is already exceeding applicable water quality criteria the Guidance requires a more stringent approach to ensure the discharge does not exacerbate the water quality standards violation—i.e., effluent limitations based on the most stringent applicable water quality criterion for the receiving water. See procedure 5.E.4.

Wisconsin's regulations contain a provision that addresses discharges into waters where background levels exceed applicable water quality criteria. Wis. Adm. Code NR 106.06(6). If 10 percent of a pollutant to be discharged by a facility is from the same body of water as the discharge, Wisconsin's procedure requires that permit limitations for the entire discharge be set at background levels, except that more stringent limitations may be established when the existing treatment system has a demonstrated cost-effective ability to achieve regular and consistent compliance with a limitation more stringent than the representative background concentration. Wis. Adm. Code NR 106.06(6)(c). Where at least 90 percent of the wastewater is from groundwater or a drinking water supply, the permitting authority is to establish limits equal to the lowest applicable ***66507** water quality criteria, except that limitations up to background levels are allowed if reasonable, practical or otherwise required steps are taken to minimize the level of the pollutant discharged. Wis. Adm. Code NR 106.06(6)(a) and (b). In either situation, the department may allow alternative limitations, including limitations above background levels, in the form of numerical limits, monitoring requirements, or a cost-effective pollutant minimization plan. Wis. Adm. Code NR 106.06(6)(d).

Wisconsin's approach differs significantly from, and is not as protective as, procedure 5 of the Guidance. Most importantly, procedure 5 only allows effluent limitations to be set above water quality criteria at "background" levels (i.e., "no net addition" limitations under procedure 5.E) for intake pollutants that are taken from, and returned to, the same body of water. Any pollutants transferred from a different body of water must meet limitations based on the most stringent applicable water quality criterion. See procedure 5.E.4. Where a facility's discharge combines pollutants from the same and different bodies of water, effluent limitations may be derived using flow-weighting to reflect the two permitting approaches. See procedure 5.E.5. Wisconsin's procedure, on the other hand, effectively allows any facility covered by its provision to discharge its entire waste stream at background levels (and potentially even higher in accordance with Wis. Adm. Code NR 106.06(d)), regardless of whether the pollutant originated from the same body of water, a different body of water, or the facility generated the

pollutant itself. Indeed, Wisconsin's procedure would even allow the permit writer to not include effluent limitations at all. Because Wisconsin's procedure allows the permitting authority to adopt less stringent effluent limitations than would be allowed by the Guidance, and even allows the permitting authority to not include any effluent limitations in situations where the Guidance would require one, the State's procedure is inconsistent with the Guidance.

Wisconsin's approach is also inconsistent with the fundamental principles underlying the Guidance permitting procedures. The Guidance allows effluent limitations at "background" levels for intake pollutants from the same body water because, in that circumstance, "the discharge containing the identified intake pollutant of concern effectively has no impact on the receiving water that would not otherwise occur if the pollutant were left in stream."See SID at 370. In contrast, Wisconsin's approach allows facilities to discharge pollutants that were not previously in the waterbody (pollutants either generated by the facility itself or intake pollutants from a different body of water), and to do so at levels greater than the applicable water quality criteria. Since the receiving waterbody is already exceeding applicable water quality criteria, such discharges have the strong potential to exacerbate the water's non-compliance with standards, and permits authorizing such discharges would not meet the underlying requirement to establish effluent limitations that ensure water quality achieved by point sources derives from and complies with water quality standards.40 CFR 122.44(d)(1)(vii)(A).

This conclusion is not changed by the fact that Wisconsin's procedures provide for limitations to be set at levels below background based on practicability considerations, as provided in Wis. Adm. Code NR 106.06(6)(b) and (c)2. The CWA does not contain an exception to the requirement to meet water quality standards based on considerations of technical feasibility. To the contrary, the Act requires discharges to meet technology-based requirements and "any more stringent limitations, including those necessary to meet water quality standards."CWA section 301(b)(1)(C) (emphasis added). When EPA developed the Guidance, EPA expressly evaluated and rejected Wisconsin's approach on the grounds that it would "substitute the feasibility of pollution control for consideration of water quality standards as the basis for deriving WQBELs."See SID at 352. Procedure 5 of the Guidance does not permit loosening of water quality-based effluent limitations based on consideration of feasibility. Therefore, Wisconsin's procedure is not as protective as the Guidance.

Finally, the Wisconsin approach is not as protective as the Guidance because it fails to include the important restrictions contained in the Guidance to ensure that all possible adverse impacts that could result from the discharge of intake pollutants are considered in determining whether limits are needed. The Guidance prohibits "no net addition" limitations where the facility alters the intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutant were left in-stream, or the timing and location of the discharge would increase the adverse effects of the pollutants. Procedures 5.D.3.b.iii and v; 5.E.3.a. The absence of these restrictions in the Wisconsin submission is inconsistent with the Guidance.

For the reasons described above, EPA finds that Wis. Adm. Code NR 106.06(6) is inconsistent with procedure 5 of appendix F of 40 CFR part 132.

EPA also finds Wisconsin's cooling-water exemption at Wis. Adm. Code NR 106.10(1) to be inconsistent with the intake pollutant procedures of the Guidance. That provision prohibits the NPDES permitting authority from imposing WQBELs on discharges of non-contact cooling waters, which do not contain additives. Even when additives are used, Wis. Adm. Code NR 106.10(1) categorically prohibits the permitting authority from imposing WQBELs for "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."Wisconsin's rules do not contain any of the limitations set forth in the Guidance at paragraph 5.3.b of appendix F discussed above, which ensure that all potential environmental effects are considered in regulating the discharge of intake pollutants.

Nothing in the Guidance allows for a categorical exclusion for non-contact cooling water discharges (with or without additives) from the need for evaluating whether WQBELs are needed to ensure compliance with water quality standards. A major premise of the provisions in the Guidance pertaining to determining reasonable potential in paragraphs A-C of procedure 5, as well as the intake pollutants addressed by paragraphs D and E, is that decisions on the need for, and calculation of, WQBELs must occur on a case-by-case basis because there is no way to categorically determine that a particular group of

discharges will have the same impact on any particular body of water. Without such an evaluation, it is not possible to make a reliable determination that limitations are being imposed that are needed to meet water quality standards, as required by section 301(b)(1)(C) of the CWA. EPA recognizes that it is possible to develop a framework for considering classes of discharges based upon their common characteristics (e.g., certain categories of non-contact cooling water) that accounts for the factors identified in the Guidance to determine whether their discharge will cause or has the reasonable potential to cause or contribute to an exceedance of water quality standards. This is evidenced by EPA's approval of once-through non-contact cooling water provisions in ***66508** other Great Lakes States. Wisconsin, however, has not tailored its procedure in this manner or supplied any analysis why the exempt category of discharges never require the imposition of WQBELs. Instead, the State has provided a broad, blanket exemptions from water quality-based permitting requirements for non-contact cooling water discharges regardless of the impacts on the receiving water of those discharges. EPA clearly stated that it would not consider such exemptions consistent with the Guidance. See SID at 384-85. EPA, therefore, finds that Wisconsin's non-contact cooling water provisions at Wis. Adm. Code NR 106.06(10)(1) are not consistent with the Guidance.

Based upon the above, EPA disapproves the provisions at Wis. Adm. Code NR 106.06(6) and Wis. Adm. Code NR 106.06(10)(1) to the extent they apply to waters of the Great Lakes System as inconsistent with procedure 5 in appendix F of 40 CFR part 132 and has determined that paragraphs D and E of procedure 5 in appendix F to 40 CFR part 132 shall apply to the waters of the Great Lakes System in the State of Wisconsin. As described in the record for today's action, EPA has approved Wisconsin's basic procedure at Wis. Adm. Code NR 106.05 for determining reasonable potential for specific chemicals as consistent with the Guidance, and that procedure will continue to govern reasonable potential determinations by the State within the Great Lakes System. In light of EPA's disapproval of Wis. Adm. Code NR 106.06(6) and Wis. Adm. Code NR 106.06(10)(1), those provisions are not an effective component of the State's NPDES program within the Great Lakes System and cannot serve as the basis for making reasonable potential determinations and establishing effluent limitations in issuing NPDES permits. See 40 CFR 123.63(b)(4) (NPDES program revisions are effective upon approval by EPA). Therefore, discharges of pollutants will be governed by the State's reasonable potential procedures in Wis. Adm. Code NR 106.05, subject to the flexibility available under the intake pollutant procedures contained in today's rule.

EPA also has determined that Wisconsin's provisions at Wis. Adm. Code NR 106.08(5) for determining reasonable potential for a discharge to cause or contribute to an exceedance of Wisconsin's narrative criteria at Wis. Adm. Code NR 102.04(1) prohibiting the discharge of toxic substances in toxic amounts are inconsistent with paragraph D of procedure 6 in appendix F to 40 CFR part 132. The Guidance procedure for evaluating reasonable potential for whole effluent toxicity (WET) is based on comparing a projected 95th percentile WET value at a 95 percent confidence level with the acute and chronic WET criteria after accounting for any available dilution. In most cases where there is quantifiable effluent data, EPA's procedure will project an effluent value greater than the maximum observed value (using factors to account for effluent variability and size of the data set) to characterize the reasonable worst case effluent. This conservative approach is designed to ensure that WQBELs are imposed when there is a reasonable potential for toxicity, taking into account the effluent variability and the size of the data set, even if no toxicity has actually been observed.

In evaluating State reasonable potential procedures for WET, EPA looked for an equivalent level of protection to that provided by the Guidance procedure. In the case of a procedure to determine when a WQBEL is needed, one important consideration is whether the alternative procedure would indicate the need for a WQBEL in similar situations to those that would trigger a WQBEL under paragraph D of procedure 6.

Wisconsin's procedures at Wis. Adm. Code NR 106.08(5) rely on the comparison of the geometric mean toxicity multiplied by the fraction of the available toxicity values that fail WET requirements to derive a WET reasonable potential factor (RPF). If the calculated RPF is greater than 0.3, a limit is required. Because effluent monitoring results are averaged under the Wisconsin approach, the importance of individual sample showing high levels of toxicity is diminished in determining the need for a limit. Indeed, Wisconsin's procedure would allow the State to not impose a limit even where actual toxicity has been observed in WET tests on the effluent, a result clearly inconsistent with the Guidance. Wisconsin's regulation also allows the permit writer not to even undertake a reasonable potential analysis if there are fewer than five data points to calculate the RPF, while the Guidance requires a reasonable potential analysis where even where there is only one data point. Each of these characteristics of the Wisconsin procedure means that it is possible to reach a determination that a limit is not necessary

even when an actual observed value would violate potential permit limits. This is clearly inconsistent with paragraph D of procedure 6.

Based upon the above, EPA finds that Wisconsin has failed to adopt procedures governing WET reasonable potential consistent with those in paragraph D of procedure 6 in appendix F to 40 CFR part 132. EPA, therefore, disapproves Wisconsin's provisions at Wis. Adm. Code NR 160.08(5) to the extent they apply to waters of the Great Lakes System, and has determined that the provisions in paragraph D of procedure 6 in appendix F to 40 CFR part 132 shall apply for discharges into the Great Lakes System in the State of Wisconsin.

As noted above, EPA, in this document, is not taking action to approve or disapprove portions of Wisconsin's Guidance submission pertaining to NPDES permitting and water quality standards issues that are not addressed by the Guidance. Therefore, EPA is not taking action under section 118 with regard to the following issue. However, EPA wishes to describe its understanding with regard to one aspect of Wisconsin's submission that is not addressed by the Guidance. Specifically, Wis. Adm. Code NR 106.07(6)(c) provides that effluent levels that are below the level of quantification (LOQ) are generally deemed to be in compliance with WQBELs that are below the LOQ. EPA expressed concern in its June 13, 2000, letter to Wisconsin that, to the extent this provision suggested that effluent levels that exceeded the WQBEL but that were below the LOQ would be deemed to be in compliance with the WQBEL, this provision would be inconsistent with the requirement in paragraph A of procedure 8 in appendix F to 40 CFR part 132 that such WQBELs must be specified in the NPDES permit as the enforceable effluent limit.

WDNR has clarified that, consistent with the Guidance, it is required to specify the WQBEL in the permit as the enforceable limit in these situations and that Wis. Adm. Code NR 106.07(6)(c) only relates to the exercise by WDNR of its enforcement discretion, not the authority of the federal government or third parties in a citizen suit to enforce the WQBEL as calculated. Moreover, WDNR has agreed in an addendum to its MOA with EPA that it will not include the language of Wis. Adm. Code NR 106.07(6)(c) in NPDES permits. Given WDNR's clarification regarding the meaning of Wis. Adm. Code NR 106.07(6)(c), EPA no longer believes that Wis. Adm. Code NR 106.07(6)(c) is relevant to the question of whether WDNR has adopted requirements consistent with the Guidance, and so EPA is not taking action at this time to either approve or disapprove that provision. EPA notes that revisions to State NPDES programs do not become ***66509** effective until approved by EPA (40 CFR 123.62(b)(4)), that EPA has concerns regarding the appropriateness of the State's limitation on its own enforcement authority, and that WDNR intends to review and potentially revise its rules to address EPA's concerns.

D. Public Comments

EPA received public comments from two commenters in response to its Federal Register notice of the availability of its June 13, 2000 letter to the State of Wisconsin. EPA has responded to those comments in a document entitled "EPA's Response to Comments Regarding the Great Lakes Guidance Submission of the State of Wisconsin" that has been included as part of the record in this matter. The following is a summary of EPA's responses to the significant points of these comments.

Comment: One commenter asserted that EPA should have provided the public with 90 days, rather than 45, to comment on EPA's June 13, 2000, letter to the State of Wisconsin setting forth EPA's initial views regarding whether Wisconsin had adopted requirements consistent with the Guidance.

Response: The final rule being promulgated by EPA makes certain provisions of 40 CFR part 132 applicable to the Great Lakes System in Wisconsin. Those provisions were adopted after publication of a proposed rule for public comment. See 58 FR 20802 (April 16, 1993). EPA is not modifying those provisions, but merely making them effective in accordance with 40 CFR 132.5(f)(2). Therefore, the public had a full opportunity to comment on the contents of today's rule. Moreover, EPA provided public notice of the availability of, and solicited comment on, the NPDES portions of Wisconsin's Guidance submission in a Federal Register document (63 FR 10221) dated March 2, 1998. In a Federal Register document (65 FR 38830) dated June 22, 2000, EPA subsequently provided notice of the availability of its June 13, 2000, letter to Wisconsin in which EPA provided (a) detailed explanations of the bases for its findings that the State had not adopted provisions consistent with

certain provisions of the Great Lakes Guidance and (b) its preliminary conclusions that, with the exception of those findings, the State had adopted provisions consistent with the Guidance. EPA also solicited comment on all aspects of this letter, and has considered and responded to all comments received before taking today's final action. EPA has complied with all applicable public participation requirements, and believes that the 45 day period for commenting on its June 13, 2000, letter to Wisconsin was adequate.

Comment: One commenter asserts that EPA's treatment of intake pollutants in the Guidance is technically flawed and economically unachievable because they could require the treatment of up to one billion gallons per day of non-contact cooling water at a power plant. According to the commenter, the power plant in such a scenario would have to either install wastewater treatment equipment at a cost of tens or hundreds of millions of dollars or to shut down. The commenter asserts that a better approach would be to determine the sources of the background pollutants of concern and to determine if there are other technically and economically feasible options for improving water quality.

Response: To the extent this commenter is asserting that the Guidance itself improperly addresses intake pollutants, EPA reiterates that it has not reopened the Guidance for revisions and therefore such comments are not within the scope of EPA's current action, which is to determine whether Wisconsin has submitted provisions consistent with the Guidance.

EPA is disapproving the Wisconsin provision that prohibits WQBELs for non-contact cooling water as being inconsistent with the Guidance for the reasons stated above. EPA believes the commenter's conclusion that power plants will have to treat billions of gallons of water or shut down is speculative and overstated. EPA expects that in many cases, especially where no additives are used, once-through non-contact cooling water will qualify for intake pollutant relief under the Guidance provisions being promulgated for application to discharges to the Great Lakes Basin in Wisconsin. In any case, the application of the intake pollutant procedures of the Guidance to a particular discharger is fundamentally a site-specific evaluation. The particular characteristics of a facility's intake water and effluent, the manner in which the intake pollutants are handled by the facility and the resulting effect of that handling on the potential adverse effects of such pollutants in the receiving water, as well as the nature of the receiving water itself, all must be considered to determine what regulatory controls, if any, are needed under the Guidance. Thus, without a full record, it is not possible for us to address fully the concerns raised by this commenter, or predict how the rule being promulgated today will apply to any particular facility.

In addition, there are two other mechanisms set forth in the Guidance for addressing the commenter's concern. First, as EPA explained in several places in the SID, the best means for States and Tribes to address comprehensively the root causes of non-attainment of water quality standards is the TMDL development process. See, e.g., SID at 347. (The SID has been included in the record for EPA's determination with respect to Wisconsin's Guidance submission.) The TMDL procedures for the Great Lakes System are set forth in procedure 3 of appendix F to 40 CFR part 132. Second, any existing discharger into the Great Lakes System can apply for a variance from water quality standards where the discharger believes that requiring compliance with necessary water quality based effluent limitations "would result in substantial and widespread economic and social impact."See 40 CFR 131.10(g)(6). EPA adopted the intake pollutant procedures in the Guidance as an additional, permit-based mechanism for dealing with simple removal and transfer of pollutants from one part of a waterbody to another, but availability of this mechanism does not preclude use of other means of adjusting water quality standards or a particular discharger's load reduction responsibilities.

Comment: One commenter asserts that Wisconsin's approach to addressing WET, which the commenter describes as being one that relies upon permittees unilaterally (or in a cooperative fashion with the WDNR) taking voluntary measures to reduce toxicity rather than upon imposition of effluent limitations to control WET, is consistent with or superior to that in the Guidance. According to the commenter, Wisconsin's voluntary approach to addressing WET is superior to an approach that requires imposition of effluent limitations because effluent limitations can actually hinder a permittee's ability to address toxicity problems. The commenter asserts that this is because exceedances of permit limits can have serious legal consequences that can often divert the technical staff of both the regulatory agency and the permittee away from doing the technical work necessary to identify and address the causes of toxicity in the permittee's effluent.

Response: Paragraph C of procedure 6 in appendix F to 40 CFR part 132 requires imposition of WQBELs for WET whenever

an effluent is or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any numeric WET criterion or narrative criterion within a State's water quality ***66510** standards (i.e., whenever there is "reasonable potential"). Paragraph D of procedure 6 sets forth procedures for determining reasonable potential for WET.

Wisconsin's rules at Wis. Adm. Code NR 106.08(1), consistent with paragraph C of procedure 6, requires that WDNR "shall establish [WET] testing requirements and limitations whenever necessary to meet applicable water quality standards as specified in [Wis. Adm. Code] chs. NR 102 to 105 as measured by exposure of aquatic organisms to an effluent and specified effluent dilutions."For the reasons explained above, Wisconsin's procedures for determining reasonable potential (i.e., for determining whether WET limitations are "necessary to meet applicable water quality standards") are clearly not consistent with paragraph D of procedure 6 because, among other things, it is possible under Wisconsin's procedures to reach a determination that a WQBEL is not necessary even when an actual observed value would violate potential permit limits.

The commenter's premise is that imposition of WQBELs is actually harmful to the environment because the commenter believes that imposition of WQBELs results in an expenditure of resources that could otherwise be used addressing toxicity problems. The commenter, therefore, concludes that Wisconsin's inadequate WET reasonable potential should be approved precisely because it does not result in imposition of WQBELs.

EPA does not agree with the commenter's premise that imposition of WQBELs is somehow harmful to the environment, and the commenter has provided nothing other than vague, conclusory assertions to support the premise. Instead, EPA believes that the procedure that determines whether or not a permit includes a WQBEL for a particular pollutant or parameter (the reasonable potential procedure) is a critical element for determining the level of protection that will be achieved when implementing a water quality standard. Where a reasonable potential procedure is not as protective as the Guidance, a State's WET program cannot be considered to achieve the same level of protection as the Guidance.

EPA also notes that in addition to the requirements of procedure 6 of the Guidance itself, section 301(b)(1)(C) of the CWA requires "limitation[s] * * * necessary to meet any applicable water quality standard."Moreover, EPA's regulations implementing section 301(b)(1)(C) at 40 CFR 122.44(d)(1)(iv) and (v) require that NPDES permits contain "effluent limits for whole effluent toxicity" or chemical-specific limits in lieu of WET limits, whenever there is reasonable potential that a discharge will cause or contribute to an in-stream excursion above a numeric criterion for WET or a narrative criterion of no toxics in toxic amounts. Therefore, the CWA and EPA's implementing regulations require permitting authorities to impose WQBELs for WET when there has been a reasonable potential finding, and EPA does not believe it would be consistent with the CWA and EPA regulations to approve an alternative approach that omits this fundamental requirement. EPA notes that, in appropriate cases, a permitting authority can include a compliance schedule for the WQBEL that would allow for additional monitoring and identification and reduction of toxicants, followed by a reassessment of the need for a limit or the identification of a specific toxicant rather than WET that could be subject to a WQBEL.

Comment: One commenter asserts that EPA has failed to present technical evidence that the Guidance WET reasonable potential statistical procedure is technically valid. Specifically, the commenter asserts that EPA has not presented any information to prove that WET data follow a log-normal distribution.

Response: The CWA requires the States to adopt policies, standards and procedures that are consistent with the Guidance promulgated by EPA.33 U.S.C. 118(c)(2)(C). EPA has reviewed Wisconsin's submission to determine its consistency with the Guidance but has not reopened any provision of the Guidance in our review. The public had a full opportunity to provide its views on the statistical procedure for determining WET reasonable potential in paragraph D of procedure 6 during the rulemaking establishing the Guidance, and the time period for challenging the Guidance has passed. See 33 U.S.C. 509(b). Therefore, this comment does not provide a basis for allowing Wisconsin to adopt WET reasonable potential procedures that are inconsistent with those in the Guidance.

EPA further notes, in response to the comment regarding whether it is appropriate to assume that WET data follow a log-

normal distribution, that although the States have flexibility to adopt approaches that make different assumptions about the distribution of WET data than is assumed in procedure 6, no one has presented EPA with an analysis identifying a different distribution or statistical method that fits WET data better, either in general or in a particular case. More fundamentally, however, for the reasons explained above, the procedure submitted by Wisconsin does not address in any manner the underlying premise of procedure 6: that effluent quality is variable and, therefore, a method for assessing WET data must account for the likelihood that the maximum value in a particular data set is less than the true maximum that is likely to be experienced by the environment as a result of the discharge. EPA, therefore, concludes that Wisconsin's approach is inconsistent with the Guidance.

Comment: One commenter asserts that EPA is asking Wisconsin to adopt TMDL rules that did not exist when the Wisconsin rules were being revised.

Response: EPA promulgated the Guidance at 40 CFR part 132 on March 23, 1995. Wisconsin subsequently engaged in a proceeding to adopt requirements consistent with the Guidance, and Wisconsin did indeed revise its rules in that time period in an effort to be consistent with the Guidance. EPA, therefore, does not agree that the Guidance required Wisconsin to adopt rules that did not exist when the Wisconsin rules were being revised.

E. Consequences of Today's Action

As a result of today's action, the Guidance provisions specified in today's rule apply in the Great Lakes System in Wisconsin until such time as the State adopts requirements consistent with the specific Guidance provisions at issue, and EPA approves those State requirements and revises the rule so that the provisions no longer apply in Wisconsin.

II. "Good Cause" Under the Administrative Procedure Act

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553 (b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA finds it unnecessary and contrary to the public interest. Today's rule does not promulgate any new regulatory provisions. Rather, in accordance with the procedures in 40 CFR 132.5(f), today's rule identifies the provisions of 40 CFR part 132 promulgated previously by EPA that shall apply to discharges in Wisconsin within the Great Lakes ***66511** System. Those provisions have already been subject to a notice of proposed rulemaking, and publication of a new proposed rule is therefore unnecessary. See 58 FR 20802 (April 16, 1993). In addition, while EPA's approval/disapproval decisions described in this document do not constitute rulemaking, EPA has nonetheless received substantial public comment on these decisions. See 63 FR 10221 (March 2, 1998) (notice of receipt of State Guidance submission and request for comment); 65 FR 38830 (June 22, 2000) (notice of letter identifying inconsistencies and request for comment). EPA also believes the public interest is best served by fulfilling the CWA's requirements without further delay and publication of a notice of proposed rulemaking therefore would be contrary to the public interest. Thus, notice and public procedure are unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, as described in Section II, above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4). In addition, because this action does not promulgate any new requirements, but only makes certain existing provisions of 40 CFR part 132 effective in Wisconsin, it does not impose any new costs. The costs of 40 CFR part 132 were considered by EPA when it promulgated that regulation. Therefore, today's rule does not significantly or uniquely affect small

governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA, or significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the State, on the relationship between the national government and the State, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a major rule as defined by 5 U.S.C. 804(2).40 CFR 132.6(f), (h)-(j) is effective on December 6, 2000.40 CFR 132.6(g) is effective on February 5, 2001.

List of Subjects in 40 CFR Part 132

Environmental protection, Administrative practice and procedure, Great Lakes, Indian-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: October 31, 2000.

Carol M. Browner,

Administrator.

For the reasons set forth above, EPA amends 40 CFR part 132 as follows:

PART 132—WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM1. The authority citation for part 132 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

40 CFR § 132.6

2. Section 132.6 is amended by adding paragraphs (f) through (i) to read as follows:

40 CFR § 132.6

§ 132.6 Application of part 132 requirements in Great Lakes States and Tribes.

* * * * *

(f) Effective December 6, 2000, the acute and chronic aquatic life criteria for copper and nickel in Tables 1 and 2 of this part and the chronic aquatic life criterion for endrin in Table 2 of this part shall apply to the waters of the Great Lakes System in the State of Wisconsin.

(g) Effective February 5, 2001, the chronic aquatic life criterion for selenium in Table 2 of this part shall apply to the waters of the Great Lakes System in the State of Wisconsin.

(h) Effective December 6, 2000, the requirements of procedure 3 in appendix F of this part shall apply for purposes of developing total maximum daily loads in the Great Lakes System in the State of Wisconsin.

(i) Effective December 6, 2000, the requirements of paragraphs D and E of procedure 5 in appendix F of this part shall apply to discharges within the Great Lakes System in the State of Wisconsin.

(j) Effective December 6, 2000, the requirements of paragraph D of procedure 6 in appendix F of this part shall apply to discharges within the Great Lakes System in the State of Wisconsin.

Dated: October 31, 2000.

Carol M. Browner,

Administrator.

[FR Doc. 00-28419 Filed 11-3-00; 8:45 am]

BILLING CODE 6560-50-P

65 FR 66502-02, 2000 WL 1650290 (F.R.)
END OF DOCUMENT

ADDENDUM TO

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

MEMORANDUM OF AGREEMENT

BETWEEN THE

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

AND

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

GREAT LAKES RULES AND PROCEDURES – OCTOBER 2000

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

Section 1. General

The federal Water Quality Guidance for the Great Lakes System (federal guidance), 40 CFR Part 132, contains the minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife. The Great Lakes states and tribes were required to adopt provisions consistent with (as protective as) the federal guidance for their waters within the Great Lakes System. The state of Wisconsin adopted rules incorporating the federal guidance in 1997.

The United States Environmental Protection Agency Region 5 (USEPA) and the Wisconsin Department of Natural Resources (WDNR) enter into this Addendum to ensure that Wisconsin's rules, WPDES permits and procedures are implemented in a manner consistent with the federal guidance.

This Addendum only applies to those portions of Wisconsin's WPDES permit program applicable to the Great Lakes System within Wisconsin.

Except for Issue 7, this Addendum does not apply to discharges of pollutants listed in Table 5 of 40 CFR Part 132.

The WDNR intends to request permission to initiate the rulemaking process to specifically incorporate some of the interpretations addressed in this Addendum below. At the end of this rulemaking effort, USEPA and WDNR may modify this Addendum as necessary.

Section 2 . Permit Administration and Specific Conditions

1. Monitoring for Bioaccumulative Chemicals of Concern (BCC): Pursuant to the authority in s. NR106.05(9), Wis. Adm. Code, if a BCC is known or believed to be present in a discharge to the Great Lakes System, the WDNR will include a monitoring requirement in the WPDES permit for the BCC. *(Appendix E, Section II.D.2. of 40 CFR Part 132).*

2. Tier II Values - Development of Data: If a pollutant listed in Table 6 of Part 132 is known or believed to be present in a WPDES permitted discharge to the Great Lakes System, and there are no pollutant data available to calculate a Tier II value for noncancer human health, acute aquatic life or chronic aquatic life, the WDNR will estimate ambient screening values to protect humans from health effects other than cancer, and aquatic life from acute and chronic effects. The WDNR will then develop preliminary effluent levels (PELs) based on those values and compare them to the permittee's preliminary effluent

quality (PEQ). If the PEQ exceeds the PELs that were developed based on the screening values, the WDNR will generate sufficient data to calculate Tier II values. *(Section C of Procedure 5 in Appendix F to 40 CFR Part 132.)*

3. Whole Effluent Toxicity (WET) Limits in Lieu of Tier II: If pursuant to s. NR 106.05(1)(c), Wis. Adm. Code, a permittee requests a WET limit under s. NR 106.07(7), Wis. Adm. Code, as an alternative to a Tier II value based limitation, the WDNR agrees to specifically list the pollutant of concern that is the basis for the alternative limit in the permit, and agrees to explain, in the fact sheet, the basis for the alternative limit and how the alternative limit will control the pollutant of concern. In addition, in the event the WDNR determines that the alternative limit is not sufficient to maintain water quality standards, the WDNR will, pursuant to the authority in s. 283.53(2), Stats., reopen the permit to include a Tier II value based limit. *(Paragraph 6.e. of Section C of Procedure 5 n Appendix F to 40 CFR Part 132)*

4. Fish Tissue Reasonable Potential: Pursuant to s. 281.31(3)(d), Stats., and s. NR 106.05(2), Wis. Adm. Code, in cases where the geometric mean of a pollutant in a fish tissue sample collected from a Great Lakes System waterbody exceeds the tissue basis of a Tier I criterion or a Tier II value, after consideration of the variability of the pollutant's bioconcentration and bioaccumulation in fish, the WDNR will impose a limitation in a WPDES permit of each facility that discharges detectable levels of the pollutant to the water body. The WDNR will request permission to initiate rulemaking to clarify this requirement into the state's reasonable potential procedures. *(Paragraph 4 of Section F of Procedure 5 in Appendix F to 40 CFR Part 132.)*

5. Monitoring Requirements - Levels of Quantification: When a water quality-based effluent limitation below the Level of Quantification for a pollutant is included in a permit issued to a Great Lakes System discharger, the WDNR will include the following statement in the permit, "*For pollutants with water quality-based effluent limitations below the Level of Quantification (LOQ) in this permit, the Level of Quantification calculated by the permittee and reported on the Discharge Monitoring Reports is incorporated by reference in this permit. The LOQ shall be reported on the Discharge Monitoring Reports, 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.*" The WDNR further agrees that it will not specify a higher LOQ in the permit unless the permittee demonstrates that a higher LOQ is appropriate because of effluent-specific matrix interference. The WDNR further agrees that if analytical methods more sensitive than the methods specified in ch. NR 219 are promulgated in 40 CFR Part 136, pursuant to the authority in s. 106.07(6), Wis. Adm. Code, when a permit is issued or reissued, the WDNR will require in the WDPES permit that the more sensitive method in 40 CFR Part 136 be used in testing the effluent and calculating the LOQ. *(Section B of Procedure 8 in Appendix F to 40 CFR Part 132.)*

6. Limit of Quantification Compliance Language: The WDNR agrees that it will not include the compliance provisions in s. NR 106.07(6)(c) in WPDES permits issued to dischargers to the Great Lakes System.

7. Pollutant Minimization Program: Pursuant to the authority in ss. NR 106.07(6)(f) and

106.04(5) and s. 283.31(3)(d), Stats., where there is a water quality-based limitation for a pollutant that is below the Level of Quantification (LOQ) in a WPDES permit issued to Great Lakes System discharger, the WDNR will require that the permittee develop and implement a pollutant minimization program that contains all of the elements listed in Section D of Procedure 8 in Appendix F to 40 CFR Part 132, including the requirement for quarterly influent monitoring and semiannual monitoring of potential sources, unless less frequent monitoring or no monitoring, is justified based upon information generated in the pollutant minimization plan. The WDNR will request permission to initiate rulemaking to clarify this intent.

8. Mixing Zones: The WDNR will not approve an alternative mixing zone unless the provisions of Sect. F of Proc. 3 in Appendix F to 40 CFR Part 132 are met.

9. Compliance Schedules for Tier II Limits: Pursuant to s. NR 106.17(2)(c), Wis. Adm. Code, the WDNR will initially limit the compliance schedule for a Tier II value based limitation to no more than five years and will only extend that compliance schedule for a period of up to two more years, if necessary, and if the secondary value studies are completed by the permittee or a third party. Any extension will be done through a permit modification. In addition, any time allowed to conduct studies pursuant to s. NR 106.17(2)(c), Wis. Adm. Code will occur within the first two years of the compliance schedule.

FOR WISCONSIN DEPARTMENT OF NATURAL RESOURCES

George E. Meyer

George E. Meyer
Secretary

10/11/00
Date

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

Francis X. Lyons
Regional Administrator

10/26/00
Date

Recd OKY JK 5-25-06 (385)

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People and Nature: Our Future Is in the Balance

May 18, 2006

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U.S. EPA REGION 5
OFFICE OF REGIONAL ADMINISTRATOR

Mr. Stephen L. Johnson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Notice of Intent to File a Citizen Suit under the Clean Water Act

Dear Mr. Johnson:

Pursuant to Section 505(b) of the Federal Water Pollution Control Act ("Clean Water Act" or "the Act" or "CWA"), 33 U.S.C. § 1365(b), this letter provides notice of intent to file suit against the United States Environmental Protection Agency ("EPA") pursuant to Section 505(a)(2), 33 U.S.C. § 1365(a)(2), for failure to perform a nondiscretionary duty promulgated under the Act and codified in 40 C.F.R. § 123.62.

In particular, this letter alleges that EPA has failed to perform its nondiscretionary duty to review, and then approve or disapprove, Wisconsin's revision to its administration of the National Pollutant Discharge Elimination System ("NPDES") program. The revision established a new special procedure for determining when a discharge of mercury has the reasonable potential to cause or contribute to a violation of the applicable water quality-based effluent limit ("WQBEL"), and is codified in Wisconsin's Effluent Limitations for Mercury Discharges, at WIS. ADMIN. CODE § NR 106.145.

This notice is provided by the National Wildlife Federation and the Clean Water Action Council of Northeastern Wisconsin (collectively, "the Parties"). The Parties are non-profit corporations working on behalf of their members and the public interest. If litigation proves necessary, the Parties will seek an order compelling EPA to exercise its nondiscretionary duty to review, and either approve or disapprove, Wisconsin's revised NPDES program.

I. BACKGROUND

Congress entrusted EPA with important nondiscretionary duties to implement the Clean Water Act and protect the American public from water pollution. Congress specifically intended

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that the Clean Water Act "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, Congress declared "as a national goal" that "the discharge of pollutants into navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). To achieve the goal of eliminating the discharge of pollutants into navigable waters, each state must establish "ambient water quality standards" at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act." 33 U.S.C. § 1313(a)–(c). The NPDES program is one of the tools provided by the Act to ensure that water quality standards are attained. 33 U.S.C. § 1342.

Congress also directed EPA to publish water quality guidance ("the Guidance") for all surface waters within the Great Lakes basin. 33 U.S.C. § 1268(c)(2). Pursuant to Section 118 of the Act, EPA published the Guidance, including in it "numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife, and . . . guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System." 33 U.S.C. § 1268(c)(2)(A).

In the Guidance, EPA established a mercury water quality criterion of 1.8 nanograms per liter ("ng/l") for protection of human health, which the Agency made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(3), Table 3 (Water Quality Criteria for Protection of Human Health). In addition, EPA established a mercury water quality criterion, or "Tier I criterion," of 1.3 ng/l for protection of wildlife, which the Agency also made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(4), Table 4 (Water Quality Criteria for Protection of Wildlife), Appendix D.II. ("Table 4 of Part 132 . . . contain[s Tier I] criteria calculated by EPA.").

Congress mandated that that the Great Lakes States "adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with [the] guidance," and charged EPA with reviewing them for consistency. 33 U.S.C. § 1268(c)(2)(C); *see also* 40 C.F.R. § 132.5(g)(3). State implementation procedures must be as protective as the Guidance's implementation procedures. 40 C.F.R. § 132.5(g)(3) & (i).

The Clean Water Act requires that NPDES permits contain technology-based limits established by EPA and "any more stringent" limits that are necessary to ensure that dischargers do not cause the quality of receiving waters to violate state water quality standards. 33 U.S.C. §§ 1311(b) & 1342(a). Generally speaking, more stringent limits are necessary to control pollutants that the agency "determines 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." 40 C.F.R. § 122.44(d)(1)(i). In particular, when the agency determines "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." *Id.* at § 122.44(d)(1)(iii) (emphasis added).

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The "reasonable potential" requirement established by the general regulations implementing the Act is echoed in the Guidance, as follows:

> If a permitting authority determines that a pollutant is or may be discharged into the Great Lakes System at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any Tier I criterion or Tier II value, the permitting authority *shall* incorporate a water quality-based effluent limitation (WQBEL) in an NPDES permit for the discharge of that pollutant.

40 C.F.R. § 132, Appendix F—Implementation Procedure 5: Reasonable Potential to Exceed Water Quality Standards ("Procedure 5") (emphasis added).

After the passage of the Clean Water Act, EPA delegated authority to Wisconsin to administer the NPDES program. Following EPA's promulgation of the Guidance, eligibility for delegation depended, in part, on a Great Lakes state's (1) authority to implement the general "reasonable potential" requirement and Procedure 5, and (2) administration of its NPDES program in conformance with both. 40 C.F.R. § 123.25(a)(15) & (38). On November, 6, 2000, EPA found that Wisconsin complied with these requirements when EPA approved the revisions Wisconsin made to conform to the Guidance. Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission from the State of Wisconsin, and Final Rule, 65 Fed. Reg. 66,502 (2000).

Having once been delegated the authority to administer the NPDES program, a state may revise its program. 40 C.F.R. § 123.62. The state must submit its proposed revision to EPA. *Id.* at § 123.62(b)(1). If EPA determines that the proposed revision is substantial, it must publish a public notice in the Federal Register and provide at least a 30-day period for public comment. *Id.* at § 123.62(b)(2). EPA must approve or disapprove program revisions based on the requirements of 40 C.F.R. Part 123 and the Act. *Id.* at § 123.62(b)(3) ("The Administrator *will* approve or disapprove program revisions based on the requirements of this part [123] . . . and of the CWA.") (emphasis added). Notice of approval of any substantial revision must be published in the Federal Register. *Id.* at § 123.62(b)(4).

II. EPA HAS A NONDISCRETIONARY DUTY TO REVIEW, AND EITHER APPROVE OR DISAPPROVE, WISCONSIN'S MERCURY-SPECIFIC VARIANCE PROCEDURE BECAUSE THE PROCEDURE CONSITUTES A REVISION TO WISCONSIN'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

On August 26, 2002, Wisconsin adopted "an alternative means of regulating mercury in permits through the establishment of alternative mercury effluent limitations and other requirements . . . ." WIS. ADMIN. CODE § NR 106.145. This "alternative mercury effluent limitation [("AMEL")] represents a variance to water quality standards . . . ." *Id.* If a permittee gets an AMEL, Wisconsin's general variance procedure does not apply. *Id.* at § NR 106.145(12).

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Under Wisconsin's new procedure, the Wisconsin Department of Natural Resources does not make a reasonable potential determination without "at least 12 monitoring results spaced out over a period of at least 2 years." WIS. ADMIN. CODE § NR 106.145(2)(b)(2); *see id.* at § NR 106.145 (8)(a)(3)(d) (requiring a permittee to submit effluent monitoring results that represent a time period of at least two years).

The mercury-specific variance procedure thus creates an exception to the EPA-approved Rules NR 106.05(4) and (6), which require a reasonable potential determination with eleven or more effluent samples, and less than eleven effluent samples, respectively. The new procedure also arbitrarily requires the twelve effluent samples to be spaced out over a period of two years. Thus, Wisconsin no longer has to administer its NPDES program in conformance with the reasonable potential requirement, contrary to 40 C.F.R. § 123.25(a)(15) & (38).

This change constituted a revision—a substantial revision—of Wisconsin's NPDES program as it pertains to the determination of "reasonable potential" for discharges of mercury. As such, it triggered EPA's nondiscretionary duty of review. Specifically, 40 C.F.R. § 123.62(b)(3) specifies that "[t]he Administrator *will* approve or disapprove program revisions based on the requirements of this part [123] . . . and of the CWA." *Id.* (emphasis added). Contrary to this requirement, EPA has not reviewed or passed judgment on the revision, even though Wisconsin consulted with EPA when drafting the AMEL procedure. Nor has EPA followed the other procedures applicable to a revision of an NPDES program prescribed by 40 C.F.R. §§ 123.62 and 132.5. Although Wisconsin may not have formally submitted its revision to EPA, that does not excuse the Agency from having to perform its nondiscretionary duty of review. *Cf. Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997) (holding that a state's "failure to submit any new or revised standards cannot circumvent the purposes of the CWA").

III. IDENTIFICATION OF THE PARTIES

The names, addresses, and telephone numbers of the Parties are as follows:

NATIONAL WILDLIFE FEDERATION
Great Lakes Natural Resource Center
213 West Liberty, Suite 200
Ann Arbor, MI 48104-1398
734-769-3351

CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN
1270 Main Street, Suite 120
Green Bay, Wisconsin 54302
920-437-7304

The Parties and their members are substantially affected by and substantially interested in the water quality of the Great Lakes System. The use and enjoyment of the waters of the Great

(385)

Lakes System in Wisconsin by the members of the Parties are adversely affected by the AMEL procedure. Specifically, implementation of the AMEL procedure lessens the protection given to the waters of the Great Lakes System (1) perpetuating the toxic mercury pollution of Wisconsin streams, rivers, and lakes, which members of the Parties use as a source of food, for recreation, or for aesthetic enjoyment, or which they would use for such purposes but for the polluted condition of such waters, or (2) increasing the likelihood that Wisconsin streams, rivers, or lakes will become or remain polluted by mercury, interfering with the use and enjoyment of such waters by members of the Parties.

IV. IDENTIFICATION OF LEGAL COUNSEL

Neil S. Kagan
Senior Counsel
NATIONAL WILDLIFE FEDERATION
Great Lakes Natural Resource Center
213 West Liberty, Suite 200
Ann Arbor, Michigan 48104-1398
734-769-3351, extension 38

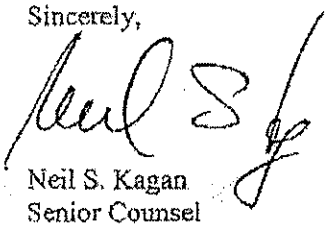
V. EFFECT OF NOTICE

If EPA's above-described failure to comply with its nondiscretionary duty is not corrected within sixty days, the Parties intend to file suit seeking declaratory relief, injunctive relief, and litigation costs, including attorney and expert witness fees on behalf of themselves, their members, and other interested parties.

The Parties respectfully request the courtesy of a written reply to this notice within thirty days of the date of this letter. Specifically, if EPA believes that the factual allegations set forth in this notice letter are not complete or are inaccurate, the Parties request that EPA provide such information in writing within thirty days.

Should you have any questions, please feel free to contact me at 734-769-3351, extension 38. Thank you for your attention to this matter.

Sincerely,



Neil S. Kagan
Senior Counsel

(385)

Cc: Alberto R. Gonzales, Attorney General of the United States
Bharat Mathur, Acting Regional Administrator, EPA Region 5
P. Scott Hassett, Secretary, Wisconsin DNR
Todd Ambs, Water Division Administrator, Wisconsin DNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 1 7 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,

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

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[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 RESOUCES 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 2-17-09
~~Region V. Administrator~~

Bharat Mathur
Acting Regional Administrator

Midwest Environmental
ADVOCATES
pro bono publico

October 22, 2008

Lynn Buhl
Regional Administrator
Region 5, USEPA
77 W. Jackson Blvd.
Chicago, Illinois 60604-3507

Matt Frank, Secretary
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Regional Administrator Buhl and Secretary Frank,

For more than a year, the Environmental Law and Policy Center, Midwest Environmental Advocates and Sierra Club have been formally working with the Wisconsin Department of Natural Resources ("WDNR") and the United States Environmental Protection Agency, Region 5, ("EPA") to address numerous deficiencies in Wisconsin's water program. In a July 31, 2007 letter to EPA and WDNR, we outlined several key concerns. On October 30, 2007, we met with Secretary Frank and on November 7, 2007, we met with EPA Region 5 staff to discuss the issues raised in our July 2007 letter. In response to those meetings EPA identified Action Items in a February 4, 2008 communication ("February Status Update"). On February 15, 2008 representatives from WDNR and EPA met with us regarding the issues raised in the July 31, 2007 letter.

We are writing to summarize those discussions and identify both actions taken to resolve these issues and issues that remain concerns.

1. Section 316(b), Clean Water Act

It remains unclear whether WDNR or EPA will establish protections against entrainment required by Sec. 316(b), Clean Water Act. WDNR has stated that it may not have authority to issues permits with entrainment limits. As of our November 2007 meeting, EPA had not taken a position regarding WDNR's authority to establish entrainment limits in permits, nor had EPA determined whether it would issue permits with entrainment limits assuming WDNR lacks authority.

Moreover, at the February 15, 2008 meeting, WDNR expressed concern that it cannot implement Clean Water Act requirements, including Sec. 316(b), without state

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implementation regulations. Without state implementation rules, WPDES permits containing entrainment protections are subject to challenge by the permittee.

Because Sec. 316 requires WDNR's protection against entrainment, failure to issue permits with entrainment limits contravenes the federal law. We seek to know how WDNR and EPA will respond to this deficiency.

II. Nutrient Water Quality Based Effluent Limits ("WQBELs")

We remain concerned that WDNR is not implementing narrative water quality standards to control nutrient discharges in WPDES permits, especially where the receiving water is listed on Wisconsin's 303(d) list for an impairment, such as low dissolved oxygen ("DO") or eutrophication, caused by excess nutrients. Of particular concern is WDNR's December 14, 2006 guidance directing permit drafters to issue WPDES permits without nutrient limits based on narrative water quality standards until there is guidance or a rule establishing a general or site-specific methodology for determining "reasonable potential." This guidance violates federal regulations codified at 40 CFR § 122.44

At our November 2007 meeting, EPA agreed to discuss implementation of narrative nutrient criteria with WDNR and committed to determine whether WDNR's guidance violates federal law.

In the February Status Update, EPA stated that WDNR should concentrate on promulgating numeric water quality standards for nutrients. EPA also stated that WDNR should apply its narrative criteria to regulate point sources discharges of nutrients in WPDES permits prior to the development of numeric criteria or TDML, on a case-by-case basis where there are obvious point source nutrient problems. WDNR then agreed to modify or clarify the December 14, 2006 guidance.

During our February 15, 2008 meeting, WDNR communicated general disinterest in translating narrative standards into WQBELs in WPDES permits. We discussed that in situations where WDNR has readily available information to determine that phosphorus is causing a DO or eutrophication impairment, WDNR should translate that impairment into WQBELs in WPDES permits. WDNR again committed to revising the December 14, 2006 guidance.

WDNR also discussed the development of numeric water quality criteria for phosphorus. We appreciate WDNR's efforts to adopt numeric phosphorus water quality criteria and encourage WDNR to proceed with that rulemaking. Nevertheless, we remain concerned that WDNR is failing to protect water quality, particularly in impaired waters, by not considering if or how phosphorus and nitrogen discharges from point source discharges will impact water quality.

For these reasons, we request that the WDNR expeditiously move to revise the 2006 guidance and start issuing WPDES permits with phosphorus and nitrogen WQBELs in

cases where there is readily available information to show phosphorus or nitrogen is causing the impairment.

III. Reasonable Potential Analysis and Water Quality Based Effluent Limits

It remains unclear whether WDNR believes it has the authority to determine whether discharges of certain pollutants have a reasonable potential to exceed water quality criteria and impose WQBELs consistently in WPDES permits where necessary. Wisconsin regulations contain both general procedures and pollutant specific (chloride and ammonia) procedures for establishing effluent limitations in WPDES permits.[1] Wis. Adm. Code § NR 106. Wisconsin's general procedures direct WNDR to establish WQBELs where a point source discharge contains "toxic or organoleptic substances at a concentration or loadings which do not...meet applicable water quality standards specified in chs. NR 102 to 105." Wis. Adm. Code § NR 106.05(1)(a). But WDNR's position on the general applicability of NR 106 is uncertain, for example:

- Once WDNR adopts phosphorus water quality criteria, neither current regulations at NR 106 nor EPA regulations contain procedures for deriving WQBELs necessary to ensure the attainment of those water quality criteria, as required by federal regulations at 40 CFR § 122.44. *See* Attachment 1, "Deriving Water Quality Based Effluent Limits (WQBEL) – Options," WDNR, April 3, 2008.

- "The EPA has delegated authority to the state of Wisconsin under the Clean Water Act, and the state legislature has given the DNR authority to promulgate rules and implement that program under Wisconsin law. Wisconsin water quality standards do not presently require the Department to undertake the 'reasonable potential analysis' referenced under EPA guidelines. ... As the Village notes, the EPA has authority to veto individual permits but has not done so in this case. ..." Ruling on the Scope of the Issues by the State of Wisconsin Division of Hearings and Appeals Case No. IH-06-14

- "The sole authority for the WDNR to administer the WPDES permit program appears in Wis. Stats. chs. 281 and 283 and Wisconsin Administrative Codes adopted pursuant to those authorities. To the extent that a comment on a WPDES permit term or condition is made pursuant to Wis. Stat. ch. 283.39, the comment must be based on Wisconsin law. The Department does not implement s. 40 CFR 122.44(d)(1)(i), and there is no corresponding specific provision in Wisconsin law or regulations that requires this analysis to be made for phosphorus. Further, doing such an analysis would be burdensome, and produce very limited benefits. Wis. Stat. s. 283.13(5) requires the development of effluent limitations that are necessary to meet applicable water quality standards. However, this provision does not apply because there is no specific water quality

[1] Section NR 106.145 establishes procedures for determining whether a permitted facility's mercury discharge has the reasonable potential to exceed water quality criteria. However, EPA has not approved this section, and therefore it is not effective for Clean Water Act purposes.

standard for phosphorus and, therefore, WQBELs cannot be established for this substance. The basis for the phosphorus limits in this permit is Wis. Stats. ss. 283.11(3)(am) and (b) and NR 217, Wis. Adm. Code." *See* Attachment 2, "Notice of Final Determination To Reissue A Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0032492-04-0", Response to 2 and 3, and June 26, 2006 Letter from Heldstab to Hanson, page 3, Response to Comment C.

Based on the foregoing, we are concerned that WDNR believes it must only perform a reasonable potential analysis and establish WQBELs for listed toxics, chloride, and ammonia, ignoring the general provisions of Wis. Adm. Code § NR 106. We ask that WDNR clarify its position.

IV. Additives In Noncontact Cooling Water – Sec. NR 106.10, Wis. Adm. Code

Wis. Adm. Code § NR 106.10 prohibits the imposition of WQBELs for discharges of additives, including chlorine, in noncontact cooling water if the addition is similar in amount as is typically added to a public drinking water supply. EPA issued a letter indicating it would object to WPDES permits proposed for two pulp and paper manufacturing facilities, (Mosinee (2005) and Domtar), if DNR issued those permits without WQBELs for chlorine.

According to the February Status Update, WDNR agrees that this rule needs to be revised; however, no clear timelines have been set to remedy the problem. At a November 16, 2007 meeting, WDNR agreed to provide EPA with a list of facilities where Wis. Adm. Code § NR 106.10 will prevent the imposition of WQBELs for additives. EPA agreed to review the proposed permits for those facilities where chlorine would be added and discharged. EPA further agreed to work with WDNR to amend Wis. Adm. Code § NR 106.10. Shortly after receiving the February Status Update, we requested a copy of the listed facilities, but were informed it had not been provided to EPA yet.

Finally, despite acknowledging that EPA has identified Wis. Adm. Code § NR 106.10 as inconsistent with the Clean Water Act, WDNR has *not* identified the modification or removal of this exemption as a priority for the 2008 – 2011 triennial standard review cycle. *See* Attachment 3, "Wisconsin's Surface Water Quality Triennial Standards Review 2008-2011 – DRAFT Prioritized Topic List", WDNR, June 26, 2008. Significantly, WDNR states that "this provision is included in the rule to allow the Department to treat such discharges similarly to how we would treat noncontact cooling water discharges which use municipal water for cooling purposes." This statement calls to question WDNR's protection of fish and aquatic life for discharges that don't directly add additives to noncontact water, but rather discharge noncontact cooling water containing concentrations of pollutants that may be harmful to fish and aquatic life due to the facilities choice of intake water.

We are deeply troubled by WDNR's apparent failure to prioritize amendments of Wis. Adm. Code § NR 106.10. We ask that WDNR take action and commit to a timeline for modification or removal of the provision. In the meantime, we request a list of facilities where Sec. NR 106.10 prevents the imposition of WQBELs for additives. We also seek to know whether DNR establishes WQBELs for facilities discharging noncontact cooling water containing pollutants from municipal source water at levels that have the reasonable potential to violate water quality standards. We further request that WDNR explain the impact of WDNR's interpretation of WQBEL provisions in Sec. NR 106.10.

V. Antidegradation

Wisconsin's antidegradation implementation regulations, found at Chapter NR 207, Wis. Adm. Code, fail to comport with Clean Water Act requirements. Specifically, Ch. 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. *See also* Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp. 2d 732 (S.D. W. Va. 2003).[2]
- 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.

[2] The Sixth Circuit Court of Appeals recently vacated those portions of EPA's decision approving Kentucky's categorical exemptions for certain discharges from Tier II review. *See* Kentucky Waterways, et. al. v. Johnson, et. al., September 3, 2008 (Attachment 5.).

- Fails to require WDNR 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.

According to the February 2008 status update, WDNR has agreed to revise its antidegradation rules and desires to collaborate with both the environmental community and EPA. To that end, WDNR also asked that we outline our priority concerns with the rule, and identify portions of Wisconsin's current antidegradation law that we desire remain intact. In several letters to WDNR, we have identified problems with the current rule and developed rule language necessary to ensure Wisconsin's antidegradation regulations comply with federal law. *See* Attachment 4, November 9, 2007, Letter from Lawton to Holst and Pfiefer.[3] WDNR has acknowledged that it rarely, if ever, 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 WDNR's assessment, Ch. NR 207 rarely, if ever, prevents consumption of the full assimilative capacity of a receiving stream or is used to require advanced treatment technology for new or increased discharges. Consumption of 1/3 of assimilative capacity is not "de minimis" and cannot be properly be approved by U.S. EPA. *See* Attachment 5, Kentucky Waterways Alliance v. Johnson, No. 06-5612 (6th Cir. Sep. 3, 2008) (remanding EPA's approval of Kentucky's antidegradation implementation procedures to address "deficiencies in its consideration of Kentucky's *de minimis* exemptions").

We are also concerned that WDNR does not uniformly apply antidegradation implementation regulations when calculating WPDES permit limits for new or increased discharges of pollutants. The following language from two recently issued WPDES permits, both discharging to intermittent receiving streams, illustrates this inconsistency:

- **"Antidegradation Evaluation:** All of the limitations above are based upon utilizing the full assimilative capacity of Sawyer Creek [zero cfs background flow]. For the purpose of this evaluation, the discharge from Utica Energy LLC is considered a "new" discharge as defined in ch. NR 207, because the facility did not discharge prior to promulgation of that rule. Consequently, effluent limitations must prevent significant lowering of water quality unless Utica Energy LLC fulfills the requirements of s. NR 207.04(1)(d). Limits which prevent significant lowering of water quality are those calculated to use no more than one-third of the remaining assimilative capacity. In this situation, such limits will simply equal one-third of the limits calculated above. Since the concept of assimilative capacity does not apply to limits based on acute toxicity, only the weekly and monthly average limits above need to be adjusted." April 4, 2007, WDNR Memo, "Water Quality-based Effluent Limitations for Utica Ethanol LLC, WPDES Permit No. WI-0063649".

[3] If either the WNDR or the EPA would like copies of the letters referred to in the November 9th letter, Midwest Environmental Advocates will be happy to provide them.

- **Antidegradation Evaluation:** "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: MEA currently represents a community group challenging the terms of this permit.) *See* Attachment 6, "Water Quality-based Effluent Limitations for proposed new discharge from Didion Ethanol LLC Plant in Town of Courtland – Columbia County", WDNR, January 16, 2008, pp.8-9.

While WDNR has committed to correct deficiencies with Wisconsin's antidegradation rule, the scope and timing of any rule revision is unclear. In February 2008, DNR stated it expected to proceed with a two stage fix: first, a "technical" update to ensure antidegradation applies to MS4s and to clarify public participation procedures; and second, a more comprehensive overhaul to correct the remainder of rule deficiencies as part of the triennial review.

Since February 2008, WDNR has issued a scope statement proposing limited revisions to NR 207 that will address WDNR's "stage one" revisions.[4] WDNR has not, however, proposed revisions necessary to bring Wisconsin's entire antidegradation implementation regulations into compliance with the Clean Water Act. Moreover, we do not know whether WDNR intends to remedy these deficiencies during the upcoming triennial review. Although WDNR has identified antidegradation review as a "high priority" for the 2008-2011 triennial review, WDNR has not explained whether or not the scope of that revision extends beyond the current scope statement. WDNR's triennial standards review description also does not clarify whether antidegradation revision is truly "high priority," or merely a reiteration of current discussions.

We call upon WDNR to amend the current statement of scope to include all technical changes necessary to make Wisconsin's antidegradation implementation procedures comport with federal law. 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, it is easier, less time consuming, and more effective to rewrite the entire rule once. Furthermore, as mentioned above, EPA cannot properly approve Wisconsin's antidegradation procedures as currently drafted. Thus, failing to correct the problems now will only delay approval of Wisconsin's triennial review and could lead to costly and protracted litigation.

EPA indicated that its Water Quality Standards program had prepared briefings for the Division Director and Regional Administrator on the antidegradation portion of the backlogged rule package, with briefings expected to occur in February 2008. We would like to know the status of those briefings, if they occurred, and if so, what, if any, follow-up action is being planned or pursued.

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[4] WDNR "Scope Statement, Relating to Amendment of Chapter NR 207, Antidegradation", available at https://apps4.dhfs.state.wi.us/admrules/public/Rmo?nRmoId=4003 (last updated March 23, 2008).

Lastly, as of the February 2008 status update, EPA has taken the position that it will focus on assuring Wisconsin's current antidegradation regulations are followed when reviewing WPDES permits. We believe it is EPA's duty to review permits for compliance with the Clean Water Act, not Wisconsin's deficient antidegradation implementation rules.

VI. Thermal Water Quality Criteria

Wisconsin has not had effective water quality criteria for temperature for nearly thirty years. While we commend WDNR's current efforts to promulgate thermal criteria, we remain concerned that WDNR continues to issue WPDES without limitations necessary to protect fish and aquatic life from harm caused by discharges of heated waters.

In fact, WDNR has the authority to impose water quality based effluent limits on discharges of heated effluent to Wisconsin waters, both in accordance with Wisconsin Electric Power Co. v. Wisconsin Natural Resources Board, 90 Wis.2 d 656, 280 N.W.2d 218 (Wis. 1979), and in accordance with federal requirements at 40 C.F.R. 122.44(d). In not imposing thermal water quality based effluent limits, we believe WDNR relies too broadly on the WEPCO case. Specifically, WDNR retains the right, and the obligation, to impose water quality based effluent limits necessary to ensure 1) "no temperature changes that may adversely affect aquatic life," 2) "natural daily and seasonal temperature fluctuations shall be maintained", and 3) the receiving water temperature shall not exceed 89 degrees F in warm water fisheries. *See* Wis. Adm. Code § NR 102.04(4)(b)1., 2., & 4. Moreover, Federal law requires WDNR to impose water quality based effluent limits necessary to comply with these narrative water quality standards. 40 C.F.R. § 122.44(d). An option for meeting this requirement would be for WDNR to rely on the proposed thermal water quality criteria to calculate WPDES permit limits necessary to ensure that heated discharges do not cause a temperature change that may adversely affect aquatic life in the receiving water. Id.

Based on recent conversations with EPA and WDNR staff, it appears that two major concerns raised by industry are delaying rule-making proceedings and can cause substantial changes to the substance and requirements publicly noticed rule, specifically, 1) the temperature cap limits necessary to ensure no acute harm within the mixing zone, and 2) the categorical variance from effluent limits on heated discharges proposed for municipal dischargers. We support EPA and WDNR's efforts to address these issues sooner rather than later, but we are concerned that the revised rule will not adequately protect fish and aquatic life.

We encourage EPA to commit to overpromulgate thermal regulations that fail to comply with Clean Water Act requirements. We further request EPA to express it obligation and commitment to promulgate thermal water quality criteria if WDNR is unwilling or unable to do so within one year.

VII. Public Participation

It remains unclear whether Wisconsin's public participation procedures comply with federal law insofar as they restrict access to judicial review. We continue to sort through this issue on a state level and will likely have additional information regarding Wisconsin's legal position on this issue shortly.

VIII. Construction Stormwater Program

MEA and other members of Wisconsin's conservation community have long been concerned about the role the Wisconsin Department of Commerce plays in the regulation of stormwater discharges from construction sites. Since at least June of 2006, we have attempted to work with WDNR to strengthen the construction site stormwater program, which is at present largely run by Commerce pursuant to section COMM 60 and 61, Wis. Admin. Code. Our efforts have proven unsuccessful thus far, and the construction site stormwater program still has serious weaknesses that must be addressed.

The WDNR's general permitting program and application procedures for construction site stormwater discharges are outlined in NR 216, Wis. Adm. Code. That regulation exempts stormwater discharges from construction sites for "public buildings and buildings that are places of employment" and "one- and two-family dwellings" regulated by the Department of Commerce from the requirement to obtain WPDES permit coverage or those discharges. Wis. Adm. Code § NR 216.42(4), (9).

The WDNR and Commerce operate their construction site stormwater programs under a Memorandum of Agreement (MOA) that, as we understand it, is currently being renegotiated by those agencies. Those negotiations have become protracted, and we have begun to lose confidence that meaningful programmatic changes will result.

Our concerns with the construction site stormwater program as implemented jointly by WDNR and Commerce are the same now as they were during the Fall of 2006, during which time MEA exchanged several letters with Ms. Jo Lynn Traub, then Water Division Director for Region 5;[5] and they are the same as they were at the time of our February 15 meeting. In terms of the revisions to the MOA, we believe that, at a minimum, the revised MOA must include the following components:

- Use of a common Notice of Intent (NOI) form by all construction sites, whether regulated directly by Commerce or WDNR;
- Posting of all NOIs to an agency website to ensure effective notification is received by relevant WDNR staff and the public;

[5] In a letter to Ms. Traub dated November 13, 2006, we described in detail the broad failure of Commerce's construction site stormwater program to ensure compliance with the Clean Water Act; and in a letter to Ms. Traub dated December 4, 2006, we reiterated the essential revisions needed to the DNR-Commerce MOA.

- Immediate notification of WDNR by Commerce whenever a WPDES-permitted construction site is found to be in noncompliance with the permit;
- Clear directives for WDNR to take the lead in enforcing any permit violations.

We request WDNR and EPA provide a timeline by which a revised MOA will be released, and explain the role that EPA will play in crafting the MOA.

VIII. Acute Toxicity Water Quality Based Effluent Limits Fail to Protect Fish and Aquatic Life in Effluent Dominated Streams

Wisconsin regulations fail to protect fish and aquatic life from acute harm in effluent dominated receiving waters. While Wisconsin regulations require WDNR to establish WQBELs to ensure that substances not be present in amounts acutely harmful to fish and aquatic life, Wisconsin regulations also require WQBELs be set equal to the final acute value, which is twice the acute toxicity criterion, regardless of the receiving flow or assimilative capacity of the receiving stream. Wis. Adm. Code §§ NR 106.06(3)(a)-(b); 105.05(2). Accordingly, acute toxicity criteria are only met where the receiving water has the same or greater flow than the effluent flow.

We request WDNR impose acute toxicity water quality based effluent limits in WPDES permits that will ensure compliance with acute toxicity criteria in all receiving water. We further request EPA review Wis. Adm. Code § NR 106.03(b) and disapprove this section of Wisconsin's administrative code insofar as it fails to comply with Clean Water Act requirements. At a minimum, we request EPA review and object to WPDES permits that fail to ensure compliance with acute toxicity criteria.

X. WDNR Action Where EPA Objects to the Terms of a WPDES Permit

We find WDNR's response when EPA threatens to object to a WPDES permit that fails to meet Clean Water Act requirements unproductive and problematic. Consider this example: In March 2007, WDNR solicited public comments on the draft Domtar Paper Company WPDES permit. In June, EPA informed WDNR that it would object to the proposed permit if DNR issued it without amending the chlorine and mercury discharge requirements to conform to Clean Water Act requirements. Now, more than one year later, WDNR has failed to reissue a final WPDES permit to Domtar. Rather, Domtar continues to operate pursuant to its expired permit, which does not contain discharge limits mandated by the Clean Water Act. In an April 30, 2008 letter, WDNR confirmed that, rather than issuing the Domtar WPDES permit in compliance with Clean Water Act requirements, WDNR intends to take no action on the Domtar permit until Fall 2008, when WDNR believes Domtar will have collected sufficient mercury data. *See* Attachment 7, Letter from Rasmussen, WDNR, to Petenwell and Castle Rock Stewards.

It is unclear how many other WPDES permits DNR has failed to issue based on EPA's objections. Regardless, this is a situation that cannot continue. Facilities must not be allowed to operate under expired permits, especially when those expired permits fail to comport with the Clean Water Act.

IX. Conclusion

This letter is not intended to identify *all* of our concerns with Wisconsin's water program, but rather provide an outline and history of inaction on issues critical to ensuring compliance with Clean Water Act requirements. We once again request EPA and WDNR take action to remedy the many serious deficiencies in Wisconsin's water program. We would appreciate it if WDNR and EPA would provide us with a time-line for the requested action and response to concerns raised herein. If WDNR and EPA believe that no corrective action is required, we would appreciate an explanation.

Sincerely,

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Linda Holst, Chief, Water Quality Branch, EPA Region 5 ✓
Peter Swenson, Chief, NPDES Program Branch, EPA Region 5

EPA: United States Environmental Protection Agency

A-Z index

2010 News Releases

EPA To Hold Listening Sessions on Potential Revisions to Water Quality Standards Regulation

Release date: 07/30/2010

Contact Information: Dave Ryan Ryan.dave@epa.gov 202-564-7827 202-564-4355

WASHINGTON – The U.S. Environmental Protection Agency (EPA) will hold two public listening sessions on potential changes to the water quality standards regulation before proposing a national rule. The current regulation, which has been in place since 1983, governs how states and authorized tribes adopt standards needed under the Clean Water Act to protect the quality of their rivers, streams, lakes, and estuaries. Potential revisions include strengthening protection for water bodies with water quality that already exceeds or meet the interim goals of the Clean Water Act; ensuring that standards reflect a continued commitment to these goals wherever attainable; improving transparency of regulatory decisions; and strengthening federal oversight.

Water quality standards are the foundation of the water quality-based approach to pollution control, including Total Maximum Daily Loads and National Pollutant Discharge Elimination System permits. Standards are also a fundamental component of watershed management.

The public listening sessions will be held via audio teleconferences on August 24 and 26, 2010, from 1 p.m. to 2:30 p.m. EDT. At the sessions, EPA will provide a review of the current regulation and a summary of the revisions the agency is considering. Clarifying questions and brief oral comments (three minutes or less) from the public will be accepted at the sessions, as time permits. EPA will consider the comments received as it develops the proposed rulemaking.

EPA will also hold separate listening sessions for state, tribal and local governments.

EPA expects to publish the proposed revisions to the water quality standards regulation in summer 2011.

More information: http://www.epa.gov/waterscience/standards/rules/wqs/

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08/11/2010	State of Illinois, Chicago Public Schools and Harris Make List of Top Purchasers of Green Power
08/11/2010	Work Begins Next Week at Pine Street Canal Superfund Site
08/11/2010	Saranac Lake, N.Y. Gas Station Owner to Install New Equipment to Ensure Underground Petroleum Tanks Are Not Leaking Into Groundwater
08/11/2010	Removal Effort Begins at Gardner, Mass. Site
08/11/2010	Owner of Fertilizer and Feed Supplement Maker in Fairbury, Neb., to Pay $30,000 Penalty for Violations of Clean Water Act

Water Quality Standards Regulatory Changes
Listening Sessions

Tuesday, August 24, 2010
1:00 – 2:30 pm EDT
Call-in number: (888) 689-4723
Access code: 90713366

Thursday, August 26, 2010
1:00 – 2:30 pm EDT
Call-in number: (888) 689-4723
Access code: 90716138

Please call in 10 minutes early (by 12:50 pm EDT) to allow time for operators to collect participant information, including your name, affiliation, telephone number, and email address.

Agenda

I. Introduction (Call Operator)

II. General instructions for participating during the call (Call Operator)

III. Purpose and agenda for the call (EPA Call Leader) (3 minutes)

IV. EPA briefing (available at www.epa.gov/waterscience/rules/wqs) (EPA staff person) (15 minutes)

V. Clarifying questions (15 minutes) – EPA will answer brief questions (up to 1 minute each) that participants may have to clarify their understanding of the briefing materials. (Please save comments and opinions until the next agenda item.)

Please follow the Operator's instructions to signal that you have a question.

VI. Public comments (1 hour) – EPA will receive views (up to 3 minutes each) from call participants

Please follow the Operator's instructions to signal that you have a comment. If asked, please indicate to the Operator the potential regulation change upon which you are commenting.

A. Antidegradation implementation methods
B. Administrator's determination
C. Designated uses
D. Variances
E. Triennial reviews
F. Updates to reflect court decisions
   F1. Definition of "water quality standards"
   F2. Compliance schedules
   F3. Records of public participation
G. General comment

VII. Conclusion (EPA Call Leader, Operator)

AUTHORITY: Clean Water Act, 33 U.S.C. 1251 *et seq.*

SOURCE: 48 FR 14178, Apr. 1, 1983, unless otherwise noted.

Subpart A—General

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National Pollutant Discharge Elimination System—NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

(b) These regulations are promulgated under the authority of sections 304(i), 101(e), 405, and 518(e) of the CWA, and implement the requirements of those sections.

(c) The Administrator will approve State programs which conform to the applicable requirements of this part. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405(a) will not be approved independent of a section 402 program.

(d)(1) Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

(2) The procedures outlined in the preceding paragraph (d)(1) of this section for suspension of permitting authority and transfer of existing permits will also apply when EPA approves an Indian Tribe's application to operate a State program and a State was the authorized permitting authority under §123.23(b) for activities within the scope of the newly approved program. The authorized State will retain jurisdiction over its existing permits as described in paragraph (d)(1) of this section absent a different arrangement stated in the Memorandum of Agreement executed between EPA and the Tribe.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this part, the CWA and any comments received.

(f) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part.

(g)(1) Except as may be authorized pursuant to paragraph (g)(2) of this section or excluded by §122.3, the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of §123.21 before EPA will begin formal review.

(2) A State may seek approval of a partial or phased program in accordance with section 402(n) of the CWA.

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

NOTE: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

(i) Nothing in this part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

NOTE: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 256, Jan. 4, 1989; 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45122, Aug. 24, 1998]

§ 123.2 Definitions.

The definitions in part 122 apply to all subparts of this part.

[63 FR 45122, Aug. 24, 1998]

§ 123.3 Coordination with other programs.

Issuance of State permits under this part may be coordinated with issuance of RCRA, UIC, NPDES, and 404 permits whether they are controlled by the State, EPA, or the Corps of Engineers. See §124.4.

Subpart B—State Program Submissions

§ 123.21 Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State (or in the case of an Indian Tribe in accordance with §123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;

(2) A complete program description, as required by §123.22, describing how the State intends to carry out its responsibilities under this part;

(3) An Attorney General's statement as required by §123.23;

(4) A Memorandum of Agreement with the Regional Administrator as required by §123.24;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program

under CWA) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(2) In the case of an Indian Tribe eligible under §123.33(b), EPA shall take into consideration the contents of the Tribe's request submitted under §123.32, in determining if the program submission required by §123.21(a) is complete.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994]

§123.22 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. If the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures;

(d) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms.

NOTE: States are encouraged to use uniform national forms established by the Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.

(e) A complete description of the State's compliance tracking and enforcement program.

(f) In the case of Indian Tribes eligible under §123.33(b), if a State has been authorized by EPA to issue permits on the Federal Indian reservation in accordance with §123.23(b), a description of how responsibility for pending permit applications, existing permits, and supporting files will be transferred from the State to the eligible Indian

Tribe. To the maximum extent practicable, this should include a Memorandum of Agreement negotiated between the State and the Indian Tribe addressing the arrangements for such transfer.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994; 63 FR 45122, Aug. 24, 1998]

§123.23 Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under §123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

NOTE: EPA will supply States with an Attorney General's statement format on request.

(b) If a State (which is not an Indian Tribe) seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) The Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under §122.28.

[48 FR 14178, Apr. 1, 1983, as amended at 58 FR 67981, Dec. 22, 1993]

§123.24 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1)(i) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

NOTE: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.

(ii) Where a State has been authorized by EPA to issue permits in accordance with §123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc.) will be accomplished.

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of §123.43.

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See §124.4.)

NOTE: To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.

(6) Provisions for modification of the Memorandum of Agreement in accordance with this part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

NOTE: Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.

(d) The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following classes or categories:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see §122.28);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in appendix A to part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(e) Whenever a waiver is granted under paragraph (d) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA with copies of final permits.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 63 FR 45122, Aug. 24, 1998]

§ 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) §122.4—(Prohibitions);

(2) §122.5(a) and (b)—(Effect of permit);

(3) §122.7(b) and (c)—(Confidential information);

(4) §122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r)—(Application for a permit);

(5) §122.22—(Signatories);

(6) §122.23—(Concentrated animal feeding operations);

(7) §122.24—(Concentrated aquatic animal production facilities);

(8) §122.25—(Aquaculture projects);

(9) §122.26—(Storm water discharges);

(10) §122.27—(Silviculture);

(11) §122.28—(General permits), *Provided* that States which do not seek to implement the general permit program under §122.28 need not do so.

(12) Section 122.41 (a)(1) and (b) through (n)—(Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under §123.34);

(13) §122.42—(Conditions applicable to specified categories of permits);

(14) §122.43—(Establishing permit conditions);

(15) §122.44—(Establishing NPDES permit conditions);

(16) §122.45—(Calculating permit conditions);

(17) §122.46—(Duration);

(18) §122.47(a)—(Schedules of compliance);

(19) §122.48—(Monitoring requirements);

(20) §122.50—(Disposal into wells);

(21) §122.61—(Permit transfer);

(22) §122.62—(Permit modification);

(23) §122.64—(Permit termination);

(24) §124.3(a)—(Application for a permit);

(25) §124.5 (a), (c), (d), and (f)—(Modification of permits);

(26) §124.6 (a), (c), (d), and (e)—(Draft permit);

(27) §124.8—(Fact sheets);

(28) §124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);

(29) §124.11—(Public comments and requests for hearings);

(30) §124.12(a)—(Public hearings); and

(31) §124.17 (a) and (c)—(Response to comments);

(32) §124.56—(Fact sheets);

(33) §124.57(a)—(Public notice);

(34) §124.59—(Comments from government agencies);

(35) §124.62—(Decision on variances);

(36) Subparts A, B, D, H, I, J, and N of part 125 of this chapter;

(37) 40 CFR parts 129, 133, and subchapter N;

(38) For a Great Lakes State or Tribe (as defined in 40 CFR 132.2), 40 CFR part 132 (NPDES permitting implementation procedures only);

(39) §122.30 (What are the objectives of the storm water regulations for small MS4s?);

(40) §122.31 (For Indian Tribes only) (As a Tribe, what is my role under the NPDES storm water program?);

(41) §122.32 (As an operator of a small MS4, am I regulated under the NPDES storm water program?);

(42) §122.33 (If I am an operator of a regulated small MS4, how do I apply for an NPDES permit? When do I have to apply?);

(43) §122.34 (As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?);

(44) §122.35 (As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?);

(45) §122.36 (As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§122.33 through 122.35?); and

(46) For states that wish to receive electronic documents, 40 CFR Part 3—(Electronic reporting).

NOTE: Except for paragraph (a)(46) of this section, states need not implement provisions identical to the above listed provisions.

Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of parts 122 and 124. See, for example, §122.5(d) (continuation of permits) and §124.4 (consolidation of permit processing).

For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of §122.41 or by requiring more prompt notice of an upset.

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

(i) *Board or body* includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) *Significant portion of income* means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) *Permit holders or applicants for a permit* does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) *Income* includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

[48 FR 14178, Apr. 1, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §123.25, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§123.26 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the Public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

(e) State NPDES compliance evaluation programs shall have procedures and ability for:

(1) Maintaining a comprehensive inventory of all sources covered by NPDES permits and a schedule of reports required to be submitted by permittees to the State agency;

(2) Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish priorities for further substantive technical evaluation;

(3) When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response;

(4) Maintaining a management information system which supports the compliance evaluation activities of this part; and

(5) Inspecting the facilities of all major dischargers at least annually.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 18785, May 2, 1989; 63 FR 45122, Aug. 24, 1998]

§123.27 Requirements for enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:

(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

NOTE: This paragraph (a)(1) requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of $5,000 a day for each violation.

(ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation.

NOTE: States which provide the criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section.

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director. These

fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

NOTE: In many States the State Director will be represented in State courts by the State Attorney General or other appropriate legal officer. Although the State Director need not appear in court actions he or she should have power to request that any of the above actions be brought.

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act;

NOTE: For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

(c) A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation.

NOTE: To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties.

Procedures for assessment by the State of the cost of investigations, inspections, or monitoring surveys which lead to the establishment of violations;

In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;

Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

Procedures for the administrative assessment of penalties by the Director.

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in §123.26(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(e) Indian Tribes that cannot satisfy the criminal enforcement authority requirements of this section may still receive program approval if they meet the requirement for enforcement authority established under §123.34.

(Clean Water Act (33 U.S.C. 1251 *et seq.*), Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), Clean Air Act (42 U.S.C. 7401 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*))

[48 FR 14178, Apr. 1, 1983, as amended at 48 FR 39620, Sept. 1, 1983; 50 FR 6941, Feb. 19, 1985; 54 FR 258, Jan. 4, 1989; 58 FR 67981, Dec. 22, 1993]

§123.28 Control of disposal of pollutants into wells.

State law must provide authority to issue permits to control the disposal of pollutants into wells. Such authority shall enable the State to protect the public health and welfare and to prevent the pollution of ground and surface waters by prohibiting well discharges or by issuing permits for such discharges with appropriate permit terms and conditions. A program approved under section 1422 of SDWA satisfies the requirements of this section.

NOTE: States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program under section 1422 of SDWA. Section 402(b)(1)(D) of CWA requires that NPDES States have the authority "to issue permits which * * * control the disposal of pollutants into wells." In many instances, therefore, NPDES States will have existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA excludes certain types of well injections from the definition of "pollutant." If the State's statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.

§123.29 Prohibition.

State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under §123.44.

§123.30 Judicial review of approval or denial of permits.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see §509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

[61 FR 20980, May 8, 1996]

§123.31 Requirements for eligibility of Indian Tribes.

(a) Consistent with section 518(e) of the CWA, 33 U.S.C. 1377(e), the Regional Administrator will treat an Indian Tribe as eligible to apply for NPDES program authority if it meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior.

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.

(3) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective NPDES permit program.

(b) An Indian Tribe which the Regional Administrator determines meets the criteria described in paragraph (a) of this section must also satisfy the State program requirements described in this part for assumption of the State program.

[58 FR 67981, Dec. 22, 1993, as amended at 59 FR 64343, Dec. 14, 1994]

§123.32 Request by an Indian Tribe for a determination of eligibility.

An Indian Tribe may apply to the Regional Administrator for a determination that it qualifies pursuant to section 518 of the Act for purposes of seeking NPDES permit program approval. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of §123.31. The application shall include the following information:

(a) A statement that the Tribe is recognized by the Secretary of the Interior;

(b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(1) Describe the form of the Tribal government;

(2) Describe the types of governmental functions currently performed by the Tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(3) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(c) A map or legal description of the area over which the Indian Tribe asserts authority under section 518(e)(2) of the Act; a statement by the Tribal Attorney General (or equivalent official authorized to represent the Tribe in all legal matters in court pertaining to the program for which it seeks approval) which describes the basis for the Tribe's assertion (including the nature or subject matter of the asserted regulatory authority); copies of those documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe believes are relevant to its assertion under section 518(e)(2) of the Act; and a description of the location of the surface waters for which the Tribe proposes to establish an NPDES permit program.

(d) A narrative statement describing the capability of the Indian Tribe to administer an effective, environmentally sound NPDES permit program. The statement should include:

(1) A description of the Indian Tribe's previous management experience which may include the administration of programs and service authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101 *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(2) A list of existing environmental or public health programs administered by the Tribal governing body, and a copy of related Tribal laws, regulations, and policies;

(3) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(4) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and administering an NPDES permit program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(5) A description of the technical and administrative abilities of the staff to administer and manage an effective, environmentally sound NPDES permit program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(e) The Regional Administrator may, at his or her discretion, request further documentation necessary to support a Tribe's eligibility.

(f) If the Administrator or his or her delegatee has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a state as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the NPDES program which is requested by the Regional Administrator.

[58 FR 67982, Dec. 22, 1993, as amended at 59 FR 64343, Dec. 14, 1994]

§ 123.33 Procedures for processing an Indian Tribe's application.

(a) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to §123.32 in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(b) The Regional Administrator shall follow the procedures described in 40 CFR part 123, subpart D in processing a Tribe's request to assume the NPDES program.

[58 FR 67982, Dec. 22, 1993, as amended at 59 FR 64343, Dec. 14, 1994]

§ 123.34 Provisions for Tribal criminal enforcement authority.

To the extent that an Indian Tribe is precluded from asserting criminal enforcement authority as required under §123.27, the Federal Government will exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region, shall develop a procedure by which the Tribal agency will refer potential criminal violations to the Regional Administrator, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the Tribe is incapable of exercising the enforcement requirements of §123.27. This agreement shall be incorporated into a joint or separate Memorandum of Agreement with the EPA Region, as appropriate.

[58 FR 67983, Dec. 22, 1993]

§ 123.35 As the NPDES Permitting Authority for regulated small MS4s, what is my role?

(a) You must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124, and 125 of this chapter. (This section is meant only to supplement those requirements and discuss specific issues related to the small MS4 storm water program.)

(b) You must develop a process, as well as criteria, to designate small MS4s other than those described in §122.32(a)(1) of this chapter, as regulated small MS4s to be covered under the NPDES storm water discharge control program. This process must include the authority to designate a small MS4 waived under paragraph (d) of this section if circumstances change. EPA may make designations under this section if a State or Tribe fails to comply with the requirements listed in this paragraph. In making designations of small MS4s, you must:

(1)(i) Develop criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

(ii) Guidance: For determining other significant water quality impacts, EPA recommends a balanced consideration of the following designation criteria on a watershed or other local basis: discharge to sensitive waters, high growth or growth potential, high population density, contiguity to an urbanized area, significant contributor of pollutants to waters of the United States, and ineffective protection of water quality by other programs;

(2) Apply such criteria, at a minimum, to any small MS4 located outside of an urbanized area serving a jurisdiction with a population density of at least 1,000 people per square mile and a population of at least 10,000;

(3) Designate any small MS4 that meets your criteria by December 9, 2002. You may wait until December 8, 2004 to apply the designation criteria on a watershed basis if you have developed a comprehensive watershed plan. You may apply these criteria to make additional designations at any time, as appropriate; and

(4) Designate any small MS4 that contributes substantially to the pollutant loadings of a physically interconnected municipal separate storm sewer that is regulated by the NPDES storm water program.

(c) You must make a final determination within 180 days from receipt of a petition under §122.26(f) of this chapter (or analogous State or Tribal law). If you do not do so within that time period, EPA may make a determination on the petition.

(d) You must issue permits consistent with §§122.32 through 122.35 of this chapter to all regulated small MS4s. You may waive or phase in the requirements otherwise applicable to regulated small MS4s, as defined in §122.32(a)(1) of this chapter, under the following circumstances:

(1) You may waive permit coverage for each small MS4s in jurisdictions with a population under 1,000 within the urbanized area where all of the following criteria have been met:

(i) Its discharges are not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4 (see paragraph (b)(4) of this section); and

(ii) If the small MS4 discharges any pollutant(s) that have been identified as a cause of impairment of any water

body to which it discharges, storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established "total maximum daily load" (TMDL) that address the pollutant(s) of concern.

(2) You may waive permit coverage for each small MS4 in jurisdictions with a population under 10,000 where all of the following criteria have been met:

(i) You have evaluated all waters of the U.S., including small streams, tributaries, lakes, and ponds, that receive a discharge from the MS4 eligible for such a waiver.

(ii) For all such waters, you have determined that storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL that addresses the pollutant(s) of concern or, if a TMDL has not been developed or approved, an equivalent analysis that determines sources and allocations for the pollutant(s) of concern.

(iii) For the purpose of paragraph (d)(2)(ii) of this section, the pollutant(s) of concern include biochemical oxygen demand (BOD), sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation), pathogens, oil and grease, and any pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the MS4.

(iv) You have determined that current and future discharges from the MS4 do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

(v) Guidance: To help determine other significant water quality impacts, EPA recommends a balanced consideration of the following criteria on a watershed or other local basis: discharge to sensitive waters, high growth or growth potential, high population or commercial density, significant contributor of pollutants to waters of the United States, and ineffective protection of water quality by other programs.

(3) You may phase in permit coverage for small MS4s serving jurisdictions with a population under 10,000 on a schedule consistent with a State watershed permitting approach. Under this approach, you must develop and implement a schedule to phase in permit coverage for approximately 20 percent annually of all small MS4s that qualify for such phased-in coverage. Under this option, all regulated small MS4s are required to have coverage under an NPDES permit by no later than March 8, 2007. Your schedule for phasing in permit coverage for small MS4s must be approved by the Regional Administrator no later than December 10, 2001.

(4) If you choose to phase in permit coverage for small MS4s in jurisdictions with a population under 10,000, in accordance with paragraph (d)(3) of this section, you may also provide waivers in accordance with paragraphs (d)(1) and (d)(2) of this section pursuant to your approved schedule.

(5) If you do not have an approved schedule for phasing in permit coverage, you must make a determination whether to issue an NPDES permit or allow a waiver in accordance with paragraph (d)(1) or (d)(2) of this section, for each eligible MS4 by December 9, 2002.

(6) You must periodically review any waivers granted in accordance with paragraph (d)(2) of this section to determine whether any of the information required for granting the waiver has changed. At a minimum, you must conduct such a review once every five years. In addition, you must consider any petition to review any waiver when the petitioner provides evidence that the information required for granting the waiver has substantially changed.

(e) You must specify a time period of up to 5 years from the date of permit issuance for operators of regulated small MS4s to fully develop and implement their storm water program.

(f) You must include the requirements in §§122.33 through 122.35 of this chapter in any permit issued for regulated small MS4s or develop permit limits based on a permit application submitted by a regulated small MS4. (You may include conditions in a regulated small MS4 NPDES permit that direct the MS4 to follow an existing qualifying local program's requirements, as a way of complying with some or all of the requirements in §122.34(b) of this chapter. See §122.34(c) of this chapter. Qualifying local, State or Tribal program requirements must impose, at a minimum, the relevant requirements of §122.34(b) of this chapter.)

(g) If you issue a general permit to authorize storm water discharges from small MS4s, you must make available a menu of BMPs to assist regulated small MS4s in the design and implementation of municipal storm water management programs to implement the minimum measures specified in §122.34(b) of this chapter. EPA plans to develop a menu of BMPs that will apply in each State or Tribe that has not developed its own menu. Regardless of whether a menu of BMPs has been developed by EPA, EPA encourages State and Tribal permitting authorities to develop a menu of BMPs that is appropriate for local conditions. EPA also intends to provide guidance on developing BMPs and measurable goals and modify, update, and supplement such guidance based on the assessments of the NPDES MS4 storm water program and research to be conducted over the next thirteen years.

(h)(1) You must incorporate any additional measures necessary to ensure effective implementation of your State or Tribal storm water program for regulated small MS4s.

(2) Guidance: EPA recommends consideration of the following:

(i) You are encouraged to use a general permit for regulated small MS4s;

(ii) To the extent that your State or Tribe administers a dedicated funding source, you should play an active role in providing financial assistance to operators of regulated small MS4s;

(iii) You should support local programs by providing technical and programmatic assistance, conducting research projects, performing watershed monitoring, and providing adequate legal authority at the local level;

(iv) You are encouraged to coordinate and utilize the data collected under several programs including water quality management programs, TMDL programs, and water quality monitoring programs;

(v) Where appropriate, you may recognize existing responsibilities among governmental entities for the control measures in an NPDES small MS4 permit (see §122.35(b) of this chapter); and

(vi) You are encouraged to provide a brief (e.g., two page) reporting format to facilitate compiling and analyzing data from submitted reports under §122.34(g)(3) of this chapter. EPA intends to develop a model form for this purpose.

[64 FR 68850, Dec. 8, 1999]

§123.36 Establishment of technical standards for concentrated animal feeding operations.

If the State has not already established technical standards for nutrient management that are consistent with 40 CFR 412.4(c)(2), the Director shall establish such standards by the date specified in §123.62(e).

[68 FR 7269, Feb. 12, 2003]

Subpart C—Transfer of Information and Permit Review

§123.41 Sharing of information.

(a) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing information under this section. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR part 2. If EPA obtains from a State information that is not claimed to be confidential, EPA may make that information available to the public without further notice.

(b) EPA shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs to implement its approved program, subject to the conditions in 40 CFR part 2.

§ 123.42 Receipt and use of Federal information.

Upon approving a State permit program, EPA will send to the State agency administering the permit program any relevant information which was collected by EPA. The Memorandum of Agreement under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter) will provide for the following, in such manner as the State Director and the Regional Administrator agree:

(a) Prompt transmission to the State Director from the Regional Administrator of copies of any pending permit applications or any other relevant information collected before the approval of the State permit program and not already in the possession of the State Director. When existing permits are transferred to the State Director (e.g., for purposes of compliance monitoring, enforcement or reissuance), relevant information includes support files for permit issuance, compliance reports and records of enforcement actions.

(b) Procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Regional Administrator which the Regional Administrator identifies as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

[48 FR 14178, Apr. 1, 1983, as amended at 63 FR 45122, Aug. 24, 1998]

§ 123.43 Transmission of information to EPA.

(a) Each State agency administering a permit program shall transmit to the Regional Administrator copies of permit program forms and any other relevant information to the extent and in the manner agreed to by the State Director and Regional Administrator in the Memorandum of Agreement and not inconsistent with this part. Proposed permits shall be prepared by State agencies unless agreement to the contrary has been reached under § 123.44(j). The Memorandum of Agreement shall provide for the following:

(1) Prompt transmission to the Regional Administrator of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.24(d). The State shall supply EPA with copies of permit applications for which permit review has been waived whenever requested by EPA;

(2) Prompt transmission to the Regional Administrator of notice of every action taken by the State agency related to the consideration of any permit application or general permit, including a copy of each proposed or draft permit and any conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit, except those for which permit review has been waived under § 123.24(d). The State shall supply EPA with copies of notices for which permit review has been waived whenever requested by EPA; and

(3) Transmission to the Regional Administrator of a copy of every issued permit following issuance, along with any and all conditions, requirements, or documents which are related to or affect the authorization of the permit.

(b) If the State intends to waive any of the permit application requirements of § 122.21(j) or (q) of this chapter for a specific applicant, the Director must submit a written request to the Regional Administrator no less than 210 days prior to permit expiration. This request must include the State's justification for granting the waiver.

(c) The State program shall provide for transmission by the State Director to EPA of:

(1) Notices from publicly owned treatment works under § 122.42(b) and 40 CFR part 403, upon request of the Regional Administrator;

(2) A copy of any significant comments presented in writing pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permit, except those comments regarding permits for which permit review has been waived under § 123.24(d) and for which EPA has not otherwise requested receipt, if:

(i) The Regional Administrator requests this information; or

(ii) The proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit; or

(iii) Significant comments objecting to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice.

(d) Any State permit program shall keep such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of CWA or of this part.

[48 FR 14178, Apr. 1, 1983, as amended at 60 FR 33931, June 29, 1995; 64 FR 42470, Aug. 4, 1999]

§ 123.44 EPA review of and objections to State permits.

(a)(1) The Memorandum of Agreement shall provide a period of time (up to 90 days from receipt of proposed permits) to which the Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed permits. EPA reserves the right to take 90 days to supply specific grounds for objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is filed within the review period specified in the Memorandum of Agreement. The Regional Administrator shall send a copy of any comment, objection or recommendation to the permit applicant.

(2) In the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit to comment upon, object to or make recommendations with respect to the proposed general permit, and is not bound by any shorter time limits set by the Memorandum of Agreement for general comments, objections or recommendations.

(b)(1) Within the period of time provided under the Memorandum of Agreement for making general comments upon, objections to or recommendations with respect to proposed permits, the Regional Administrator shall notify the State Director of any objection to issuance of a proposed permit (except as provided in paragraph (a)(2) of this section for proposed general permits). This notification shall set forth in writing the general nature of the objection.

(2) Within 90 days following receipt of a proposed permit to which he or she has objected under paragraph (b)(1) of this section, or in the case of general permits within 90 days after receipt of the proposed general permit, the Regional Administrator shall set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of CWA or regulations that support the objection), and

(ii) The actions that must be taken by the State Director to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator.)

NOTE: Paragraphs (a) and (b) of this section, in effect, modify any existing agreement between EPA and the State which provides less than 90 days for EPA to supply the specific grounds for an objection. However, when an agreement provides for an EPA review period of less than 90 days, EPA must file a general objection, in accordance with paragraph (b)(1) of this section within the time specified in the agreement. This general objection must be followed by a specific objection within the 90-day period. This modification to MOA's allows EPA to provide detailed information concerning acceptable permit conditions, as required by section 402(d) of CWA. To avoid possible confusion, MOA's should be changed to reflect this arrangement.

(c) The Regional Administrator's objection to the issuance of a proposed permit must be based upon one or more of the following grounds:

(1) The permit fails to apply, or to ensure compliance with, any applicable requirement of this part;

NOTE: For example, the Regional Administrator may object to a permit not requiring the achievement of required effluent limitations by applicable statutory deadlines.

(2) In the case of a proposed permit for which notification to the Administrator is required under section 402(b)(5) of CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;

(3) The procedures followed in connection with formulation of the proposed permit failed in a material respect to comply with procedures required by CWA or by regulations thereunder or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the proposed permit misinterprets CWA or any guidelines or regulations under CWA, or misapplies them to the facts;

(5) Any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations or standards for sewage sludge use and disposal required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable effluent standards and limitations or standards for sewage sludge use and disposal under sections 301, 302, 306, 307, 318, 403, and 405 of CWA have not yet been promulgated by the Agency, the proposed permit, in the judgment of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this paragraph apply to determinations made pursuant to §125.3(c)(2) in the absence of applicable guidelines, to best management practices under section 304(e) of CWA, which must be incorporated into permits as requirements under section 301, 306, 307, 318, 403 or 405, and to sewage sludge use and disposal requirements developed on a case-by-case basis pursuant to section 405(d) of CWA, as the case may be;

(7) Issuance of the proposed permit would in any other respect be outside the requirements of CWA, or regulations issued under CWA.

(8) The effluent limits of a permit fail to satisfy the requirements of 40 CFR 122.44(d).

(9) For a permit issued by a Great Lakes State or Tribe (as defined in 40 CFR 132.2), the permit does not satisfy the conditions promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132.

(d) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (c) of this section, the Regional Administrator:

(1) Will consider all data transmitted pursuant to §123.43 (or, in the case of a sewage sludge management program, §501.21 of this chapter);

(2) May, if the information provided is inadequate to determine whether the proposed permit meets the guidelines and requirements of CWA, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record that the Regional Administrator determines are necessary for review. If this request is made within 30 days of receipt of the State submittal under §123.43 (or, in the case of a sewage sludge management program, §501.21 of this chapter), it will constitute an interim objection to the issuance of the permit, and the full period of time specified in the Memorandum of Agreement for the Regional Administrator's review will recommence when the Regional Administrator has received such record or portions of the record; and

(3) May, in his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection;

(e) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or interstate agency or any interested person may request that a public hearing be held by the Regional Administrator on the objection. A public hearing in accordance with the procedures of §124.12 (c) and (d) of this chapter (or, in the case of a sewage sludge management program, §501.15(d)(7) of this chapter) will be held, and public notice provided in accordance with §124.10 of this chapter, (or, in the case of a sewage sludge management program, §501.15(d)(5) of this chapter), whenever requested by the State or the interstate agency which proposed the permit or if warranted by significant public interest based on requests received.

(f) A public hearing held under paragraph (e) of this section shall be conducted by the Regional Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(g) Following the public hearing, the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(h)(1) If no public hearing is held under paragraph (e) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit in accordance with parts 121, 122 and 124 of this chapter and any other guidelines and requirements of CWA.

(2) If a public hearing is held under paragraph (e) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection within 30 days of the date of the Regional Administrator's notification under paragraph (g) of this section, the Regional Administrator may issue the permit in accordance with parts 121, 122 and 124 of this chapter and any other guidelines and requirements of CWA.

(3) Exclusive authority to issue the permit passes to EPA when the times set out in this paragraph expire.

(i) [Reserved]

(j) The Regional Administrator may agree, in the Memorandum of Agreement under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter), to review draft permits rather than proposed permits. In such a case, a proposed permit need not be prepared by the State and transmitted to the Regional Administrator for review in accordance with this section unless the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment.

[48 FR 14178, Apr. 1, 1983, as amended at 54 FR 18785, May 2, 1989; 54 FR 23896, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45122, Aug. 24, 1998; 65 FR 30910, May 15, 2000]

§123.45 Noncompliance and program reporting by the Director.

The Director shall prepare quarterly, semi-annual, and annual reports as detailed below. When the State is the permit-issuing authority, the State Director shall submit all reports required under this section to the Regional Administrator, and the EPA Region in turn shall submit the State reports to EPA Headquarters. When EPA is the permit-issuing authority, the Regional Administrator shall submit all reports required under this section to EPA Headquarters.

(a) *Quarterly reports.* The Director shall submit quarterly narrative reports for major permittees as follows:

(1) *Format.* The report shall use the following format:

(i) Provide a separate list of major NPDES permittees which shall be subcategorized as non-POTWs, POTWs, and Federal permittees.

(ii) Alphabetize each list by permittee name. When two or more permittees have the same name, the permittee with the lowest permit number shall be entered first.

(iii) For each permittee on the list, include the following information in the following order:

(A) The name, location, and permit number.

(B) A brief description and date of each instance of noncompliance for which paragraph (a)(2) of this section requires reporting. Each listing shall indicate each specific provision of paragraph (a)(2) (e.g., (ii)(A) thru (iii)(G)) which describes the reason for reporting the violation on the quarterly report.

(C) The date(s), and a brief description of the action(s) taken by the Director to ensure compliance.

(D) The status of the instance(s) of noncompliance and the date noncompliance was resolved.

(E) Any details which tend to explain or mitigate the instance(s) of noncompliance.

(2) *Instances of noncompliance by major dischargers to be reported*—(i) *General.* Instances of noncompliance, as defined in paragraphs (a)(2)(ii) and (iii) of this section, by major dischargers shall be reported in successive reports until the noncompliance is reported as resolved (i.e., the permittee is no longer violating the permit conditions reported as noncompliance in the QNCR). Once an instance of noncompliance is reported as resolved in the QNCR, it need not appear in subsequent reports.

(A) All reported violations must be listed on the QNCR for the reporting period when the violation occurred, even if the violation is resolved during that reporting period.

(B) All permittees under current enforcement orders (i.e., administrative and judicial orders and consent decrees) for previous instances of noncompliance must be listed in the QNCR until the orders have been satisfied in full and the permittee is in compliance with permit conditions. If the permittee is in compliance with the enforcement order, but has not achieved full compliance with permit conditions, the compliance status shall be reported as "resolved pending," but the permittee will continue to be listed on the QNCR.

(ii) *Category I noncompliance.* The following instances of noncompliance by major dischargers are Category I noncompliance:

(A) Violations of conditions in enforcement orders except compliance schedules and reports.

(B) Violations of compliance schedule milestones for starting construction, completing construction, and attaining final compliance by 90 days or more from the date of the milestone specified in an enforcement order or a permit.

(C) Violations of permit effluent limits that exceed the Appendix A "Criteria for Noncompliance Reporting in the NPDES Program".

(D) Failure to provide a compliance schedule report for final compliance or a monitoring report. This applies when the permittee has failed to submit a final compliance schedule progress report, pretreatment report, or a Discharge Monitoring Report within 30 days from the due date specified in an enforcement order or a permit.

(iii) *Category II noncompliance.* Category II noncompliance includes violations of permit conditions which the Agency believes to be of substantial concern and may not meet the Category I criteria. The following are instances of noncompliance which must be reported as Category II noncompliance unless the same violation meets the criteria for Category I noncompliance:

(A) (*1*) Violation of a permit limit;

(*2*) An unauthorized bypass;

(*3*) An unpermitted discharge; or

(*4*) A pass-through of pollutants which causes or has the potential to cause a water quality problem (e.g., fish kills, oil sheens) or health problems (e.g., beach closings, fishing bans, or other restrictions of beneficial uses).

(B) Failure of an approved POTW to implement its approved pretreatment program adequately including failure to enforce industrial pretreatment requirements on industrial users as required in the approved program.

(C) Violations of any compliance schedule milestones (except those milestones listed in paragraph (a)(2)(ii)(B) of this section) by 90 days or more from the date specified in an enforcement order or a permit.

(D) Failure of the permittee to provide reports (other than those reports listed in paragraph (a)(2)(ii)(D) of this section) within 30 days from the due date specified in an enforcement order or a permit.

(E) Instances when the required reports provided by the permittee are so deficient or incomplete as to cause misunderstanding by the Director and thus impede the review of the status of compliance.

(F) Violations of narrative requirements (e.g., requirements to develop Spill Prevention Control and Countermeasure Plans and requirements to implement Best Management Practices), which are of substantial concern to the regulatory agency.

(G) Any other violation or group of permit violations which the Director or Regional Administrator considers to be of substantial concern.

(b) *Semi-annual statistical summary report.* Summary information shall be provided twice a year on the number of major permittees with two or more violations of the same monthly average permit limitation in a six month period, including those otherwise reported under paragraph (a) of this section. This report shall be submitted at the same time, according to the Federal fiscal year calendar, as the first and third quarter QNCRs.

(c) *Annual reports for NPDES*—(1) *Annual noncompliance report.* Statistical reports shall be submitted by the Director on nonmajor NPDES permittees indicating the total number reviewed, the number of noncomplying nonmajor permittees, the number of enforcement actions, and number of permit modifications extending compliance deadlines. The statistical information shall be organized to follow the types of noncompliance listed in paragraph (a) of this section.

(2) A separate list of nonmajor discharges which are one or more years behind in construction phases of the compliance schedule shall also be submitted in alphabetical order by name and permit number.

(d) *Schedule*—(1) *For all quarterly reports.* On the last working day of May, August, November, and February, the State Director shall submit to the Regional Administrator information concerning noncompliance with NPDES permit requirements by major dischargers in the State in acordance with the following schedule. The Regional Administrator shall prepare and submit information for EPA-issued permits to EPA Headquarters in accordance with the same schedule:

QUARTERS COVERED BY REPORTS ON NONCOMPLIANCE BY MAJOR DISCHARGERS:

[Date for completion of reports]

January, February, and March	[1] May 31
April, May, and June	[1] August 31
July, August, and September	[1] November 30
October, November, and December.	[1] February 28

[1] Reports must be made available to the public for inspection and copying on this date.

(2) *For all annual reports.* The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

APPENDIX A TO §123.45—CRITERIA FOR NONCOMPLIANCE REPORTING IN THE NPDES PROGRAM

This appendix describes the criteria for reporting violations of NPDES permit effluent limits in the quarterly noncompliance report (QNCR) as specified under §123.45(a)(2)(ii)(c). Any violation of an NPDES permit is a violation of the Clean Water Act (CWA) for which the permittee is liable. An agency's decision as to what enforcement action, if any, should be taken in such cases, will be based on an analysis of facts and legal requirements.

Violations of Permit Effluent Limits

Cases in which violations of permit effluent limits must be reported depend upon the magnitude and/or frequency of the violation. Effluent violations should be evaluated on a parameter-by-parameter and outfall-by-outfall basis. The criteria for reporting effluent violations are as follows:

a. Reporting Criteria for Violations of Monthly Average Permit Limits—Magnitude and Frequency

Violations of monthly average effluent limits which exceed or equal the product of the Technical Review Criteria (TRC) times the effluent limit, and occur two months in a six month period must be reported. TRCs are for two groups of pollutants.

Group I Pollutants—TRC=1.4
Group II Pollutants—TRC=1.2

b. Reporting Criteria for Chronic Violations of Monthly Average Limits

Chronic violations must be reported in the QNCR if the monthly average permit limits are exceeded any four months in a six-month period. These criteria apply to all Group I and Group II pollutants.

GROUP I POLLUTANTS—TRC=1.4

Oxygen Demand

Biochemical Oxygen Demand
Chemical Oxygen Demand
Total Oxygen Demands
Total Organic Carbon
Other

Solids

Total Suspended Solids (Residues)
Total Dissolved Solids (Residues)
Other

Nutrients

Inorganic Phosphorus Compounds
Inorganic Nitrogen Compounds
Other

Detergents and Oils

MBAS

NTA
Oil and Grease
Other detergents or algicides

Minerals

Calcium
Chloride
Fluoride
Magnesium
Sodium
Potassium
Sulfur
Sulfate
Total Alkalinity
Total Hardness
Other Minerals

Metals

Aluminum
Cobalt
Iron
Vanadium

GROUP II POLLUTANTS—TRC=1.2

METALS (ALL FORMS)

Other metals not specifically listed under Group I

Inorganic

Cyanide
Total Residual Chlorine

Organics

All organics are Group II except those specifically listed under Group I.

(Approved by the Office of Management and Budget under control number 2040–0082)

[48 FR 14178, Apr. 1, 1983, as amended at 50 FR 34653, Aug. 26, 1985; 54 FR 18785, May 2, 1989; 63 FR 45123, Aug. 24, 1998]

§ 123.46 Individual control strategies.

(a) Not later than February 4, 1989, each State shall submit to the Regional Administrator for review, approval, and implementation an individual control strategy for each point source identified by the State pursuant to section 304(l)(1)(C) of the Act which discharges to a water identified by the State pursuant to section 304(l)(1)(B) which will produce a reduction in the discharge of toxic pollutants from the point sources identified under section 304(l)(1)(C) through the establishment of effluent limitations under section 402 of the CWA and water quality standards under section 303(c)(2)(B) of the CWA, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of establishment of such strategy.

(b) The Administrator shall approve or disapprove the control strategies submitted by any State pursuant to paragraph (a) of this section, not later than June 4, 1989. If a State fails to submit control strategies in accordance with paragraph (a) of this section or the Administrator does not approve the control strategies submitted by such State in accordance with paragraph (a), then, not later than June 4, 1990, the Administrator in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of CWA section 304(l)(1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under CWA section 304(l)(1) any navigable waters for which any person submits a petition to the Administrator for listing not later than October 1, 1989.

(c) For the purposes of this section the term individual control strategy, as set forth in section 304(l) of the CWA, means a final NPDES permit with supporting documentation showing that effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that applicable water quality standards will be met not later than three years after the individual control strategy is established. Where a State is unable to issue a final permit on or before February 4, 1989, an individual control strategy may be a draft permit with an attached schedule (provided the State meets the schedule for issuing the final permit) indicating that the permit will be issued on or before February 4, 1990. If a point source is subject to section 304(l)(1)(C) of the CWA and is also subject to an on-site response action under sections 104 or 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), (42 U.S.C. 9601 *et seq.*), an individual control strategy may be the decision document (which incorporates the applicable or relevant and appropriate requirements under the CWA) prepared under sections 104 or 106 of CERCLA to address the release or

threatened release of hazardous substances to the environment.

(d) A petition submitted pursuant to section 304(l)(3) of the CWA must be submitted to the appropriate Regional Administrator. Petitions must identify a waterbody in sufficient detail so that EPA is able to determine the location and boundaries of the waterbody. The petition must also identify the list or lists for which the waterbody qualifies, and the petition must explain why the waterbody satisfies the criteria for listing under CWA section 304(l) and 40 CFR 130.10(d)(6).

(e) If the Regional Administrator disapproves one or more individual control strategies, or if a State fails to provide adequate public notice and an opportunity to comment on the ICSs, then, not later than June 4, 1989, the Regional Administrator shall give a notice of approval or disapproval of the individual control strategies submitted by each State pursuant to this section as follows:

(1) The notice of approval or disapproval given under this paragraph shall include the following:

(i) The name and address of the EPA office that reviews the State's submittals.

(ii) A brief description of the section 304(l) process.

(iii) A list of ICSs disapproved under this section and a finding that the ICSs will not meet all applicable review criteria under this section and section 304(l) of the CWA.

(iv) If the Regional Administrator determines that a State did not provide adequate public notice and an opportunity to comment on the waters, point sources, or ICSs prepared pursuant to section 304(l), or if the Regional Administrator chooses to exercise his or her discretion, a list of the ICSs approved under this section, and a finding that the ICSs satisfy all applicable review criteria.

(v) The location where interested persons may examine EPA's records of approval and disapproval.

(vi) The name, address, and telephone number of the person at the Regional Office from whom interested persons may obtain more information.

(vii) Notice that written petitions or comments are due within 120 days.

(2) The Regional Administrator shall provide the notice of approval or disapproval given under this paragraph to the appropriate State Director. The Regional Administrator shall publish a notice of availability, in a daily or weekly newspaper with State-wide circulation or in the FEDERAL REGISTER, for the notice of approval or disapproval. The Regional Administrator shall also provide written notice to each discharger identified under section 304(l)(1)(C), that EPA has listed the discharger under section 304(l)(1)(C).

(3) As soon as practicable but not later than June 4, 1990, the Regional Offices shall issue a response to petitions or comments received under section 304(l). The response to comments shall be given in the same manner as the notice described in paragraph (e) of this section except for the following changes:

(i) The lists of ICSs reflecting any changes made pursuant to comments or petitions received.

(ii) A brief description of the subsequent steps in the section 304(l) process.

(f) EPA shall review, and approve or disapprove, the individual control strategies prepared under section 304(l) of the CWA, using the applicable criteria set forth in section 304(l) of the CWA, and in 40 CFR part 122, including §122.44(d). At any time after the Regional Administrator disapproves an ICS (or conditionally aproves a draft permit as an ICS), the Regional Office may submit a written notification to the State that the Regional Office intends to issue the ICS. Upon mailing the notification, and notwithstanding any other regulation, exclusive authority to issue the permit passes to EPA.

[54 FR 256, Jan. 4, 1989, as amended at 54 FR 23896, June 2, 1989; 57 FR 33049, July 24, 1992]

Subpart D—Program Approval, Revision, and Withdrawal

§ 123.61 Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the FEDERAL REGISTER,

and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the FEDERAL REGISTER;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under §123.21 the Administrator shall approve or disapprove the program based on the requirements of this part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's program he or she shall notify the State and publish notice in the FEDERAL REGISTER. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985]

§123.62 Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. Grounds for program revision include cases where a State's existing approved program includes authority to issue NPDES permits for activities on a Federal Indian reservation and an Indian Tribe has subsequently been approved for assumption of the NPDES program under 40 CFR part 123 extending to those lands.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator will approve or disapprove program revisions based on the requirements of this part (or, in the case of a sewage sludge management program, 40 CFR part 501) and of the CWA.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under §123.22(b) (or, in the case of a sewage sludge management program, §501.12(b) of this chapter) must be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR part 403 (pretreatment) shall be accomplished as provided in 40 CFR 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, submit, as part of their application, the information required under §§124.4(d) and 122.21 (g) or (h), as appropriate.

(f) Revision of a State program by a Great Lakes State or Tribe (as defined in 40 CFR 132.2) to conform to section 118 of the CWA and 40 CFR part 132 shall be accomplished pursuant to 40 CFR part 132.

[48 FR 14178, Apr. 1, 1983, as amended at 49 FR 31842, Aug. 8, 1984; 50 FR 6941, Feb. 19, 1985; 53 FR 33007, Sept. 6, 1988; 58 FR 67983, Dec. 22, 1993; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

§123.63 Criteria for withdrawal of State programs.

(a) In the case of a sewage sludge management program, references in this section to "this part" will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under §123.24 (or, in the case of a sewage sludge management program, §501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

(6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

§ 123.64 Procedures for withdrawal of State programs.

(a) A State with a program approved under this part (or, in the case of a sewage sludge management program, 40 CFR part 501) may voluntarily transfer program responsibilities required by Federal law to EPA by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the FEDERAL REGISTER and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in §123.63 (or, in the case of a sewage sludge management program, §501.33 of this chapter). The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph will fix a time and place for the commencement of the hearing and will specify the allegations against the State which are to be considered at the hearing. Within 30 days the State must admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program will have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing Clerk," and "Presiding Officer" in 40 CFR 22.03 apply in addition to the following:

(i) *Party* means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) *Person* means the Agency, the State and any individual or organization having an interest in the subject matter of the proceeding.

(iii) *Petitioner* means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* (i) The following provisions of 40 CFR part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

(A) §22.02—(use of number/gender);

(B) §22.04(c)—(authorities of Presiding Officer);

(C) §22.06—(filing/service of rulings and orders);

(D) §22.09—(examination of filed documents);

(E) §22.19(a), (b) and (c)—(prehearing conference);

(F) §22.22—(evidence);

(G) §22.23—(objections/offers of proof);

(H) §22.25—(filing the transcript); and

(I) §22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) *Computation and extension of time—(1) Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

(2) Extensions of time. The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion *(i)* upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or *(ii)* upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(3) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) *Ex parte discussion of proceedings.* At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) *Intervention—(1) Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (b)(3)(ii)(C)*(3)* of this section, within ten (10) days after service of the motion for leave to intervene.

(2) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is first published.

(3) Disposition. Leave to intervene may be granted only if the movant demonstrates that *(i)* his presence in the proceeding would not unduly prolong or otherwise prejudice that adjudication of the rights of the original parties; *(ii)* the movant will be adversely affected by a final order; and *(iii)* the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(4) Amicus curiae. Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an

order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) *Motions*—(*1*) *General.* All motions, except those made orally on the record during a hearing, shall (*i*) be in writing; (*ii*) state the grounds therefor with particularity; (*iii*) set forth the relief or order sought; and (*iv*) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(*2*) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(*3*) *Decision.* The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(4) *Record of proceedings.* (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 1200 Pennsylvania Ave., NW., Washington, DC 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involves matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service, and;

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party.* A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and pre-hearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions, and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommeded decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act and regulations he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that such appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take such appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes such appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. 704.

(viii) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions by the State prior to withdrawal.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 57 FR 5335, Feb. 13, 1992; 63 FR 45123, Aug. 24, 1998]

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart A—General Program Requirements

Subpart B—Specific Procedures Applicable to RCRA Permits

Subpart C—Specific Procedures Applicable to PSD Permits

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General policies.

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C—Procedures for Review
l Revision of Water Quality
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**State review and revision of
r quality standards.**

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101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process.

(b) *Public participation.* The State shall hold a public hearing for the purpose of reviewing water quality standards, in accordance with provisions of State law, EPA's water quality management regulation (40 CFR 130.3(b)(6)) and public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

(c) *Submittal to EPA.* The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.

§ 131.21 EPA review and approval of water quality standards.

(a) After the State submits its officially adopted revisions, the Regional Administrator shall either:

(1) Notify the State within 60 days that the revisions are approved, or

(2) Notify the State within 90 days that the revisions are disapproved. Such notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements. Any new or revised State standard must be accompanied by some type of supporting analysis.

(b) The Regional Administrator's approval or disapproval of a State water quality standard shall be based on the requirements of the Act as described in §§131.5 and 131.6, and, with respect to Great Lakes States or Tribes (as defined in 40 CFR 132.2), 40 CFR part 132.

(c) *How do I determine which water quality standards are applicable for purposes of the Act?* You may determine which water quality standards are applicable water quality standards for purposes of the Act from the following table:

If—	Then—	Unless or until—	In which case—
(1) A State or authorized Tribe has adopted a water quality standard that is effective under State or Tribal law and has been submitted to EPA before May 30, 2000 . . .	. . . the State or Tribe's water quality standard is the applicable water quality standard for purposes of the Act . . .	. . . EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect . . .	. . . the EPA-promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.
(2) A State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or *after* May 30, 2000 . . .	. . . once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act . . .	. . . EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect . . .	. . . the EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.

(d) *When do I use the applicable water quality standards identified in paragraph (c) above?* Applicable water quality standards for purposes of the Act are the minimum standards which must be used when the CWA and regulations implementing the CWA refer to water quality standards, for example, in identifying impaired waters and calculating TMDLs under section 303(d), developing NPDES permit limitations under section 301(b)(1)(C), evaluating proposed discharges of dredged or fill material under section 404, and in issuing certifications under section 401 of the Act.

(e) *For how long does an applicable water quality standard for purposes of the Act remain the applicable water quality standard for purposes of the Act?* A State

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

FEB 4 1974

FEB 18 1974

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,

/s/ Russell E. Train

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

By

Thomas G. Frangos, Administrator
Division of Environmental Protection

12/19/73
Date

U.S. Environmental Protection Agency
Region V

By

Francis T. Mayo
Regional Administrator

12/17/73
Date

APPROVED:

Administrator
Environmental Protection Agency

2/4/74
Date

Attachment I to the Memorandum of Agreement

The Department proposes to issue permits to all major industrial and major municipal dischargers listed below by December 31, 1974.

IA MAJOR INDUSTRIAL DISCHARGERS
IN WISCONSIN

DISCHARGER	LOCATION	RECEIVING WATER
Sterling Pulp & Paper	Eau Claire, WI	Chippewa River
Flambeau Paper Company	Park Falls, WI	Flambeau River
Peavey Paper Mills	Ladysmith, WI	Flambeau River
American Can Co.	Green Bay, WI	Fox River
Appleton Papers, Inc.	Combined Locks, WI	Fox River
Bergstrom Paper Co.	Neenah, WI	Fox River
Charmin Paper Products Co.	Green Bay, WI	Fox River
Chicago & Northwestern	Green Bay, WI	Fox River
Consolidated Papers, Inc.	Appleton, WI	Fox River
Fort Howard Paper Co.	Green Bay, WI	Fox River
George A. Whiting Paper Co.	Menasha, WI	Fox River
Green Bay Packaging Inc.	Green Bay, WI	Fox River
John Strange Paper Co.	Menasha, WI	Fox River
Kimberly-Clark Corp. (Badger Globe Division)	Neenah, WI	Fox River
Kimberly-Clark Corp. (Kimberly Mill)	Kimberly, WI	Fox River
Kimberly-Clark Corp. (Lakeview Division)	Neenah, WI	Fox River
Kimberly-Clark Corp. (Neenah Paper Mill)	Neenah, WI	Fox River
Nicolet Paper Company	West De Pere, WI	Fox River
Riverside Paper Corp.	Appleton, WI	Fox River
Thilmany Pulp & Paper Co.	Kaukauna, WI	Fox River
Chicago & Northwestern	Altoona, WI	Lake Altoona
Wisconsin Electric Power (Lakeside Plant)	Milwaukee, WI	Lake Michigan
Wisconsin Electric Power (Oak Creek Plant)	Oak Creek, WI	Lake Michigan
Wisconsin Electric Power (Point Beach Nuclear Plant)	Two Rivers, WI	Lake Michigan
Wisconsin Electric Power (Port Washington)	Milwaukee, WI	Lake Michigan
Wisconsin Power & Light*	Sheboygan, WI	Lake Michigan
Wisconsin Public Service*	Green Bay, WI	Lake Michigan
Wisconsin Public Service (Kewaunee Nuclear Plant)	Kewaunee, WI	Lake Michigan
Madison Gas & Electric*	Madison, WI	Lake Monona

American Can Company	Ashland, WI	Lake Superior
Koppers Co.	Superior, WI	Lake Superior
Lake Superior District Power Co. (Bay Front)	Ashland, WI	Lake Superior
Superior Fiber Products, Inc.	Superior, WI	Lake Superior
Superior Water, Light, Power*	Superior, WI	Lake Superior
Joseph Schlitz Brewing Co.*	Milwaukee, WI	Menominee River
Scott Paper Company	Marinette, WI	Menominee River
Wisconsin Electric Power (Valley Power Plant)	Milwaukee, WI	Menominee River
Wisconsin Electric Power (Commerce Plant)	Milwaukee, WI	Milwaukee River
Wisconsin Electric Power (Wells Plant)	Milwaukee, WI	Milwaukee River
Dairyland Power Co-op*	Alma, WI	Mississippi River
Dairyland Power Co-op (E.J. Stoneman)	Cassville, WI	Mississippi River
Dairyland Power Co-op (Genoa #3)	Genoa, WI	Mississippi River
Dairyland Power Co-op (La Crosse B.W. Reactor)	Genoa, WI	Mississippi River
Northern States Power Co. (French Island)	La Crosse, WI	Mississippi River
Wisconsin Power & Light*	Cassville, WI	Mississippi River
Scott Paper Co.	Oconto Falls, WI	Oconto River
Badger Paper Co.	Peshtigo, WI	Peshtigo River
Wisconsin Power & Light (Blackhawk Station)	Beloit, WI	Rock River
Wisconsin Power & Light*	Janesville	Rock River
American Can Co.	Rothschild, WI	Wisconsin River
Badger Army Ammunition	Baraboo, WI	Wisconsin River
BASF Wyandotte	Port Edwards, WI	Wisconsin River
Consolidated Papers, Inc. (Kraft Division)	Wisconsin Rapids, WI	Wisconsin River
Consolidated Papers, Inc. (Rapids Division)	Wisconsin Rapids, WI	Wisconsin River
Consolidated Papers, Inc.	Biron, WI	Wisconsin River
Consolidated Papers, Inc.	Stevens Point, WI	Wisconsin River
Consolidated Papers, Inc.	Whiting, WI	Wisconsin River
Georgia-Pacific Corp.	Tomahawk	Wisconsin River
Mosinee Paper Co.	Mosinee, WI	Wisconsin River
Nekoosa-Edwards Paper Co. (Whiting-Plover Paper Co.)	Whiting, WI (Plover)	Wisconsin River
Nekoosa-Edwards Paper Co.	Nekoosa, WI	Wisconsin River
Nekoosa-Edwards Paper Co.*	Nekoosa, WI	Wisconsin River
Nekoosa-Edwards Paper Co.	Port Edwards, WI	Wisconsin River

Owens-Illinois, Inc.	Tomahawk, WI	Wisconsin River
St. Regis Paper Co.	Rhinelander, WI	Wisconsin River
Tomahawk Power & Pulp	Tomahawk, WI	Wisconsin River
Ward Paper Co.	Merrill, WI	Wisconsin River
Wausau Paper Company	Brokaw, WI	Wisconsin River
Wisconsin Public Service Corp.*	Weston, WI	Wisconsin River
Shawano Paper Mills	Shawano, WI	Wolf River

DISCHARGER	RECEIVING WATER
Antigo, City of	Spring Brook
Appleton, City of*	Fox River/Green Bay
Ashland, City of	Lake Superior
Baraboo, City of	Baraboo River
Beaver Dam, City of	Beaver Dam River
Beloit, City of	Rock River
Berlin, City of	Fox River/Green Bay
Brookfield, City of *	Fox (Illinois) River
Burlington, City of	Fox (Illinois) River
Cedarburg, City of	Cedar Creek
Chippewa Falls, City of	Chippewa River
Delavan, City of	Turtle Creek
DePere, City of*	Fox River/Green Bay
Eau Claire, City of	Chippewa River
Fond du Lac, City of	Lake Winnebago
Fort Atkinson, City of	Rock River
Green Bay Metro. Sewerage District	Fox River/Green Bay
Janesville, City of	Rock River
Jefferson, City of	Rock River
Kaukauna, City of*	Fox River/Green Bay
Kenosha, City of	Lake Michigan
La Crosse, City of	Mississippi River
Madison Metro. Sewerage District	Ditch to Badfish Creek
Manitowoc, City of	Lake Michigan
Marinette, City of	Menominee River
Marshfield, City of	Mill Creek
Menomonee Falls, Village of*	Menomonee River
Menomonie, City of	Red Cedar River
Merrill, City of	Wisconsin River
Milwaukee Metro. Sewerage Commission:	
Jones Island Plant*	Lake Michigan
South Shore Plant*	Lake Michigan
Monroe, City of	Honey Creek
Neenah-Menasha Sewerage Commission*	Fox River/Green Bay
Oconomowoc, City of	Oconomowoc River
Oconto, City of	Oconto River
Oconto Falls, City of	Oconto River
Oshkosh, City of	Fox River/Green Bay
Peshtigo, City of	Peshtigo River
Platteville, City of	Roundtree Branch, Little Platte River
Prairie du Chien, City of	Mississippi River
Racine, City of	Lake Michigan
Reedsburg, City of	Baraboo River
Rhinelander, City of	Pelican River
Rice Lake, City of	Red Cedar River
Ripon, City of	Silver Creek
Shawano, City of	Wolf River

DISCHARGER	RECEIVING WATER
Sheboygan, City of	Lake Michigan
South Milwaukee, City of*	Lake Michigan
Sparta, City of	La Crosse River
Stevens Point, City of	Wisconsin River
Superior, City of	Lake Superior
Two Rivers, City of	Twin River
Wapun, City of	South Branch, Rock River
Watertown, City of	Rock River
Waukesha, City of*	Fox (Illinois) River
Wausau, City of	Wisconsin River
West Bend, City of*	Milwaukee River
Whitehall, City of	Trempealeau River
Whitewater, City of	Whitewater Creek
Wisconsin Rapids, City of	Wisconsin River

*Also listed in Table 3

Attachment II to the Memorandum of Agreement

Projected Six-Month Schedule
of Permits to be Processed

Priority	Projected Number
A. Major Municipal	35
B. Major Industrial	30

STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,
Petitioners-Appellants,

v. APPEAL NO. 2008AP3235

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT COURT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT A PETITIONER MAY OBTAIN A CONTESTED CASE HEARING UNDER WISCONSIN STATUTES SECTION 283.63 TO CHALLENGE A WPDES PERMIT THAT FAILS TO SATISFY THE APPLICABLE REQUIREMENTS OF FEDERAL LAW, AS REQUIRED BY STATE STATUTES

RESPONDENTS' BRIEF

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STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

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RESPONDENTS' BRIEF

In this case, the Court of Appeals correctly decided that, as a matter of State law, wastewater discharge ("WPDES") permits issued by the Department of Natural Resources ("DNR") must comply with the applicable

requirements of the federal Clean Water Act. *Andersen v. DNR*, 2010 WI App 64, ¶¶ 29, 33, 324 Wis. 2d 828, 783 N.W.2d 877.

The sole issue before this Court is procedural: whether the original petitioners (collectively referred to as "the Council") have a right to a hearing to determine DNR's compliance with a State law that requires the agency to comply with applicable federal law when issuing a WPDES permit. There is no challenge to any federal decision; nor is the Council challenging any DNR rule.

The following pertinent State statutes are clear:

a. DNR-issued WPDES permits must include limitations "[n]ecessary to comply with any applicable federal law or regulation." WIS. STAT. § 283.31(3)(d)(2).

b. Parties contesting a discharge permit are entitled to a contested case hearing on, *inter alia*, "the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit." WIS. STAT. § 283.63(1).

Accordingly, a citizen may challenge, in a contested case hearing, whether a permit issued by DNR under State law complies with applicable federal law.

DNR's brief to this Court presents an array of arguments that are tangential, irrelevant, or simply wrong. DNR has offered a disjointed discussion of selected features of the relationship between DNR and the U.S. Environmental Protection Agency ("EPA"), as well as arguments regarding the ability to raise federal law issues to EPA in alternative forums. DNR has offered interpretations of State statutes that artificially restrict its statutory authority, essentially rewriting those statutes to evade their plain meaning. DNR

has also suggested that its permit decision here is consistent with federal law, an argument that is at best premature since DNR denied the Council a hearing to determine that issue.

This Court therefore should affirm the decision of the Court of Appeals and reject the arguments of the DNR.

ISSUE PRESENTED

Whether a petitioner may obtain a contested case hearing under Wisconsin Statutes section 283.63 to challenge a WPDES permit that fails to satisfy the applicable requirements of federal law, as required by State statutes.[1]

Answered "yes" by Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Council agrees that oral argument and publication are appropriate, consistent with this Court's practice.

STATEMENT OF FACTS

I. THE FEDERAL CLEAN WATER ACT PROGRAM

DNR scatters descriptions of selected components of the Clean Water Act ("CWA") throughout its brief. The issue presented in this case, however, warrants a more integrated

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[1]DNR presented this issue in two different ways: in its Petition, as relating to the application of federal to a ". . . federally delegated program where EPA has approved the state's rules . . .?"; but in its Brief as relating to the application of federal to ". . . the state program that governs state permits, in a state program that EPA has approved and determined is consistent with federal law . . .?" The issue here relates to review of a specific permit, not the many aspects of the state wastewater program.

discussion of the CWA, and the relationship it creates between EPA and the states.

The Clean Water Act envisions a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

> The role envisioned for the [delegated] states encompasses both the opportunity to assume primary responsibility for the implementation and enforcement of federal effluent discharge limitations, and the right to enact discharge limitations which are more stringent than the federal standards.

Aminoil U. S. A., Inc. v. Cal. State Water Res. Control Bd., 674 F.2d 1227, 1230 (9th Cir. 1982) (citations omitted).

The CWA is a multifaceted federal law containing several programs to protect water resources, including programs regulating discharges of pollutants by ships, factories, sewerage systems, and other point sources; funding for pollution control programs and facilities; and the dredge and fill of material in navigable waters. Two programs central to this case are the National Pollutant Discharge Elimination System ("NPDES") permit program, authorized by Title IV of the Act, and the related Water Quality Standards program, authorized by Title III of the Act. These programs work in tandem to ensure that discharges of pollutants do not exceed levels that are safe for fishing, recreation, and other designated uses.

A. The NPDES Permit Program

A foundational goal of the CWA was to eliminate the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a). The principal mechanism to achieve this and other interim goals is the NPDES permit program. The

CWA prohibits the discharge of any pollutant by any person to navigable waters from any point source unless an authorized agency has issued that person a NPDES permit. 33 U.S.C. §§ 1251(a)(1), 1311(a), 1342, and 1362(12). The core of the NPDES permit is to regulate discharges through the establishment of numeric or narrative "effluent limitations," and to require periodic monitoring and reporting of compliance with such limitations. NPDES permits may not be issued if the permit does "not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA." 40 C.F.R. § 122.4(a).

The CWA and EPA regulations establish different levels of effluent limitations. First, municipal and industrial dischargers are subject to technology-based limitations, which reflect the level of treatment that can be achieved using specific technology. 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 122.44(a)(1). Where application of technology-based limits will not achieve goals for the use of individual water bodies, point sources are subject to more stringent limitations based on water quality standards, discussed immediately below. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d); *see also* 33 U.S.C. § 1312.

Water quality-based effluent limitations are necessary to control pollutants that the permitting agency "determines 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." 40 C.F.R. § 122.44(d)(1)(i). The permitting agency makes this determination by conducting what has come to be known as a "reasonable potential analysis." Water quality-based effluent limitations are not based on available control technology, but on what is necessary to achieve water quality standards. *See American Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993); 40 C.F.R. § 122.44(d)(1).

B. The Water Quality Standards Program

The states have primary authority to establish water quality standards within state borders. 33 U.S.C. § 1313(a). Each state must establish ambient water quality standards for intrastate waters at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of" the CWA. 33 U.S.C. § 1313(c)(2)(A). A water quality standard consists of three components: (1) designated uses of the water, (2) narrative or numeric criteria necessary to protect the designated uses, and (3) a policy limiting the degradation of water quality ("antidegradation policy"). 33 U.S.C. § 1313(c)(2)(A); *PUD No. 1 of Jefferson Co. v. Wash. Dep't of Ecology*, 511 U.S. 700, 714 (1994); 40 C.F.R. § 131.3(e); 40 C.F.R. § 131.6; EPA, WATER QUALITY STANDARDS HANDBOOK § 1.2 (1994), *available at* http://www.epa.gov/ waterscience/ standards/ handbook/chapter01.html.

Under the CWA, EPA retains a limited oversight role of a State's implementation of the water quality standards program, particularly where changing technology and information show the need for updated water quality standards. After a state officially adopts revisions to its water quality standards program, EPA must review and determine whether the standards comply with the CWA. 40 C.F.R. §§ 131.5, 131.21. If EPA approves the standards they become applicable for CWA purposes. 40 C.F.R. § 131.21. If the adopted standards fail to comply with the requirements of the CWA, EPA must disapprove the State standards and must then "overpromulgate" by establishing CWA-compliant standards that are directly applicable to that state's waters. 33 U.S.C. § 1313(c)(4); 40 C.F.R. §§ 131.21-.22. *See* 40 C.F.R. Subpart D. The applicable water quality standards adopted by the state or overpromulgated by EPA for that state are the minimum standards used when developing water quality-

based effluent limits in NPDES permits. 40 C.F.R. § 131.21(d).

C. State Delegated NPDES Programs

EPA has primary authority over the NPDES permit program, but EPA may delegate that authority to a state to administer the NPDES program if the state has adequate authority to ensure compliance with applicable CWA requirements. 33 U.S.C. § 1342(b); *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 38, 268 N.W.2d 153 (1978); *see also* WIS. STAT. §§ 283.001, 283.31(3)-(4) (DNR-issued permits must comply with any applicable federal laws or regulations).

Delegated state programs must at all times be administered at least in conformance with specified federal regulations, identified in 40 C.F.R. § 123.25 as "*applicable* to State NPDES program." 40 C.F.R. §§ 123.25(a), 122.1(a)(5) (emphasis added). The "[WPDES permit program] must be administered consistently with the federal act." *Badger Paper Mills Inc. v. DNR*, 154 Wis. 2d 435, 437, 452 N.W.2d 797 (Ct. App. 1990).

Once EPA has delegated authority to a state, EPA's oversight is limited.[2] EPA must review state program revisions, and may object to state issued permits or withdraw delegation of the state program in its entirety. 33 U.S.C. § 1342(d)(2); 40 C.F.R. §§ 123.62-.63. Revisions to delegated state NPDES programs do not become effective under the CWA until approved by EPA. 40 C.F.R. § 123.62(b)(4). Where a state program no longer meets applicable CWA requirements and the state fails to take corrective action EPA may withdraw state delegation of the NPDES program. *Id.* §

[2]EPA continues to oversee the NPDES program in non-delegated states. 33 U.S.C. § 1342. It must supervise state programs and update effluent standards and applicable requirements as technology, information, and legal and regulatory requirements change. *Id.* § 1251 *et. seq.*

123.63. Finally, the state may not issue permits that EPA has exercised its discretionary authority to object to. *Id.* §§ 122.4(b), 123.44.

Except for review of program revisions, EPA's oversight of delegated state programs is also largely discretionary. The CWA "reflects 'the desire of Congress to put the regulatory burden on the states and to give the [EPA] broad discretion in administering the program.'" *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989) (quoting *District of Columbia v. Schramm,* 631 F.2d 854, 860 (D.C. Cir. 1980)). "[F]ederal courts should leave EPA with its discretion to review state-issued permits." *Id.* EPA's objection or non-objection to a state-issued permit is unreviewable in federal courts. *Id.*

II. WISCONSIN'S CLEAN WATER ACT PROGRAM

Wisconsin Statutes chapter 283 authorizes DNR to implement and administer the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit program. By design, the Wisconsin program mirrors the federal program. Chapter 283 prohibits the discharge of a pollutant to waters of the state unless authorized pursuant to a WPDES permit, with the goal of eliminating the discharge of pollutants into waters of the state by 1985. WIS. STAT. §§ 283.001(2), 283.31(1). Permits issued by DNR must comply both with all applicable state and federal water quality standards and with all applicable state and federal laws and regulations. WIS. STAT. § 283.31(3)-(4). DNR-issued permits must also include effluent limits "necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation" and require compliance with these water quality-based effluent limits. WIS. STAT. § 283.13(5).[3]

[3]In Wisconsin, water quality standards are established pursuant to section 281.15(1) and are contained in chapters NR 102 – 105 of the Wisconsin Administrative Code. WIS. STAT. § 281.15(1); WIS. ADMIN. CODE §

Certain DNR-issued rules also must mirror federal law:

> (2) COMPLIANCE WITH FEDERAL STANDARDS. (a) Except for rules concerning storm water ..., 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 [CWA]* and regulations adopted under that act.

WIS. STAT. § 283.11(2) (emphasis added). This so-called "uniformity provision" does not apply to water quality based effluent limits or technology based phosphorus limits. WIS. STAT. §§ 283.11(3)(am) and (5). EPA reviews revisions to the state's program to determine whether the rule complies with federal requirements, but does not review to determine whether the rule exceeds federal requirements. 40 C.F.R. § 123.62.

These longstanding state statutes form the legal foundation for EPA's delegation of the CWA program to Wisconsin—they were first enacted in July 1973, Act 74, and placed in chapter 147 of the statutes to allow the State to qualify for NPDES delegation.

III. BACKGROUND FACTS

DNR's statement of the facts in this case is generally accurate.[4] Additional explanation is necessary, however, to fully understand the nature of the underlying substantive

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NR 106.01 and chs. NR 102, 103, 104 and 105. DNR is wrong: Wisconsin Statutes section 283.11 does not provide the foundation for setting water quality standards. (Pet-Br:17, 22).

[4]DNR only petitioned for review of that part of the Court of Appeals decision requiring DNR to review whether the Fort James permit terms comply with federal law. (DNR Br. 5). Therefore, the facts and legal analysis presented here are limited to those facts and analysis relevant to that issue.

issues that prompted the Council to request a hearing, and to correct certain DNR misstatements.

A. Facts Underlying the Council's Hearing Request.

The DNR's treatment of two pollutants in the Fort James permit led to the Council's hearing request: phosphorus and mercury.

1. Phosphorus

Phosphorus is a pollutant that can cause extreme and unpleasant algal growth in surface waters. (R.5:1-11.) These algal blooms also use significant amounts of dissolved oxygen, depressing the amount of oxygen available to support a healthy aquatic ecosystem, including fish and food sources for fish. (R.5:1-11.) DNR has identified the lower Fox River as "impaired" by depressed levels of dissolved oxygen, caused by severe and excessive levels of phosphorus. (R.5:1-11.)

Wisconsin has established a technology-based effluent limit of 1 milligram per liter ("mg/L") for certain dischargers of phosphorus. WIS. ADMIN. CODE § NR 217.04(1)(a). The 1 mg/L limit is imposed in WPDES permits as a 12-month rolling average concentration limit. *Id.* This requirement was promulgated under an exemption from the state uniformity clause. WIS. STAT.§ 283.11(3)(am).

At the time DNR reissued the Fort James permit, Wisconsin had not adopted numeric phosphorus water quality criteria. Wisconsin regulations did however contain narrative water quality criteria that prohibit, *inter alia*, floating or submerged debris, oil, scum, objectionable deposits, and material producing color, odor, taste or unsightliness—these water quality problems are associated with phosphorus pollution. WIS. ADMIN. CODE § NR 102.04(1).

2. Mercury

Mercury is a toxic pollutant that bio-accumulates in fish and other living organisms. *See* 40 C.F.R. § 132, Table 6A. It is linked to cancer, brain damage, and birth defects in humans. Because of the high levels of mercury in the lower Fox River, DNR has issued a fish consumption advisory, limiting the recommended amount of fish from the lower Fox River that individuals, particularly women of child-bearing age, should consume. (R.5:5.)

Wisconsin has established numeric mercury water quality criteria for the protection of human health and for the protection of wildlife: 1.5 nanograms per liter ("ng/L") and 1.3 ng/L respectively. WIS. ADMIN. CODE §§ NR 105.08(3), Table 8, 105.07(1)(b), Table 7. In late 2002, DNR promulgated regulations establishing procedures for obtaining a variance from meeting water quality-based effluent limits for mercury, including a procedure to determine whether a mercury effluent limit is necessary, in a WPDES permit. WIS. ADMIN. CODE § NR 106.145. Sections NR 106.145(2)-(3) prohibit DNR from imposing necessary mercury water quality-based effluent limits in a WPDES permit and requires DNR to impose quarterly monitoring requirements unless the permittee supplies "at least 12 monitoring results spaced out over a period of at least 2 years" at the time of permit reissuance.

Although promulgated in 2002, DNR did not submit section NR 106.145 to EPA for approval as a WPDES permit program revision until May 30, 2007, nearly two years after DNR had invoked the regulation to issue the Fort James permit without a mercury effluent limit. (Pet-App:293-301.) Thus, the regulation was not effective for CWA purposes when DNR issued the Fort James permit. 40 C.F.R. § 123.62.

In 2009, EPA formally disapproved the portions of the regulation that DNR used to justify excluding a mercury effluent limit in the Fort James permit, Wisconsin Administrative Code sections NR 106.145(2) and (3); and EPA directed DNR to issue permits in accordance with the prior, EPA-approved state program requirements. (Pet-App:293-301.) *See* 33 U.S.C. § 1342; 40 C.F.R. § 123.62. Despite EPA's disapproval eighteen months ago, DNR has still not repealed section NR 106.145 (2)-(3).

3. The Council's Hearing Request

In 2005, when DNR reissued a WPDES permit to Fort James to discharge pollutants into the lower Fox River, DNR did not include limits necessary to protect fish and aquatic life, recreation, and human health from phosphorus and mercury pollution. (R.7:331-349.) Rather, DNR imposed a "technology-based" phosphorus limit of 1 mg/L as a twelve-month rolling average and required Fort James to monitor its discharge of mercury under section NR 106.145. (R.7:351.) DNR also did not determine whether Fort James' increased discharge of phosphorus – 10,000 lbs annually – was necessary before authorizing this increased pollution. (R.5:1-11).

The Council petitioned DNR under Wisconsin Statutes section 283.63 for a contested case hearing to review the deficient phosphorus and mercury terms and conditions in the Fort James permit. (R.7:243-254; Resp't App.:101-112.) The Council alleged that DNR failed to follow state law requiring the agency to comply with applicable federal regulations requiring a reasonable potential analysis for phosphorus and mercury, and the inclusion of daily maximum and average monthly limits for phosphorus. (R.7:247-48; Resp't App.:105-06); *See* 40 C.F.R. §§ 122.44(d)(1), 122.45. There is no issue in this appeal involving a challenge to any DNR rule. Rather, the Council is challenging DNR's issuance of a single discharge permit as inconsistent with

minimum requirements of federal law required to be imposed by state statutes.

B. Procedural Posture

DNR partially denied the Council's petition, barring review of any challenge grounded in federal law. (R.7:5-9; Pet-App:129-33.) The Council sought judicial review of the DNR's decision to partially deny its petition, pursuant to Wisconsin Statutes section 227.52, *et seq.* (R.1:1-38.) The Council also asked the circuit court to declare that DNR may not issue a WPDES permit that fails to comply with federal regulations, pursuant to Wisconsin Statutes section 806.04. (R.1:1-38.)[5] The circuit court denied the Council's request for declaratory judgment and upheld DNR's decision to deny a hearing on the phosphorus and mercury terms in the Fort James permit, holding that DNR must limit the hearing to challenges based upon state law because EPA was not a party to that action. (R.64:5-6; Pet-App:126-27.) The circuit court also held that it was without jurisdiction because EPA was an indispensable party under section 803.03. (R.64:5-6; Pet-App:126-27.)

On appeal, the Court of Appeals reversed the circuit court regarding the scope of hearing under Wisconsin Statutes section 283.63, but affirmed the dismissal of the Council's declaratory judgment claims, albeit for different reasons. *Andersen v. DNR*, 2010 WI App 64, 324 Wis. 2d 828, 783 N.W.2d 877; (Pet-App:101-21.) The Court of Appeals held that "DNR possesses authority to determine whether provisions within a state-issued wastewater discharge permit comply with federal law." *Andersen*, 2010 WI App 64, ¶ 33; (Pet-App:118).

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[5]The Council originally sought a declaratory judgment, pursuant to Wisconsin Statutes section 227.40, *et. seq.*, that two state administrative rules were invalid, but later withdrew that request. (R.1:2-3.) That claim is therefore not relevant to this review.

ARGUMENT

I. THIS COURT REVIEWS DNR'S DECISION *DE NOVO*

The issue before the Court—whether DNR can and must review a WPDES permit under section 283.63 for compliance with the federal CWA—is a question of agency authority, which is reviewed *de novo*. When deciding issues of statutory authority, this Court owes no deference to an agency's legal interpretation of its own authority—particularly here, where DNR has concocted jurisdictional restrictions that are absent from the statutes. *Wis. Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994). DNR's expertise on environmental issues does not equate to specialized knowledge in construing authorizing and procedural statutes. *Town of Norway v. Racine County Drainage Bd.*, 220 Wis. 2d 595, 602-03, 583, N.W.2d 437 (Ct. App. 1998).

DNR argues that this Court must review its decision to deny the Council a hearing through a lens tinted by "DNR's longstanding understanding of the WPDES statutes." (DNR Br. 6). It cited no authority for this proposition. Moreover, it provided no support for the proposition that its arguments in this case reflect any longstanding agency understanding. Additionally, as discussed immediately below, no weight is accorded to agency interpretation where the statute is unambiguous. There is simply no need for interpretation by the agency.

II. STATE LAW REQUIRES DNR TO ISSUE PERMITS THAT COMPLY WITH FEDERAL LAW.

A. The Pertinent Statutes Are Clear and Require No DNR Interpretation

The goal of statutory interpretation is to "discern and give effect to the intent of the legislature." *State v. Head*, 2002 WI 99, ¶ 82, 255 Wis. 2d 194, ¶ 82 648 N.W.2d 413, ¶ 82. Courts first look to the statute's plain language to determine if it "clearly and unambiguously sets forth the legislative intent." *Id.* If the statute is clear and unambiguous, the inquiry ends there. *Id.* In interpreting a statute, courts will "favor a construction that fulfills the purpose of the statute over one that undermines the purpose." *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 17, 325 Wis. 2d 135, ¶ 17, 785 N.W.2d 302, ¶ 17.

B. Wisconsin Statutes Require that DNR-Issued WPDES Permits Comply with Applicable Federal Laws and Regulations.

When EPA delegated the administration of the NPDES permit program to Wisconsin in the 1970s, sections 147.02(3) and (4), now sections 283.31(3) and (4), required that DNR-issued permits include any water quality-based effluent limitations and conditions necessary to comply with any applicable federal law or regulation. The language has not substantively changed since its adoption in 1973:

> (3) The department 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:
>
> (a) Effluent limitations.
>
> (b) Standards of performance for new sources.
>
> (c) Effluent standards, effluents prohibitions and pretreatment standards.
>
> (d) Any more stringent limitations, including those:
>
> 1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
>
> 2. Necessary to comply with *any applicable federal*

> *law or regulation*; or
> 3. Necessary to avoid exceeding total maximum daily loads established pursuant to a continuing planning process developed under s. 283.83.
> (e) Any more stringent legally applicable requirements necessary to comply with an approved areawide waste treatment management plan.
> [. . .]
> (4) The department shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3)....

WIS. STAT. §§ 283.31(3)-(4) (WEST 2010)(emphasis added). *Compare* WIS. STAT. §§ 147.02(3)-(4) (1973).

The statute could not be clearer. DNR must, in addition to state requirements, impose more stringent effluent limitations necessary to comply with any applicable federal laws and regulations.

C. DNR's Argument Rewrites the Statute, Making it Inconsistent with Both State and Federal Law.

Although DNR acknowledges that its rules must comply with federal law, it denies that section 283.31(3)(d)(2) means what it explicitly says. Instead, without the benefit of any authority, it argues that the "applicable" federal laws and regulations referenced in section 283.31(3)(d)(2) are limited to federal permit requirements established by EPA that apply solely to Wisconsin—"overpromulgated" in DNR's words. (DNR Br. 24.)

DNR's argument ignores EPA's stricture that "[c]ertain [NPDES] requirements set forth in [C.F.R.] part[] 122 . . . are made *applicable* to approved State programs by . . . reference . . . in § 123.25 of this chapter. . . ." 40 C.F.R. § 122.1(a)(5) (emphasis added). Those sections or paragraphs that are "applicable to States, through reference in § 123.25 . .

. , [are] signaled by the following words at the end of the section or paragraph heading: (Applicable to State programs, see § 123.25 of this chapter)." *Id.* EPA's use of those words at the end of the headings of sections 122.44 and 122.45 signals that those sections are applicable to *all* State NPDES programs, including Wisconsin's WPDES program. *See* 40 C.F.R. §§ 122.44, 122.45. Sections 122.44 and 122.45 are the sections that were the basis for the Council's claims that DNR failed to comply with federal law by failing to conduct reasonable potential analyses for phosphorus and mercury and by failing to include daily maximum and average monthly limits for phosphorus.

Thus, DNR's arguments that sections 122.44 and 122.45 are not "applicable" and that it did not have to comply with them lack any foundation and are simply wrong. EPA expressly made those regulations "applicable" to all state NPDES programs, and our Legislature confirmed through its enactment of section 283.31(3)(d)(2) that DNR has an obligation to comply with them in establishing permit conditions in the Fort James permit.[6]

D. State Statutes That Limit DNR's Authority to Establish State Rules More Stringent than Certain EPA Requirements Do Not Invalidate DNR's Obligation to Issue Permits that Comply with Any Applicable Federal Laws and Regulations.

DNR makes the untenable contention that Wisconsin Statutes section 283.11(2) authorizes the agency to violate the requirements of section 283.31(3)(d)(2) and to issue WPDES permits that lack conditions necessary to ensure compliance with any applicable federal law or regulation. (DNR Br. 21-23.)

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[6] Reliance on applicable federal regulations may also be necessary where a delegated state has simply failed to adopt federal requirements into state code.

Section 283.11(2) does not apply here. That statute mandates that certain state *rules* related to point source discharges, technology-based effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions, and pretreatment standards comply with and do not exceed the requirements of the CWA. WIS. STAT.§ 283.11(2). Permit terms do not violate the uniformity provision in section 283.11(2) unless those terms are considered "rules." *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 240, 287 N.W.2d 113, 124 (Wis. 1980). Moreover, that statute provides that state *rules* must comply with and cannot "exceed" federal requirements. It has no bearing on the Council's position that the Fort James *permit* fails to meet minimum federal requirements.

In addition, section 283.31(3)(d) authorizes DNR, in specified circumstances, to issue permits containing more stringent limits than effluent limits promulgated by rule. In particular, 283.31(3)(d)(1) requires more stringent permit limits if they are necessary to meet state and federal water quality standards, and 283.11(2) does not bar inclusion of those more stringent limits in WPDES permits. *Wis. Elec. Power*, 93 Wis. 2d at 250; *Niagara of Wis. Paper Corp.*, 84 Wis. 2d 32, 53-54, 268 N.W.2d 153, 162-63 (Wis. 1978). More stringent limits necessary to meet any other applicable federal law and regulations, as required under 283.31(3)(d)2, therefore must also not be barred by 283.11(2).

E. DNR's Definition of Applicable Federal Laws Leads to an Absurd Result.

DNR is wrong to assert that the Council's interpretation renders the Wisconsin program altogether useless. So long as a delegated program is at least as stringent as the applicable federal law and regulations, a state may tailor its program "to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any

requirement respecting control or abatement of pollution." 33 U.S.C. § 1370; 40 C.F.R. § 123.25, Note.

The plain language of the CWA makes "applicable" all federal NPDES regulations identified as "applicable," 40 C.F.R. §§ 40 C.F.R. 122.1(a)(5), 123.25(a), and all water quality standards adopted by the state or overpromulgated by EPA. 40 C.F.R. § 131.21(c). *See* 40 C.F.R. § 131.31-.38 (federal promulgated water quality standards). It would render these clear requirements meaningless and create redundancies if EPA were required to republish—or overpromulgate—identical NPDES regulations specific to each state: the NPDES regulations applicable to *all* state delegated NPDES programs are *already* clearly identified in the federal code, so there is no authority or need to overpromulgate those requirements. In any event, the state law which requires DNR to issue permits which comply with *all* of these applicable federal laws and regulations never makes any reference to the "overpromulgation" concept on which DNR's strained argument rests.

III. STATE LAW DOES NOT BAR CHALLENGES TO STATE-ISSUED PERMITS THAT FAIL TO COMPLY WITH FEDERAL REQUIREMENTS.

A. Wisconsin Statutes Section 283.63 Does Not Authorize DNR to Deny a Hearing to Challenge WPDES Permit Terms For Failure to Comply with Federal Law.

State law does not prevent review of a WPDES permit for compliance with federal law. Wisconsin Statutes section 283.63(1) authorizes citizens to obtain a contested case hearing to review, among other things, the "reasonableness of or necessity for any" WPDES permit "term or condition." By its plain language, section 283.63 neither authorizes nor

requires DNR to limit that review to state law issues.[7] DNR is authorized to determine whether permit limits and conditions comply with all applicable laws and regulations, regardless of whether those regulations are federal or state regulations. *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 627-28, 307 N.W.2d 389 (1981).

Indeed, DNR concedes that nothing in section 283.63 restricts the scope of the hearing to state law challenges.[8] (DNR Br. 36.) Consequently, DNR cannot graft onto section 283.63 a restriction barring the Council from demonstrating that the Fort James WPDES permit violates applicable federal law and regulations made mandatory by section 283.31(3)(d)(2).[9]

B. Reading Section 283.63 to Prohibit Review of WPDES Permits for Compliance with Applicable Federal Law is Illogical.

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[7]The legislature did, however, expressly restrict the scope of review under section 283.63 in several other respects, specifically restricting review to: 1) permit denials, modifications, suspensions or revocations; 2) the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit; 3) any proposed thermal effluent limitations; or 4) any water quality based effluent limit. WIS. STAT. § 283.63(1).

[8]As the Court of Appeals correctly noted, the statutory scheme surrounding section 283.63, contrary to DNR's assertion, does not reserve to EPA the exclusive right to review a permit for consistency with federal law. *Andersen v. DNR*, 2010 WI App 64, ¶ 30.

[9] Regardless, state statutes require DNR to review the permit to ensure that state requirements were implemented and applied in a manner that does not violate federal law. Just as DNR might erroneously implement or apply a state requirement in violation of state law, DNR might also implement or apply a state requirement in violation of a federal law, regardless of whether the state requirement was originally intended to comply with federal law.

In establishing the authority necessary to obtain delegation, the Wisconsin Legislature expressly prohibited DNR from issuing WPDES permits that fail to include effluent limitations necessary to comply with any applicable federal law or regulation. WIS. STAT. § 283.31(3)(d)(2) (formerly § 147.02(3)(d)(2), 1973 Wis. Act 74). As part of the same Act, the Legislature enacted section 283.63 (then § 147.20) to provide interested persons the opportunity to obtain review of the terms of a WPDES permit. 1973 Wis. Act 74.

It would have been illogical for the Legislature to have required DNR to issue permits that comply with federal laws and regulations and to authorize citizens to obtain a review of any permit term or condition before an independent hearing examiner, but to preclude the hearing examiner from considering DNR's compliance with its statutory mandate to comply with applicable federal law. Statutory language is interpreted to avoid unreasonable results—not in isolation, but as part of a coherent whole. *Heritage Farms, Inc. v. Market Ins. Co.,* 2009 WI 27, ¶ 7, 316 Wis. 2d 47, ¶ 7, 762 N.W.2d 652, ¶ 7 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane County,* 2004 WI 58 ¶¶ 45, 49, 271 Wis. 2d 633, 681 N.W.2d 110). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* ¶ 13 n.9 (quoting *Kalal*, 2004 WI 58, ¶ 39). "[E]very word excluded from a statute must be presumed to have been excluded for a purpose." *Id.* (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTE AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007)). In enacting section 283.63 to authorize contested case hearings regarding the reasonableness of permit provisions, the legislature did not include any language excluding issues arising under federal law or regulation.

C. State Tribunals Are Competent to Interpret and Apply Federal Law.

State courts are perfectly competent to interpret and apply federal law. *See, e.g., Terry v. Kolski,* 78 Wis. 2d 475, 482, 254 N.W.2d 704 (1977); *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989). Similarly, administrative law judges are competent to interpret and apply federal law: "it is permissible to raise federal environmental law in state administrative litigation;" and Administrative Law Judges ("ALJs") are competent to find that "Wisconsin provisions as interpreted by []DNR violate[] the federal [CWA]." *Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000). "When reviewing state-issued permits . . .state courts are perfectly competent to decide questions of federal law." *American Paper*, 890 F.2d at 875.

This Court has itself interpreted federal law to assess whether WPDES permit terms or DNR rules are *more* stringent than CWA requirements. *Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d at 243. A state ALJ is similarly competent to determine whether WPDES permit terms are *less* stringent than CWA requirements, in violation of Wisconsin Statutes section 283.31(3)(d)(2).[10]

IV. EPA'S DECISION NOT TO OBJECT TO A WPDES PERMIT THAT FAILS TO COMPLY WITH CWA REQUIREMENTS IS NOT AN ENDORSEMENT OF THE PERMIT.

DNR overstates the relevance and importance of EPA's failure to object to the Fort James permit. EPA is not authorized, let alone required, to approve state-issued NPDES permits, regardless of whether they fail to comply with applicable federal law or regulations. 40 C.F.R. § 123.44. In fact, EPA may, under the CWA, waive all authority to object

[10]Shortly after enactment of the CWA, federal courts began upholding the authority of state administrative agencies to hold hearings to determine compliance with the federal act and federal regulations promulgated under it. *See, e.g., Power Auth. of State of N.Y. v. Dep't of Envtl. Conservation*, 379 F. Supp. 243 (N.D.N.Y. 1974).

to NPDES permits issued in a state delegated program. 33 U.S.C. § 1342(d)(3).

EPA's decision not to object does not mean the agency made an affirmative decision that the Fort James permit complies with federal law. Any decision to intervene in a state permitting decision is purely discretionary. 40 C.F.R. § 123.44 (providing that EPA "*may* make . . . objections to . . . proposed [State] permits." (emphasis added)). EPA's decision not to object to the Fort James permit may reflect its judgment that it should allocate its resources to broader concerns rather than intervene in an individual case, particularly since the Wisconsin legislature had established a state process for reviewing individual permits. DNR should have followed that process by granting the Council's request for a hearing on the Fort James permit.

DNR's suggestion that the Council's remedy is to appeal EPA's decision not to object to the Fort James permit is faulty. Congress intended "EPA to retain discretion to decline to veto a permit even after the agency found some violation of applicable guidelines." *Save the Bay, Inc. v. EPA,* 556 F.2d 1282, 1291-92, 1294-95 (5th Cir. 1977) (emphasizing minimal federal intervention in state programs). Federal courts do not have jurisdiction, pursuant to 33 U.S.C. §1369(b) or any other statute, to hear challenges to EPA's failure to object to a state-issued NPDES permit. *American Paper,* 890 F.2d at 874-75; *Save the Bay,* 556 F.2d at 1291-92, 1294-95. The Council is not allowed, much less required, to file a federal action to challenge a WPDES permit that is inconsistent with federal law. *Save the Bay,* 556 F.2d at 1294-95. EPA's decision not to veto an individual permit is not a reviewable action; and it is immune from judicial review. *Id.* EPA's failure to object to a permit is discretionary and unreviewable, and the Court of Appeals correctly held that EPA does not have the exclusive right to determine state compliance with federal environmental laws and regulations. *Andersen v. DNR,* 2010 WI APP at ¶¶ 27-28, 33.

In delegating primary responsibility to Wisconsin over the NPDES program within the State, EPA transferred its authority to issue permits and determine their legality. It would defeat the purpose of the delegation to hold that EPA retains the obligation to determine whether a WPDES permit complies with federal CWA requirements. Indeed, the sole avenue for review of a state-issued NPDES permit is through the state. The CWA "does not contemplate federal court review of state-issued permits." *American Paper,* 890 F.2d at 875. DNR therefore cannot divest itself of the obligation to ensure the Wisconsin WPDES program and permits issued thereunder comply with the CWA. The Wisconsin legislature confirmed that obligation by requiring DNR to provide an opportunity for review of a WPDES permit for compliance with applicable federal law and regulations.

V. EPA'S OVERSIGHT OF THE DELEGATED WPDES PERMIT PROGRAM DOES NOT RELIEVE DNR OF ITS DUTY TO ENSURE COMPLIANCE WITH THE CWA; NOR DOES IT PRECLUDE A STATE FORUM FOR REVIEW OF DEFICIENT WPDES PERMITS.

Although EPA retains an oversight role and may withdraw approval of Wisconsin's WPDES program, that oversight role does not absolve DNR of its state statutory obligation to ensure compliance with the CWA; nor does it deprive an ALJ or State court of authority to find that a permit fails to comply with applicable federal laws or regulations. DNR's suggestion that citizens may invoke EPA's oversight role or seek other recourse is no substitute for a petition for a contested case hearing.[11] None of the

[11] DNR's suggested remedies for the Council are unfeasible. Rather than request review of a NPDES permit under the clear procedures in state law, DNR suggests that, within the 30 day public notice period following DNR's notice of proposed issuance of a WPDES permit, citizens must: assess whether rules underlying the permit have been approved by EPA

avenues DNR suggests will provide the remedy the Council seeks. Indeed, if the Council is denied an opportunity to challenge deficiencies in the Fort James permit in a state forum, the Council will be without any forum in which to obtain review of a clearly deficient WPDES permit.[12]

A. EPA's Obligation to Review and Approve NPDES Program Revisions is Not Discretionary, Provides No Remedy for the Council in This Case, And is Irrelevant to the Issue Presented to This Court.

DNR asks "what should happen when a DNR permit contains a term that follows a state rule setting permit implementation procedures that EPA has decided was not so substantial as to warrant review, but the Council asserts should be reviewed and found to violate federal law?" (DNR Br. 20). EPA did not decide not to review Wisconsin's mercury rule revisions because the WPDES program changes were not substantial; *EPA did not review those revisions because DNR had not submitted them for review and approval.* (Pet-App:293.) Moreover, when EPA did review the state rule setting implementation procedures for mercury after it was brought to its attention, EPA declared those procedures invalid. (Pet-App:293-301.)

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or whether rules necessary to ensure compliance with applicable federal law are absent from the Wisconsin code, and then ask EPA to review unapproved rules, petition EPA or DNR to promulgate missing rules, ask EPA to object to a rule, or petition for withdrawal of the entire WPDES program. (DNR Br. 32-33). It would be next to impossible to obtain any of the suggested remedies within the short public comment period or prior to DNR's final issuance of the WPDES permit.

[12]The record does not establish that EPA approved the contested permit terms as compliant with federal or state law. In fact, after DNR issued the Fort James permit, EPA determined certain of the underlying regulations violated federal law and disapproved them. (Pet-App:293-301.)

Secondly, DNR asks "what should happen when a DNR permit contains a term that follows a state rule setting a water quality standard that EPA has approved, but that the Council asserts violates federal law?"[13] (DNR Br. 20.) This question mischaracterizes the issue in this case. The Council is not challenging any state water quality standard, but rather DNR's failures to conduct reasonable potential analyses for phosphorus and mercury, and to set daily maximum and average monthly limits for phosphorus, as required by applicable federal regulations when issuing an individual permit to Fort James. Compliance with those federal rules is wholly compatible with DNR's narrative water quality standards, and does not require different or additional state regulations.

DNR incorrectly suggests that federal regulations give EPA the option to forgo review of revisions to a delegated NPDES permit program it deems are not substantial.[14] DNR misreads federal regulations and cites no legal authority allowing EPA to forgo review and approval or disapproval of

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[13] DNR suggests, without any relevant support, that EPA has approved Wisconsin's antidegradation rules insofar as they relate to phosphorus. (DNR Br:11, 19.) DNR is wrong. The document DNR cites as support is actually EPA's approval/disapproval of Wisconsin's submission under the Great Lakes Water Quality Guidance, of which EPA only reviewed Wisconsin's antidegradation procedures as applied to bio-accumulative chemicals of concern. (Pet-App:271); 40 C.F.R. Part 132, Table 6A and Appendix E; 40 C.F.R. §§ 132.4(a)(6) & (f). Regardless the Council is still entitled to a hearing to determine whether DNR's application of the state's antidegradation rules in the Fort James permit satisfies the state law requirement mandating compliance with all applicable federal requirements.

[14] DNR has not shown how EPA's participation during the rulemaking process or periodic program reviews has any relevance to the issues before this Court. Regardless of EPA's informal involvement in the rulemaking process or programmatic reviews, WPDES rule revisions are not applicable for CWA purposes unless approved by EPA. 40 C.F.R. § 123.62(b)(4).

revisions that are not substantial.[15] No program revisions are effective for CWA purposes unless approved by EPA. Approval is given via publication in the Federal Register, or for revisions that are not substantial, via letter. 40 C.F.R. §§ 123.62(b)(2) and (4).[16] In this case, EPA did not forgo review of the state rule for setting mercury limits because it deemed the revision not substantial. Rather, DNR did not timely submit that revision to EPA for review.[17]

EPA's disapproval of that revision, once it was brought to the agency's attention, will not remedy the Council's legitimate concerns that the Fort James permit violates applicable CWA requirements. The Fort James

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[15] DNR is wrong to imply that the Council's request for EPA to review the mercury rule as a revision to the approved WPDES permit program illustrates that EPA reviews promulgated DNR rules upon public request or that the Council asked EPA to *disapprove* the rule. Similarly, the October 22, 2008 letter contained in DNR's appendix raising concerns of the Sierra Club, not a party to this action, about numerous deficiencies in Wisconsin's permitting program, is not relevant to this Appeal. (Pet-App. 302-312.)

[16]DNR's appendix contains numerous documents regarding various revisions to the state program. None of them support the inference that EPA ever deemed any of Wisconsin's submitted rule or statute revisions as non-substantial and therefore not worthy of review. Even if EPA had determined that some revisions were non-substantial, which there is nothing in the record to indicate, EPA would be required to issue a notice of approval before those NPDES program revisions became effective for CWA purposes. 40 C.F.R. § 123.62(4). What DNR's documents potentially illustrate are additional examples of WPDES permitting regulations and requirements that may not have been approved as compliant with CWA requirements by EPA. The few documents within DNR's appendix that *are* relevant document EPA's rejection of NR 106.145(2)-(3) after it was belatedly submitted for approval. That was the rule on which DNR had relied in fashioning the deficient mercury provisions in the Fort James permit. (Pet-App. 293-301.)

[17] DNR's theory "would allow DNR to promulgate rules and issue permits violating federal law so long as it can successfully skirt the EPA's discretionary review." *Andersen v. DNR*, 2010 WI App 64, ¶ 28.

permit still contains terms based on regulations that EPA deemed violate CWA requirements, *i.e.*, WIS. ADMIN. CODE § NR 106.145(2)-(3). Those regulations, despite EPA's disapproval, continue to be part of the Wisconsin Administrative Code. Thus, EPA's disapproval of rules that fail to comply with CWA requirements may not prevent DNR from issuing permits that violate applicable federal law in the future. Under DNR's argument that it must implement state law and only state law, DNR arguably would be required to rely on these disapproved regulations when issuing WPDES permits.

Even if EPA had approved a state program revision, *state statutes* never authorize DNR to issue WPDES permits that fail to comply with applicable federal law. EPA's approval of state program revisions neither authorized DNR to issue WPDES permits that fail to comply with applicable federal regulations, nor relieved DNR of its independent obligation to meet the requirements of sections 283.13(3)-(4). EPA's approval of a state rule also does not establish an incontrovertible determination that each and every state permit issued thereafter is in compliance with federal law, regardless of its contents.

B. Petitioning EPA to Withdraw Delegation of the WPDES Program Will Not Remedy the Deficiencies in the Fort James Permit and Is Irrelevant to the Issue Presented to this Court.

Withdrawal of a state program may remedy *programmatic* problems with a delegated NPDES permit program, such as a state's repeated issuance of NPDES permits that fail to conform to the Act. 40 C.F.R. § 123.63(a)(2)(ii). EPA cannot withdraw the entire program based on deficiencies in *one* permit. A petition to withdraw the WPDES program, premised solely on DNR's issuance of the Fort James permit in violation of applicable federal law,

would fail to meet the criteria for withdrawal of the Wisconsin program. [18]

DNR's suggestion, even if available, is facially absurd. The WPDES permit program applies to hundreds if not thousands of facilities, involves hundreds of Wisconsin employees involved in permit writing, technical assistance and compliance, and involves millions of dollars of federal funding. Why would a party seek to eliminate an entire state program when there is an available, statutory opportunity under Wisconsin law to seek a hearing regarding the deficient permit? DNR's proposition illustrates why EPA's authority to withdraw Wisconsin's delegation of the NPDES program is irrelevant to this action.

C. EPA's Authority to Overpromulgate Water Quality Standards is Irrelevant to the Issue Before This Court.

DNR's suggestion that the Council file a federal citizen suit against EPA to promulgate regulations for the state is similarly absurd and legally unavailable. Federal citizen suits under 33 U.S.C. section 1365(a)(2) are only available where EPA has failed to perform a *non-discretionary duty*. In DNR's example, *Florida Wildlife Federation v. Jackson*, the plaintiffs alleged that EPA had failed to perform its non-discretionary duty under Title III of

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[18] Scenarios under which EPA could withdraw approval of a state program include: action by state legislature or court striking down or limiting State authorities or failure to promulgate necessary new authorities; failure to issue permits, repeated issuance of permits which do not conform to applicable requirements, or failure to comply with public participation requirements; failure to act on permit violations, seek adequate enforcement penalties or inspect and monitor activities subject to regulation; failure to comply with the terms of the Memorandum of Agreement; failure to develop an adequate program for developing water quality-based effluent limits in NPDES permit; failure of a great lakes state or tribe to adequately incorporate the NPDES permitting implementation procedures. 40 C.F.R. § 123.63(a).

the Act, 33 U.S.C. section 1313(c)(4)(B), to establish water quality criteria for the state of Florida. (DNR Br. 33); *Fla. Wildlife Fed'n v. Jackson,* 2009 WL 5217062, at *2, 4 (N.D. Fla., Dec 30, 2009). In this case, the Council does not seek new water quality criteria for Wisconsin. DNR has pointed to no similar non-discretionary duty in Title IV of the CWA, relating to NPDES permits, that would provide the relief the Council seeks. Moreover, as demonstrated above, the EPA has *already* identified and explicitly designated which federal regulations are applicable to all delegated state programs, including Wisconsin. The regulations have already been promulgated. All that remains is for this Court to direct the DNR to acknowledge their existence, and follow them in issuing permits, as mandated by our Legislature.

D. DNR Urges This Court To Deny An Opportunity For Review of the Fort James WPDES Permit in the Only Available Forum.

Despite its acknowledgment that the Fort James permit must comply with applicable federal law, (DNR Ct. App. Resp. Br 23), DNR argues that the Council cannot obtain review in any state forum.

If this Court adopts DNR's position, the Council and similarly situated persons will be entirely barred from presenting their legitimate concerns to any tribunal. As explained above, the Council cannot obtain review in federal court either of the Fort James permit or EPA's discretionary decision not to review the permit. This Court should not interpret EPA's delegation to nullify a fundamental CWA right: the right to challenge through state proceedings a state's issuance of a permit that fails to comply with applicable federal law and regulations. 33 U.S.C. §1342(b), 40 C.F.R. §123.30.[19]

[19] Ruling in DNR's favor would similarly abrogate the right to a hearing established by our Legislature in section 283.63.

VI. THE COUNCIL IS NOT REQUESTING REVIEW OF STATE RULES.

DNR's professed fear of incongruous results is unavailing.

The Council's request for declaratory judgment is not before this Court. Contrary to DNR's assertion, even if the ALJ rules in the Council's favor, there is no risk of an incongruous result. Nothing in the record indicates that any of the Council's challenges would require the ALJ to determine that EPA-approved state rules violate federal law.

Even if the Council were to challenge state rules, state tribunals are perfectly competent to determine whether state rules violate applicable federal laws, and a contested case hearing *is* the appropriate forum in which to raise such a challenge. On at least one occasion, this Court has determined that state rules exceed the requirements of federal laws implicated by state laws. *See Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d at 243 (in review of WPDES permit challenge, pertinent rules violate sec. 147.021 (now 283.11(2)). Nothing would prohibit that type of review in this matter. A contested hearing pursuant to section 283.63, in conjunction with section 227.40(2)(e), is the appropriate forum to raise challenges that agency rules underlying a challenged WPDES permits exceed DNR's statutory authority. *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 633, 307 N.W.2d 189 (1981). A challenge to a permit *and* a rule is appropriate in a contested case hearing, even where resolution of issues related to DNR's legal authority depend solely on the construction of federal law. *Id. at* 627-28. Such a challenge to the rule underlying the disputed permit term, if "invoked upon timely judicial review of a department decision on a permit-review pursuant to compliance with the procedural terms of sec. 147.20 [now

283.63], authorizes a declaratory challenge to the validity of the rule underlying the permit." *Id.* at 628.

VII. THE COURT OF APPEALS DECISION WILL NOT LEAD TO THE UNWORKABLE RESULTS DNR IDENTIFIES.

A. The Court of Appeals Decision Harmonizes State and Federal Law.

Delegated states should play the "leading role" in implementing delegated state programs: "it seems beyond argument that [the Court] should construe the Act to place maximum responsibility for permitting decisions on the states where the EPA has certified a NPDES permitting program." *American Paper Inst.*, 890 F.2d. at 874.

The Court of Appeals' decision harmonizes state and federal law, by requiring DNR to administer the WPDES permit program as delegated to it by EPA, and ensuring that DNR issues and reviews permit terms in compliance with applicable state and federal law, as our Legislature has directed. *Andersen v. DNR,* 2010 WI APP at ¶ 29. As the Court of Appeals aptly noted, it would be illogical to allow DNR to determine whether regulations or permit terms comply with federal law at the time of their creation, but not to consider or determine federal compliance when permit terms are challenged. *Id.*

DNR's interpretation necessarily requires this Court to either 1) ignore the plain language of a state law underlying EPA's decision to delegate the WPDES permit program; 2) redefine the term "applicable federal law," in Wisconsin statutes section 283.31(3)(d)2; or 3) carve out a statutorily nonexistent exemption to the review available under section 283.63. DNR seeks not to harmonize or clarify the law, but to invalidate and disregard the statutes that were the foundation for EPA's approval of a state-run NPDES

program. This would further confuse the clear requirements of the EPA-approved state WPDES program.

DNR has provided no support for its contention that the Court of Appeals' decision will result in incongruence between state and federal law, and it provides no examples of such incongruence. Indeed, not requiring harmony between state and federal law creates greater risk to permittees and the public.

Wisconsin has a well-developed, EPA-approved, state system for issuance and review of WPDES permits. Eliminating contested case review of WPDES permits that fail to comply with federal law would create an "undesired bifurcated system" that would authorize DNR to issue permits under state law, but require EPA to review issues related to whether a permit violates federal law. *American Paper*, 890 F.2d at 875.

B. The Court of Appeals Decision Reduces the Possibility that Wisconsin Water Will Receive Weaker Protection than Uniformly Required in Other States.

DNR urges this Court to disregard EPA-approved legal requirements that form the foundation of the WPDES program, and to empower DNR to do what it is prohibited from doing: issue WPDES permits that fail to contain restrictions and requirements necessary to comply with applicable CWA requirements. To do so would ignore the underlying federal nature of the delegated state program and authorize DNR to issue permits less stringent than uniformly required across the nation, without any opportunity for affected communities to object.

DNR acknowledges that the Court's decision has the potential to affect many hundreds of municipal and industrial wastewater dischargers in the state. But DNR altogether

ignores the impact this Court's holding will have on the vibrant state tourism industry and the millions of Wisconsin residents and visitors who drink, live on, fish in, and recreate in Wisconsin's many waters. If state contested case hearings do not provide a forum for review of a WPDES permit for compliance with the CWA, concerned residents and tourism-related businesses would have no option but to accept that DNR does not require polluters to limit their discharges to the extent uniformly required in other states. This means that the water outside our back door, at the end of our faucet, or at our favorite fishing or vacation spot, may be more polluted than if we lived elsewhere—but affected citizens will have no forum in which to raise their concerns, and DNR will be insulated from review of its decision to impose less stringent requirements. DNR's position is that all WPDES permits comply with federal law simply because DNR has enacted rules that it believes comply with federal law. Nevertheless, DNR has not presented any justification for treating its permit-issuing decisions with respect to compliance with federal law as infallible and unreviewable.

C. The Court of Appeals Decision Will Not Create a Conflict Between State Administrative Decisions and EPA Approved State Rules.

DNR also provides no support for its bald contention that the review required by the Court of Appeals decision "is necessarily a review of the rules not the terms, and only EPA or federal court may reject promulgated state rules as inconsistent with federal law." (DNR Br:8.) The Court of Appeals did not decide whether the permit terms comply with state law, or whether state law complies with federal law. That question was not before the court or developed in the record because there has been no actual review of the substance of the Council's petition. The Council was denied that opportunity by DNR.

The Court of Appeals decision will not result in unpromulgated state rules that have not been reviewed or approved by EPA. The Council is not asking for new rules, but for DNR's implementation of existing state requirements consistent with its statutory responsibilities.

D. DNR's Attempts to Distinguish or Question the Court of Appeals' Citation to Established Caselaw Are Baseless and Irrelevant.

DNR asks this Court to clarify that cases cited by the Court of Appeals "do not authorize DNR review of whether a permit term that complies with state rules nonetheless falls short of federal law, and do not authorize DNR alteration of a rule so as to comply with federal law, in a contested-case permit review hearing."[20] (DNR Br:37). DNR misreads the Court of Appeals decision to encompass issues and facts that are not present. The Court of Appeals' reliance on these cases was not so broad as DNR implies. The Court of Appeals cited these cases only as "suggesting [that] state administrative agencies and courts may determine the requirements of, and state compliance with, federal law." *Andersen v. DNR,* 2010 WI APP at ¶31; (Pet-App:117.)[21]

DNR does not and cannot contend that the Court of Appeals mischaracterized any of these cases. Nor does DNR offer any legal or factual authority to dispute the Court of Appeals' application of these cases. DNR simply disagrees with the conclusion reached by the Court of Appeals, and

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[20]*Froebel v. Meyer*, 217 F.3d at 935; *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 559, 525 N.WW.2d 723 (1995); *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991); *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d at 619. The Court of Appeals does not, as DNR asserts, cite *Badger Paper Mills v. DNR*, 154 Wis. 2d 435, 438-39 (Ct. App. 1990).

[21]In view of the Supremacy Clause of the United States Constitution, that is hardly a novel proposition.

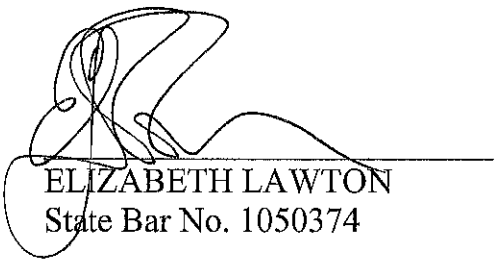
relies not on any legal or factual authority, but on its unsubstantiated assessment of its own authority.

CONCLUSION

For the reasons stated herein, the Council respectfully requests the Court to affirm the decision of the Court of Appeals.

Respectfully submitted this 13th day of September, 2010.

MIDWEST ENVIRONMENTAL ADVOCATES



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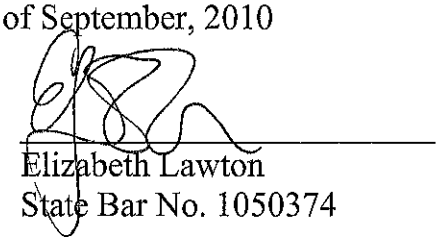
CERTIFICATION

I 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 9,836 words.

Dated this 13th day of September, 2010



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CERTIFCATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(2)

I certify that:

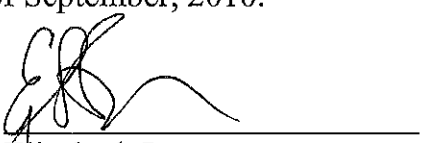
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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 13th day of September, 2010.



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STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,
Petitioners-Appellants,

v. APPEAL NO. 2008AP3235

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT COURT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT A PETITIONER MAY OBTAIN A CONTESTED CASE HEARING UNDER WISCONSIN STATUTES SECTION 283.63 TO CHALLENGE A WPDES PERMIT THAT FAILS TO SATISFY THE APPLICABLE REQUIREMENTS OF FEDERAL LAW, AS REQUIRED BY STATE STATUTES

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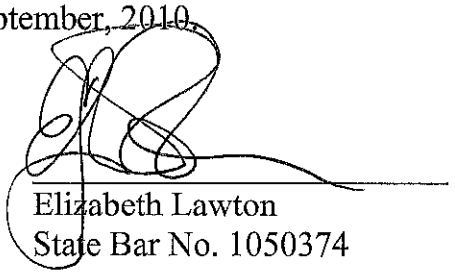
APPENDIX CERTIFICATION

I certify that filed with this brief, either as a separate document or as part of this brief, is a supplemental appendix that complies with Wis. Stat. § 809.19(3)(b). This supplemental appendix includes a table of contents.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of September, 2010.



Elizabeth Lawton
State Bar No. 1050374

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I certify that:

I have submitted an electronic copy of this supplemental appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic supplemental appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 13th day of September, 2010.

Elizabeth Lawton
State Bar No. 1050374

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Midwest Environmental ADVOCATES

pro bono publico

VIA HAND DELIVERY

October 28, 2005

Scott Hassett, Secretary
Wisconsin Department of Natural Resources
101 S Webster Street - AD/5
Madison WI 53703

RE: Petition for Contested Case, WPDES Permit WI-001848-07-0, Fort James Operating Company – Broadway Mill.

Dear Secretary Hassett,

Please find attached a verified petition for review of the above matter. By hand delivery of this letter, I am serving the same on the Wisconsin Department of Natural Resources in accordance with Wis. Admin. Code § NR 2.03.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Andrew C. Hanson

cc: Neil Kagan, National Wildlife Federation
Rebecca Katers, Clean Water Action Council of Northeastern Wisconsin

702 E. Johnson Street, Madison, WI 53703
Telephone 608.251.5047 Fax 608.268.0205
advocate@midwestadvocates.org • www.midwestadvocates.org

TO THE DEPARTMENT OF NATURAL RESOURCES:

The undersigned hereby petition for a review of the Wisconsin Department of Natural Resources' ("DNRs'") Wisconsin Pollutant Discharge Elimination System ("WPDES") permit reissuance to Fort James Operating Company – Broadway Mill, entitled WI-0001848-07-0, and dated August 30, 2005 ("WPDES Permit"). The effective date of the WPDES Permit is October 1, 2005.

The specific issues requested to be reviewed are:

1. The reasonableness of the DNR's failure to determine, in preparing an effluent limit for phosphorus in Section 2.2.1 of the WPDES Permit, whether Fort James' discharges of phosphorus will cause, have the reasonable potential to cause, or contribute to an excursion above narrative water quality criteria, and the necessity for such "reasonable potential analysis";

2. The reasonableness of the DNR's failure to impose one or more water quality based effluent limits for phosphorus in Section 2.2.1 of the WPDES Permit, and the necessity for such water quality based effluent limitations;

3. The reasonableness of the DNR's failure to conduct an antidegradation analysis under Wis. Admin. Code Ch. NR 207 in imposing a 1 mg/L technology-based effluent limit for phosphorus in Section 2.2.1 of the WPDES Permit, and the necessity for such anti-degradation analysis;

4. The reasonableness of the DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit as a daily maximum limit and average monthly limit, and the necessity for such daily maximum and average monthly limits;

5. The reasonableness of the DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit as a "mass" limit in addition to a concentration limit, and the necessity for such a mass limit;

6. The reasonableness of the DNR's failure to determine whether Fort James discharges or may discharge mercury at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above numeric water quality criteria for mercury, in addition to narrative criteria, and the necessity for such "reasonable potential analysis," and its inclusion of Section 2.2.1.3 in the WPDES Permit, postponing such determination, and a determination of whether the WPDES Permit must incorporate a water quality based effluent limit for the discharge of mercury in Section 2.2.1.3, until Fort James collects twelve samples of mercury from its effluent.

7. The reasonableness of Section 2.2.1 of the WPDES Permit in allowing Fort James to conduct only quarterly monitoring for mercury, and the necessity of more frequent monitoring of that pollutant.

The interests of the petitioners are:

Curt Andersen resides at 2942 Jack Pine Lane, Green Bay, Wisconsin, 54313. Mr. Andersen is a member of Clean Water Action Council of Northeastern Wisconsin. Mr. Andersen owns real property on the lower Green Bay near Suamico on the west shore of the Bay. Mr. Andersen's use and enjoyment of his property is adversely impacted by the foul, algae ridden appearance of the water in the Green Bay. Mr. Andersen is an avid angler and would fish and swim more in the lower Green Bay, but for his concerns about mercury pollution in the lower Fox River and the Green Bay. Mr. Andersen is reasonably afraid that the DNR's reissuance of the WPDES Permit to Fort James has threatened and will continue to threaten his recreational and aesthetic interests in the lower Fox River and Green Bay. Mr. Andersen has been adversely affected or aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without imposing water quality based effluent limits on phosphorus and mercury in the WPDES Permit.

John Hermanson resides at E110 Shefchik Road, Luxemburg, Wisconsin, 54217. Mr. Hermanson is a member of Clean Water Action Council of Northeastern Wisconsin and National Wildlife Federation. Mr. Hermanson is an active sea kayaker on the bay of Green Bay and would use the lower Fox River and Green Bay more but for the foul algae blooms and phosphorus pollution in the bay of Green Bay and the lower Fox River. Mr. Hermanson has to travel to the northern portions of Green Bay to find clearer, clean water that is more aesthetically pleasing. Mr. Hermanson is reasonably afraid that the DNR's reissuance of the WPDES Permit to Fort James has threatened and will continue to threaten his recreational and aesthetic interests in the lower Fox River and Green Bay. Mr. Hermanson has been adversely affected or aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without imposing water quality based effluent limits on phosphorus and mercury in the WPDES Permit.

Rebecca Leighton Katers resides at 2484 Manitowoc Road, Green Bay, Wisconsin 54311. Ms. Katers is a member of Clean Water Action Council of Northeastern Wisconsin and serves as its volunteer Executive Director. Ms. Katers enjoys watching wildlife from the shore of Green Bay, but does not frequently watch wildlife along the lower Fox River and lower Green Bay because of the foul, unsightly pea green soup appearance of the lower Fox River and Green Bay which coats the rocks and impairs her recreational wildlife viewing. Ms. Katers is an avid angler, but does not fish in the lower Fox River or Green Bay because of the mercury and poly-chlorinated biphenol contamination. Ms. Katers is reasonably afraid that the DNR's reissuance of the WPDES Permit to Fort James has threatened and will continue to threaten her recreational and aesthetic interests in the lower Fox River and Green Bay. Ms. Katers has been adversely affected or aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without imposing water quality based effluent limits on phosphorus and mercury in the WPDES Permit.

Christine Fossen-Rades resides at 2554 Bittersweet Avenue, Green Bay, Wisconsin 54301. Ms. Rades is a member of Clean Water Action Council of Northeastern Wisconsin. Ms. Rades fishes from lower Green Bay and would like to eat more fish but for mercury contamination in lower Green Bay. In addition, Ms. Rades is concerned about the health of her two young children, and would like to swim in and recreate on the lower Fox River and Green Bay but for the mercury and phosphorus pollution in those waters. Specifically, Ms. Rades' recreational use of lower Green Bay has been impaired by the excessive algal growth and phosphorus pollution

and mercury pollution in those waters. Ms. Rades is reasonably afraid that the DNR's reissuance of the WPDES Permit to Fort James has threatened and will continue to threaten her recreational and aesthetic interests in the lower Fox River and Green Bay. Ms. Rades has been adversely affected or aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without imposing water quality based effluent limits on phosphorus and mercury in the WPDES Permit.

Thomas Sydow resides at 1254 Melissa Boulevard, Little Suamico, Wisconsin, 54141. Mr. Sydow is a member of Clean Water Action Council of Northeastern Wisconsin and National Wildlife Federation, and is an avid sailor on the bay of Green Bay. Mr. Sydow once moored his sailboat in lower Green Bay, but moved it to Oconto approximately twenty miles north four years ago in search of cleaner water in the more northern portion of the Bay. Mr. Sydow would use lower Green Bay more but for the severe algae and phosphorus pollution in the bay. Mr. Sydow is concerned about mercury levels in Green Bay, because he and his wife catch and eat fish from Green Bay. He would fish more, but for the mercury pollution in the lower Fox River and Green Bay. Mr. Sydow is reasonably afraid that the DNR's reissuance of the WPDES Permit to Fort James has threatened and will continue to threaten his recreational and aesthetic interests in the lower Fox River and Green Bay. Mr. Sydow has been adversely affected and aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without imposing water quality based effluent limits on phosphorus and mercury in the WPDES Permit.

James L. Baldock resides at 1302 Vogt Drive, West Bend, Wisconsin, 53095. Mr. Baldock is a member of the National Wildlife Federation. Mr. Baldock is an enthusiastic fisherman. He fishes many lakes and rivers in, bordering on, or running through Wisconsin. He goes fishing or ice-fishing several times every year, and fish for bass, bluegill, walleye, and northern pike. Mr. Baldock intends to go fishing with the same frequency in the future. Mr. Baldock is aware that because of the polluted condition of its water bodies, Wisconsin has a mercury advisory warning against the consumption of fish caught in any water body in the State. The advisory applies to all fish and also covers salmon, trout and walleye in the Great Lakes. Because the fish that Mr. Baldock catches are contaminated with mercury and unsafe to eat, he now returns most of the fish he catches, rather than keep and eat them. In particular, based on the fish consumption advisories issued by Wisconsin and other states, Mr. Baldock is reasonably concerned that eating the fish may have long-term adverse effects on his health because of the way the pollutants, such as mercury, build up and accumulate in fish tissue. Were it not for these potential adverse health effects, Mr. Baldock would keep and eat all of his catch. In fact, Mr. Baldock now does not fish at all in many lakes and rivers in Wisconsin where he formerly fished because they are so polluted. These water bodies include the Fox River downstream of the Fort James discharge (near the Hwy 172 bridge) and Green Bay Harbor. Were it not for the pollution, and the resulting fish consumption advisories, Mr. Baldock would fish in these and other currently polluted water bodies. In addition, Mr. Baldock has a son and daughter who are in their twenties and a one year old granddaughter. Mr. Baldock taught his children to fish, and continues to go fishing with them now. As a family, the Baldocks would go fishing and then clean and eat the fish they caught. Because the fish in Wisconsin are contaminated with mercury and other toxic substances, the Baldocks can no longer share this family activity. If the contamination problem were resolved and the fish were safe to eat again, Mr. Baldock and his family would fish together and eat the fish they caught. Mr. Baldock is adversely affected or aggrieved by the DNR's decision to reissue the WPDES Permit to Fort James without determining whether the company

discharges or may discharge mercury at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the mercury criteria, and its inclusion of Section 2.2.1.3 in the WPDES Permit, postponing such determination, and a determination of whether the WPDES permit must incorporate a water quality-based effluent limit for the discharge of mercury, until Fort James collects twelve samples of mercury from its effluent.

The reasons why a hearing is warranted are:

The DNR has reissued the WPDES Permit to Fort James without complying with basic requirements of the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") and federal regulations promulgated under that law. The Clean Water Act and these federal regulations are legally binding on the DNR.

As of July 2004, Fort James increased its mass loading of phosphorus to the lower Fox River, Green Bay, and Lake Michigan by approximately 10,000 pounds (lbs.) annually.

Fort James' discharge goes into waters the DNR has identified as impaired; both the lower Fox River and Green Bay are on the Section 303(d) list of impaired waters because they are impaired by phosphorus. Phosphorus is a pollutant that can cause excessive algal growth in surface waters, severely impairing aquatic habitat for fish and invertebrates, recreational uses for swimmers and boaters, and use as a domestic drinking water supply.

The DNR has not conducted an analysis of whether the 10,000 lbs. annual increased discharge of phosphorus by Fort James will cause or contribute to a violation of water quality standards in the lower Fox River, Green Bay, or Lake Michigan. The DNR is required to prepare this analysis under 40 C.F.R. § 122.44(d). The DNR may not issue the WPDES Permit if it will cause or contribute to a violation of water quality standards, according to 40 C.F.R. § 122.4(i). The DNR's failure to prepare this analysis is unreasonable and violates federal law.

The DNR has also not prepared an analysis under its antidegradation policy of whether the increased discharge of phosphorus by Fort James will cause a lowering of water quality in the lower Fox River, Green Bay or Lake Michigan. The DNR is required to prepare this analysis under Wis. Admin. Code § NR 102.05(1), Ch. NR 207, 33 U.S.C. § 1313(d)(4)(B) and 40 C.F.R. § 131.12(a)(1). The DNR's failure to prepare this analysis is unreasonable because the DNR has not determined whether Fort James' increased discharge will result in a lowering of water quality or may impair existing uses. The DNR's failure violates federal law.

The DNR has allowed the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit to be expressed as a 12-month rolling average. Federal regulations require that the phosphorus limit be expressed as a daily maximum limit and average monthly limit, "unless impracticable." 40 C.F.R. § 122.45(d). The DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit is unreasonable, in that Section 2.2.1 of the WPDES Permit allows Fort James to exceed the 1 mg/L effluent limit during certain times of the year when surface waters may be most susceptible to phosphorus pollution. This permit term is also unreasonable because it violates federal law.

The DNR has allowed the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit to be expressed as a concentration limit. Federal regulations require that the phosphorus limit be expressed as a mass limit, with limited exceptions that do not apply to this case. 40 C.F.R. § 122.45(f). Without a mass limit, Fort James may discharge an unlimited amount of phosphorus to the lower Fox River, Green Bay and Lake Michigan. The DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit in terms of mass is unreasonable in that it violates federal law.

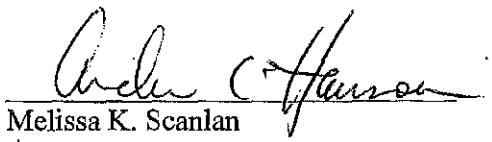
The DNR has also placed the lower Fox River and Green Bay on its Section 303(d) list of impaired waters because they are impaired by mercury. Fort James discharges mercury to the lower Fox River, Green Bay, and Lake Michigan, and its average discharge concentration of mercury is 5.78 ng/L, several times higher than both the human health criterion of 1.5 ng/L and the wildlife criterion of 1.3 ng/L for mercury. Wis. Admin. Code §§ NR 105.07(1)(b), Table 7 (Wildlife Criteria) and NR 105.08(3), Table 8 (Human Threshold Criteria).

Nevertheless, the DNR failed to determine whether Fort James discharges or may discharge mercury at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the mercury criteria, as required by federal law. 40 C.F.R. §§ 122.44(d), 132 (Appendix F—Great Lakes Water Quality Initiative Implementation Procedure 5: Reasonable Potential to Exceed Water Quality Standards.) Instead, the DNR included Section 2.2.1.3 in the WPDES Permit, postponing the determination, and a determination of whether the WPDES permit must incorporate a water quality-based effluent limit for the discharge of mercury, until Fort James collects twelve samples of mercury from its effluent. The DNR's failures: (1) to make the determination required by federal law, (2) to incorporate a water quality-based effluent limit for the discharge of mercury, if appropriate, and (3) to require more frequent monitoring for mercury, are unreasonable in that they violate federal law.

Dated this 27th day of October, 2005.

Respectfully submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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Ann Arbor, MI 48104-1398
kagan@nwf.org
Tel. 734-769-3351
Fax. 734-769-1449

SIGNATURE OF PETITIONER **DATE**

Christine M. Rosen-Locke 10-27-05

NOTARY PUBLIC STATE OF WISCONSIN

VERIFICATION OF SIGNATURE

Signed and sworn to before

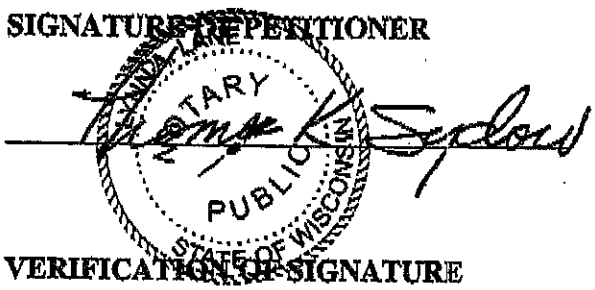
On 10-27-05

By Lynn Bonnlander

Notary Public, State of Wisconsin

My commission 6-1-08

SIGNATURE OF PETITIONER **DATE**



27 OCT 05

VERIFICATION OF SIGNATURE

Signed and sworn to before

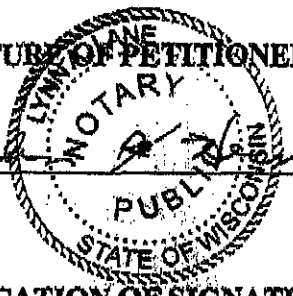
On 10-27-05

By Lynn A. Lowe

Notary Public, State of Wisconsin

My commission 6-1-08

SIGNATURE OF PETITIONER **DATE**



Resp't App. 101

10/27/05

VERIFICATION OF SIGNATURE

Signed and sworn to before

On 10-27-05

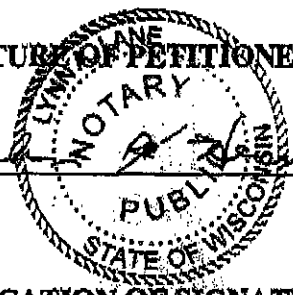
By Lynn A. Lane

Notary Public, State of Wisconsin

My commission 12-1-08

10-27-2005 4:34PM FROM REBECCA KATERS 920 437 7326 P.5

SIGNATURE OF PETITIONER **DATE**



10/27/05

VERIFICATION OF SIGNATURE

Signed and sworn to before

On 10-27-05

By Lynn A. Lane

Notary Public, State of Wisconsin

My commission 12-1-08

SIGNATURE OF PETITIONER

Rebecca Katers

DATE

10/27/05

VERIFICATION OF SIGNATURE

Signed and sworn to before

On 10-27-05

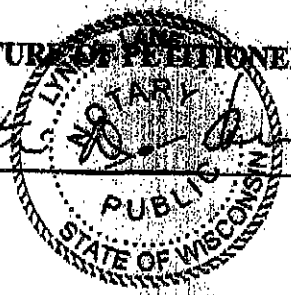
By Lynn A. Lane

Notary Public, State of Wisconsin

My commission 6-1-08

SIGNATURE OF PETITIONER **DATE**

Becky R. Anderson 10-27-05



VERIFICATION OF SIGNATURE

Signed and sworn to before

On 10-27-05

By Lynn A. Loe

Notary Public, State of Wisconsin

My commission 6-1-08

RECEIVED
09-23-2010
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION and CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,
Petitioners-Appellants,

v. APPEAL NO. 2008AP003235

DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT DNR MUST IN A PERMIT REVIEW HEARING DETERMINE WHETHER A WASTEWATER DISCHARGE PERMIT ISSUED UNDER STATE LAW PURSUANT TO AN EPA-APPROVED STATE PROGRAM COMPLIES WITH FEDERAL LAW

DNR'S REPLY BRIEF AND APPENDIX

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STATE OF WISCONSIN
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CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION and CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

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DNR'S REPLY BRIEF

State statutes provide that state WPDES permit terms shall meet conditions in applicable state rules and "any applicable federal law or regulation." The Council interprets this clause as embracing the whole of federal law that prescribes the prerequisites for initial EPA approval of state programs and rules. DNR interprets this clause to mean only any post-approval federal rules promulgated directly for Wisconsin waters, none of which is at issue here. DNR asks this Court to accord DNR the great weight deference due its interpretation, reverse the court of appeals, and affirm its denial of the Council's request for a hearing on whether state permit terms violate general federal law.

I. DNR'S INTERPRETATION OF WIS. STAT. § 283.31(3)(d)2. IS DUE GREAT WEIGHT DEFERENCE.

DNR agrees with the Council that Wis. Stat. § 283.31(3) and (4) authorizes DNR to issue permits containing terms based on the sources of standards set forth in that statute, "whenever applicable." Wis. Stat. § 283.31(3). DNR and the Council disagree as to how to interpret one of those sources, Wis. Stat. § 283.31(3)(d)2.: "Any more stringent limitations . . . [n]ecessary to comply with any applicable federal law or regulation." The interpretation of "any applicable federal law or regulation" is a question of law reviewed under the great weight deference standard.

A. The interpretation of "any applicable federal law or regulation" is not a question of DNR's authority to regulate.

The Council in its petition for a hearing contended that certain terms in the St. James WPDES permit "violate[d] federal law." R.7:247-48; Resp'tApp:105-06; Pet-App:351-352 (highlighting added).[1]

DNR denied the challenges based on federal law "as not being authorized pursuant to Wis. Stat. § 283.63." R.7:8; Pet-App:132. The Council intertwined its subsequent petition for judicial review with requests for declaratory judgments (R.1:1-38), and DNR responded

[1] The Council now recharacterizes its claims that permit terms violate federal law, as claims that the permit violates the state statute setting forth the sources of terms in permits that DNR is authorized to issue (Wis. Stat. § 283.31(3) and (4)). However, the Council disputes not DNR's compliance with that statute but DNR's interpretation that that statute does not embrace the Council's general federal law claims. The fact remains that the Council claims that permit terms violate federal law.

(R.19) and the circuit court decided (R.64:1-7; Pet-App:122-28) without addressing the standard of review.

In the parties' briefs on appeal, the Council framed the issue of whether DNR properly limited the scope of the hearing that it granted to the Council, as one of DNR's authority to review claims that permit terms violate federal law. Council Ct.App.Br:xi, 41-42; DNR Ct.App.Br:3, 7. DNR followed suit in its initial brief in this Court. Pet-Brief:6.

The Council's response brief makes it clear that the question to be decided is not one of DNR's authority, but whether DNR properly interpreted statutory language identifying the various sources of terms in permits. That question is a question of law that this Court decides under the great weight deference standard.

Here, DNR is not reaching out to regulate pursuant to a statute, as in *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶2, 270 Wis. 2d 318, 677 N.W.2d 612 (whether statute gave DNR authority to promulgate rule setting a hunting season for mourning doves); *Grafft v. DNR*, 2000 WI App 187, ¶14, 238 Wis. 2d 750, 618 N.W.2d 897 (whether statute authorized rule setting standards for boat shelters); *Wis. Environmental Decade v. PSC*, 81 Wis. 2d 344, 347, 351, 260 N.W.2d 712 (1978) (whether statute that required a public hearing before a change in schedules increasing rates authorized PSC to permit clauses allowing rate increases without any hearing); or the cases cited by the Council on page 14 of its brief.

Rather, DNR is determining how to do what it is authorized to do—what terms to include in the permits that it is authorized to issue. DNR has determined that the terms are those based on state rules prescribing the "[e]ffluent limitations," "[s]tandards of performance", and "[e]ffluent standards, effluent prohibitions and pretreatment standards" referred to in Wis. Stat. § 283.31(3)(a), (b), (c) and (d)1. (all rules that DNR is

authorized to prescribe under Wis. Stat. § 283.11(1) ("The department shall promulgate by rule effluent limitations, standards of performance for new sources, toxics effluent standards or prohibitions and pretreatment standards"), and more stringent limitations necessary to meet federal requirements directed specifically at Wisconsin waters under Wis. Stat. § 283.31(3)(d)2.

The Council disagrees with DNR's interpretation of the basis or source of terms covered by the last subdivision. That disagreement is not over DNR's authority; it is not jurisdictional; it is not over procedure (and the cases cited by the Council on page 14 of its brief do not stand for the propositions stated there). It is over how DNR puts terms in the permits the parties agree it is authorized to issue.

B. DNR's interpretation of "any applicable federal law or regulation" as a source of permit terms in Wis. Stat. § 283.31(3)(d)2. is due great weight deference in light of its 36 years of administering the WPDES program and its consistent reliance on that interpretation in permit reviews.

DNR's conclusions of law interpreting and applying the WPDES permitting statutes and rules are entitled to great weight deference, the highest degree of deference. Great weight deference is due an agency decision where: "(1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of 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." *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶16, 292 Wis.

2d 549, 717 N.W.2d 184; *Hilton v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166 ("'the correct test [for great weight deference] is whether the agency "has experience in interpreting [the] particular statutory scheme" at issue'" (citation omitted); *Clean Wisconsin v. PSC*, 2005 WI 93, ¶¶38-41, 282 Wis. 2d 250, 700 N.W.2d 768 (great weight deference due agency with expertise and experience in interpreting the particular statutory scheme at issue, and with primary responsibility for determination of fact and policy).

"'It is not necessary that the agency has previously ruled on the application of the statute to a factual situation similar to the one presented if the agency has extensive experience in administering the statutory scheme in a variety of situations.'" *Homeward Bound Services v. Office of Ins. Com'r*, 2006 WI App 208, ¶16, 296 Wis. 2d 481, 724 N.W.2d 380 (emphasis added).

Most broadly, "[t]he legislature has delegated to the DNR the duty of enforcing the state's environmental laws." *Hilton*, 293 Wis. 2d 1, ¶20. Here the legislature has charged DNR with administration of the WPDES program specifically. Wis. Stat. §§ 283.001(2), 283.31. DNR has administered the WPDES program since 1974. As a matter of course, it has had to interpret the statutory provisions, including the provision establishing the sources for permit terms, when issuing permits over the past 36 years.

Examples of specific instances in which federal law challenges to permit terms have been made, and DNR has interpreted Wis. Stat. § 283.31(3)(d)2. and declined to hear claims based only on general federal law, are included in Pet-App:351-388. *See* Pet-App:354-355; 358; 370-371; 389-379; 381; 384-385; 386-388.

Because DNR is charged with administering the WPDES program, it has long and consistently applied its programmatic expertise and experience to the development of permit terms, and it has previously

interpreted Wis. Stat. § 283.31(3) consistently with its interpretation here, its interpretation and application of that provision are entitled to great weight deference.

Under great weight deference, the court upholds DNR's interpretation if it is reasonable, "even if an equally reasonable or more reasonable interpretation is offered." *Hilton*, 293 Wis. 2d 1, ¶17.

C. DNR's interpretation is due great weight deference regardless whether the statute is ambiguous.

The Council in its brief at pages 14-15 suggests that no deference is due an agency interpretation of an unambiguous statute. The Council cites no law supporting its suggestion. As established above, this Court must follow the multi-factor analysis recently and fully set forth in *Harley-Davidson* and *Hilton.* Under chapter 227 review of agency decisions, and under state case law applying chapter 227 to state agency decisions, the question is not first whether the law interpreted by the agency is ambiguous, but whether the four factors set out in *Harley-Davidson* and *Hilton* are present. As also shown above, those factors are present here, and DNR's interpretation is due great weight deference.

If this Court reviews DNR's statutory interpretation *de novo*, then the statute is ambiguous because, as shown below, resort to the federal regulations and to EPA's comments in the C.F.R. is necessary to construe the statutory subdivision properly.

II. THE FEDERAL REGULATIONS THAT ARE "APPLICABLE TO STATE PROGRAMS" ARE GENERAL PREREQUISITES THAT STATE PROGRAMS MUST MEET TO OBTAIN EPA APPROVAL.

The Council contends that Wis. Stat. § 283.31(3)(d)2. means that all federal requirements denominated "applicable to state programs" in the federal law are directly applicable to state dischargers through state permits—that state permits must directly implement federal requirements even if there is a state program with state rules in place to meet those requirements. If the Council were correct, then there would be no need for state rules setting requirements to be placed in state permits. No state statute provides for such direct implementation, *see Wis. Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980), and EPA's comments in the Federal Register confirm that there is no such direct implementation.

The federal register notice for the revision of 40 C.F.R. Part 123 in 1980 states:

> Those sections of Part 122 and Part 124 which are applicable to State program (through reference in Part 123) have been highlighted in the section (or where necessary, paragraph) headings. Indication that a section is "applicable to State programs" does not mean that exactly the same provision will be applicable to owners or operators who receive their permits from a State. Rather, "applicability" means that a State program must have a similar provision in its own statutes and regulations in order to receive approval to operate in lieu of EPA (or the Corps of Engineers for 404). For the corresponding State provisions, these statutes and regulations would have to be consulted.

45 Fed. Reg. 33294.

> This Part [123] establishes the requirements for State RCRA, UIC, NPDES, and 404 programs and the process for approval, revision, and withdrawal of these State programs. It also establishes guidelines for EPA overview of these programs, including the requirements for a Memorandum of Agreement between EPA and the State. Although State programs are established and operated under State law, approved State RCRA, UIC, NPDES, and 404 programs also implement Federal law and operate in lieu of Federally administered programs. A permit issued by a State under State law after its program has been approved satisfies the Federal permit requirement . . . the requirements of Part 123 represents the *minimum* requirements which States must meet to qualify for approval. States are allowed some flexibility in how they implement these requirements.

45 Fed. Reg. 33377.

This language establishes that the requirements denominated "applicable to state programs" are federal requirements that states have to meet to get their programs approved at the front end. The regulations cited by the Council as the basis for its federal law claims, 40 C.F.R. §§ 122.44-45, are large compendia of requirements for states to meet to obtain approval of their programs. They are checklists for EPA to use to determine whether state programs suffice to enforce the federal program. They do not mandate results in the form of specific permit terms.

EPA's comments confirm that these front-end program approval requirements are not in addition to the state rules in the approved state programs. If they were, no state would ever promulgate state rules.

III. THE STATE STATUTE REFERS TO SPECIFIC FEDERAL REQUIREMENTS IMPOSED DIRECTLY ON WISCONSIN WATERS AFTER EPA'S PROGRAM APPROVAL.

After EPA determines that a state program suffices to enforce federal requirements, EPA may find specific gaps that need to be filled by direct federal action.

> Under the Clean Water Act, States must adopt water quality standards to protect public health and welfare and enhance the quality of water. Section 303(c)(4) of the Clean Water Act authorizes the Administrator of EPA to promulgate Federal standards applicable to a State when: (1) The State submits standards for EPA approval and EPA determines that the State standards fail to meet the requirements of the Act, or (2) in any case where the Administrator determines a new or revised standard is necessary to meet the requirements of the Act. EPA's implementing regulations also make clear that the Administrator may take action to promulgate either when a State fails to adopt changes specified in a disapproval or in any case where the Administrator determines a new or revised standard is necessary (40 CFR 131.22).

57 Fed. Reg. 60871.

What Wis. Stat. § 283.31(3)(d)2. means is that ALJs and circuit courts can interpret federal law only where EPA has clearly sent a message that a federal requirement is directly applicable to Wisconsin water (*see* examples at Pet-Brief:24-25), and so stands in the same shoes as a state rule.[2] Such a federal requirement is in

[2] The case cited in footnote 10 of the Council's brief concerned state hearings to determine compliance with state law, not federal law: "for the State of New York to complete its important, yet singular, task in the federal licensing procedure, of issuing a certificate of compliance with certain state laws." *Power Auth. of St. of N.Y. v. Department of Environ. Con.*, 379 F. Supp. 243, 246 (N.D. N.Y. 1974).

addition to the state requirements referred to in Wis. Stat. § 283.31(3)(a)-(d)1. This meaning fulfills the statute's purpose, to ensure that permits contain terms based on all "applicable" sources. Wis. Stat. § 283.31(3)(Intro).

Where EPA has intervened in the state program by overpromulgating, a permit term's compliance with that requirement is subject to state review to determine whether the permit is in compliance with that overpromulgated regulation. Where EPA has not stepped in to supplement or displace a state program that EPA has found consistent with nationwide federal law requirements, then EPA is an indispensable part in any challenge that a state permit term, or rule in an approved state program, is contrary to federal law.

DNR's position harmonizes federal and state law. DNR issues permits with terms based on state law in a state program that EPA has found is consistent with the many federal requirements applicable to state programs, plus any specific federal requirements directed at Wisconsin waters insufficiently addressed in the state program. Any terms based on those sources may be challenged under Wis. Stat. § 283.63.

The Council has proffered no evidence that its claims here rest on either source of permit terms—state law or federal law specifically applicable to Wisconsin waters—and so DNR properly declined to hear its claims as not within the reach of the permit term sources in Wis. Stat. § 283.31(3) and (4).

If neither source of permit terms provides the protection that the Council believes federal law requires, then its recourse is to EPA, to require DNR to revise its program to provide that protection or for EPA to promulgate a federal requirement directed at Wisconsin waters. The Council's contention that the permit is "inconsistent with minimum requirements of federal law required to be imposed by state statutes," Resp-Brief:12-13, is precisely a challenge that there should be rules

imposing those requirements, that DNR's program is deficient. If DNR does not on its own promulgate the missing rules, only EPA can remedy the deficiency.[3]

IV. THE FEDERAL/STATE PARTNERSHIP SCHEME SUPPORTS DNR'S INTERPRETATION.

The word "delegate" does not appear in the federal law; rather, EPA approves state programs as consistent with the federal law. 40 C.F.R. §§ 123.1(c) and 123.61(b). States are not delegatees; they have "primary authority to establish water quality standards" and "maximum responsibility for permitting decisions." Resp-Brief:6, 32. The Council ignores the structure of the partnership—the underlying basis for federal approval of a program's establishment, and the state's subsequent responsibility for permitting decisions. *American Paper Institute, Inc. v. US E.P.A.*, 890 F.2d 869, 874 (7th Cir. 1989). The construction of Wis. Stat. § 283.31(3) and (4) so as to limit sources of permit terms to state law and specifically imposed federal requirements is consistent with a state's maximum permitting responsibility.

While the public's opportunity to challenge EPA's review of state permits is limited, it is not non-existent. *See* Pet-Brief:32-33; *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1295-96 (5th Cir. 1977) (identifying available avenues of review of EPA failure to object to a state permit). That the public's options for remedying a permit or rule inconsistent with general federal law are post-permit, is a consequence of the federal/state partnership prescribed by federal law.

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[3] DNR's interpretation does not leave it free to regulate less stringently than other states. The phosphorus rules that DNR is developing suggest to the contrary—the Council cites to no other states with rules that set numeric criteria for streams and lakes statewide for phosphorus.

DNR properly denied review of claims of conflict with federal laws that do not apply to state permit terms.

CONCLUSION

DNR asks this Court to reverse the court of appeals and affirm DNR's denial of a contested case hearing on the Council's general federal law challenges to Ft. James's state permit terms, because general federal law does not apply to those terms.

Respectfully submitted this 23rd day of September, 2010.

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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 2,953 words.

Dated this 23rd day of September, 2010.

_____

JoAnne F. Kloppenburg
Assistant Attorney General

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 23rd day of September, 2010.

_____

JoAnne F. Kloppenburg
Assistant Attorney General

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CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION and CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

Petitioners-Appellants,

v. APPEAL NO. 2008AP003235

DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent-Petitioner.

REVIEW OF A COURT OF APPEALS DECISION REVERSING AN AMENDED DECISION AND ORDER ENTERED BY BROWN COUNTY CIRCUIT JUDGE TIMOTHY A. HINKFUSS AND HOLDING THAT DNR MUST IN A PERMIT REVIEW HEARING DETERMINE WHETHER A WASTEWATER DISCHARGE PERMIT ISSUED UNDER STATE LAW PURSUANT TO AN EPA-APPROVED STATE PROGRAM COMPLIES WITH FEDERAL LAW

DNR'S REPLY APPENDIX

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of September, 2010.

JoAnne F. Kloppenburg
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 23rd day of September, 2010.

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discharges or may discharge mercury at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the mercury criteria, and its inclusion of Section 2.2.1.3 in the WPDES Permit, postponing such determination, and a determination of whether the WPDES permit must incorporate a water quality-based effluent limit for the discharge of mercury, until Fort James collects twelve samples of mercury from its effluent.

The reasons why a hearing is warranted are:

The DNR has reissued the WPDES Permit to Fort James without complying with basic requirements of the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act") and federal regulations promulgated under that law. The Clean Water Act and these federal regulations are legally binding on the DNR.

As of July 2004, Fort James increased its mass loading of phosphorus to the lower Fox River, Green Bay, and Lake Michigan by approximately 10,000 pounds (lbs.) annually.

Fort James' discharge goes into waters the DNR has identified as impaired; both the lower Fox River and Green Bay are on the Section 303(d) list of impaired waters because they are impaired by phosphorus. Phosphorus is a pollutant that can cause excessive algal growth in surface waters, severely impairing aquatic habitat for fish and invertebrates, recreational uses for swimmers and boaters, and use as a domestic drinking water supply.

The DNR has not conducted an analysis of whether the 10,000 lbs. annual increased discharge of phosphorus by Fort James will cause or contribute to a violation of water quality standards in the lower Fox River, Green Bay, or Lake Michigan. The DNR is required to prepare this analysis under 40 C.F.R. § 122.44(d). The DNR may not issue the WPDES Permit if it will cause or contribute to a violation of water quality standards, according to 40 C.F.R. § 122.4(i). The DNR's failure to prepare this analysis is unreasonable and violates federal law.

The DNR has also not prepared an analysis under its antidegradation policy of whether the increased discharge of phosphorus by Fort James will cause a lowering of water quality in the lower Fox River, Green Bay or Lake Michigan. The DNR is required to prepare this analysis under Wis. Admin. Code § NR 102.05(1), Ch. NR 207, 33 U.S.C. § 1313(d)(4)(B) and 40 C.F.R. § 131.12(a)(1). The DNR's failure to prepare this analysis is unreasonable because the DNR has not determined whether Fort James' increased discharge will result in a lowering of water quality or may impair existing uses. The DNR's failure violates federal law.

The DNR has allowed the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit to be expressed as a 12-month rolling average. Federal regulations require that the phosphorus limit be expressed as a daily maximum limit and average monthly limit, "unless impracticable." 40 C.F.R. § 122.45(d). The DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit is unreasonable, in that Section 2.2.1 of the WPDES Permit allows Fort James to exceed the 1 mg/L effluent limit during certain times of the year when surface waters may be most susceptible to phosphorus pollution. This permit term is also unreasonable because it violates federal law.

The DNR has allowed the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit to be expressed as a concentration limit. Federal regulations require that the phosphorus limit be expressed as a mass limit, with limited exceptions that do not apply to this case. 40 C.F.R. § 122.45(f). Without a mass limit, Fort James may discharge an unlimited amount of phosphorus to the lower Fox River, Green Bay and Lake Michigan. The DNR's failure to express the phosphorus effluent limit in Section 2.2.1 of the WPDES Permit in terms of mass is unreasonable in that it violates federal law.

The DNR has also placed the lower Fox River and Green Bay on its Section 303(d) list of impaired waters because they are impaired by mercury. Fort James discharges mercury to the lower Fox River, Green Bay, and Lake Michigan, and its average discharge concentration of mercury is 5.78 ng/L, several times higher than both the human health criterion of 1.5 ng/L and the wildlife criterion of 1.3 ng/L for mercury. Wis. Admin. Code §§ NR 105.07(1)(b), Table 7 (Wildlife Criteria) and NR 105.08(3), Table 8 (Human Threshold Criteria).

Nevertheless, the DNR failed to determine whether Fort James discharges or may discharge mercury at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above the mercury criteria, as required by federal law. 40 C.F.R. §§ 122.44(d), 132 (Appendix F—Great Lakes Water Quality Initiative Implementation Procedure 5: Reasonable Potential to Exceed Water Quality Standards.) Instead, the DNR included Section 2.2.1.3 in the WPDES Permit, postponing the determination, and a determination of whether the WPDES permit must incorporate a water quality-based effluent limit for the discharge of mercury, until Fort James collects twelve samples of mercury from its effluent. The DNR's failures: (1) to make the determination required by federal law, (2) to incorporate a water quality-based effluent limit for the discharge of mercury, if appropriate, and (3) to require more frequent monitoring for mercury, are unreasonable in that they violate federal law.

Dated this 27th day of October, 2005.

Respectfully submitted,

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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Petition for Review of the Issuance of WPDES Permit No. WI-0028835-08-0 Issued to the Village of Roberts, St. Croix County, Wisconsin

Case No. IH-06-14

RULING ON THE SCOPE OF ISSUES AND AMENDED SCHEDULING ORDER

Pursuant to the Scheduling Order, on January 22, 2007, the petitioners filed a Detailed Statement of Issues. On February 7, 2007, the DNR and the permit-holder responded. The petitioners replied on February 23, 2007. A telephone prehearing conference was held on February 27, 2007. All parties were given the opportunity to submit written responses again, and the last was received on March 6, 2007.

The petitioners originally set forth the following issues for hearing:

1. Whether the Nitrogen effluent limitations approved in § 2.2.2 of WPDES Permit No. WI 0028835-08-0 (hereinafter "the Permit") are reasonable, given that DNR did not perform a "Reasonable Potential Analysis" before setting these limits to ensure that the allowed Nitrogen discharges would not cause or contribute to a violation of narrative water quality standards in violation of Wis. Stat. § 283.13(4) & (5); Wis. Admin. Code § NR 102.04(1); and 40 C.F.R. § 122.44(d)(1)?

2. Whether the Phosphorus effluent limitations of 1 mg/L concentration and 880 lbs/yr mass set forth in §§ 2.2.1 and 2.2.2 of the Permit are reasonable, given that DNR did not first establish a total maximum daily load ("TMDL") for the impaired waters; and whether DNR was required to first establish a TMDL for these waters before issuing the Permit under Wis. Stat. Ch. 281, Wis. Stat. § 283.31(3)(d), and § 303(d) of the federal Clean Water Act, 33 U.S.C. § 1313(d)(1)(A)?

3. Whether, pursuant to Wis. Stat. § 283.13(4) & (5), and Wis. Stat. § 283.31(3)(f), it was reasonable for DNR to include §§ 4.1 and 4.2 in the Permit without also including at least a 10 mg/L Nitrogen limitation for wastewater which enters the lagoons (as initially proposed by DNR), given DNR's very limited understanding and study of the hydrology of the Twin Lakes and underlying groundwater?

4. Whether it was reasonable for DNR to require a report concerning "what actions will be taken to complete abandonment of the lagoon system within

East Twin Lake" by June 30, 2007 under § 4.1 of the Permit, without specifically requiring lagoon abandonment by a certain date, pursuant to Wis. Stat. § 283.13(4) & (5), and Wis. Stat. § 283.31(3)?

5. Whether it was reasonable for DNR to establish a total Phosphorus discharge limit of 880 lbs per year in § 2.2.2 of the Permit, instead of 410 lbs per year, based on the plant's discharge criteria?

Both the DNR and the Village of Roberts argue that issues 1 and 2 (as set forth above) fail to state a claim upon which relief can be granted in this contested case proceeding. They note that federal law, but not state law, require the Reasonable Potential Analysis (Issue 1) and the establishment of a total maximum daily load (TMDL) as part of the permit (Issue 2).

In their reply brief, "Petitioners concede that DNR was not required to establish a TMDL for these waters before issuing the Permit and, therefore, hereby withdraw the second part of Issue #2. However, since there is no dispute that these waters are impaired and that DNR is required to do a TMDL for them at some point in time under § 303(d) of the federal Clean Water Act, Petitioners assert that the first part of Issue #2 is stated in a manner which is sufficiently related to the Permit and the reasonableness of the Permit terms and conditions relative the approved Phosphorus effluent limitations contained therein. As such, Petitioners hereby restate Issue #2 as follows: 'Whether the Phosphorus effluent limitations of 1 mg/L concentration and 880 lbs/yr mass set forth in §§ 2.2.1 and 2.2.2 of the Permit are reasonable, given that DNR did not first establish a total maximum daily load ("TMDL") for the impaired water?'"

This new formulation was discussed at the prehearing conference held on February 27, 2006, and addressed in the latest written submittals. Subsequently, the petitioners agreed to drop issue 2 above altogether, but now state their concern as part of an amended issue 5. The petitioners' final iteration of the issue, as set forth in their February 28, 2007, filing, is as follows:

"Whether the Phosphorus effluent limitations of 1 mg/L concentration and 880 lbs/yr mass set forth in §§ 2.2.1 and 2.2.2 of the Permit are reasonable." Petitioners believe this statement of the issue should address the concerns raised by the Administrative Law Judge and alleviate any confusion over the difference between Issues #2 and #5, as previously set forth [above].

With respect to issue 1, there is no claim that the limits in the Permit violate state water quality standards, nor any other provision of state codes or statutes. There is simply no requirement to undertake a "reasonable potential analysis" under §§ 283.13(4) or (5). The only language that suggests such a requirement is from (5):

(5) MORE STRINGENT LIMITATIONS. The department shall establish more stringent effluent limitations than required under subs. (2) and (4) and shall require compliance with such 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. The department shall require compliance with these water quality based effluent limitations by no later than July 1, 1977, or by a

later date as specified in the water quality standard, treatment standard, schedule of compliance or other state or federal law, rule or regulation.

However, this provision does not automatically make every federal regulation a part of state law. Rather, the federal government delegates to the state the authority to administer the CWA. As the Department notes, *"Wis. Stat. 283.13(5) does very clearly require that any effluent limitation that appears in a wastewater discharge permit comply with water quality standards. The Department's procedures for calculating effluent limitations as set out in Wis. Admin. Code chs. NR 102 through 106 have stood the test of time and have long been accepted by the U.S. Environmental Protection Agency (EPA) as fulfilling the requirements of federal law.*

There are many provisions in federal law that identify substantive standards or procedural measures for administration of the Clean Water Act. A state that seeks delegation from EPA for administration of the Clean Water Act must convince EPA that the state's program includes requirements sufficiently similar to the federal requirements for the delegation to be accomplished. However, it is neither required nor possible that each state have a program that is identical to the federal program."

In their February 28, 2007, submittal, the petitioners also cite two cases for the provision that the federal regulation is controlling under state law.

The first case, *Sewage Commission of Milwaukee v. DNR,* 102 Wis. 2d 617, 307 N.W.2d 189 (1981), relates to the procedural process for challenging a rule and its relationship to the process for hearing contested cases. The court ruled that because a contested case was not sought, the Commission was precluded from challenging a rule in a subsequent judicial review. The case does not address the instant situation in any fashion.

The second case cited is a Division Order that "considered and applied" federal regulations as part of a WPDES review proceeding, *In the Matter of the Petition for Contested Case Hearing Regarding WPDES Permit WI-0000-414-07-0, Issued to Wisconsin Electric Power for the Elm Road Generating Station.* In that case, the ALJ applied federal regulations as guidance for the interpretation of state law. That is different from invalidating a permit because it does not contain provisions of federal as opposed to Wisconsin law. The Division lacks authority to order such a requirement.

The EPA has delegated authority to the State of Wisconsin under the Clean Water Act, and the state legislature has given the DNR authority to promulgate rules and implement that program under Wisconsin law. Wisconsin water quality standards do not presently require the Department to undertake the 'reasonable potential analysis' referenced under the EPA guidelines. No cause of action has been stated under Wisconsin law. The Division does not have authority to determine what state laws "should be," but only whether or not the current permit is in compliance with state law. As the Village notes, the EPA has authority to veto individual permits but has not done so in this case. Issue one must be dismissed.

With respect to issue 2, the Petitioners originally cited § 283.31(3)(d) as authority for their position that the DNR should have undertaken a TMDL in connection with issuance of the instant permit. However, as the DNR notes, " . . . that section requires only that if there has been a TMDL done under the 'continuing planning process' pursuant to Wis. Stat. 283.31(3)(d) that the results of

that effort be incorporated into the applicable WPDES permits. Section 283.31(3)(d) does not require that a permit issuance or reissuance be held up pending a TMDL. In fact, while the Department is undertaking TMDLs as resources allow, neither s. 283.31(3)(d) nor s. 283.83 require TMDLs to be done." The Division concurs, and issue 2 is dismissed. Further, as noted above, the petitioners have withdrawn the previous iteration of issue two in favor of amended issue five as described above.

All parties concede that issues number 3 to 5 involve a factual dispute which entitle the petitioners to a hearing. However, the Village of Roberts asks that issues 3 to 5 be set over for alternative dispute resolution in the event that disputed issues 1 and 2 above are dismissed. The Division lacks authority to order alternative dispute resolution. If all parties agree to such an effort, the Division has no objection. However, until such time, the hearing on issues 3 to 5 will go forward. As modified by the petitioners, issue five states a cause of action

Finally, the Village asks that it be allowed to submit an additional dispositive motion, given the repeated amendments of the pleadings by the petitioners. This request is granted, and a revised schedule is incorporated in the Order set forth below.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that issues 1 and 2 as set forth above be DISMISSED, for failing to state a claim under Wisconsin law;

IT IS FURTHER ORDERED, that issue 5 be amended as set forth above;

IT IS FURTHER ORDERED, that the Scheduling Order be modified to require the filing of any further dispositive motions by April 2, 2007. Any response is due by April 13, 2007, and any reply by April 20, 2007.

Dated at Madison, Wisconsin on March 9, 2007.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIV LAW JUDGE

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State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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January 12, 2007

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Subject: Petition for Contested-Case Hearing – WPDES Storm Water General Permit No. WI-S050075-1

Dear Mr. Denzin:

On March 20, 2006 the Department received a transmittal letter from Mr. Andrew Hanson and a petition signed by Ms. Melissa K. Scanlan for Midwest Environmental Advocates, Inc., on behalf of 5 individuals and 2 non-stock corporations. The petition seeks a contested-case hearing under s. 283.63, Stats., regarding the Department's WPDES Storm Water General Permit No. WI-S050075-1 for municipal separate storm sewer systems (the MS4 general permit). This permit was issued and took effect January 19, 2006. The petition was filed within 60 days and therefore was timely under s. 283.63 (1) (a), Stats.

Issues raised

Under s. 283.63 (1), Stats., 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 petition set forth the following specific issues to be reviewed by the Department:

1. "The reasonableness of section 1.4.3 of the MS4 General Permit, in that Section 1.4.3 allows a lowering of water quality as the result of increased discharges of polluted stormwater to Exceptional Resource Waters under Wis. Adm. Code § NR 102.11 without conducting the required antidegradation analysis under 40 CFR § 131.12(a)(2), Wis. Adm. Code § NR 102.05(1)(a) and Wis. Adm. Code §§ NR 207.04 and 207.05."

2. "The necessity for permit terms in the MS4 General Permit that require an analysis under §§ NR 207.04 and 207.05 to determine whether new or increased discharges of polluted stormwater to FAL [Fish and Aquatic Life] waters in §. NR 102.13 will cause a lowering of water quality, and whether such lowering of water quality is justified by important social and economic development, and the reasonableness of the DNR's failure to require or conduct such analysis prior to issuing the MS4 General Permit."

3. "The necessity for permit terms in the MS4 General Permit that require monitoring of polluted stormwater discharges from MS4's to determine compliance with water quality standards and to determine whether and to what extent there has been a lowering of water quality, and the reasonableness of DNR's failure to require terms for such monitoring in the MS4 General Permit."

Applicable law

The Department's authority to administer the WPDES permit program arises from ch. 283, Stats., and Wisconsin administrative codes promulgated under that chapter. The Department's MS4 general permit was issued under the specific authority of ss. 283.33 (4) and 283.35, Stats., and in accordance with its storm water discharge permit rules in ch. NR 216, Wis. Adm. Code. These rules were adopted under s. 283.33 (8) and (9), Stats., and are subject only to the limitation in s. 283.11 (2) (b), Stats., which provides that rules concerning storm water discharges may be no more stringent than the requirements under the federal water pollution control act, 33 USC 1251 to 1387, and regulations adopted under that act.

The Department has a delegation agreement with the United States Environmental Protection Agency (EPA) pursuant to which EPA accepts WPDES permitting in Wisconsin in lieu of federal permitting under the Clean Water Act. Consequently, any WPDES permit for a discharge to navigable waters of the United States also serves as a National Pollutant Discharge Elimination System (NPDES) permit pursuant to that delegation, except within Indian Country. EPA maintains federal permitting authority under the Clean Water Act within Indian Country. EPA maintains oversight over Wisconsin's administration of the WPDES/NPDES program and may direct Wisconsin to correct any deficiencies in its laws or rules in order for the state program to conform to federal law. EPA also has review authority over the issuance of WPDES permits. If a proposed permit does not comply with federal requirements, EPA may object to the permit. Section 283.31 (2) (c), Stats., bars the Department from issuing a permit if EPA objects to it. EPA did not object to the issuance of the MS4 general permit.

Any challenge under s. 283.63, Stats., to a WPDES storm water permit term or condition must be based exclusively on Wisconsin law, except to the extent that a federal law is made applicable by operation of state law. Petitioners have not cited, nor is the Department aware of any provision in the storm water permit program's statutory authority that makes any provision of federal law applicable to the storm water permit program. Furthermore, nothing in the storm water permit program's authorizing legislation expressly requires that terms or conditions in storm water discharge permits – including the MS4 general permit – comply with federal laws or regulations. Finally, nothing in the EPA delegation agreement makes it enforceable by third parties or confers any oversight authority or right of review on third parties

Accordingly, the petition is denied with respect to any claim (or part of any claim, such as Petitioners' issue no. 1.) that the MS4 general permit does not comply with any federal law or regulation, or that the Department failed to comply with any federal law or regulation prior to issuing the MS4 general permit.

Scope of review

Section 283.63, Stats., sets out a specialized review procedure. It appears to be intended primarily for the protection of WPDES permittees who are aggrieved by a permit term or condition imposed by the Department, usually through a modification to an existing 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 MS4 general 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 a review of other agency action or inaction related to the MS4 general permit, nor does it allow for review of administrative rules. Finally, it does not provide a petitioner with the opportunity to propose new or additional "necessary" permit terms or conditions.

Petitioners' issues no. 2. and 3. do not challenge or identify as unreasonable or unnecessary any specific term or condition contained in the MS4 general permit. With these issues Petitioners instead seek a review of the Department's decision to not include certain terms or conditions in the MS4 general permit. They assert that the MS4 general permit lacks certain key terms or conditions, to the effect that it must be

modified to incorporate the additional requirements sought by them. Other review statutes may allow for such challenges, but s. 283.63, Stats., clearly does not.

Thiensville* and *Madison Kipp

If an issue was not adequately placed before the Department for evaluation while the permit was still in draft form, the issue ought not to be the subject of a subsequent contested-case hearing. The Department interprets *Village of Thiensville v. DNR*, 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986) and *In the Matter of an Air Pollution Control Construction Permit Issued to Madison-Kipp Corporation, Located in Madison, Wisconsin, Permit No. 03-POY-328*, State of Wisconsin Division of Hearings and Appeals Case No. IH-04-12, (Nov. 15, 2005) to hold that an issue may not be raised at a contested-case hearing on a Department determination if it was not aired during the earlier public comment period on that determination, although the petitioners for the contested-case hearing need not be the ones who raised it.

Petitioners' issue no. 1. asks for a review of the reasonableness of Section 1.4.3. of the MS4 general permit in part because it allegedly allows a lowering of water quality as the result of increased discharges of polluted storm water from permitted MS4s to Exceptional Resource Waters listed under s. NR 102.11, Wis. Adm. Code, without first requiring an anti-degradation analysis under ss. NR 102.05 (1) (a), 207.04 and 207.05, Wis. Adm. Code. This issue was not raised by Midwest Environmental Advocates, Inc., by the individual or corporate Petitioners, or by any other person during the public comment period or at public hearings on the proposed MS4 general permit.

Petitioners' issue no. 2. concerns the potential for increased or new storm water discharges to Fish and Aquatic Life waters by municipalities covered by the MS4 general permit. This issue also was not raised during the public comment period or at hearings, and is being raised for the first time in the petition. The public comments on the proposed MS4 general permit included only statements that general permits are not compatible with the requirements of anti-degradation policy and therefore should not be used at all.

Petitioners' issue no. 3. relates to storm water effluent discharge monitoring by municipalities under the MS4 general permit. Again, this issue was not raised by Midwest Environmental Advocates, Inc., by the individual or corporate Petitioners, or by any other person during the public comment period or at hearings on the proposed MS4 general permit. Instead, some comments called for permittees to conduct ambient water quality monitoring, to which the Department responded by pointing out that Wisconsin law does not require a discharger to monitor receiving waters to which it discharges (i.e., to conduct ambient monitoring). Ambient monitoring activities that are necessary to determine if a receiving water is not attaining its designated use standard are conducted by the Department, not by permittees. In its January, 2006 Summary and Responses to Public Comments, the Department did note that monitoring of individual storm water discharges for compliance is ineffective and cost-prohibitive to conduct accurately, but this statement was not a response to any specific public comment regarding discharge monitoring.

Anti-degradation requirements

As noted above, Petitioners' issue no. 1. challenges MS4 general permit Section 1.4.3., alleging that it allows a lowering of water quality as the result of increased discharges of polluted storm water from permitted MS4s to Exceptional Resource Waters, and that the Department did not comply with procedures of ch. NR 207, Wis. Adm. Code, relating to implementation of the water quality anti-degradation policy of s. NR 102.05 (1) (a), Wis. Adm. Code.

According to s. NR 207.01 (2), Wis. Adm. Code, ch. NR 207 applies to any person proposing to increase an existing discharge to the surface waters of the state. An "increased discharge" is defined in s. NR

207.02 (6) (a), Wis. Adm. Code, as "any change in concentration, level or loading of a substance which would exceed an effluent limitation specified in a current WPDES permit." However, the municipalities whose existing storm water discharges are to be authorized and regulated by the challenged MS4 general permit currently have no permit and thus have no effluent limitations. Once their storm water discharges are covered by the MS4 general permit, effluent limitations will be narrative in nature rather than numerical. Instead of setting numerical limits on concentrations, levels or loadings in effluent, the permit requires the implementation of the minimum measures described in s. NR 216.07, Wis. Adm. Code, in order to control storm water pollution. This approach is in keeping with EPA's Phase II Storm Water regulations and satisfies the limitation in s. 283.11 (2) (b), Stats., that the Department's rules concerning storm water discharges be no more stringent than EPA regulations.

Because municipalities that will be subject to the MS4 general permit cannot have an "increased discharge" within the meaning of ch. NR 207, Wis. Adm. Code, Petitioners' issue no. 1. is premised on an incorrect interpretation of law and does not warrant a contested-case hearing.

Determination

Based on the forgoing reasons, the petition for a contested case hearing under s. 283.63, Stats., is denied.

If you have any questions regarding this decision, please direct them to Attorney Peter Flaherty at (608) 266-8254.

Sincerely,

William H. Smith
Deputy Secretary

cc: Todd Ambs – AD/5
Russ Rasmussen – WT/2
Gordon Stevenson – WT/2
Jim Bertolacini – WT/2
Eric Rortvedt – SCR
Pete Flaherty – LS/5

Notice of Appeal Rights

If you believe you have a right to challenge this decision made by the Department, you should know that Wisconsin statutes, administrative codes and case law establish time periods and requirements for reviewing Department decisions.

To seek judicial review of the Department's decision, ss. 227.52 and 227.53, Stats., establish criteria for filing a petition for judicial review. Such a petition shall be filed with the appropriate circuit court and shall be served on the Department. The petition shall name the Department of Natural Resources as the respondent.

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | DANE COUNTY

FRIENDS OF MILWAUKEE'S RIVERS, CHERYL NENN, CLEAN WATER ACTION COUNSEL OF NORTHEAST WISCONSIN, REBECCA L. KATERS, GLENN M. STODDARD, CHRISTINE FOSSEN RADES, and CHARLES FRISK,

Petitioners,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 07-CV-497

Case Code: 30607, 30701

DECISION AND ORDER

I. Introduction and Causes of Action

Petitioners, by their attorneys Midwest Environmental Advocates, Inc. (MEA), via a Petition for Review (Petition), sought, first, judicial review, pursuant to Wis. Stat. § 227.52, of Respondent Wisconsin Department of Natural Resources' (DNR), represented by its attorneys from the Attorney General's office, denial of their petition for administrative review under Wis. Stat. § 283.63 of Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-S050075-1, Municipal Separate Storm Sewer System (MS4 General Permit). (Petition, p. 2).

Second, Petitioners sought a declaratory judgment, pursuant to Wis. Stat. § 806.04, that: Wis Stat. § 283.31(3) and (4) require that DNR comply with applicable federal regulations regarding effluent limits and conditions in WPDES permits; Wis. Stat. § 283.63 authorizes DNR

to assess the need for additional limitations and considerations in WPDES permits if they are necessary to comply with state and federal regulations; Wis. Stat. § 283.63 does not require persons to submit written or oral objections to a WPDES permit prior to requesting an adjudicatory hearing to review the reasonableness of the terms of the WPDES permit. (Petition, p. 2).

Third, Petitioners sought a declaratory judgment, pursuant to Wis. Stat. § 227.40, that Wis. Admin. Code § NR 207 is invalid because it conflicts with federal law and regulations promulgated in the Clean Water Act (CWA), specifically 40 C.F.R. § 131.12. (Petition, p. 2-3).

The Court uses the past tense in describing Petitioners' goals because those goals appear to have changed. Petitioners, in their Petition for Review, filed on February 14, 2007, sought the three general goals described above. However, in their Initial Brief of Petitioners (Initial Brief), Petitioners state only that they "request that this Court: 1) declare NR 207 invalid in so far as it violates federal law and exceeds DNR's statutory authority; and 2) review and set aside DNR's denial as it is based on erroneous interpretations of law and an invalid rule." (Initial Brief, p. 5). Respondent noted as much in its Brief in Opposition to Petition for Review (Brief in Opposition): "Petitioners appear to have properly abandoned their...three claims for a declaratory judgment as to asserted errors in the Department's denial of their request for a hearing." (Brief in Opposition, p. 6). The Court need not address arguments that have not been briefed or have been inadequately briefed. *See, e.g., Barakat v. Wisconsin Dept. of Health and Social Services*, 191 Wis.2d 769, 530 N.W.2d 392 (Ct. App. 1995). Accordingly, the Court will only consider the one requested declaratory judgment and the denial of the petition for administrative review, as mentioned above in this paragraph and on page 5 of the Initial Brief, and consider the other arguments to have been waived.

Respondent requests that the Court affirm DNR's decision of January 12, 2007 denying Petitioners' request for a hearing and dismiss their remaining claim for declaratory judgment.

The Municipal Environmental Group—Wastewater Division (MEG), the North East Wisconsin Stormwater Consortium (NEWSC), and the City of Madison (Madison) have contributed helpfully as *amici curiae* in the form of a brief.

II. Parties

A combination of two organizations and five individuals constitute the Petitioners in this case. Friends of Milwaukee's Rivers (FMR) is a nonprofit organization dedicated to protecting the water quality and wildlife habitat in river corridors and to advocating for sound land use in the Milwaukee, Menomonee, and Kinnickinnic River Watersheds. FMR is also a member of the Waterkeeper Alliance and the licensed Riverkeeper® for Milwaukee.

Clean Water Action Council (CWAC) is a nonprofit organization made up of citizens committed to protecting public health and the environment in Northeast Wisconsin.

Cheryl Nenn is a Wisconsin resident who lives in Milwaukee, is a member of FMR, and enjoys the benefits of many of the rivers and waterways of eastern Wisconsin.

Rebecca L. Katers is a Wisconsin resident who lives in Green Bay, serves as the volunteer Executive Director of CWAC, and enjoys the waters in her city.

Glenn M. Stoddard is Wisconsin resident who lives in Eau Claire and takes pleasure in the waters in that county.

Christine Fossen Rades, a Wisconsin resident, lives in Green Bay, serves as a member of the Board of Directors of CWAC, and enjoys the waters in her city.

Charles Frisk, a Wisconsin resident, lives in Green Bay, serves as a member of the Board of Directors of CWAC, and enjoys the waters of his city. He is also the past president of Baird Creek Preservation Foundation.

The DNR, Respondent in this case, has been statutorily delegated the authority to protect the waters of Wisconsin.

III. *Amici Curiae*

Three *amici curiae* have joined together to submit a helpful brief. In the Motion for Leave to File *Amicus Curiae* Brief, MEG is identified as an organization of approximately ninety municipalities through the state of Wisconsin that own and operate wastewater treatment facilities. All members have wastewater discharge permits, as required under the Clean Water Act (CWA) and Wisconsin state law, issued by DNR and known as WPDES permits. Many MEG members also own and operate Municipal Separate Storm Sewer Systems (MS4s). Communities operating MS4s must obtain a permit from DNR for stormwater discharge. (¶¶ 1-3).

NEWSC, whose mission is to help implement stormwater programs both locally and regionally, is made up of thirty-two communities in the Fox Wolf Watershed. All NEWSC communities must obtain DNR permits for storm water. (¶¶ 4-5).

Madison is a municipality with a MS4 and has held a permit for storm water from DNR since July 1, 1995. (¶¶ 6-7).

IV. Factual Timeline

In November of 2004, DNR issued a draft of a MS4 General Permit for public comment. (Petition, ¶ 37).

MEA submitted written comments raising a number of concerns regarding antidegradation and monitoring requirements in the proposed MS4 General Permit in January of 2005. (Petition, ¶ 40).

DNR released a final draft of the proposed MS4 General Permit in January of 2006. (Petition, ¶ 43).

In March of 2006, Petitioners filed a petition for review of the MS4 General Permit, per Wis. Stat. § 283.63, based on concerns that that it did not comply with federal and state antidegradation requirements in a number of ways. (Petition, ¶ 52). Specifically, Petitioners questioned whether the MS4 General Permit: complied with federal and state antidegradation requirements for Exceptional Resource Waters (ERW); complied with federal and state requirements for Fish and Aquatic Life (FAL) Waters; complied with federal monitoring requirements. (Id).

DNR denied Petitioners' petition for review and sent its decision to Petitioners in January of 2007. (Petition, ¶¶ 53-54).

Petitioners initiated this action in February of 2007.

V. Analysis

A. Declaratory Judgment on the Validity of NR 207

Both parties agree that the proper standard of review in a challenge to the validity of a rule is *de novo*. (Initial Brief, p. 6, Brief in Opposition, p. 4). *Seider v. O'Connell*, 236 Wis.2d 211, 225, 612 N.W.2d 659, 666 (2000).

As noted above, Petitioners ask, under Wis. Stat. § 227.40, that the Court declare Wis. Admin. Code § NR 207 invalid in so far as it violates federal law and exceeds DNR's statutory authority. In doing so, they point out that "Wisconsin statutes give DNR authority to promulgate rules and administer the WPDES program in a manner that is 'consistent with all of the requirements of the federal [Clean Water Act],'" (Initial Brief, p. 5) citing Wis. Stat. § 283.001(2). Petitioners argue that DNR is not authorized to promulgate rules that violate or are inconsistent with the requirements of the CWA (Initial Brief, p. 5) and note that "the CWA requires states to implement an antidegradation policy that is 'consistent' with the policy that EPA set forth in 40 C.F.R. § 131.12," citing 40 C.F.R. § 131.6(d). In sum, Petitioners argue that "NR 207 is inconsistent with federal CWA requirements and consequently exceeds DNR's statutory authority. Therefore, the Court should declare NR 207 [an] invalid rule."

However, Petitioners themselves acknowledge that "Wisconsin's policy is generally consistent with the federal policy." (Initial Brief, p. 9). As Respondent points out, "that is all that federal law or state law requires," (Brief in Opposition, p. 7) citing Wis. Stat. § 283.001(2): "[t]he purpose of this chapter is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system... consistent with all the requirements of the federal water pollution control act." "The

antidegradation policy and implementation methods shall, at a minimum, be consistent" with the antidegradation regulations specified in 40 C.F.R. § 131.12. *See* 40 C.F.R. § 131.12(a).

Respondent argues that the state legislature has authorized, then, DNR to effectuate "a storm water discharge permitting system pursuant to regulations that are 'no more stringent than' the federal Clean Water Act and USEPA regulations adopted under that Act," (Brief in Opposition, p. 10) citing Wis. Stat. § 283.11(2)(b). "Rules for the discharge of wastewater other than storm water must 'comply with and not exceed' federal requirements," (Brief in Opposition, p. 10) citing Wis. Stat. § 283.11(2)(a).

Inherent to these statements is an acknowledgment that, as Respondent puts it, "a state that seeks delegation from USEPA for administration of the Clean Water Act must convince USEPA that the state's program includes requirements sufficiently similar to the federal requirements for the delegation to be accomplished," (Brief in Opposition, p. 10). In the same vein, the *Amici* point out that "[p]etitioners' assertion that Wisconsin's stormwater general permit and NR 207 are not consistent with the federal Clean Water Act fails to recognize a fundamental aspect of the Clean Water Act: EPA has primary jurisdiction to determine whether a state program complies with the CWA provisions," (Response Brief of Municipal *Amici*, p. 3). Indeed, "[s]tates must submit their antidegradation policy and implementation procedures to the EPA...if the State's policy and procedures are consistent with the minimum federal standards, the EPA must approve the procedures." *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp.2d 732, 738-39 (S.D.W.Va. 2003).

Both Respondent and the *Amici* point out that, as Respondent states, EPA has "reviewed Wis. Stat. ch. 283 and its implementing regulations, and determined that Wisconsin has all of the authority necessary to administer and enforce a wastewater discharge permitting program that

mirrors the federal program...USEPA thereafter delegated the federal wastewater discharge permitting program to Wisconsin...USEPA has not withdrawn that delegation since the storm water rules were promulgated, and did not object to the WPDES Permit issued here," (Brief in Opposition, p. 11). Or, as the *Amici* explain, in enacting the CWA, Congress "created a program under which EPA was required to promulgate minimum standards and then review state programs for compliance with those standards. EPA's authority included review over the state program as a whole as well as review over individual CWA permits," (Response Brief of Municipal *Amici*, p. 3).

As both Respondent and the *Amici* further point out, state programs, then, are not required to mirror every element of EPA guidelines to be in accord with them. Both cite to *Aminoil U.S.A., Inc. v. Cal. State, etc.*, 674 F.2d 1227, 1229-30 (9th Cir. 1982) and the description in that case of the system as a "scheme of cooperative federalism established by the [Clean Water] Act."

As a result, "[b]ecause the question of whether a state permit or rule is consistent with the CWA requirements is a matter for EPA to decide," (Response Brief of Municipal *Amici*, p. 5) Therefore, whether DNR's rules and permitting scheme specifically are consistent with the requirements of the CWA is a matter for EPA to determine.

More specifically, as Respondent illustrates, this Court lacks jurisdiction over the claim for declaratory judgment. "[F]ederal law prescribes the manner in which a petitioner may petition USEPA to disapprove a state permit or a state rule, to enforce a federal requirement violated by a state permittee, or to withdraw state delegation of a federal program," (Brief in Opposition, p. 11) citing to 33 U.S.C. §§ 1365(a)(2), 1369(b), and 1319.

In sum, EPA must be a party to an action seeking to invalidate NR 207. But EPA can be made a party to an action in federal court only. Petitioners may or may not have a legitimate argument as to the stringency of DNR's rules regarding protecting Wisconsin's waters from further degradation, but this is not the forum in which to raise that argument. As a result, it is unnecessary to consider or discuss other arguments that may have been put forth by Petitioners, and the Court declines to do so.

Petitioners' request that this Court declare Wis. Admin. Code § NR 207 invalid must be dismissed.

B. Judicial Review

In March of 2006, Petitioners filed a petition for review, per Wis. Stat. § 283.63, of the final draft of DNR's proposed MS4 General Permit. Petitioners expressed concern that the MS4 General Permit did not comply with federal and state law in several ways. That petition was denied by DNR in January of 2007.

The scope of judicial review of administrative actions in described in Wis. Stat. § 227.57. "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a *specified provision* of this section, it shall affirm the agency's action." Wis. Stat. § 227.57(2) (emphasis added).

Though Petitioners do not explicitly state in which provision of § 227.52 they believe grounds lie for overturning DNR's decision, the Court assumes that § 227.52(5) summarizes their position: "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation

of the provision of law." § 227.52(8), however, may also be applicable: "[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."

As Respondent has noted (Brief in Opposition, p. 4), § 227.52(1) states that in reviewing the administrative decision, "[t]he review shall be conducted by the court without a jury and shall be confined to the record." Accordingly, the affidavits, exhibits, and other supplemental material supplied by Petitioners will not be considered by the Court in this review. *See also State Public Intervenor v. DNR*, 171 Wis.2d 243, 248-250, 490 N.W.2d 770, 772-73 (Ct. App. 1992). Particularly, as the petition seeks review of issues of statutory interpretation (Initial Brief, p. 19) in the administrative decision, consideration of material outside of the record is inappropriate. *State Public Intervenor*, 171 Wis.2d at 249-250.

Citing *Keup v. DHFS*, 269 Wis.2d 59, 675 N.W.2d 755 (2004), Petitioners argue that the Court is not bound by an administrative agency's determination in questions of statutory interpretation (Initial Brief, p. 19). However, even in *Keup*, the Supreme Court stated that "we have generally used one of three standards of review, with varying degrees of deference, to review an agency's conclusions of law or statutory interpretation. The three standards of deference this court typically applies to such agency decisions are great weight, due weight, or de novo." (internal citations omitted) *Id.* at 73.

In that decision, the Supreme Court noted that "we give an agency decision great weight deference when the following four criteria are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." *Id.*, quoting *UFE Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57 (1996), quoting, in turn, *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995). See also *Racine Harley-Davison, Inc. v. State*, 292 Wis.2d 549, 564, 717 N.W.2d 184, 191 (2006), *Hilton v. DNR*, 293 Wis.2d 1, 13, 717 N.W.2d 166, 172 (2006).

Furthermore, as Respondent has identified, "the correct test [in determining whether great weight deference is appropriate] is whether the agency 'has experience in interpreting [the] particular statutory scheme' at issue." *Hilton*, 293 Wis.2d at 13, quoting *Clean Wisconsin, Inc. v. Public Service Comm'n of Wisconsin*, 282 Wis.2d 250, 308, 700 N.W.2d 768, 796 (2005).

As to this issue—whether great weight deference is appropriately given to DNR's decision and whether the agency has "experience in interpreting [the] particular statutory scheme" at issue—Respondent points out that: the "Department of Natural Resources has administered the WPDES program since USEPA approved it in 1974 and has administered the storm water permitting program since 1994. As a matter of course, it has had to interpret the statutory provisions, including those governing the availability of contested case hearing review, those governing antidegradation and municipal storm water permits, and those requiring consistency with federal law—to interpret, administer, and enforce those provisions and to apply them to sets of facts—over the 10 to 30 years since."

It is clear, then, that the first three of the four criteria cited in *Keup* and elsewhere are met in this case. It is equally clear that DNR has expertise in interpreting [the] particular statutory scheme at issue in this case. As to the fourth criterion—whether the agency's interpretation will provide uniformity and consistency in the application of the statute—the *amici curiae* helpfully point out that "there are now approximately 220 cities, villages, towns and counties across Wisconsin that are required to meet the new municipal stormwater pollution control requirements imposed by the Department of Natural Resources." (Response Brief of Municipal *Amici*, p. 1). For those 220 cities, villages, towns and counties, the agency's interpretation will certainly provide uniformity and consistency in the application of the statute at hand. Perhaps more to the point, overturning DNR's interpretation would cause considerable disorder and confusion in the application of the statute.

Having met the four criteria, DNR's decision to deny Petitioners' petition for review is properly accorded great weight deference.

"When a reviewing court applies great weight deference, it sustains an agency's reasonable statutory interpretation, even if the court concludes that another interpretation is equally reasonable, or even more reasonable, that that of the agency. An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis." *Racine Harley-Davidson*, 292 Wis.2d at 564 (internal citations omitted).

While Petitioners arguments and interpretations may or may not be reasonable, it is not at all clear that DNR's conclusions of law directly contravene the applicable statutes or the federal

or state constitution. Nor are they clearly contrary to the legislative intent, history, or purpose at the statutes at issue, nor are they without a rational basis.

The Court, therefore, affirms the decision of DNR to deny Petitioners' petition for review on the grounds that DNR's decision conforms to long-held understandings and applications of law. Because there are sufficient grounds on which to affirm DNR's decision to deny Petitioners' petition without considering whether DNR may deny a contested case hearing on the basis of an alleged failure to raise arguments at a public hearing, the Court need not do so and declines to do so.

This is the final and only decision for purposes of appeal in connection with the dismissal of Respondent's claims herein.

IT IS SO ORDERED.

Dated this 2nd day of November 2007.

Steven Ebert

The Honorable Steven D. Ebert
Circuit Court Judge, Branch 4

This is a final order or judgment for purposes of appeal. No subsequent document is contemplated by the court. See, Radoff v. Red Owl Stores, Inc., 109 Wis. 2d 490, 494, 326 N.W.2d 240 (1982).

cc: Attorney Brent Denzin
Assistant Attorney General JoAnne F. Kloppenburg
Attorney Paul G. Kent

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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September 16, 2008

Elizabeth Lawton
Midwest Environmental Advocates, Inc.
551 W. Main Street, Suite 200
Madison, Wisconsin 53703

RE: Wis. Stat. § 283.63 Petition for Review of WPDES No. WI-0063771-01-0 Issued to Didion Ethanol, LLC

Dear Ms. Lawton:

The purpose of this letter is to partially grant your request for a contested case hearing pursuant to Wis. Stat. § 283.63, challenging the terms and conditions of WPDES permit no. WI- 0063771-01-0 issued to Didion Ethanol, LLC ("Didion"). Your petition was filed on behalf of five individuals – John Domino, Margo Domino, Leonore Neumann, Jeff Schumacher and Roger Springman.

With regard to the petition challenging Didion's WPDES permit, the petition for a contested case hearing is granted with respect to the following issues:

Issue 5 of the petition: Under state law, is the monitoring and sampling frequency established in s. 1.2.1 of the permit reasonable?

Issue 6 of the petition: Under state law, is the daily maximum chlorine limit reasonable?

Issue 9 of the petition: Under state law are the terms and conditions of the permit that control the additives Sulfuric Acid, Biotrol 120 and BWT 104 unreasonable?

Insofar as your petition seeks to raise any other issues not specifically listed above, the request for a hearing is denied. The issues denied are specifically discussed below. It should be noted that on two of the issues addressed below, the Department is granting the relief you have requested in the petition, so a hearing is not needed on those issues.

Issues 1 & 2 & 3 - Antidegradation

In the first three issues of the petition, the petitioners have argued that the Department did not follow all of the antidegradation procedures required under state and federal laws. In issue 3 the petitioners directly challenged the state antidegradation regulations in ch. NR 207. Even though the petitioners were present at the informational hearing on the proposed permit, antidegradation issues were not raised by anyone at the informational hearing nor during the public comment period. Consequently, the request for a hearing under Wis. Stat. § 283.63 on issues 1, 2 and 3 is denied because the petitioners did not raise any antidegradation issues during the permit issuance process[1]. *Village of Thiensville v. DNR,* 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986). (Also see *In the Matter of an Air Pollution*

[1] Under federal regulations (40 CFR §§124.13 and 124.19), a person may not challenge a term or condition of a permit unless the issue was raised during the public comment period. Although the Department recognizes that this federal

regulation does not directly apply to state proceedings, it is worth noting that the Department's position is consistent with federal regulations.

Control Construction Permit Issued to Madison-Kipp Corporation, Located in Madison, Wisconsin, Permit No. 03-POY-328, State of Wisconsin Division of Hearings and Appeals Case No. IH-04-12 (Nov. 15, 2005) regarding the application of *Thiensville* as well as 40 CFR § 124.13 and 124.19).

Although the antidegradation issue is denied, the Department acknowledges that under state regulations, a social or economic development review should have been conducted, so the Department is requiring that Didion submit the information needed for such a review. Again, if this issue had been raised during the public comment period, the Department could have addressed this omission prior to permit issuance.

NOTE: The challenges based on federal antidegradation procedures as well as the direct challenge to the state's antidegradation rules in ch. NR 207 are also denied for other reasons discussed below (see Direct Challenges To State Administrative Rules and Challenges Based on Federal Regulations and Statutes).

Issue 4: Monitoring and Sampling Location

The Department acknowledges that a typographical error was made in the permit regarding the outfall location and will modify the permit to correct this error. Since this correction addresses issue 7 in the petition, the issue becomes moot.

Issue 6: Acute Zinc Limits and Acute Chlorine Limit
Issue 8: Phosphorus Limitations and Arsenic Concentration Limit

In issue 6 of the petition, the petitioner challenged the acute chlorine and zinc limits and directly challenged the state regulations found in Wis. Adm. Code § 106.06(3). The chlorine and zinc limits were calculated based on state administrative rules which are based on federal regulations. In issue 8 of the permit, the petition alleges that the phosphorus and arsenic limitations are unreasonable because the Department did not determine whether the limitations violated narrative water quality standards in Wis. Adm. Code § NR 102.04(1). No written or verbal comments were presented to the Department during the public comment period regarding the reasonableness of the zinc, arsenic or phosphorus limits by the petitioners or anyone else[2]. Consequently, the request for a hearing under Wis. Stat. § 283.63 on issues 6 and 8 is denied for the same reasons that the antidegradation issues are denied. (see discussion above regarding Antidegradation)

The challenges to chlorine, zinc, phosphorus and arsenic limits based on federal law and the direct challenge to state administrative rules are also denied for the reasons discussed below. (see Direct Challenges To State Administrative Rules and Challenges Based on Federal Regulations and Statutes)

Issue 7: Arsenic Mass Limit

The Department failed to include an arsenic mass limit in Didion's permit as required under § NR 106.07(2). It was an unintentional omission. If this comment had been raised during the

[2] During the public comment period, a comment was submitted regarding "chlorides." Based on the nature of the comment, the Department determined the commenter mistakenly used the term "chlorides", instead of "chlorine." The intent of the comment was really directed to the impacts of chlorine. Based on this determination, the Department has granted a hearing on the reasonableness of the acute chlorine limit based on state law.

public comment period, the Department could have made the correction prior to issuance. Regardless, the Department agrees to modify the permit to include a mass limit which makes issue 7 moot.

Direct Challenges to State Administrative Rules – Issue 3 (chapter NR 207), Issue 6 (s. NR 106.06(3)(b) and Issue 9 (s. NR 106.10)

The petition is denied with regard to direct challenges to Department administrative rules. In Issue 3, the petition alleges that chapter NR 207 violates state and federal antidegradation policies. In Issue 6, the petition alleges that s. NR 106.06(3) violates state and federal laws. Issue 9 of the petition alleges that s. NR 106.10 may violate state and federal laws. All of these issues are denied because an administrative law judge does not have the authority to rule on whether a state administrative rule violates either state or federal laws. Pursuant to Wis. Stat. § 227.45(4), an administrative law judge is required to take judicial notice of all rules which have been published in the administrative register.

Under state law, the proper forum for challenging an administrative rule is a declaratory judgment proceeding under Wis. Stat. § 227.40. However, for challenges to rules based on alleged noncompliance with federal regulations or statutes, a petition must be filed with EPA.

Challenges Based on Federal Regulations and Statutes

The Department's authority to administer the WPDES permits program comes from Wis. Stat. chapter 283 and state administrative codes promulgated under that chapter. Didion's WPDES permit was issued pursuant to the authority in Wis. Stat. chapter 283 and applicable state regulations.

The Department has a delegation agreement with the United States Environmental Protection Agency (EPA) and under that agreement EPA accepts Wisconsin's issuance of WPDES permits in lieu of federal permitting under the Clean Water Act. Consequently, any WPDES permit for a discharge to waters of the United States also serves as a National Pollutant Discharge Elimination System (NPDES) permit pursuant to that delegation, except within tribal lands. EPA maintains oversight over Wisconsin's administration of the WPDES program and may direct Wisconsin to correct any deficiencies in its laws or rules if the state program does not comply with the federal requirements. EPA also has review authority over the issuance of each WPDES permit. If a proposed permit does not comply with federal requirements, EPA may object to the permit. Wis. Stat. § 283.31(2)(c) bars the Department from issuing a permit if EPA objects to it. EPA did not object to the issuance of Didion's permit.

If the petitioners believe that Didion's permit was issued under state laws and rules that fail to comply with federal regulations and statutes, they should have requested that EPA object to the permit, or they should seek to have the applicable state legal authority reviewed by EPA. EPA has primary jurisdiction to determine whether a state program and a permit issued under that program complies with the Clean Water Act and federal regulations promulgated under the Act (see 40 CFR §§ 123.44, 123.63 and 123.64 and 40 CFR part 131).

It should be noted that under Wis. Stat. § 283.31(3)(d), the Department is authorized to issue a WPDES permit upon condition that such discharge will meet, whenever applicable, limitations

that are necessary to comply with federal water quality standards or applicable federal laws or regulations. In this statutory reference, the Legislature has twice used the term "applicable" in referencing federal requirements. When the Department has promulgated a rule or procedure based on federal regulations and EPA has approved the state program or procedures, the corresponding federal regulation is not "applicable." An administrative law judge or reviewing court should refer to the federally approved state statutory provision or rule when determining whether the term or condition of a permit is reasonable. However, in cases where the state has failed to adopt a rule that is as protective as the federal regulations and EPA has consequently promulgated a water quality standard or requirement that directly and specifically applies to Wisconsin waters, then that federally promulgated standard or requirement is arguably "applicable" to the permit. Put another way, "applicable" federal regulations in s. 283.31(3)(d) means those federal regulations that EPA has directly promulgated for Wisconsin waters because Wisconsin has failed to adopt a water quality standard or requirement that satisfies the federal requirements.

Accordingly, the petition is denied with regard to any claim that a permit term or condition does not comply with a federal law or regulation, or that the Department failed to comply with any federal law or regulation prior to issuing the permit. The decision to deny review based upon federal regulations is consistent with a Dane County Circuit Court decision in Friends of Milwaukee Rivers, et al. vs. Department of Natural Resources, Case No. 07-CV-497 as well as previous rulings by the Division of Hearings and Appeals, In the Matter of the Petition for Review of the Issuance of WPDES Permit No. WI-0028835-08-0, Issued to the Village of Roberts, St. Croix County, Wisconsin.

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes, administrative rules and case law establish time periods and requirements for reviewing Department decisions.

To seek judicial review of a Department decision, sections 227.52 and 227.53, Stats., establish criteria for filing a petition for judicial review. Such a petition must be filed with the appropriate circuit court and served on the Department. The petition must name the Department of Natural Resources as the respondent.

If you have any question, please contact Robin Nyffeler at (608) 266-0024.

Sincerely,

Pat Henderson
Deputy Secretary

cc: Brenda Howald – SCR Fitchburg
Cynthia Hirsch – DOJ

STATE OF WISCONSIN CIRCUIT COURT COLUMBIA COUNTY

JOHN DOMINO,
MARGO DOMINO,
LENORE NEUMANN,
JEFF SCHUMACHER and
ROGER SPRINGMAN,

Plaintiffs,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Defendant.

DECISION

Case No. 08-CV-351

FACTUAL BACKGROUND

The factual background of this case is somewhat complicated, but it is sufficient in the context of the action as it currently stands before this Court to give a brief summary of the pertinent facts. Didion applied for a permit under Wisconsin's Pollutant Discharge Elimination System program on December 11, 2007. The Department of Natural Resources (DNR) granted the permit to Didion on March 28, 2008, after allowing for a public comment period and a public hearing. On May 27, 2008, Petitioners filed a petition for review with the DNR pursuant to Wis. Stat. § 283.63. After a contested hearing and, after modifying and amending the permit slightly, and denied the remainder of Petitioners' claims on the basis that such claims triggered federal law, which in turn required the involvement of the EPA. At that time, Petitioners initiated this action in Columbia County while the administrative proceedings were continuing with the DNR.

DECISION

Petitioners raise many issues regarding the validity of the permit, but the Court need not get into all of the details on their arguments regarding the permit, as the Court must first look to determine whether the Court has jurisdiction to hear the case. After a

review of the issues presented, it is clear that the Court lacks jurisdiction over this case and therefore the action is dismissed.

Petitioners challenge the DNR's rules regarding the issuance of the permit as well as the grounds on which the permit was granted. The rules which Petitioners challenge have been approved by the EPA as complying with the Clean Water Act, and the EPA also continually oversees the enforcement of these rules. Any challenge is governed by federal law, not state law. However, as pointed out in Respondent's brief, any such action must include the EPA as a party to the suit, which Petitioners have not done here. Moreover, the EPA cannot be made a party to an action in state court, but rather only in federal court. *Chesapeake Bay Found., Inc. v. United States*, 445 F. Supp. 1349, 1354 (E.D. Va. 1978). Therefore, this Court lacks jurisdiction to hear Petitioners' claims regarding declaratory judgment, and they are dismissed.

Even if we were to assume that the action was appropriately filed in state court, Petitioners failed to comply with the filing requirements of Wis. Stat. § 227.40, which mandates that "the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of such rule brought in the circuit court for Dane County." Petitioners initiated the action in Columbia County, rather than in Dane County as the statute explicitly requires. Petitioners fail to qualify under any of the listed exceptions, and therefore the action must also be dismissed for failure to file in the proper forum. The declaratory judgment claims are dismissed initially on the grounds that Petitioners failed to include a necessary party and mistakenly filed in federal court, instead filing in state court. Furthermore, even if the decision to file in state court were appropriate, Petitioners failed to file in the appropriate forum, as they chose to file the suit in Columbia County rather than in Dane County as the statue requires.

There is no need for the Court to reach the substantive merits of Petitioners claims for declaratory judgment, as this Court lacks jurisdiction to hear them and the action is dismissed. Additionally, there is no need to even stay the proceedings pending the outcome of the administrative hearings, because even If Petitioners have the right to petition a court for a declaratory judgment, this Court lacks jurisdiction and the Petitions must instead file their action in the appropriate forum.

Dated this 4th day of May 2009.

BY THE COURT:

Patrick J. Taggart, Circuit Judge

C: Elizabeth Lawton, 551 W Main Street, Ste. 200, Madison, WI 53703
Cynthia Hirsch, P.O. Box 7857, Madison, WI 53703-7857
Eric McLeod, P.O. Box 1806, Madison, WI 53701-1806

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

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Madison, Wisconsin 53707-7921
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June 30, 2009

Jamie Saul
Midwest Environmental Advocates, Inc.
551 W. Main Street, Suite 200
Madison, Wisconsin 53703

RE: Wis. Stat. § 283.63 Petition for Review of WPDES No. WI-0063959-01-0
Issued to Rosendale Dairy, LLC

Dear Mr. Saul:

The purpose of this letter is to partially grant your request for a contested case hearing pursuant to Wis. Stat. § 283.63, challenging the terms and conditions of WPDES permit no. WI-0063959-01-0 issued to Rosendale Dairy, LLC ("Rosendale"). Your petition was filed on behalf of nine individuals – Elaine Swanson, Severin Swanson, Timothy Thiel, Lynn Thiel, Helen Parker, Mary Butcher, Charles Putzer, Philip Hoopman and Ann Lindstrom.

With regard to the petition challenging Rosendale's WPDES permit, the petition for a contested case hearing is granted with respect to the following issues:

Issue One: Are the terms of the approved nutrient management plan (NMP) relating to the following areas reasonable:

- Identification of subsurface drainage systems in fields where manure or process wastewater will be applied.
- Application of manure to areas of fields where the soil type has been identified as w soils.
- The NMP did not contain a showing by the permittee that the 25 foot buffer approach of NR 243.14(4)(a) 1. and 2. resulted in "pollutant reductions equivalent to, or better than, reductions achieved by not applying manure and process wastewater within 100 feet of downgradient navigable waters or conduits to navigable waters."

Issue Two: Is permit term 1.5.1 unreasonable if it authorizes a new discharge of phosphorus and sediment to phosphorus-impaired or sediment-impaired waters?

Issue Three: Are permit terms 1.1 and 1.5.1 reasonable if they do not include additional water quality based effluent limitations?

Issue Four: Are permit terms 1.1 and 1.5.1 unreasonable if the Department did not conduct an antidegradation analysis?

Issue Six: Whether the permit term 1.6 includes sufficient water quality monitoring requirements to ensure compliance with its terms and conditions and compliance with state water quality standards?

Insofar as your petition seeks to raise any other issues not specifically listed above, the request for a hearing is denied. The issues denied are specifically discussed below.

Denial of Issue Five

A hearing on issue five of the petition is denied because this issue was not raised during the public comment period. In issue five, the petitioners argue that the permit should have specified maximum levels of discharges as required by law. Even though the petitioners were present at the informational hearing on the proposed permit, this issue was not raised by anyone at the informational hearing nor during the public comment period. Consequently, the request for a hearing under Wis. Stat. § 283.63 on issue five is denied because the petitioners did not raise the issue that the permit shall contain maximum levels of discharges during the permit issuance process. *Village of Thiensville v. DNR,* 130 Wis. 2d 276, 386 N.W.2d 519 (Ct. App. 1986). (Also see *In the Matter of an Air Pollution Control Construction Permit Issued to Madison-Kipp Corporation, Located in Madison, Wisconsin, Permit No. 03-POY-328,* State of Wisconsin Division of Hearings and Appeals Case No. IH-04-12 (Nov. 15, 2005) regarding the application of *Thiensville* as well as 40 CFR § 124.13).

Denial of Federal Issues

Insofar as your petition seeks to raise any issue with respect to the application of federal law to Wisconsin permits, the request for a hearing is denied. The Department's authority to administer the WPDES permit program comes from Wis. Stat. chapter 283 and state administrative codes promulgated under that chapter. Rosendale's WPDES permit was issued pursuant to the authority in Wis. Stat. chapter 283 and applicable state regulations.

The Department has a delegation agreement with the United States Environmental Protection Agency (EPA) and under that agreement EPA accepts Wisconsin's issuance of WPDES permits in lieu of federal permitting under the Clean Water Act. Consequently, any WPDES permit for a discharge to navigable waters of the United States also serves as a National Pollutant Discharge Elimination System (NPDES) permit pursuant to that delegation, except within tribal lands. EPA maintains oversight over Wisconsin's administration of the WPDES program and may direct Wisconsin to correct any deficiencies in its laws or rules if the state program does not comply with the federal requirements. EPA also has review authority over the issuance of WPDES permits. If a proposed permit does not comply with federal requirements, EPA may object to the permit. Wis. Stat. § 283.31(2)(c) bars the Department from issuing a permit if EPA objects to it. EPA did not object to the issuance of Rosendale's permit.

If the petitioners believe that the Rosendale's permit issued under state laws and regulations fail to comply with federal regulations and laws, they should have requested that EPA object to the permit, or they should seek to have the applicable state regulations reviewed. EPA has primary

jurisdiction to determine whether a state program and a permit issued under that program complies with the Clean Water Act and federal regulations promulgated under the Act (see 40 CFR §§ 123.44, 123.63 and 123.64 and 40 CFR part 131).

Accordingly, the petition is denied with regard to any claim that a permit term or condition does not comply with a federal law or regulation, or that the Department failed to comply with any federal law or regulation prior to issuing the permit. The decision to deny review based upon federal regulations is consistent with a Dane County Circuit Court decision in *Friends of Milwaukee Rivers, et al vs. Department of Natural Resources*, Case No. 07-CV-497, a Brown County Circuit Court Decision in *Curt Andersen, et al. v. Department of Natural Resources*, Case No. 06-CV-726 and 06-CV-924 (consolidated), as well as previous rulings by the Division of Hearings and Appeals, *In the Matter of the Petition for Review of the Issuance of WPDES Permit No. WI-0028835-08-0 Issued to the Village of Roberts, St. Croix County, Wisconsin.*

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes, administrative rules and case law establish time periods and requirements for reviewing Department decisions.
To seek judicial review of a Department decision, sections 227.52 and 227.53, Stats., establish criteria for filing a petition for judicial review. Such a petition must be filed with the appropriate circuit court and served on the Department. The petition must name the Department of Natural Resources as the respondent.

If you have any questions, please contact Marney Hoefer at (608) 266-7588.

Sincerely,

Patrick Henderson
Deputy Secretary

cc: Marney Hoefer LS/8
Russ Rasmussen WT/3
David Crass, Michael, Best & Friedrich, LLP, One S. Pinckney St., Ste. 700, Madison, WI, 53703

¶31 Finally, we conclude that the DNR's decision will provide uniformity and consistency in setting BACT emissions limits. Sierra Club's assertion that the DNR's approach in this case was not consistent with its prior decisions ignores the fact that the top-down analysis is a case-by-case basis inquiry that necessarily results in varied outcomes. What matters is whether the DNR properly applied the BACT top-down analysis and reached a reasonable BACT determination based on the facts and circumstances of each pollution source. As we explain later, we are satisfied that the DNR properly applied the BACT analysis and reasonably established the BACT emissions limits for the Weston 4 plant boiler.

¶32 Sierra Club's assertion that deference should be accorded to the EPA and not the DNR is not supported by the statutory and regulatory scheme governing the air pollution permitting process nor by the specific cases it cites in support of its arguments. Specifically, Sierra Club ignores the Prevention of Significant Deterioration permitting process contained in the Act. As we have explained, the Act directs the federal government to delegate to the states primary authority to approve air pollution permits. *See* 42 U.S.C. § 7410(a). In addition, the EPA specifically approved Wisconsin's permitting process plan, which authorizes the state to issue permits. *See* Approval and Promulgation of Implementation Plans for Wisconsin, 64 Fed. Reg. 28,745 (May 27, 1999). Moreover, contrary to Sierra Club's assertions, the DNR applied state law, not federal law, when it issued WPSC's air pollution permit. Even though Wisconsin's statute and regulation defining BACT are based on the Act, the definitions became state law when they were adopted by the Wisconsin Legislature and the DNR. The legislature charged the DNR with the responsibility for applying these definitions in the permitting process.

¶33 The cases that Sierra Club relies on do not support its assertion that a state agency is not entitled to deference when it interprets and applies a state statute or regulation that is based on a federal law. Sierra Club cites several cases where courts resorted to federal authority in interpreting a state law that was modeled after federal law. *See* ***State v. Poly-America, Inc.***, 164 Wis. 2d 238, 245, 474 N.W.2d 770 (Ct. App. 1991); *see also* ***State v. Harenda Enters., Inc.***, 2008 WI 16, ¶¶29-57 307 Wis. 2d 604, 746 N.W.2d 25; ***DILHR v. LIRC***, 161 Wis. 2d 231, 247-49, 467 N.W.2d 545 (1991). However, in ***Poly-America*** and ***DILHR***, the appellate court turned to interpretations of the federal regulations merely for "guidance" or "assistance" in interpreting the state law analogue. ***Poly-America, Inc.***, 164 Wis. 2d at 243, 245; ***DILHR***, 161 Wis. 2d at 247. The ***Poly-America*** and ***DILHR*** courts were not compelled to adopt the federal law interpretations. ***Harenda*** is inapposite, as well, because, unlike the statutes and rules applicable in this case, the DNR rules at issue there *explicitly required* the DNR to follow applicable federal regulations when measuring levels of asbestos contamination. *See* ***Harenda***, 307 Wis. 2d 604, ¶29. Contrary to Sierra Club's assertions, none of these cases stand for the novel proposition that a state court engaging in the interpretation of state law must follow interpretations of analogous federal statutes.

¶34 Moreover, we are not persuaded that the DNR's interpretation and application of the BACT definition conflicts with the EPA's. To insure compliance with federal law, the DNR is required to provide the EPA with a draft permit and final permit language. *See* 42 U.S.C. § 7475(d). The EPA has the opportunity to issue an order or seek injunctive relief if it concludes that the permit terms do not constitute BACT. 42 U.S.C. § 7477. If a conflict exists, the EPA may seek to prevent construction of a proposed facility. *See* ***Alaska Dep't of***

Envtl. Conservation v. E.P.A., 540 U.S. 461, 468-69 (2004). Tellingly, EPA did not exercise this power by objecting to the DNR's issuance of the final Weston 4 permit.

¶35 Finally, Sierra Club argues that the DNR's interpretation and application of its own regulations is not entitled to controlling weight because the DNR interpreted EPA's regulations and not its own. It asserts that, because WIS. ADMIN. CODE § NR 405.02(7) incorporates language created by Congress in the Clean Air Act, see 42 U.S.C. § 7479(3), the DNR rule is not, in effect, the DNR's own regulation, and therefore the Department should not receive any deference in its interpretation and application of this regulation. For support, it cites the following language in ***Gonzales v. Oregon,*** 546 U.S. 243, 257 (2006): "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." We reject Sierra Club's argument.

¶36 First, as we have explained, Congress has delegated authority to the states to administer their own clean air permitting programs. While the DNR has chosen to largely adopt the definition of BACT contained in the Clean Air Act, it was not required to do so. The rules at issue in this case are the DNR's own. In addition, Sierra Club's reliance on ***Gonzales*** is misplaced. In ***Gonzales***, the Supreme Court concluded that the United States Attorney General lacked the authority to issue an Interpretive Rule directed at invalidating Oregon's assisted suicide statute where the Interpretive Rule merely "parrot[ted]" language in the federal Controlled Substances Act. ***Id.*** at 257. As the State argues, ***Gonzales*** is distinguishable because neither an Interpretive Rule nor a question of the DNR's authority is at issue in this case. It does not matter that the DNR rules "parrot" the Act because the EPA delegated the authority to the DNR to adopt its own rules.

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STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

Petitioners-Appellants,

vs. Appeal No. 2008AP3235
Circuit Court Case No. 2006CV726

DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent-Petitioner.

JOINT *AMICUS CURIAE* BRIEF OF MUNICIPAL ENVIRONMENTAL GROUP– WASTEWATER DIVISION, THE LEAGUE OF WISCONSIN MUNICIPALITIES AND MILWAUKEE METROPOLITAN SEWERAGE DISTRICT IN SUPPORT OF THE DNR'S PETITION FOR REVIEW

STAFFORD ROSENBAUM, LLP
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MILWAUKEE METROPOLITAN SEWERAGE DISTRICT
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Milwaukee, WI 53201-3049

September 23, 2010

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INTRODUCTION

The Municipal Environmental Group – Wastewater Division (MEG), on behalf of its over 95 members throughout Wisconsin who own and operate wastewater treatment plants, the League of Wisconsin Municipalities (League) on behalf of its 583 member communities, and the Milwaukee Metropolitan Sewerage District (MMSD) (collectively Municipal Amici) are concerned about the impact of the Court of Appeals determination in this case. Wastewater and stormwater permits should not be subject to challenge based on the assertion that the permit limits are not consistent with federal law when EPA has reviewed the rules upon which the permit is based, and has approved the permit itself.

This is a significant concern because the Wisconsin Department of Natural Resources (DNR) issues Wisconsin Discharge Pollution Elimination System (WPDES) wastewater permits to approximately 690 municipalities[1] and stormwater permits to approximately 220 municipalities.

[1] http://dnr.wi.gov/org/water/wm/ww/pmttypes.htm#municipal

ARGUMENT

I. THE FEDERAL CLEAN WATER ACT CREATES A FEDERAL-STATE PARTNERSHIP IN WHICH STATES HAVE FLEXIBILITY SUBJECT TO FEDERAL OVERSIGHT.

The Municipal Amici concur with the position articulated by the DNR. The discharge permit program established by the Clean Water Act (CWA) is a federal-state partnership in which the states have primacy and flexibility in implementing its provisions. This is particularly true in establishing water quality standards. As the Petitioner Clean Water Action Council of Northeast Wisconsin (Council) acknowledges, "The States have primary authority to establish water quality standards within state borders 33 U.S.C. §1313(a)." Council Br. at 6. States also have flexibility in crafting permit language to achieve water quality standards. "States need not implement provisions identical to the above listed provisions." 40 C.F.R. § 123.25(a)(Note).

However, state programs are subject to continued oversight by the Environmental Protection Agency (EPA). This comes in the form of review of state rules and review of state issued permits. In *Aminoil U.S.A. v. Cal State*, 674 F.2d 1227, 1229-30 (9th Cir. 1982), the court summarized

this federal-state relationship as follows:

> The Administrator [of EPA] must approve a proposed state permit program unless he determines that the program does not provide "adequate authority" to enforce the Act. *Id.* . . .
>
> The EPA, however, retains independent supervisory authority over approved state programs. It may withdraw its approval of a state program if it determines that the state program is not being administered in accordance with the requirements of the Act, § 402(c)(3), 33 U.S.C. § 1342 (c)(3), and the Administrator may veto any state discharge permit which he deems to be "outside the guidelines and requirements of [the Act]." Act § 402(d)(2), 33 U.S.C. § 1342 (d)(2). . . .
>
> Despite this residual federal supervisory responsibility, the scheme of cooperative federalism established by the Act remains "a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program [which] creates a separate and independent State authority to administer the NPDES pollution controls. . . ." (Citations Omitted).

Under the CWA, "Congress has vested in the [EPA] Administrator broad discretion to establish conditions for NPDES permits . . . Similarly, Congress preserved for the Administrator broad authority to oversee state permit programs. . . ." *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). Thus, not every word of EPA guidelines need be adopted for EPA to approve a state program, nor is EPA compelled to veto every permit simply because it is not identical to federal regulations. Yet, that is what the Council is attempting to accomplish when it argues that a state permit violates federal law.

For the Municipal Amici, the problem with the Council's approach

is twofold. First, the Council is asking a state Administrative Law Judge (ALJ) to second guess determinations made by the EPA on the issue of whether a particular permit, and the rules it is based upon, is consistent with federal law. This is not a situation where an ALJ is being asked to review a question of federal law in the abstract; it is a review of a question of federal law where there has already been a federal determination.[2]

Second, what the Council is effectively doing is attempting to make major policy changes in wastewater permits through the permit process rather than through the rulemaking process. Such a process places unfair burdens on the targeted permittee and bypasses the process for broad public input that the rulemaking process under Wis. Stat. ch. 227 provides.

These concerns can best be illustrated by looking at the specific factual context of this case. One of the key issues raised by the Council is that the Fort James permit did not include numeric water quality based limits on phosphorus. However, the issue of whether Wisconsin should develop a numeric water quality standard for phosphorus, and what that standard should be, is an issue subject to rule development that has just been completed. Nothing better demonstrates how the federal-state

[2] Compare *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), where the issue was whether a permit was required in the first instance, and no federal review had taken place.

partnership under the Clean Water Act can and does work than this recent process.

II. THE RECENT DEVELOPMENT OF NUMERIC PHOSPHORUS STANDARDS DEMONSTRATES THAT THE FEDERAL-STATE PARTNERSHIP WORKS.

A. History Of The Development Of Numeric Water Quality Standards for Phosphorus.

As the Council notes, wastewater discharges are subject to two basic kinds of effluent limits – technology based limits and water quality based limits. Council Br. at 4-6. EPA chose not to establish any *technology* based effluent limitation for phosphorus applicable to municipal wastewater treatment plants. However, Wisconsin was one of the few states that created a *state* technology based standard for phosphorus applicable to municipal wastewater treatment facilities when it adopted Wis. Admin. Code ch. NR 217 in 1992.[3] *See* 443 Wis. Admin. Reg. (November 1992).

As the Council also notes, Wisconsin also had a general narrative water quality standard under NR 102.04(1), but like most other states, Wisconsin did not have a numeric water quality based phosphorus standard. And, as the DNR notes, while EPA had the authority to promulgate a water

[3] Because there was no national technology based standard for phosphorus, the state rule would have been prohibited under the state's uniformity clause. As a result, and as the Council notes, the Legislature made an exception for this regulation. Wis. Stat. § 283.11(3)(am).

quality criteria for Wisconsin under 33 U.S.C. § 1313(c)(4)(b), EPA chose not to do so. DNR Br. at 24.

Wisconsin has, however, been in the forefront of developing numeric water quality based standards for phosphorus. On June 23, 2010, the Natural Resources Board adopted final rules including numeric water quality based standards for phosphorus and implementation provisions. The "Greensheet" accompanying the rule package to the Natural Resources Board recounts the rule development process and the years of background scientific analysis as follows:

> In 2001, the department, in concert with the US Geological Survey, initiated stream and river studies to determine the cause and effect relations between phosphorus and nitrogen and stream biotic indices. The results of the stream study were published in 2006 and the results of the river study in 2008. Based on those studies and related studies both in Wisconsin and elsewhere, the department developed proposed phosphorus criteria for streams and rivers. In addition, using a wealth of experience and established lake management procedures, the Department proposed phosphorus criteria for lakes and reservoirs.

Greensheet Background Memo at 1 and 2.[4]

In 2008, shortly after the final results of the scientific study were available, the DNR assembled an advisory committee comprised of various stakeholders to develop a rule. The Council and other environmental

[4] The Greensheet for this rule is available at http://www.dnr.state.wi.us/org/nrboard/2010/June/06-10-3A4.pdf and is included in the Municipal Amici Appendix at M-App 1.

groups were not satisfied with the pace of the rule making and on November 23, 2009 filed a notice of intent to sue EPA under the Clean Water Act, 42 U.S.C. § 1365 for failing to promulgate numeric water quality standards for phosphorus and nitrogen.[5]

On March 16, 2010, the Natural Resources Board authorized a draft rule for public hearing which included numeric water quality standards for phosphorus in Wis. Admin. Code ch. NR 102 and a detailed set of implementation provisions in NR 217. These rules were subject to vigorous public debate and for good reason. The municipal community was concerned about the implementation provisions because the initial cost – even by DNR's estimate – exceeded $1.3 billion dollars.[6] Municipalities were also concerned that this enormous cost would not result in improved water quality because most of the phosphorus loading in the state was from farms and other "non-point" sources. [7]

Other stakeholders including private sector discharges and the

[5] A copy of the Notice of Intent to sue the EPA is available at http://www.midwestadvocates.org/archive/phosphorus/11-23-2009%20Final%2060%20Day%20Notice.pdf and attached at M-App 52. See Notice M-App 53-54 for the reference to the pace of the DNR advisory committee.
[6] See Greensheet Fiscal Analysis p.2 M-App 43.
[7] See, Greensheet Response to Public Comments. M-App 41.

environmental community also vigorously commented on these rules.[8] Over two hundred persons and organizations attended public hearings around the state and over 411 individuals and organizations submitted written comments on the rules, including the Municipal Amici in this case.[9]

At the end of the process, a general consensus was reached on an appropriate rule package which included innovative and flexible compliance options such as adaptive management that had the support of agriculture, environmental and municipal groups. *See* NR 217.18; s*ee also* Editorial, *Adopt These Rules*, Milwaukee-Wisconsin Journal Sentinel, July 26, 2010, *available at* http://www.jsonline.com/news/opinion/99272874.html at M-App 69-70.

As part of this process, EPA reviewed and commented in detail on many aspects of the rule. As the DNR brief noted, EPA filed an initial set of comments on April 30, 2010 (Pet. App at 203-210), and follow-up comments on June 18, 2010 (Pet. App. 201-202). The one remaining issue in the June 18 EPA letter was addressed by the Natural Resources Board when it adopted the rule.[10] These rules were subject to legislative hearings

[8] *Id.* at M-App 8-41.
[9] *Id.* at M-App 4.
[10] Minutes from the Natural Resources Board Meeting June 22-23, 2010 are on line at http://www.dnr.state.wi.us/org/nrboard/2010/June/06-10-NRB-Minutes.pdf. and attached

under Wis. Stat. § 227.19 in July and August 2010 and that review is now completed. DNR will now seek final EPA approval of these rules through the process under 40 C.F.R. § 131.21.

After these rules are finalized and applied to state permits, the EPA will have yet another chance to object if DNR is not applying the rules in a manner consistent with federal and state law. 33 U.S.C. § 1342(d)(2).

B. Lessons From The Phosphorus Rule Process.

Several conclusions can be drawn from this process. First, questions of the sort being raised by the Council in this case – should a permit contain numeric water quality based effluent limits for phosphorus and how those limits should be calculated – present significant scientific and public policy considerations of statewide application. The "cause and effect relations between phosphorus and nitrogen and stream biotic indices" is a complex analysis that took years to undertake. Compliance with these standards involves billions of dollars. The resolution of those issues affects not just one permittee but hundreds of public and private permittees across the state. This is not an issue that should be resolved in the context of a single permit whether it is a large industrial concern like Georgia Pacific or a small

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as M-App 59. The specific objection of EPA was addressed by the Board by a change noted on page 9 of the minutes, M-App 67.

municipality like MEG member, Fort Atkinson, Wisconsin. Ultimately, with broad public input, a rule was developed which affected parties could endorse.

The second conclusion from the phosphorus rulemaking process is that DNR rules and permits issued under those rules have in fact been subject to active EPA review. This review by EPA reflects its judgment that the rules comply with federal law. In the case of phosphorus, EPA chose not to promulgate its own numeric water quality standards for phosphorus in Wisconsin. Instead, it chose to approve permits such as Fort James' permit with the numeric *technology based* phosphorus standard in NR 217. It also chose to encourage and participate in the recent phosphorus water quality rule process. EPA submitted detailed formal comments twice during the rule process and has a final review yet to occur. EPA can and did actively participate in this process and will continue to do so as individual permits are issued.

In this context, it should also be noted that the narrative standard referenced by the Council under NR 102.04(1) is a very generic standard which provides in relevant part as follows:

NR 102.04 Categories of standards.

(1) GENERAL. To preserve and enhance the quality of waters, standards are established to govern water management decisions. Practices attributable to municipal, industrial, commercial, domestic, agricultural, land development or other activities shall be controlled so that all waters including the mixing zone and the effluent channel meet the following conditions at all times and under all flow conditions:

(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to interfere with public rights in waters of the state.

(b) Floating or submerged debris, oil, scum or other material shall not be present in such amounts as to interfere with public rights in waters of the state.

(c) Materials producing color, odor, taste or unsightliness shall not be present in such amounts as to interfere with public rights in waters of the state.

(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.

While the Council asserts that "these water quality problems are associated with phosphorus pollution" (Council Br. at 10), the Council did not demonstrate that the amounts involved in the Fort James permit exceeded those standards. Instead, the Council asked the DNR to require Fort James to undertake the process to demonstrate that its discharge does not have the "reasonable potential" to exceed those generic and ill-defined standards.

The decision of the DNR and the EPA to rely upon the approved rules and technology standard in NR 217 for the current permit is a rational

determination based on an exercise of the discretion vested in each agency by law. The decision of these agencies not to require an individual permittee to undertake a "reasonable potential" analysis to determine whether its discharge implicates one of the ill-defined narrative standards, should not be second guessed by a state ALJ.

Third, groups like the Council and/or their attorneys have had opportunities to participate in the rulemaking process and have participated at every level. The Council was on record in filing of the 60-day notice, participation in the advisory committee work, participation in the public hearing and comment process and participation in at the Natural Resources Board meeting approving the rule among other opportunities.

It may be that groups like the Council disagree with the pace of rule development or the manner in which certain standards are implemented, but ultimately those decisions reside with DNR and EPA, not the Council. Just as citizen groups are often impatient with the pace or extent of enforcement of federal environmental laws, once EPA or DNR acts, courts are not to second guess those discretionary determinations of the agencies. In the analogous context of citizen suit enforcement of environmental laws, a presumption of diligence by and resulting deference to the discretion of

federal and state agencies is widely recognized in the judicial decisions. *See, e.g.*, *Gwaltney of Smithfield, Ltd. vs. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *North & South Rivers Watershed Association vs. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) ("deference to the agency's plan of attack should be particularly favored."); *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). This same deference to reasonable state and federal agency decisions regarding permit terms is consistent with the statutory scheme and should be afforded here.

The practical question presented by this case is not whether numeric water quality standards should be adopted for phosphorus; because that issue has now been resolved by rule. The question of concern to Municipal Amici is the next set of issues. Will the Council's demand for the next set of water quality standards such as standards for nitrogen be played out through the rulemaking process, or will the Council be allowed to choose to raise those issues on a piecemeal basis in the context of a wastewater permit issued to Fort Atkinson, or Medford, or Rice Lake? This result is unfair not just to the one community whose permit is being challenged, but also to the larger community of stakeholders who should be able to participate in the rulemaking process.

Of equal concern is whether the Council will be able to claim that notwithstanding EPA discretionary review of state rules and individual permits, the ALJ can second guess those determinations. Such review is both unnecessary and unwarranted. It is unnecessary because there is a process to challenge federal action or inaction. For example, the Council used one of those remedies when it filed the 60-day notice against EPA's alleged inaction with regard to promulgating a numeric water quality standard for phosphorus and nitrogen. It is unwarranted because there is no reason to subject individual municipalities to permit challenges based on a dispute with how EPA has exercised its discretion.

CONCLUSION

State administrative hearings on individual permits are not the forum to second guess EPA determinations of federal compliance, nor are they the forum to advance new public policy initiatives that ought to be resolved in a public rulemaking process. DNR's position on the Fort James permit should be upheld, and the Court of Appeals reversed.

Dated this 23rd day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b) AND (c)

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with Times New Roman, 13 point font. The length of this brief is 2,993 words.

Dated this September 23, 2010.

/s/Paul G. Kent
Paul G. Kent (#1002924)

CERTIFICATE OF COMPLIANCE WITH 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. § 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 23rd day of September, 2010.

/s/Paul G. Kent
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CERTIFICATE OF SERVICE

I, Marjorie Irving, am a legal secretary at Stafford Rosenbaum LLP. I hereby certify that I caused three true and correct copies of (1) Joint Motion For Leave To File An Amicus Curiae Brief By Municipal Environmental Group–Wastewater Division, The League Of Wisconsin Municipalities, And Milwaukee Metropolitan Sewerage District, (2) Joint Amicus Curiae Brief by Municipal Environmental Group–Wastewater Division, the League of Wisconsin Municipalities and Milwaukee Metropolitan Sewerage District and Joint Amicus Curiae Brief of Municipal Environmental Group–Wastewater Division, the League of Wisconsin Municipalities, and Milwaukee Metropolitan Sewerage District, and (3) Appendix in support of the DNR's Petition for Review to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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WI Department of Justice
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Dated this September 23, 2010.

/s/ Marjorie Irving
Marjorie Irving, Legal Assistant

STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

Petitioners-Appellants,

vs.

Appeal No. 2008AP3235
Circuit Court Case No. 2006CV726

DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent-Petitioner.

APPENDIX

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of September, 2010.

/s/Paul G. Kent
Paul G. Kent (#1002924)

STATE OF WISCONSIN
SUPREME COURT

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

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Dated this 23rd day of September, 2010.

Paul G. Kent (#1002924)

Form 1100-001
(R 12/09)

NATURAL RESOURCES BOARD AGENDA ITEM

Item No. 3.A.4

SUBJECT: Request adoption of Board Order WT-25-08, revisions to NR 102 and NR 217 related to phosphorus water quality standards criteria and WPDES permit provisions for phosphorus.

FOR: JUNE 2010 BOARD MEETING

TO BE PRESENTED BY: Russ Rasmussen, Director Bureau of Watershed Management

SUMMARY:

These rules are part of a comprehensive strategy to address one of the greatest remaining sources of water pollution in Wisconsin - excess nutrients, specifically phosphorus. Ch. NR 102 establishes phosphorus water quality criteria and ch. NR 217 provides for implementation of those criteria for point sources of phosphorus pollution through WPDES permits. The proposed administrative rule revisions include phosphorus water quality standards criteria for streams, inland lakes and Great Lakes, as required by the U.S. Environmental Protection Agency. These criteria are also in response to identified phosphorus-related water quality in many Wisconsin waters including nuisance algae blooms in lakes, "toxic algae", algal mats along Lake Michigan beaches and low dissolved oxygen in streams and rivers.

The criteria will be used to determine whether or not waters are impaired, serve as "targets" for total maximum daily load allocations, used to determine water quality based effluent limits for WPDES permits, and used as the basis for water quality based nonpoint source performance standards. The proposed revisions also include new procedures for developing and implementing Wisconsin Pollutant Discharge Elimination System permit water quality based effluent limits for phosphorus. The affordability of meeting projected effluent limits is a concern for many municipal and industrial wastewater dischargers.

The other significant contributor of phosphorus pollution is from nonpoint source pollution, primarily from agricultural and urban storm water runoff. Nonpoint sources of phosphorus pollution are being addressed through a concurrent revision to ch. NR 151, Runoff Management, which establishes performance standards for nonpoint source pollution designed to meet water quality standards

RECOMMENDATION: Adoption of Board Order WT-25-08

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:

Russell Rasmussen — Bureau Director, Date: June 11, 2010

Administrator, Date: 6/11/10

Secretary, Matt Frank — Date: 6-14-10

cc: Laurie J. Ross - AD/8
Russ Rasmussen - WT/3
Julia Riley - WT/3
Robin Nyffeler - LS/8

CORRESPONDENCE/MEMORANDUM — State of Wisconsin

DATE: June 11, 2010 FILE REF: 3200

TO: Natural Resources Board Members

FROM: Matt Frank, Secretary

SUBJECT: Request Adoption of Board Order WT-25-08, Pertaining to the Revision of chs. NR 102 and 217, Wis. Adm. Code, Incorporating Phosphorus Water Quality Standards Criteria for Lakes, Streams and Wisconsin Pollutant Discharge Elimination System Permit Water Quality Based Effluent Standards and Limitations for Phosphorus

1. Why is this rule being proposed?

These rules are being proposed to amend portions of our rules to adopt numeric phosphorus water quality standards criteria for lakes, reservoirs, streams and rivers per s. 281.15, Stats, and to adopt provisions for developing and implementing Wisconsin Pollutant Discharge Elimination System (WPDES) permit provisions based on the phosphorus criteria per ss. 283.11, 283.13 (5), 283.31, 283.55 and 283.84, Stats.

These rules are part of a comprehensive strategy to address one of the greatest remaining sources of water pollution in Wisconsin – excess nutrients, specifically phosphorus. Ch. NR 102 establishes phosphorus water quality criteria and ch. NR 217 provides for implementation of those criteria for point sources of phosphorus pollution through WPDES permits. The other significant contributor of phosphorus pollution is from nonpoint source pollution, primarily form agricultural and urban storm water runoff. Nonpoint sources of phosphorus pollution are being addressed through a concurrent revision to ch. NR 151, Runoff Management, which establishes performance standards for nonpoint source pollution designed to meet water quality standards.

a. What event or action triggered the proposal?

The revisions are based on recognition of phosphorus related water quality problems across the state, including algal mats on Lake Michigan beaches, nuisance algae conditions in many Wisconsin lakes, low dissolved oxygen in many Wisconsin streams, and "toxic" blue-green algae in a number of lakes. Presently, 172 lakes and streams are included on Wisconsin's impaired waters list for phosphorus. The revisions are also in response to nationwide federal requirements to adopt nutrient criteria.

In late 2000, US EPA, under the authority of s. 304 (a) of the Clean Water Act, published two guidance documents for use by states in setting water quality standards nutrient criteria. Once US EPA publishes such guidance documents, states are generally required within a reasonable number of years to adopt water quality criteria that are protective of designated uses. Under s. 303 (c) (4) (B) of the Clean Water Act, US EPA may determine, in the absence of state adopted criteria, that a new or revised standard is needed to meet Clean Water Act requirements and pursue federal adoption of the criteria for the state. On November 23, 2009, seven groups notified US EPA of their intent to sue over the US EPA's failure to promulgate phosphorus and nitrogen criteria for Wisconsin.

In 2001, the department, in concert with the US Geological Survey, initiated stream and river studies to determine the cause and effect relations between phosphorus and nitrogen and stream biotic indices. The

results of the stream study were published in 2006 and the results of the river study in 2008. Based on those studies and related studies both in Wisconsin and elsewhere, the department developed proposed phosphorus criteria for streams and rivers. In addition, using a wealth of experience and established lake management procedures, the department proposed phosphorus criteria for lakes and reservoirs. The department is not proposing nitrogen criteria at this time and will need to develop such criteria in the future.

b. *What issues are addressed by the rule?*

Department regulations are being revised in response to federal regulations and in response to identified phosphorus related problems in many Wisconsin lakes and streams. Although these water quality problems have been known for some time, results of studies published in 2006 and 2008 have now provided information sufficient to establish statewide phosphorus water quality standards to ensure protection of designated uses of Wisconsin's waters.

2. Summary of the Rules

The Bureau of Watershed Management proposes to incorporate phosphorus criteria for rivers and streams and for lakes and reservoirs into s. NR 102.06; replacing the general narrative phosphorus provision. The proposed criterion for listed rivers is 100 ug/l and the proposed criterion for all other streams, unless exempted, is 75 ug/l. These criteria are intended to protect fish and aquatic life uses. For lakes and reservoirs, a series of phosphorus concentrations are proposed ranging from 15 ug/l for lakes supporting a cold water fishery in lower portions of the lake to 40 ug/l for shallow lakes and reservoirs. For small impoundments, the criteria are the same as the inflowing streams or river. These lake criteria are intended to protect both fish and aquatic life and recreational uses. For Lake Michigan and Lake Superior, the proposed criteria are based on the analyses of the Great Lakes Water Quality Agreement. Provisions are also proposed for future incorporation of site-specific criterion.

The Bureau of Watershed Management also proposes to incorporate provisions for phosphorus water quality based effluent limits into a new subchapter of ch. NR 217. Chapter NR 217 currently contains technology-based effluent standards and limitations for phosphorus. These proposed water quality based provisions apply to: publicly and privately owned wastewater dischargers discharging phosphorus; to a limited extent to concentrated animal feeding operations when phosphorus is being discharged though a treatment system (non-storm water related) discharge; and to municipal storm water discharges when the department determines that the existing requirements contained in chs. NR 151 and NR 216, are not sufficient to attain and maintain the applicable phosphorus criteria. The proposed rule includes procedures for: determining when a point source has "reasonable potential" to cause or contribute to exceeding water quality standards; calculating water quality based effluent limits; maximum limits; use of total maximum daily load wasteload allocations in lieu of, or in addition to, water quality based effluent limits; compliance schedules and a variance procedure for stabilization pond and lagoon systems. The proposed provisions for compliance schedules and variances include procedures for interim measures and interim effluent limits.

3. How does this proposal affect existing policy?

The proposed phosphorus criteria for streams, rivers, lakes, reservoirs and Great Lakes are in additional to existing criteria for dissolved oxygen and other parameters. In general, the proposed criteria are numeric and are a refinement of the existing narrative criteria in s. NR 102.06. The proposed criteria fill gaps in

our suite of numeric water quality standards criteria. The criteria will also be used in identifying impaired waters and will be the water quality basis for establishing total maximum daily load allocations for phosphorus.

The proposed WPDES phosphorus water quality based effluent limitations are in addition to the existing technology-based phosphorus effluent limitations in ch. NR 217. The existing technology-based effluent limitations apply to municipal discharges of more than 150 pounds of phosphorus per month and industrial discharges of more than 60 pounds per month, regardless of the water quality conditions in the receiving water. The existing technology-based effluent limitations are set at 1 mg/l for phosphorus or an alternate limitation.

4. Hearing Synopsis, Response to Public Comments, and Response to Rules Clearinghouse Comments.

Hearing Synopsis

The Department conducted 4 public hearings in 2010 on the proposed rule revisions: Rhinelander, April 15; Green Bay, April 20; Oconomowoc, April 21; and Eau Claire, April 27. Over 238 attended the hearings, 224 registered by filing appearance slips and 62 provided verbal testimony. Of those people who registered, 41 were in support, 134 were in opposition, and 49 registered as interest may appear (in favor or opposition to some provisions, but not others; attending to get information). The attendance and testimony breakdown is shown in the table below.

	Attendance	Support		Opposition		As Interest May Appear		Total	
		Registered	Testified	Registered	Testified	Registered	Testified	Registered	Testified
Rhinelander	19	4	3	8	3	6	2	18	8
Green Bay	75	10	4	51	6	10	3	71	13
Oconomowoc	56	12	8	24	6	17	10	53	24
Eau Claire	88	15	8	51	5	16	4	82	17
Totals	238	41	23	134	20	49	19	224	62

The Department also received written comments from 411 individuals and organizations. There were 217 comments in general support; 62 comments in opposition; 121 comments with neutral positions, questions, or statements with tangential information; and 11 comments that supported portions of the rule but opposed other portions.

Support for the rules came from lakes and river associations, environmental groups, conservation groups and individuals who want strong rules limiting phosphorus inputs to lakes and streams. Lakeshore property owners, small businesses, and municipalities that rely on tourism were concerned about excessive, unsightly green algae growth in the lakes that adversely affects the health of animals and humans. Opposition to the rules came from the paper industries, wastewater utilities, dairy farmers, and municipalities.

Testimony and comments received at the public hearings and during the comment period identified these issues that were of most significant concern:

- Costs to comply with low phosphorus effluent limits are not affordable by local communities and industries.

- Effluent limits would not need to be as stringent if nonpoint sources were controlled and the rule should not force the point sources to bear the entire phosphorus control burden.
- Effluent limits should only be based on the stream or river conditions at the facilities outfall and should not be based on downstream water quality conditions.
- The permit compliance averaging period of monthly is too short given the inherent variability in the treatment processes needed to meet low phosphorus effluent limits.
- Mass limits in addition to concentration limits are not warranted.
- Limits should not apply to combined sewer outfalls, storm water discharges, and non-contact cooling water discharges.
- Compliance schedules are too long.

In addition, there was support in general for control of phosphorus from all sources and for specific flexibility elements in the proposed rules, including:

- Compliance schedules that may extend beyond one permit term, although many wanted longer compliance schedules than proposed.
- Adaptive Management Option, but the concept needs greater detail.
- The variance provisions that apply to small communities with lagoon or stabilization ponds, but these provisions should be expanded to include industrial lagoons and mechanical wastewater treatment plants for small communities.

Response to Public Comments

Germane comments and department responses to public comments are in Attachment 1 of this document.

Response to Rules Clearinghouse Comments

With the exception of comments discussed below, the comments included in the Wisconsin Legislative Council Clearinghouse Report to the department have either been incorporated into the proposed rules or are no longer applicable because subsequent revisions removed or significantly altered that portion of the rule.

- Statutory Authority. Section 283.15 (4) (a) 1. f., Stats., generally provides that the Secretary of the Department of Natural Resources must approve all or part of a requested variance, or modify and approve a requested variance, if the permittee demonstrates that attaining the water quality standard is not feasible because the standard will cause a substantial and widespread adverse social and economic impact in the area where the permittee is located. Section NR 217.18 (1) (b) 3. is a departmental finding that in many cases it will be necessary for owners of stabilization ponds and lagoons to construct a new wastewater treatment plant to comply with phosphorus effluent limitations; and construction of these facilities will result in substantial and widespread adverse social and economic impacts in the area served by the existing stabilization pond and lagoon system. Section NR 217.18 (3) (c) also provides that a permittee with a lagoon and stabilization pond that is denied a variance may not be granted a variance for phosphorus 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. It appears, although it is not clear, that the rule provision voids the statutory provision regarding variances. If so, what statutory authority exists for the rule provisions?

Response: The statutory authority for this rule section is s. 283.15 (4) (a) 1. f., Stats. In s. NR 217.18 (3) (c), the rule language was intended to prohibit a person from applying for a variance from a limit for the same factor (widespread adverse social and economic hardship) twice – both before the permit is issued and immediately after issuance. The Department made revisions to the variance rule procedures in s. NR 217.18 to clarify that the rule is implementing the statutory variance provision in s. NR 283.15 (4) (a) 1 .f.

- 2.l. In s. NR 217.15 (1) (c), the introductory material should be renumbered subd. 1., and the remaining subdivisions should be renumbered accordingly.

Response: The material in (1) (c) is introductory to the other two subdivisions. It has not been renumbered as suggested.

5. Public Contacts Following Public Hearings.

Numerous contacts with the public and organizations occurred following the public hearings. Various staff attended meetings and conferences to discuss potential rule revisions. Attendees at such meetings included representatives of the Municipal Environmental Group, Milwaukee Metropolitan Sewerage District, Madison Metropolitan Sewerage District, Green Bay Metropolitan Sewerage District, Wisconsin Paper Council, Midwest Food Processors Association, Wisconsin Cheese Makers Association, Saputo, Trega Foods, Foremost Farms, Meister Dairy, Probst Group, Bytec Inc, Dairy Business Association, Midwest Environmental Advocates, Clean Wisconsin, Environmental Law and Policy Center, the U. S. Environmental Protection Agency, the U. S. Geological Survey and Representative Brett Davis's office.

6. Environmental Analysis.

This rule revision is considered a Type III action since it does not have adverse environmental impacts or involve conflicts in the use of waters.

7. Final Regulatory Flexibility Analysis.

Food processing facilities and cheese factories were identified as potential categories of small businesses that would most directly be affected by these rule revisions. Data on these types of facilities was analyzed and there are few, if any, small businesses that directly discharge wastewater containing phosphorus to lakes or streams. Many small cheese factories land apply their wastes and do not discharge wastewater containing phosphorus. Therefore, this rule revision does not anticipate any additional compliance or reporting requirements for small businesses.

If there is an impact on small businesses as a result of these rule revisions, it would likely be an indirect fiscal impact. Many small businesses discharge their wastes to a municipal wastewater treatment facility. If a municipal wastewater treatment plant's wastewater discharge permit is modified to require further removal of phosphorus, it is likely that the cost to provide additional treatment levels will be absorbed by increasing sewer use charges. Some small businesses may experience an increase in sewer service fees as these rule revisions are implemented statewide.

Some municipalities may also require specific small businesses to provide pretreatment for phosphorus removal if a wastewater discharge from a small business contributes significant

loadings of phosphorus to the sanitary sewer system. Implementation of these rule revisions may result in additional costs for phosphorus pretreatment to a select subset of small businesses.

The department is unable to specifically estimate the indirect fiscal impact to small businesses as a result of implementation of this rule package because of the variability of each situation.

Attachment 1

Summary of Public Comments and Department Responses
WT-25-08
Revisions to NR 102 and 217

The department received a total of 473 written and verbal comments from municipalities, industries, organizations, agencies and individuals. As requested by the Natural Resources Board, specific comments by US EPA are identified. US EPA comments are highlighted in bold and italic typeface within the bulleted list of each section. However, if others made similar comments to those made by EPA those comments were not repeated.

The major issues that emerged from the comments and the department's responses are listed below. In addition, the department made minor clarifying edits based on comments, which are not listed here.

I. NR 102

A. NR 102.06 (3) Criteria for Rivers and Streams

- NR 102.06 numeric phosphorus standards criteria development process is reasonable for rivers and streams.
- There is nothing to prevent water resources currently below the standard from being degraded to the standard before any action is taken.
- There does not appear to be a relationship between the criteria and the designated uses that are to be protected by the criteria.
- Scientific understanding of cause and effect relationships are not sufficiently advanced to develop valid criteria.
- An in-stream phosphorus concentration above the response threshold does not necessarily mean that an impaired condition exists or that designated uses are not being met.
- Approach is too simplistic. Breakpoints may not exist; if they do not exist, proposed criteria have no scientific basis.
- Focus on bio-available phosphorus; use of total phosphorus will overstate potential for discharges to have impacts.
- Nutrient concentrations may not be sufficient indicators. USGS report on wadeable streams states, "Although there were many significant correlations and visual relations between the nutrient concentrations and the characteristics of biotic communities, this may or may not be an indication of cause-and-effect relations."
- WDNR has not made a clear case that the stressor-response relationships can reasonably be expected to contain true breakpoints.
- WDNR has not conducted a systematic evaluation of the potential for designated use attainment decision errors if the proposed TP criteria are adopted as part of Wisconsin's state water quality standards.
- WDNR should re-examine the technical bases of its TP criteria in light of EPA draft guidance on the derivation of numeric criteria using the stressor-response

approach, and the results of a U. S. Environmental Protection Agency (EPA) Science Advisory Board review of the draft guidance document.

- Aquatic ecoregion should be used.
- Extend the river portion of the Wisconsin River upstream from the confluence with the Pelican River to the Rhinelander Dam. Data exists to show that the flow exceeds 150 cubic feet per second more than 90 percent of the time.
- Listing of waters impaired by phosphorus is a disgrace. Problems have existed for decades. Can't continue to add phosphorus to waters; it accumulates. Excess phosphorus damages our economy.
- Phosphorus-impaired waters should be waters impaired by phosphorus not other substances since there are other factors that can impact dissolved oxygen and other factors besides phosphorus that affect the algae-dissolve oxygen relationship, such as light, other nutrients, stream gradient, and retention time in reservoirs, lakes and impoundments.
- WDNR should develop guidance concurrent with these rules regarding how the proposed NR 102 criteria would be used to determine if a stream is impaired relative to phosphorus.
- The method used to establish the criteria for streams, river and lakes is based on methods which the EPA Science Advisory Board found to be deficient.

Response:

Several people commented on the scientific validity of the proposed phosphorus criteria for rivers and streams. Prior to requesting permission from the Natural Resources Board to go to pubic hearing, the department, with the assistance of US EPA, reviewed the data analysis for rivers and streams using a step-by-step process consistent with the newly released US EPA guidance document developed with the Science Advisory Board and compared the results to other lines of evidence. In the first step of the data analysis, the applicability of each correlation was reviewed; emphasizing those with a direct relation with phosphorus and eliminating those with little or no scientific relationship. Those correlations that interfere or mask the effects, such as high turbidity, were separated. In the second step, the statistical strength of each correlation was given a weight so that stronger correlations would be given more emphasis. In the fourth step, the correlations were divided into three groups: linear correlations; correlations with abrupt thresholds with very clear breakpoints; and correlations with gradual thresholds and less clear breakpoints. Greater emphasis was given to those with abrupt thresholds than gradual thresholds. Linear thresholds were compared differently, such as a comparison to US EPA guidance values. In the fifth step, similar correlations were grouped, so that they were not "double counting". The result of this analysis was a set of ranges, where the proposed criteria fell within the ranges. In addition, the proposed criteria were compared to the results of other studies, such as reference stream studies of trout streams in southwest Wisconsin and compared to information on trout streams were attainment of designated uses is certain. Analysis of streams and rivers did not show a difference between eco-regions.

In response to the comment on developing guidance for listing waters as impaired, the department has developed draft guidance, "Wisconsin Consolidated Assessment and Listing Methodology", for listing of impaired waters. The department will be refining this guidance in the next year or two. The notes relating to impaired waters have been refined to only include waters with low dissolved oxygen where a diurnal swing is occurring.

In response to the comment that phosphorus concentrations in streams and rivers should not be allowed to increase up to the criterion, ch. NR 207, Antidegradation, deals with procedures for determining whether any or all of the "assimilative capacity" in a stream is available to sources of phosphorus or other pollutants. Different amounts of the assimilative capacity are available depending on whether the stream is an Outstanding Resources Water, an Exceptional Resource Water or other water. Changes to ch. NR 207 are currently being discussed with an advisory committee.

Consistent with the information provided, the proposed rules extend the river portion of the Wisconsin River to the Rhinelander Dam.

In response to the comment on use of bioavailable phosphorus instead of total phosphorus, the bioavailability of phosphorus varies greatly over time. Soluble phosphorus is generally available immediately to algae; while portions of the particulate phosphorus may become available over time and have impacts downstream. US EPA guidance calls for use of total phosphorus.

B. NR 102.06 (4) Criteria for Lakes and Reservoirs

- Revisit the application of the two reservoir phosphorus standards, 30 ug/l for stratified reservoirs and 40 ug/l for non-stratified reservoirs, taking into account whether the water body is a warm water fishery or a cold water fishery.
- Revisit the definition of a stratified reservoir and allow for a more technically sound evaluation of whether a body of water is stratified.
- Specific guidance is required in the rule to restrict the use of reservoir criteria only for development of the WQ based limits for reservoir waters unless the department documents a specific need.
- Phosphorus-impaired waters should be waters impaired by phosphorus not other substances since there are other factors that can impact dissolved oxygen and other factors besides phosphorus that affect the algae-dissolve oxygen relationship, such as light, other nutrients, stream gradient, and retention time in reservoirs, lakes and impoundments.
- P standards apply to whole lake and specific bays should not be given different criteria.

Response:

In response to several comments on the definition of reservoirs, the definition has been refined to clarify that the 14-day "residence time" for the flow through the reservoir applies during summer conditions.

In response to the comment on many factors other than phosphorus that may influence algae growth and dissolved oxygen, phosphorus is the nutrient that limits algae growth in more than three-quarters of Wisconsin's inland lakes. Generally lakes have adequate light.

In response to the comment on phosphorus standards applying to whole lake and specific bays not be given different criteria, the criteria should apply to the entire lake unless a site-specific criterion is adopted for specific bays.

C. NR 102.06 (5) Criteria for the Great Lakes

- There is an absence of numeric criteria for the portion of Green Bay from the mouth of the Fox River to a line from Long Tail Point to Point au Sable.
- The criteria fail to establish either a narrative or numeric criteria protective of the recreational uses of that water.
- Clarify how narrative criteria and WQBELS will be implemented.
- The narrative criterion for lower Green Bay should be removed or should provide quantifiable and defendable measurements that relate upstream performance to the water quality in the bay.
- What are the Lake Michigan models?

Response:

In response to several comments on the narrative criterion for the inner portion of Green Bay, commonly referred to as the lower bay, the narrative criterion was developed as part of the TMDL being developed for the inner bay. The narrative criterion is in recognition that the inner bay is not a uniform body of water, with a gradient of phosphorus concentrations from the mouth of the Fox River to an imaginary line between Long Tail Point and Point au Sable. The TMDL is being developed for the conditions at the mouth of the Fox River, the most critical location is the inner bay from a pollutant management perspective. The completed TMDL will also serve to further guide phosphorus control from both upstream point sources and nonpoint sources, including numeric wasteload allocations for point sources and numeric load allocations for nonpoint sources.

The criterion for Lake Michigan, while based on the open water guidance values of the International Joint Commission, is the best available scientific information for the nearshore waters based on studies conducted by the department and universities. Nearshore waters in Lake Michigan which are warmer than open waters and where light penetrates to the bottom provide conditions more suitable for Cladophora growth than open waters, and are more sensitive to nutrient conditions than open waters. Lake Superior nearshore waters tend to be much colder and don't exhibit the same nearshore conditions as Lake Michigan. The original modeling of the Great Lakes was based on equations developed by Vollenweider. US EPA's Office of the Great Lakes has contracted with researchers to further develop submodels that are applicable to nearshore waters.

D. NR 102.06 (6) Exclusions for Numeric Criteria

- Effluent dominated streams should be added as an exclusion.
- The four exclusion categories in s. NR 102.06 (6) should be retained in the final rule.
- Add a fifth category in s. NR 102.06 (6) that specifically excludes effluent dominated streams.
- Include an exclusion for plants already getting to low levels.
- Supportive of excluding ephemeral streams and limited aquatic life waters, but additional clarification needed so that landowners know which waters are covered by ch. NR 102.
- The language excluding ephemeral streams is too vague, and will cause confusion in the regulated community. Suggests that grassed waterways, concentrated flow channels (NRCS 590), non-continuous streams (ch. NR 104), agricultural ditches and drains s. 88.01 (8) Stats., be excluded.

Response:

Several comments were made on excluding the application of the criteria to effluent dominated streams without offering any reason for the exclusion. Effluent dominated streams are not all of the same type or size. Many are small streams that may receive the majority of their flow from point source dischargers and are included in the exclusion of limited aquatic life streams. Criteria could not be developed at this time for limited aquatic life streams due to a lack of data. However, others are larger, such as the Fox River in southeast Wisconsin or Badfish Creek in south central Wisconsin, and fall within the range of the streams studied.

In response to the comment on clarifying the definition of ephemeral streams, the department has included grassed waterways and grassed swales as examples. The Department does not agree with exclusion of all agricultural ditches and drains; some of which are designated as supporting fish and aquatic life, including cold water trout streams.

E. NR 102.06 (7) Site Specific Criteria

- The criteria for toxics under 40 C. F. R. Part 132 Appendix F, Procedure 1, which is incorporated by reference in s. NR 105.02, does not apply to phosphorus.
- Retain the provision allowing development of site-specific criteria.
- Identify factors to consider in developing site-specific criteria such as concentration of suspended algae and floating plants; density of benthic algae; macrophyte density; minimum and daily change in dissolved oxygen levels; water clarity and natural background phosphorus concentrations.
- Modify the rule so that the results from an EPA-approved TMDL can completely replace the statewide criteria for concentrations and loads in the rule for waters appropriated modeled.
- Clarify that a TMDL can serve to identify a site-specific criterion without additional rulemaking and that a water body in compliance with in-stream TMDL standards is not in non-attainment for phosphorus.

- The Department should provide the opportunity to evaluate the appropriateness of the criteria on a site/water specific basis as an option to application of the categorical criteria.
- Site-specific criteria process is vague. A description of the process and information/analysis methods are needed.
- ***Add language relating to water quality standards of downstream waters shall be considered and phosphorus criteria may be modified to ensure the attainment and maintenance of the water quality standards of downstream waters.***

Response:

In response to the several comments on site-specific criteria, the department, in consultation with US EPA, has modified the language to delete the reference to the procedures cited in the draft rule language. Site-specific criteria may be developed in conjunction with or through a number of different processes, including the TMDL process. However, all site-specific criteria must be scientifically defensible, be protective of designated uses, be adopted by rule and be approved by US EPA. The Department already has the authority to revise water quality criteria to take into account downstream conditions through the site-specific criteria process and does not need to add the language suggested.

F. Notes following NR 102.06 (7)

- The second note to s. NR 102.06 (7) lists the factors the department should consider when determining whether a water body is impaired for phosphorus. The department should have a comprehensive rule on TMDLs, but in the absence of such a rule, this note should be placed into rule language as s. NR 102.06 (8). It may also be appropriate to include this language under s. NR 217.11 (3).
- The criteria provide a better baseline for the development of TMDLs.
- A rule providing guidance on the development and use of TMDLs is needed in advance of the promulgation of the proposed phosphorus rule.
- ***Include with the criteria, the frequency and duration that will be used to list waters as impaired.***

Response:

There were several suggestions to expand the scope of this set of administrative rule changes to incorporate protocols for listing impaired waters, development of total maximum daily load allocations, implementation of total maximum daily loads, pollutant trading and antidegradation. All of these topics apply to more pollutants than phosphorus, and the department intends to develop administrative rules or rule revisions for each in the next few years.

The second note was expanded to include a reference to the Department's impaired waters listing methodology guidance. The Department's intent is to revise the guidance

within the next few months to incorporate appropriate frequency and duration values for streams and rivers, lakes and reservoirs and nearshore waters of the Great Lakes.

II. NR 217

A. NR 217.10 Applicability

- ***Define "privately owned wastewater facilities and treatment works" in the rule or explain in a note or the rule record its intent that non-domestic dischargers are subject to ch. NR 217, Subchapter III.***
- ***Revise s. NR 217.10 to provide that (1) concentrated aquatic animal production facilities (40 CFR § 122.24), aquaculture projects (40 CFR § 122.25), and silvicultural point sources (40 CFR § 122.27); (2) production area overflows from Large concentrated animal feeding operations (CAFOs); and (3) production area discharges from Medium and Small CAFOs, are subject ch. NR 217, Subchapter III. In the alternative, Wisconsin could add a note to s. NR 217.10 to clarify that these point sources are subject to s. 283.15(15) Stats.***
- ***Clarify that ch. NR 217 provisions apply to all WPDES permits or identify the applicable regulations or procedures WDNR will rely on to establish phosphorus WQBELS in the WPDES permits not specifically identified in s. NR 217.10. Limiting the applicability of these criteria to a subset of WPDES permitted facilities violates the Clean Water Act.***
- Given the existing standards in ch. NR 151 and NR 216, this section should be amended as follows: (4) A facility or site that is regulated under ch. [NR] 216 but only to the extent it is subject to a TMDL allocation for phosphorus . ~~only where the department has determined that compliance with the standards in ch[s]. N[R] 151 and 216 are not sufficient to meet phosphorus criteria in s. NR 102.06~~.
- Support an additional exclusion for water treatment additives that contain a de minimus amount of phosphorus.
- Point sources are still the big polluters.
- Supportive of this subchapter applying only to confined animal feeding facilities with alternative treatment facilities.
- All references to potentially regulating storm water dischargers from municipalities should be deleted or should be made more clear that WDNR intends to significantly limit the applicability of NR 102 and NR 217 on storm water discharges.
- Non-contact cooling waters originating from municipal or private potable water supply treatment continue to be exempt from the proposed rules.
- The department should clearly state that the WQBELs only apply to those discharges exceeding the monthly mass loadings in s. NR 217.04(1)(a) 1 and 2.
- Storm water discharges should be exempt from the proposed rule unless the department has information relative to and for which the department has developed limits for these specific sites.
- Current rules provide an exemption from WQBELs for non-contact cooling water under s. NR 106.10(1).

- Modify the ch. NR 205 definition to exclude storm water.
- There should be an exemption for all POTW facilities constructed in the last two years.

Response:

The department has added a note to clarify that some point sources may be subject to other statutes (s. 283.13(5), Stats.) or other rules (ch. NR 243) that address phosphorus discharges. The department believes that the current rule language pertaining to noncontact cooling water is consistent with the exemption in s. NR 106.10 (1) and, in any case, this rule provision is under review due to US EPA concerns. The department believes that setting phosphorus numeric limits for storm water discharges are necessary if the storm water discharge contributes to an exceedance of the phosphorus criteria and the practices implemented to comply with chs. NR 151 and NR 216 do not adequately control the phosphorus contributions from storm water discharges. Modifications to ch. NR 205 are beyond the scope of this rulemaking authorization. The department will determine that phosphorus discharges consistent with s. NR 217.04 (1) (a) 1. and 2. do not meet the reasonable potential determination that results in setting a WQBEL limit under s. NR 217.12 (1) (a).

B. NR 217.11 Definitions

- ***Revise the definition of "new source" in s. NR 217.11 (2) to provide that it applies solely for the purpose of ch. NR 217 Wis. Adm. Code. Alternatively, Wisconsin could add the term "new discharger" to the rule, define that term in accordance with 40 CFR § 122.2, and revise the definition of "new source" in accordance with 40 CFR § 122.2.***
- Define "Phosphorus impaired water" (s. NR 217.11(3)) more broadly to include all waters that are in fact impaired by phosphorus as determined in accordance with the proposed criteria.
- Revise the definition of a "new source" in s. NR 217.11(2) to include a relocated outfall based on the definition used to address thermal discharges in NR 106.59: *"Re-located POTW outfall" means any point source outfall structure associated with a previously issued WPDES permit that is moved or constructed after the effective date of this rule ... [revisor insert date] to convey wastewater to the same receiving water where fish and other aquatic life are materially exposed to a modified phosphorus pollutant load."*
- The definition of phosphorus impaired water in s. NR 217.11 (4) should be limited to phosphorus parameters and not linked to the general terms of "nutrients" and "dissolved oxygen".
- Definitions should be consolidated in s. NR 217.03.

Response:

"New source" has been replaced with "new discharger" in the rule. The department believes it has appropriately defined "phosphorus impaired water" both in terms of the

proposed criteria and the fact that phosphorus is a nutrient and that excess phosphorus is a direct cause of low dissolved oxygen in water.

C. NR 217.12 and NR 217.15 General

- ***Revise ss. NR 217.12 (1) (a), NR 217.15 (1) (a), and NR 217.15 (1)(c) Wis. Adm. Code to match the language in 40 CFR § 122.44 (d) (1) (i) and (ii), to provide that a water quality-based effluent limitation (WQBEL) will be set when the Department determines that a discharge will cause, has the reasonable potential to cause, or contribute to an excursion above the phosphorus water quality criterion.***
- Amend the proposed language to clarify that it will establish phosphorus limits in WPDES permits where the discharge from a point source contains phosphorus at concentrations or loading which will cause, have the reasonable potential to cause, or contribute to an exceedance of the applicable criteria in NR 102.06 in the receiving water or downstream waters.
- ***Include a provision to ensure compliance with federal antidegradation requirements, 40 C.F.R. 131.12, stating: "(3) For a new or increased discharge of phosphorus, the amount of new phosphorus loading permitted shall be limited to that which has been shown by the applicant to be necessary to accommodate important social or economic development."***
- A recognition should be included in ch. NR 217 that the proposed limits more stringent than "effluent concentrations consistently achievable through proper operation and maintenance" as defined in s. NR 210.03 (5) as follows: "For a given pollutant parameter, the 95th percentile value of at least two years, excluding values attributable to upsets, bypasses, operational errors, or other unusual circumstances."
- There is a need for a simple procedure/guidance – *simpler than a TMDL* - to be developed by the department and approved by EPA allowing for the establishment of point source limitations under the sole authority of the department.
- Retain alternate technology based limit provisions in ch. NR 217; especially for enhanced biological phosphorus removal.

Response:

The rule has been revised to include the phrase "cause, has the reasonable potential to cause or contribute to, an exeedance of the water quality standards . . . . " Antidegredation is addressed in ch. NR 207 and appropriate reference to this code has been included. The department does not have the authority to establish an alternative to TMDL development in this rule and these provisions are to establish and implement water quality based effluent limitations, so the alternate technology based limit provision does not apply.

D. NR 217.12 (1) (a) and NR 217.13 (1) (b) Downstream Impacts

- The language in this section lists criteria but lacks any ascertainable standard and is too broad and uncertain. How far "down" is downstream?

- ***Develop guidance for staff as they review the factors in considering whether a discharge may affect a downstream water.***
- Language relating to determining limits based on downstream effects should be amended to reference a significant adverse effect.
- In the absence of a TMDL, the criteria should be applied at the point of discharge or the point an effluent dominated stream enters a non-effluent dominated stream.
- Engage in additional discussion with a diverse group of stakeholders to develop guidance regarding how to interpret/apply the distance factor.
- Consider additional factors in determining whether a discharge will affect downstream waters, specifically the concentration of phosphorus in the receiving water and the downstream water and the contribution of phosphorus from upstream and downstream sources that impact the downstream water.
- The criteria in s. NR 102.06 should only be applied at the point of discharge. Any discharges based on downstream effects should be based on a US EPA – approved TMDL after the WDNR has listed the body of water as impaired for phosphorus
- The Department should provide guidance in the rules to clarify that effluent limits for point source dischargers be established to protect receiving waters and eliminate references to "or downstream waters.

Response:

These comments refer to the relationship of the phosphorus criteria, WQBELs and impacts to downstream waters. US EPA has not provided instruction or methods on how these impacts are to be factored and calculated. Until US EPA issues guidance on this issue, the department will recognize that downstream impact may be considered, but it is limited in determining a process of how to consider these impacts in permits until further federal direction is available.

E. NR 217.13 Calculation of WQBELs

- ***Create a note, state in the record, or revise the rule to explicitly provide that the Department may use representative data that are older than five years.***
- ss. NR 217.13 (3) and (7) Wis. Adm. Code identify circumstances when limits would be set equal to criteria. These rules do not conform to 40 CFR § 122.45 (d) (made applicable to States by 40 CFR § 123.25 (a) (16)).
- For continuous dischargers, this regulation provides that, unless impracticable, limits shall be set as average weekly and average monthly values for POTWs and maximum daily and average monthly values for other dischargers. So as to not preclude the establishment of limits in accordance with federal regulations, revise the noted rules to provide that the wasteload allocation will be set equal to criteria. Please see chapter five of the *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2-90-001, March 1991) for considerations that may be relevant when establishing WQBELs.
- ***s. NR 217.13(4) Wis. Adm. Code provides that the Department shall set effluent limits consistent with model results for discharges to the Great Lakes. Add language to the first sentence to establish that limits based on model results will***

conform to any mixing zone granted under ch. NR 102 and any applicable approved wasteload allocation.

- Add language to the second sentence in s. NR 217.13 (4) to establish that a permit with an interim limit will include a final WQBEL where a discharge will cause, has a reasonable potential to cause, or contribute to an excursion beyond water quality criteria. (*See* 33 U.S.C. § 1311 (b) (1) (C) and 40 CFR § 122.44 (d).)
- ***s. NR 217.13 (4) Wis. Adm. Code provides that the allowable load shall be divided among the various discharges, when the Department determines that more than one discharge may affect the quality of the same receiving waters. Supplement this language to establish an affirmative requirement that the Department will determine whether more than one discharge may affect a body of water.***
- ***Please revise s. NR 217.13 (8) (a) Wis. Adm. Code as follows: "The new source of phosphorus is allocated as part of the wasteload allocation or reserve capacity in an EPA approved TMDL."***
- ***Amend the proposed language to state that the "...the Department <u>will</u> calculate the limitation based on more stringent downstream water quality criteria if the discharge will affect the downstream water."***
- Include language requiring WQBELs where the discharge will *cause or contribute* to a violation of water quality standards in the receiving water and downstream waters.
- The implementation of total phosphorus (TP) criteria may not prevent detrimental impacts to important biological measures of aquatic life in rivers with point source dischargers that are primarily composed of dissolved phosphorus (DP) unless protective assumptions are made in the calculation of permit limits that recognizes the ongoing and potent effect of continuous dissolved phosphorus dischargers to the nutrient status and aquatic life health of a water;
- Wisconsin's algal thresholds also indicate that significant increases in algae are likely at levels less than the criteria (particularly for rivers where increased algae is seen at concentrations greater than 0.064 mg/L TP).
- Fish, macroinvertebrate, and algal thresholds showed that effects to these measures of biotic integrity began to occur at levels less than the proposed criteria for streams.
- Revise to explicitly state that the wasteload allocation from a TMDL can be used as an alternative means of calculating an effluent limitation for existing sources, with specific reference being made to s. NR 217.16.
- Establish WQBELs that are no more stringent than 0.5 mg/l, to allow industries to avail themselves of more affordable treatment technologies.
- Presumes all WWTPs need to have limits of 0.1 mg/l; except lake Michigan dischargers need to achieve 0.007 mg/l
- Any limit less than the current technology-based ch. NR 217 limit should only be developed following completion of a TMDL.
- Current ch. NR 217 technology-based limitations for lagoons and small WWTPs including the 150 pound per month exemption should be maintained unless WDNR can document that downstream non-attainment of designated uses is occurring and that the discharger is a significant source of phosphorus.

- The current de minimus level of effluent phosphorus limits of 150 pounds per month for facilities regulated by ch. NR 210 and 60 pounds per month for other facilities should be maintained.
- Research by WERF indicates the current technology limit is greater than 0.1 mg/l for a monthly average.
- Determination of whether an existing lagoon can meet the effluent limitations in s. NR 217.13 should be based on the performance of that lagoon system only.
- Given that raw (influent) wastewater phosphorus concentrations can be expected to be in the range of 40 mg/l, treatment to 100 ug/l (0.1 mg/l) requires 99.75% removal of phosphorus from the wastewater. The most stringent limitation should be no lower than 100 ug/l (0.1 mg/l).
- Against use of data in WQBEL calculation from similar locations.

Response:

The rule has been revised to allow for the use of representative data older than five years.

For very low limits (those at 0.3 mg/l or below) water quality standards and use are protected based on longer averaging times because the concentrations in the discharge are so low. The department has recognized this and provided for annual averaging at these very low limits, with a maximum monthly average to ensure protection of water quality.

Some comments involve the use yet-to-be-developed models for calculating WQBELS for Great Lakes discharges. US EPA is developing these models and until they are available, there is no method to calculate a WQBEL. Since there is no way to calculate a WQBEL, one cannot be included in the permit. The department will include an interim limit of 0.6 mg/l in permits to direct discharges to the Great Lakes until methods exist for calculating a WQBEL.

Downstream impacts and reasonable potential issues are addressed in responses to comments under sections D and C above.

The rule contains a great deal of flexibility in regards to limits set consistent with TMDLs. Limits based on TMDLs will be included in permits, compliance schedules may be granted due, in part, to the development of TMDLS, and the adaptive management option allows permittees a great deal of flexibility to engage in partnerships to address nonpoint phosphorus contributions. Even if a WQBEL is effective in a permit, it can be replaced by a less stringent TMDL-based limit if antidegredation issues are addressed.

The balance of the comments in this section were rhetorical, informational or beyond the scope of this rule-making effort.

F. NR 217.13 (2) Flow Statistics

- Use a 7Q10 flow statistic to ensure that the criteria is met even at low flows equal to the 7 day lowest flow found in a particular water at a 10 year return frequency to help prevent nuisance algal accumulations.
- Suggested flows would allow concentrations greater than the criteria for a duration of time (7 days or 30 days) and at a recurrence (every two or three

years), which could lead to water quality problems for too long a duration and too often to protect instream uses.

- Instream flow statistics that deviate from the recommended 7Q10 flow must be justified by a review of available scientific information and show that phosphorus criteria and narrative criteria prohibiting nuisance conditions will be met in order to adequately protect all designated uses in the receiving water.
- Use of the 7Q2, the 30Q3, or other flows deemed by the department to be more representative of "average" flow conditions when calculating a water quality based effluent limitation makes sense given that phosphorus is not a toxic substance.
- Flows for determining the need for limits should be based on the growing season average at a minimum or, preferably, an annual average.
- Because of the lack of phosphorus concentration information and flow data, it is not possible to estimate site-specific impacts. The South Branch of the Rock River has much lower concentrations than previously reported.
- Use flow estimates based on drainage area and correlated with gauging stations on similar, nearby streams. Recommend deleting language in s. NR 217.13 (2).

Response:

The department believes that the 7Q2 flow is the appropriate flow measure and is protective of water quality and use.

G. NR 217.13 (2) (d) Upstream Concentrations

- Require the collection of at least 6 samples, one per month each month between May and October. Nearly all monitoring programs designed to adequately sample for water quality call for – at a minimum – monthly samples.
- All determinations of background phosphorus concentrations should be based on actual data in the receiving water and not data from a different location due to significant variability in background concentrations due to a number of factors.
- Using upstream concentrations for reissuing a permit should be based on a minimum of 3 seasons of samples (i. e. minimum of 12 samples total).
- NR 106 allows higher limit if the background water quality is above the standard and the discharger's "relative contribution" is negligible.

Response:

This section is to establish the procedures for determining upstream concentrations for the WQBEL calculation equation. The department is confident of the methods and data frequency provisions in this section. If an entity is concerned about the use of data from a "similar location", they are welcome to collect and provide data from the specific waterbody.

H. NR 217.13 (3) Discharges to Inland Lakes and Reservoirs

- Requiring dischargers to reservoirs to comply with effluent limits equivalent to the to the criteria fails to take into account dilution and attainment status of the

specific waters as well as to target the sources of P proportionally to their contribution to the non-attainment status.

- There is a lack of a mixing zone (dilution factor) for lakes.
- Limits more stringent than those current technology-based ch. NR 217 limits for direct inland lake or reservoir discharges should be based on an USEPA approved TMDL or equivalent.

Response:

If the discharge is to a lake that meets the applicable criterion, the reasonable potential analysis will likely result in a "no-limit necessary" determination by the department. In addition, a limit can be based on the wasteload allocation in a TMDL, consistent with other waters.

I. NR 217.13 (4) Discharge Directly to Great Lakes

- Impose effluent limits based on the best technology used anywhere in the country.
- ***The proposed rule authorizes WDNR to issue WPDES permit for discharges to Lake Superior and Lake Michigan that may cause or contribute to an exceedance of the phosphorus water quality standard without necessary WQBELs, and without any justification for failing to include necessary limits.***
- Define "best readily available phosphorus removal technology commonly used in Wisconsin."
- Evaluate Lake Michigan needs before imposing any limit, including interim limits.
- Near shore criteria should be developed for Lake Michigan and Lake Superior rather than using the open waters criteria currently in the proposed rule. Significant dilution of point source discharges occurs when they reach open waters. Higher dilution factors for these discharges should be considered at a minimum.

Response:

No model exists to calculate WQBELs for water as large and dynamic as the Great Lakes. US EPA is developing such a model. Until the model or other methods for calculating a WQBEL in the Great Lakes are available, the department is proposing an interim limit of 0.6 mg/l.

J. NR 217.13 (7) Minimum Effluent Limits

- Minimum effluent limits are inappropriate because they do not consider lower effluent limits derived from TMDLs or required under antidegradation analysis.
- The rule fails to ensure that WPDES permits protect all the receiving waters' designated uses and existing uses, as well as all narrative criteria, and protect all downstream uses and criteria.
- ***The proposed rule should establish the criterion for the specific water as the most stringent limitation which can be applied to a point source discharge,***

regardless of the procedures used to compute the limitation and that this rule specifically apply to limitations derived from TMDLs.

Response:

These provisions are consistent with federal and state statues, regulations and codes, except where water quality based effluent limitations derived from total maximum daily load allocations may be more stringent, according to state statutes.

K. NR 217.13 (8) New Sources

- This provision should be limited to 303 (d) listed waters.
- We are concerned that s. NR 217.13 (8) (b) authorizes a new source to discharge phosphorus to a phosphorus impaired water if it is able to demonstrate that the new discharge of phosphorus will "improve water quality in the phosphorus impaired segment." How will the department make this determination?
- This provision is inconsistent with federal law as stated in *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007 (9th Cir. 2007) which rejected, under 40 CFR 122.4 (ii), allowing new discharges pursuant to a trading scheme that was not part of a plan to secure compliance of the water body with water quality standards. Any proper trading scheme requires that a comprehensive cap be developed and that the provisions of the trade be fully enforceable by WDNR and the public.
- New sources should be regulated under s. NR 217.15 (e) for the proposed receiving stream.

Response:

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. In regards to trading, any trades must be approved by the department, which will ensure that all applicable regulations applicable to the trade are met.

L. NR 217.14 Expression of Limitations

- ***Unless impracticable, limits shall be set as average weekly and average monthly values for POTWs and maximum daily and average monthly values for other dischargers.***
- All pollutants must have mass limits except when applicable standards are expressed in terms of other units of measurement.
- Phosphorus WQBELs must be stated as both a concentration and load whenever possible.
- For permits allowing new or increased pollution loadings, calculation of a load limit is necessary to determine the amount of assimilative capacity being used by the discharge for purposes of determining compliance with the antidegradation requirements.

- WDNR should require average weekly and monthly WQBELs, The expression of permit limits as weekly and monthly average concentrations diminishes the potential for recurring episodes of algal accumulation that can lead to water quality impairments.
- ***To use averaging periods longer than one month, the Department must demonstrate that compliance with a one month averaging period is impracticable.***

Response:

The department believes it has appropriately identified when mass limits are necessary. S. NR 217.14 (1) (b) allows for mass limits in appropriate situations not enumerated in the code.

The Department and EPA intend to come to an agreement on how and when it is impracticable to establish 30-day or shorter averaging periods for publically and privately owned treatment works and how this determination should be included in administrative records.

M. NR 217.14 (1) (d) TMDLs/Trading

- Trading should only be allowed under s. NR 217.14 (1) (d) if: (1) an overall cap exists on the allowable loading for the affected water bodies, (2) the traded for loading reductions which are being used as an offset, whether from a point source or a nonpoint source, are fully enforceable by WDNR and the public, and (3) local algal blooms or other phosphorus caused impairments will not be created in any portion of the watershed.
- The note should say: *". . . The Department may approve the use of phosphorus trading as a means for a point source to achieve compliance with the water quality based effluent limitation, including a TMDL based limitation, in accordance with a trading framework to be developed by the Department."*
- Given the language in s. NR 217.16, it is not clear whether s.NR 217.14 (1) (d), is necessary.
- The rules circumvent the current nonpoint source pollution prevention program. In chs. NR 151 and NR 217, DNR has the ability to have an open ended regulatory process on farmers within a TMDL established region. Opposed to establishing TMDLs with a potential pollutant trading that has not been proposed in an administrative rule.
- Margin of safety is redundant is the trading note third sentence. Either strike "margin of safety" or the entire note.
- In cases where a TMDL has been developed, this should be the only mass limit for phosphorus placed in a permit. This language should also be expanded to allow concentration limits to be derived from a TMDL wasteload allocation. The note should say: "To the extent that trading is authorized under state statutes~~, in accordance with s 283.84, Wis. Stats.~~, the Department may approve the use of phosphorus trading as a means for a point source to achieve compliance with the water quality based effluent limitation, including a TMDL based limitation. ~~The~~

~~trade shall be incorporated into the tenns ofthe WPDE8 pennit for the point SO-UTee and must be approved by the Department prior to implementation. Any trade should consider a trading ratio, a margin of safety and must result in a vlater quality improvement. A trade may occur between two point sources or a point source and a nonpoint source or a combination thereof."~~

Response:

The department intends to address pollutant trading through statutory changes and development of an administrative code regarding pollutant trading in the near future. Adjustment to the note regarding trading have been made in response to comments.

N. NR 271.14 (2) Concentration Based Limitations

- 30-day rolling average – The use of a 30-day rolling average will cause significant compliance issues for point source dischargers, especially at the level of 0.1 mg/l. A six month or annual rolling average or a seasonal average is more appropriate for phosphorus given that it is not a toxic pollutant. If there is a need for a 30-day limit, then the limit should be the current standard in ch. NR 217, i.e. 1.0 mg/l.
- Establish policy and procedures through which the department will determine compliance and calculate penalties in the event of noncompliance with ss. NR 217.14 (2) and (3) concentration-based limits expressed as 30-day rolling averages.
- A seasonal average is more appropriate, as phosphorus loadings into POTWs tend to increase in the warmer months and may be somewhat variable. A seasonal average for the period from May 1st to October 31st is requested.
- Use of May through October data for WQBEL calculation is inappropriate and will lead to overly- restrictive limitations for point source discharges. Suggest winter month data be used as the most accurate indication of the impact of point sources and be used to establish a baseline condition for point sources. If the in stream phosphorus criteria are met during the winter months but not attained during May-October, then current point source limitations are retained.
- Seasonal-based limits should be provided as an option to facility equipment maintenance and repairs.
- Growing season means for lakes. Averaging period language is not included and should be June through September mean.
- Use of a longer averaging period than one month for phosphorus is appropriate given that phosphorus is neither an acute or chronic toxicant. It will also allow for less conservative assumptions to be used when designing upgrades to wastewater treatment plants, resulting in lower construction costs.
- Use an annual averaging period, which is consistent with the averaging period being used for both phosphorus and nitrogen in the Chesapeake Bay. An annual averaging period is also consistent with EPA's proposed criteria for the State of Florida, where the in-stream protection value criteria for rivers and streams is based on an annual geometric mean.

- Use a six month growing season (May-Oct) averaging period. This is consistent with the time frame that data used in the criteria development process was collected and is consistent with the averaging period specified in the adaptive management approach under s. NR 217.17 (4).
- Include a maximum monthly limit consistent with the technology based limits currently in ch. NR 217 (i.e. 1.0 mg/l or a facility specific alternative limit). Establishment of a monthly limit consistent with this recommendation would also be appropriate for the adaptive management option in s. NR 217.17 (4).
- There should be consistency between the 30-day rolling average in the expression of permit limitations and the effluent flow used to calculate an effluent limit.
- A 30-day rolling average is too complicated
- The use of a 30 day rolling average will cause significant compliance issues for point dischargers, especially at the level of 0.1 mg/L, where short term and seasonal variability can be expected.
- Currently, most permits that contain a phosphorus limit require the discharger to meet an effluent concentration of 1.0 mg/L as a monthly average. At the 1.0 mg/L level, this procedure has proven to be reasonable.
- Ongoing research by the Water Environment Research Foundation (WERF) has shown that at a limit of 0.1 mg/L (ten times less), the inherent variability related to the operation of a well run wastewater treatment plant increases, making occasional violations of traditional averaging periods more likely.
- A longer averaging period (i.e. 12 months) for determining compliance for phosphorus limits that are less than 1.0 mg/L will minimize the number of permit violations based on the increased level of natural variability of effluent quality from a well run wastewater treatment plant when discharging at phosphorus levels significantly below 1.0 mg/L. If there is a regulatory need for a 30 day limit, then that limit should be the current standard in ch. NR 217, i.e. 1.0 mg/L.
- A March 3, 2004 memo from Jim Hanlon, Office of Wastewater Management, EPA, stated that annual permit limits for nutrients were appropriate for protection of the Chesapeake Bay.
- Concentration limits should be expressed as annual averages in permits. Otherwise, WWTP facilities will need to be designed to fully treat short-duration peak flows; which add significant cost with not corresponding measurable water quality improvement.

Response:

As reflected above, a wide range of conflicting comments were received regarding how to express concentration-based WQBELs. Monthly average limits are required buy federal regulations, however, the department has developed an approach for very low limits with annual and monthly averages that is protective of water quality, but recognizes what is technologically feasible.

O. NR 217.14 (3) Mass Based Limitations

- Do not arbitrarily hamper attainment strategies by requiring both concentration and mass based effluent limits. This proposal essentially eliminates the ability to recycle water to reduce effluent flows.
- Intake credits should be allowed if mass limits are imposed. The net contribution of a discharger to the Lower Fox River should be the basis when setting mass limits.
- Unclear how mass limits would be applied when using the interim limits.
- Mass limits – only if an increase in phosphorus is likely to result in significant adverse impacts on water quality.
- Mass limits in addition to concentration based limits are not required (except possibly in the case of a TMDL) since the proposed effluent concentrations would be protective of water quality. Imposing mass limits in addition to concentration based limits results in effluent limits that would be lower than required to meet water quality criteria.
- Mass limits for lakes; does it apply only to inland lakes or also to Great Lakes?

Response:

The department believes that it has appropriately identified how and when mass limits for phosphorus will be included in permits.

P. NR 217.15 (1) (c) Reasonable Potential

- ***Revise the rule to contemplate such cases where phosphorus discharge data are not available.***
- ***Amend the proposed language to clarify that the DNR will establish phosphorus limits in WPDES permit where the discharge from a point source contains phosphorus at concentrations or loading which will cause, have the reasonable potential to cause, or contribute to an exceedance of the applicable criteria in NR 102.06 in the receiving water or downstream waters.***

Response:

These comments have all been included in the revised rule.

Q. NR 217.16 Relationship of WQBELS and TMDLs

- ***Add language to establish that the level of water quality to be achieved by the limitations in a permit is derived from, and complies with, the water quality standards in ch. NR 102 Wis. Adm. Code to achieve conformance with 40 CFR § 122.44 (d) (1) (vii) (A).***
- ***Add language to establish an affirmative requirement that limits will be set consistent with the assumptions and requirements of any approved TMDL to achieve conformance with 40 CFR § 122.44 (d) (1) (vii) (B).***
- ***Explain in a note or the record for the rule that a permit modified or reissued in the manner contemplated here is subject to the State's antibacksliding provision. If antibacksliding is not so recognized, then Wisconsin must revise s. NR 217.16 (1) to expressly provide that a permit which is modified or reissued***

to contain a less stringent limit is subject to 33 U.S.C. § 1342 (o) and 40 CFR § 122.44 (l).

- Clarify WDNR will determine whether to allow less stringent effluent limits based on a TMDL. It appears that the department may allow the less stringent TMDL-based limits to stay in effect for up to 3 permit terms even where the TMDL or TMDL implementation plan provides no reasonable assurances for relying on or anticipating real nonpoint loading reductions. Further, the rule might allow weakened permit limits even where it becomes apparent during the TMDL implementation period that the TMDL is not in fact resulting in the needed reductions in nonpoint loading.
- Phosphorus limits less stringent than the WQBELs calculated under s. NR 217.13 should only be allowed under a TMDL if: (1) the TMDL has been federally approved, and (2) it has been shown on the record that there is reasonable assurance that the point or nonpoint load reductions that are the basis for allowing the less stringent limits will *in fact* occur. Further, WDNR must revise any less stringent limits during the TMDL implementation if it becomes apparent that the nonpoint source load reductions are not in fact occurring as planned.
- A TMDL should not be in addition to a WQBEL under ch. NR 217. Where a TMDL is adopted, it should be the WQBEL. Similarly, the timetable for implementation should not be artificially limited to two permit terms. The timetable should coincide with the TMDL process. If a TMDL contains an implementation schedule, the length of time that a TMDL-based limit should remain in the permit should be consistent with the implementation schedule.
- Delete the words "in addition to" from the second sentence of s. NR 217.16 (1). Including both a TMDL derived WQBEL and a WQBEL calculated under s. NR 217.13 in a permit does not make sense.
- Revise this section to state that in cases where a TMDL implementation schedule has been developed, the length of time that a TMDL derived WQBEL can remain in a permit will be consistent with the time frame specified in the implementation schedule. The rule should not unnecessarily constrain the time period that a TMDL based limit is in place.
- The compliance schedule in this section should be consistent with the schedules of compliance laid out under s. NR 217.17. That section recognizes that while compliance should be accomplished as soon as possible, there are situations where compliance schedules beyond five (5) years are reasonable.
- Clarify that a WPDES permit would not include two separate phosphorus limits. Where a TMDL is adopted for a given watershed, permit limits for dischargers subject to the TMDL should be based on the TMDL recommendation. Similarly, the timetable for implementation should not be artificially limited to two permit terms. The timetable should coincide with the TMDL process. If a TMDL contains an implementation schedule, that schedule should govern and be incorporated into the permit.
  Permits should not include a TMDL-based limit and a WQBEL. There should be a single limit for the same substance. Recommend that "in addition to" be deleted.
- TMDLs should be considered as custom tailored and should be superior to the application of a generic statewide standard. Limitations resulting from a TMDL

should be allowed to remain in place until such time as the impairment has been eliminated and the TMDL expires.

- Don't prejudge when and only when a TMDL may be used in this rule or to promise in advance to abandon TMDL responsibilities.
- Lacks specific metrics to determine whether a nonpoint source is a significant phosphorus sources responsible for its impairment. Include specific metrics, such as a percent reduction in the receiving stream, to provide the regulated community more certainty on their compliance obligations.
- The rule appears to confine and confuse the use of site-specific criteria for nonpoint source dominated watersheds, which is not representative of EPA's approach for watersheds. Modify to eliminate this preference for nonpoint source watersheds, and allow this science-based approach to establish appropriate criteria for specific watersheds as the need arises.
- Concerned with "Wisconsin only" WQBELs. No other state has proposed permit procedures. Should postpone any revisions until EPA promulgates uniform national regulations that strike an equitable balance between point and nonpoint source discharges of phosphorus.

Response:

The code has been revised, in rule and notes, to be consistent with federal regulations as identified in the comments for this section. The department believes that inclusion of a TMDL-based limit, as provided in this section, and in conjunction with other rules (such as ch. NR 151), provides the reasonable assurance that nonpoint reductions will occur. In additions adjustments to the TMDL-based limit are allowed if necessary. Several comments were received regarding inclusion of both a WQBEL and TMDL limit in a permit. Federal regulations require that the WQBEL limit be included, even if it is superseded by a TMDL-based limit (if nonpoint reductions are made in the watershed). This section is consistent with this construction.

R. NR 217.17 (1) and (2) Schedules of Compliance

- ***Explain in a note that the "necessity" and "as soon as possible" standards in s. NR 217.17 (1) (a) apply in each place in ch. NR 217, Subchapter III, wherein a compliance schedule is contemplated or may be inferred.***
- ***A compliance schedule based solely on time to develop a TMDL is not appropriate for conformance with 40 CFR § 122.47. Remove paragraph (1) (c) (3) from s. NR 217.17.***
- ***Compliance schedules must be designed to achieve compliance with water quality based effluent limits as soon as possible.***
- WDNR must not utilize compliance schedules to delay compliance with WQBELs while the regulated point source awaits nonpoint sources to voluntarily reduce pollution.
- ***Compliance schedules longer than one year must contain yearly enforceable interim requirements and dates for achievement to achieve compliance with 40 C.F.R. § 122.47 (a) (3).***

- WDNR should consider any good faith efforts to achieve compliance prior to permit reissuance. Failure to do so would essentially reward permittees that fail to take any actions to optimize plant performance or develop a plan for compliance prior to permit reissuance by providing those permittees with a longer time frame in which to achieve compliance.
- A seven to nine-year compliance schedule is likely to be inadequate in a significant number of cases. Some facilities will be looking at trading and other options for compliance before committing to major facilities planning. Major facilities planning, financing and construction will require time after that point. At a minimum, this section must acknowledge that seven to nine-year periods may be extended upon a showing of good cause.

Response:

A note has been included to explain "necessity" and "as soon as possible". Development of a TMDL is only one of many factors to be considered in granting a compliance schedule. See s. NR 217 (1) (a) 1. regarding achieving water quality standards as soon as possible. The rule has been revised to provide that compliance schedules longer than one year contain yearly enforceable interim requirements. See s. NR 217 (1) (b) 3. regarding good faith efforts on the part of a permittee. If a seven to nine year compliance schedule is unlikely to achieve compliance, the adaptive management option may be more appropriate.

S. NR 217.17 (3) Interim Limitations/Pollutant Trading

- ***The monitoring contemplated in these rules does not fit within the meaning of "compliance schedule" in 33 U.S.C. § 1362 (17) and 40 CFR § 122.2 because is not an action or operation which will lead to compliance with the effluent limitation in a permit as initially issued. Strike these provisions from s. NR 217.17 (3).***
- ***Supplement the list in s. NR 217.17 (3) to include preparation of preliminary and final designs for new or modified treatment technology, the initiation of construction, and the completion of construction.***
- ***Incorporate the provisions of 40 CFR § 122.47 (a)(3) and (4) into s. NR 217.17 (3) Wis. Adm. Code and add a note to clarify that the provisions of 40 CFR § 122.47 (a) (3) and (4) apply in each place in ch. NR 217, Subchapter III, where a compliance schedule is contemplated or may be inferred.***
- ***A local pollutant trading program that applies to the receiving water does not fall within the meaning of "schedule of compliance" in 33 U.S.C. § 1362 (17) and 40 CFR § 122.2 because it is not an action or operation leading to compliance with an effluent limitation. Strike this provision or revise it to provide that a compliance schedule may include implementation of one or more trades that apply to the permittee, provided that such trade is established and incorporated into the permit so that it is enforceable.***
- Interim numerical limitations, as provided in s. NR 217.17 (3), are not WQBELs. Wisconsin must revise this rule to provide that the WQBEL will be established in

the first permit term to achieve compliance with 33 U.S.C. § 1311 (b) (1) (C) and 40 CFR § 122.44 (d).

- Clarify the availability and applicability of the interim limits, including the phosphorus limit that would apply outside of the initial 0.6 mg/l seasonal average.
- Interim limits for facilities should be based on the performance of that facility only.
- WDNR should consider interim limits for Great Lakes dischargers equal to those proposed for the adaptive management approach (0.6 mg/l for the first permit term) for simplicity.
- Recommend greater flexibility for interim limits than the 0.6 mg/l.

Response:

The rule has been revised to comply with the first five bullets of the comments in this group. The other comments are addressed in either the adaptive management section (s. NR 217.18) or the Great Lakes section (s. NR 217.13(4)).

T. NR 217.17 (4) Adaptive Management Option

- ***Whether a pollution control technology is expensive or not is not, by itself, a sufficient basis to justify a compliance schedule. However, a compliance schedule may be provided to adjust sewer use rates or securing financing for design and construction of a technology. Revise s. NR 217.1 (4) (a) 4. c. and (c) accordingly.***
- ***Include companion provisions which will produce the needed nonpoint source reductions. Establish a total maximum daily load for the waterbody and make the determination and finding, and promulgate the targeted performance standards, as required under s. NR 151.004 Wis. Adm. Code.***
- ***Exercise legal authority provided in ss. NR 243.26 (2), 216.21 (2), and 216.51 (3) to designate animal feeding operations, commercial sources, and land disturbing activities as point sources subject to the permit program.***
- ***Compliance schedules under 40 CFR 122.47 and 40 CFR 130.2 (i) allow less stringent controls on point sources under TMDLs if there is reasonable assurance that water quality standards can be met through "Best Management Practices (BMPs) or other nonpoint source pollution controls."***
- It is illegal to simply exempt or extend categorically compliance periods for classes of point sources. Allow and encourage point sources to seek out and implement enforceable long-term phosphorus reductions in the most cost-effective manner.
- A point/non-point trading regime should allow communities to cost-effectively reduce phosphorus loadings by capturing low-hanging nonpoint source reductions. Set a phosphorus criteria "cap" for point sources and a reliable method for quantifying phosphorus reductions from non-point sources.
- Identify the size of the watershed DNR will evaluate in determining whether nonpoint sources contribute more than 50% phosphorus criteria. Will WDNR account for just the receiving stream, or also consider the larger watershed impairments?

- If there is a basin wide TMDL, that scale should determine the percentage. If there is not a TMDL, then the Department should specify a basin by the 8-digit hydrologic unit code level, as is currently proposed in s. NR 151.13 (2) (b)3 .b., which is roughly equivalent to the Department's geographic management units
- Insert the following or similar language to define scale: "The department will determine the appropriate scale for making the determination o f the percent contribution from nonpoint sources on a case-by-case basis. In cases where a basin wide TMDL has been established, the scale shall be consistent with the scale used in the TMDL".
- Restricting this option to where nonpoint is 50% of the load is unclear and too restrictive. Even if nonpoint is less than 50%, it could still be a significant portion of the load, and if so an adaptive management plan still makes sense. If a percent is required it should be set no higher than 25%.
- Retain the adaptive management option so that instream water quality improvements resulting from other phosphorus control measures may be realized before POTW's are forced to invest in extremely costly filtration. Available science indicates that these nonpoint and urban storm water runoff sources should be controlled first.
- Delete the section from the proposed rule that requires the POTW to prove, in advance, that nonpoint source reductions will achieve water quality requirements; an unreasonable burden to place on the permittee who seeks to apply for the Option.
- Delete the language from the proposed rule that essentially creates a "point sources first" burden to achieve instream water quality. If the point source control will achieve water quality, regardless of cost, then the nonpoint sources need not do anything.
- Include language that the department shall grant a request by the POTW in any case where the POTW commits to perform the instream water quality sampling required and to achieve the interim limits set out in this section.
  Unclear what limits would apply remainder of year.
- Specify which water bodies qualify.
- Allow use where additional water quality monitoring would be beneficial to observe the effects of continued improvement efforts on water quality.
- Supportive of adaptive management approach, but the Department should not proceed without written assurances from EPA that this approach will be approved.
- Recommend that existing technology based limits in s. NR 217.04 and alternative limits remain in effect.

Response:

Based on these comments, the department removed references to expensive technology, revised eligibility to provide more availability for the adaptive management option, and revised the requirement that the point sources demonstrate that nonpoint reductions alone will achieve water quality criteria. Several comments were received asking the department to define the scope over which the 50% nonpoint threshold would be measured. As this will vary widely across the state, the department did not believe it

advisable to artificially limit the availability of this option by limiting the scope. Several other comments were either rhetorical or did not apply to this rule, however, in the second bullet, ch. NR 151 is referenced and that rule is, in fact, consistent with that comment.

U. NR 217.17 (4) (c) Schedule of Compliance

- ***Revise the rule so that the list of mandatory interim requirements in s. NR 217.17 (4) (c) is not exhaustive. To illustrate this point, treatment equipment which is not "readily" affordable may nevertheless need to be installed to achieve compliance.***
- ***The rule does not define the meaning of the words, "readily affordable."***
- ***Require that a compliance schedule shall include the installation of the treatment equipment as needed to achieve compliance with the WQBEL as soon as possible to achieve compliance with 40 CFR § 122.47 (a) (1).***
- Define "expensive technology" and the types or costs of "expensive controls" that must be implemented by an eligible permittee. Are only point sources that must install advance filtration technology eligible?
- Provide justification for including a 0.6 mg/L interim limit during the first permit term, and a 0.5 mg/L interim limit during the second permit term, and how imposition of these interim limits will result in or create incentives for nonpoint source phosphorus reductions.
- ***The rule does not provide for ultimate compliance with the WQBELs or criteria, as it merely authorizes, rather than mandates, DNR to require compliance with WQBELs during the 3rd permit term.***
- Require compliance within 15 years of adoption of the phosphorus criteria, rather than 3 permit terms, to ensure that permit backlogs and delay caused by permit challenges and other administrative delays does not allow this specialty compliance schedule to delay compliance indefinitely.
- The compliance schedule should be based upon the TMDL set for the water body.
- Use the monthly limit values in s. NR 217.04 (e.g. 1 mg/l or an alternate limit) for s. NR 217. 17 (4) (c) (4) (a).
- The compliance schedules for third permit terms calculated under NR 217.13 should be consistent with s. NR 217.17 (1) and (2), which allow for compliance periods greater than 5 years.
- Consider two standard permit terms for time period to collect data, provide monitoring and select appropriate implementation of any constructed capital requirements.
- There should be assurance that each reissuance will not require an additional capital investment. If the discharger is required to complete capital improvements at each permit reissuance, this will lead to a piecemeal treatment process for the discharger.
- ***Require that a TMDL be developed if the water quality criteria have not been met by the end of the second permit term and develop the compliance schedule consistent with the TMDL implementation schedule.***
- NR 217 should incorporate flexible compliance options because of the lack of precise breakpoints for phosphorus water quality criteria.

- Maintain the adaptive management provisions, but do not prejudge the compliance timeline established in the third permit term particularly where there is a longer response time for the water body.
- Clarify that TMDL implementation or the adaptive management implementation may exceed the 7 to 9 year compliance schedule

Response:

References to "readily affordable" and "expensive technology" were removed. The adaptive management option section was thoroughly rewritten and was moved out of the compliance schedule section and placed in its own section. A plan is now required on how compliance will be achieved and WQBELS are required in all permit terms, even though interim limits are identified in the first two terms. This option does not preclude the development of a TMDL. Implementation of a TMDL will include limits consistent with the load allocation and participation in the adaptive management option will not preclude inclusion of those limits and appropriate compliance schedules either by opting out of the option or during the third permit term.

V. NR 217.18 Variances – stabilization ponds and lagoon systems

- The broad variance proposed for existing stabilization ponds and lagoon systems fails to comply with the Clean Water Act.
- WDNR has failed to provide adequate justification for a broad categorical variance for stabilization ponds and lagoons that is any different than the general variance procedures in state and federal law. Without critical site specific information regarding treatment availability, user fees, and water quality impacts, WDNR simply cannot justify a categorical variance for the approximately 150 lagoon systems and stabilization ponds in the state
- Make lagoon variance procedure available to industries.
- Add recirculating sand filter systems to the lagoon and stabilization pond variance.
- Expand applicability of continued variances under s. NR 217.18 (5) (b) to industries and add the phrase "as applicable to the type of facility".
- Variances should only be issued where the receiving water will eventually meet water quality standards.
- Variance procedures must be consistent with the substantive requirements of 40 C.F.R.§ 131 and must not be granted either to remove an existing use or where a use may be attained by implementing cost-effective and reasonable best management practices for nonpoint source control.
- Consider implementation of best management practices for nonpoint sources as a prerequisite to obtaining a variance and as a term of an issued variance.
- Variances must not be used to delay compliance while a point source awaits voluntary reasonable and cost effective reductions from non-point sources.
- Variances should ensure that 1) the justification for obtaining a variance includes documentation that treatment options that will lead to attainment of the standards have been carefully considered, and that alternative effluent control strategies

have been evaluated, 2) the criterion is maintained and is binding upon all other dischargers on the stream or stream segment, and 3) the discharger is required to meet the applicable criteria for other constituents.

- At a minimum a variance application must include: 1) Information regarding the quality of the effluent and of the receiving water; 2) A list of treatment technologies and alternative effluent control strategies, including installation and operating cost estimates, the applicant evaluated and a detailed justification why the option will cause widespread social and economic impacts (for a municipality this must include an analysis of projected user fees in the community); 3) A detailed analysis outlining how the phosphorus water quality criteria will be attained, including steps that ensure reasonable progress will be made towards this goal, and a plan for accomplishing the work necessary to bring the facility into compliance; 4) An analysis of reasonable and cost-effective best management practices for nonpoint sources the applicant can implement to achieve the standard; and 5) Documentation that state and federal funding is not available to assist the applicant, including state Clean Water Fund and hardship program funds.
- Permittees obtaining a variance should closely monitor their effluent to document reasonable progress towards achieving the water quality based effluent limits and monitor and record the mass and concentration of phosphorus in their effluent at least 3 times per week.
- Variances may only be granted for a specific period of time not to exceed three years – see Wis. Stat. § 283.15 (5) (b). WDNR should authorize only one variance renewal, if adequately justified.
- Variances must contain enforceable initial effluent limits and conditions or "steps" necessary to ensure the permittee is making reasonable progress towards attaining compliance with water quality standards.
- WDNR has provided no analysis or documentation regarding the presumed "widespread social and economic" damage that will occur at each facility if a variance from phosphorus water quality criteria is not granted.
- WDNR has not provided the requisite documentation that the more stringent technology controls have been carefully considered, and that alternative effluent control strategies have been evaluated.
- The rule fails to demonstrate the relevance of the size of the communities served, that those facilities cannot meet WQBELS, that construction of a new facility is the only available option for achieving WQBEL, or that more construction will result in a widespread economic and social impact.
- The proposed rule and accompanying documentation do not demonstrate that WDNR considered any other type of control than construction of a new wastewater treatment plant, performed the requisite economic analysis establishing that construction will cause widespread economic harm, or considered how much the technology will cost or who will bear that cost.
- WDNR should amend the proposed variance language to ensure compliance with the following requirements: 1) The proposed variance must prohibit all other dischargers on the same stream segment from receiving a phosphorus water quality variance. According to EPA's requirements for approving a water quality

variance, Wisconsin may not issue a phosphorus water quality variance to more than one facility discharging into the same stream segment. 2) A discharger who receives a variance from phosphorus water quality criteria must meet the applicable criteria for all other constituents. 3) Variances from water quality standards expire every 3 years, at which time the discharger must either have made a new demonstration of unattainability upon expiration or comply with applicable water quality criteria. In fact Wisconsin state law unequivocally states "[a] variance applies for the term ... not to exceed 3 years."

- The lagoon variance should not be limited to one permit term. Communities with lagoon systems should be able to continue the variance until the lagoon system needs to be replaced.
- Systems currently defined as exempt under NR 217 (less than 150 pounds/month of phosphorus) in the streamlined variance should be included. Such facilities are from small communities with little ability to afford or operate filtration systems. They collectively account for very little of the phosphorus in our waters. As a practical matter, adding 140 small facilities to the 142 lagoon facilities will mean processing standard variances for as many as 282 communities. This is not a wise use of resources for either these communities or the Department and it will not materially change water quality.
- Include the need for technologies other than phosphorus removal technologies in the consideration for compliance schedules. The rule only considers the need for end of pipe removal treatments for justifying a timeline and ignores pollution prevention type projects upstream of plants or effluent recycling projects.

Response:

This section does not provide a categorical variance, but a streamlined process for small communities and industrial facilities to apply for a variance under the widespread social and economic impact factor allowed in ch. NR 200. Industry and communities can also apply for a variance under s. 283.15, Stats. and ch. 200. A number of comments to this section apply to variances in general and to the factors that should be considered for any variance. These comments do not apply to the narrow focus of this rule provision, as they would require revisions to both s. 283.15, Stats. and ch. NR 200.

W. Site Specific Comments

- Would the City of Superior even need interim limits? They discharge to the harbor area through multiple outfalls.
- Recent permits made our situation worse; Georgia Pacific allowed to double phosphorus releases.
- Develop and implement TMDLs, where appropriate. Use the TMDL development efforts in the Fox/Wolf Watershed

Response:

Whether the City of Superior needs interim limits will depend on the current level of phosphorus in its discharge, the ambient water levels of phosphorus in the receiving

water, and any flexibility option the City chose to pursue. Without more information, it is impossible to speculate on the comment regarding Georgia Pacific. The department is pursuing development of TMDLS as fast as resources allow.

X. Dairy Industry Concerns

- Technology to achieve levels required to meet the proposed discharge limits is unproven in the dairy processing industry. Multiple technologies are likely needed. Very limited experience is use of these systems in Wisconsin.
- Tertiary treatment systems offer minimal or no return on investment; adding to the difficulty in attaining financing.
- Suggest cooperation with industry to study the efficacy of technologies new to unique effluent systems.
- Suggest a study and education period for pilot or full-scale systems of no less than 5 years to determine the cost and effectiveness of new technologies for each unique effluent system. Following the study period the Department shall grant a schedule of compliance in permits with similar effluent systems that plant to adopt a studied technology. This schedule of compliance would include a minimum study adoption time of no less than 9 years form the date that this new technology study period ends. In cases where a compliance schedule extends beyond 9 years, the Department may revise the schedule at reissuance of a permit.
- Limited area to expand; cost concerns. Phosphorus removal will lead to greater need to remove chlorides. Removal during cold weather may not be achievable. Not all phosphorus is usable for plant growth in waterways. Research may show that it is unnecessary to achieve such limits.
- Criteria will result in designation of many impaired waters which may necessitate thousands of new TMDLs; which in turn will trigger implementation of ch. NR 151 performance standards and increased costs for thousands of Wisconsin dairy and livestock farmers.
- Concerned over significant costs to dairy and food processors.

Response:

Several of these comments involve establishing studies which are not within the scope of this rule revision effort. The department can consider these studies independently given resources constraints. The other comments in this group need to be considered in the context of the conditions that exist at a particular site and the flexibility afforded in the rule and in other forms of regulation including compliance schedules, adaptive management and variances.

Y. Applicability to CSOs.

- Would limits apply to CSOs? How iss such guidance reflected in permits?
- There is not reliable or practical enhanced treatment system technology available for peak wet weather intermittent CSO treatment facilities. Mechanism for regulating CSOs and CSTPs is the EPA Combined Sewer Overflows Guidance for Long-term Control Plan.

Response:

Combined sewer overflows are treated as conditions in permits in accordance with federal regulations and guidance and not considered in this rule.

Z. Rule-making Process Comments

- Timing and logistics of hearing were inadequate; room too small
- Rules are too flexible; DNR cannot be trusted to have flexibility.
- Timeline is too slow; may take 15 years before full requirements are imposed.
- A second set of public hearings should be held after proposed rules are reconciled with US EPA and the impacts of the proposed rule can be reasonably evaluated.
- Rule is not cost-effective.
- An environmental impact assessment should be conducted.

Response:

The department attempts to anticipate the level of hearing attendance and sometimes either guesses wrong or is limited as to the facilities available. The department does not anticipate any additional hearings, although hearings might be held by the legislature if the rule is adopted by the Natural Resources Board. This rule effort does not meet the criteria in ch. NR 150 for producing an environmental impact statement. Comments on the fiscal estimate are addressed separately.

AA. Affordability Concerns

- Significant financial burdens; costs are likely to exceed any benefits; has not conducted an adequate cost-benefit analysis.
- Concern over additional costs for municipalities who also need to comply with NR 216 municipal storm sewer system regulations.
- Costs must be born by individual paper mills and not by the broader corporations. To the extent that cost increases are incurred by Wisconsin mills, but not by mills in other states, it jeopardizes the long-term viability of these mills.
- Implementation flexibility under EPA guidance is very limited; contributing to the extreme costs associated with this rule.
- Reliably achieving effluent limits in the range of 0.1 mg/l will require advance technology that will come at an enormous cost.
- Support development of stable, increasing funding for both point and nonpoint source programs. Rules create an unfunded mandate.
- Removing phosphorus from POTW effluent is the least cost effective way of reducing phosphorus to our waters.

Response:

The department recognizes the potential for costs to dischargers of phosphorus that may be substantial and possibly not affordable. Under state and federal laws and rules, the issue of affordability is addressed on a case-by-case basis through the variance process.

While full compliance may not be affordable for one community or one industrial discharger, it may be affordable for others.

The administrative rules, contain a number of elements that provide flexibility to dischargers, including: (1) authorizing longer averaging periods for facilities with low phosphorus effluent limits; (2) allowing permit limits to be based on total maximum daily load allocations which allocate load reductions between point sources and nonpoint sources; (3) authorizing extended compliance schedules that provide time to incorporate needed improvements into facility plans; (4) providing for a watershed adaptive management option that fosters a watershed approach and ties interim effluent limits to changes in the water; and (5) providing special variance procedures for lagoon and stabilization ponds. In addition, variance procedures are already in place and available for all dischargers and notes in the rules recognize that pollutant trading may also be a tool to provide flexibility in implementation.

AB. Cost Estimates Concerns

- The Background memo and fiscal estimate understate the number of industrial dischargers impacted. The estimated number of dischargers does not take into account those the discharge to municipal wastewater treatment facilities and may be required to install pretreatment systems.
- DNR concedes that costs could be higher given site-specific factors, but then fails to undertake any meaningful analysis of those costs. Four site-specific cost analyses were contained in the Strand Report.
- DNR estimate of the number of affected facilities does not reflect the hearing draft of the rule.
- The DNR estimates of unit costs are conservative and do not account for the proposed averaging period. EPA's contractor studies from the eastern part of the United States reflect what technology can achieve under optimal conditions, on an annual basis.
- DNR's reliance on variances and future improvements distorts the actual cost impact. Applying such factors as variances, emerging technology and pollutant trading are inappropriate. Without an accurate understanding of the costs, sound public policy cannot be made.
- The Department underestimated the number of industrial facilities impacted by not making an estimate of the cost to industries discharging to municipal wastewater treatment plants. Those discharging to municipal wastewater treatment plants may include small businesses.
- Cost estimates for a dairy processing facility are too low
- The fiscal estimate and small business analysis fail to recognize that there is an indirect effect. Increase costs to dairy processing facilities will have an impact on dairy farms and consumers. Costs to control nonpoint sources as a result of TMDLs will directly have an impact on farmers.
- The cost estimates do not include any estimate of the cost reduction due to below market value loans from the state's Clean Water Fund.
- The fiscal estimate underestimates the number of staff needed to incorporate phosphorus water quality based effluent limits into permits.

Response:

Several comments were received on the cost estimates included with the administrative rules. The department believes that it is proper to provide a reasonable range of costs, to the extent practicable, that reflect projected implementation of the rules. The department does not agree that only one cost estimate based on the "worst case scenario" should be presented.

The upper end of the range of estimates is based on US EPA's technical guidance document, "Municipal Nutrient Removal Technologies Reference Document (September 2008), updated to present construction costs and increased by 30 percent to incorporate a number of factors, such as northern conditions. The content of the US EPA document is based on case-by-case review of functioning wastewater treatment plants achieving low phosphorus effluent limits across the country, including those using filtration. The department agrees that site conditions specific to a facility may increase the overall cost estimate, such as the example for Green Bay Metropolitan Sewerage District included in comments received. This was recognized and stated in the assumptions used to estimate costs. However, the department does not believe that site conditions from two or three facilities should be extrapolated to the entire state for making a cost estimate.

The department anticipates that there will be a number of municipal and industrial dischargers seeking variances based on widespread social and economic impacts. In making a cost estimate, the department assumed a certain number of variances based on the type of treatment process, such as lagoon and stabilization ponds, and the size of community or facility. These were assumed to be conservative assumptions and do not pre-determine which facilities will receive variances.

Similar to the cost estimate prepared by Strand Associates and submitted with comments, the upper end of the department's range of estimates does not assume any lower costs due to a number of flexibility elements contained in the rule, such as less stringent effluent limits based on TMDL wasteload allocations or resulting from nonpoint source or urban storm water control of phosphorus achieved through implementation of the watershed adaptive management option contained in the rules. Lower costs due to emerging technological processes, although likely, could not be accounted for in the cost estimates.

As mentioned in a comment, the cost estimates do not account for any subsidy to municipalities from loans or grants from the state's Clean Water Fund. The current subsidy value is about 20 percent for eligible municipalities.

The department agrees with the comment that the costs estimated for the food industry do not take into account potential costs to those industries discharging wastes to municipal wastewater treatment plants. In the cost estimate, those costs were entirely attributed to the municipality. A note is added to the estimate to recognize this fact.

The department agrees that costs to the dairy processing industry were underestimated and the costs have been revised. Many of the 25-30 facilities identified by the Cheesemakers discharge non-contact cooling water only and discharge less than 50 pounds of phosphorus per year. Many of these may not have a reasonable potential to cause or contribute to an exceedance of the criteria.

AC. General Comments

- Paper industry ought not have a role in making further progress in addressing nutrient pollution.
- Wisconsin should defer action until there is a scientifically defensible and uniform national approach.
- The lack of specific requirements leaves much rule interpretation to the permit writer; causing an incredible amount of business uncertainty in the regulated community.
- Past attempts to reduce phosphorus use have resulted in treatment process upsets; difficult to reduce phosphorus residuals by cutting back on phosphorus use.
- Concerns with limits of technology associated with site-specific or system-specific technology and further requirements to control chlorides.
- Rate payer money should not be used to lobby; don't listen to rants about "unfunded mandates".
- Use algaecides to solve problem or phosphorus-using plants.
- Contributes to urban sprawl.
- WDNR needs to develop rules regarding procedures for conducting Use Attainability Analyses.
- With other agencies and the legislature, convene a legislative council study for developing the necessary statutory language (and/or) administrative codes) so that water quality trading would be a legal and implementable option.
- Concern that more POTWs will not accept septage. Fewer landspreading options as urban sprawl takes place and DNR land application site approval becomes more restrictive. Increased number of septage storage facilities is the answer. Request DNR to revise its rules to ease permitting requirements for septage storage facilities.
- None of 172 waters on 303(d) list with phosphorus related impairments are listed solely due to point sources. Point sources have already achieved significant reductions in phosphorus discharges.
- Do not include waters with low dissolved oxygen as phosphorus impaired.
- Concerned that the proposed rules are aimed at agricultural "limitations".
- Use two significant figures, such as 0.10 mg/l. Effective date should be six to 12 months after the date of promulgation.
- Proposed criteria fail to be prescriptive enough and fail to address large gaps.
- A number of northern lakes and streams have concentrations below the proposed criteria and if there are no antidegradation standards, these waters may be substantially degraded before standard "thresholds" are violated.

- We will not achieve significant water quality improvements if we only regulate point sources. Need to develop a regulatory nonpoint source program where enforcement is not tied to availability of cost sharing.
- Adopt the revisions to ch. NR 151 that establish phosphorus standards for agricultural runoff. Then ch. NR 151 must be funded, implemented and enforced. Move the proposed revisions to chs. NR 102, NR 151 and NR 217 through the rule making process in parallel.
- Develop a comprehensive watershed based trading protocol and report back to the Board by July 1, 2011.
- Develop and implement a comprehensive water quality monitoring program to elevate the effectiveness of phosphorus control strategies.
- Adopt phosphorus standards on a watershed by watershed basis and develop a watershed based permitting approach.

Response:

Most of these comments are either rhetorical in nature or do not apply to these rules. However, some are pertinent to this effort.

It is not possible to defer action on these criteria. US EPA has received a notice of intent to sue from a variety of groups that will require the agency to establish numeric phosphorus water quality criteria for Wisconsin if the state does not act.

Several comments referred to pollutant trading. As prior responses have indicated, the department intends to engage in a process to more effectively establish pollutant trading in the near future.

Several comments were also made concerning nonpoint impacts on phosphorus levels in water. This rule provides the adaptive management option to allow time to address nonpoint sources in a watershed. In addition, revisions to ch. NR 151, the nonpoint performance standard rule, are moving forward on a parallel track, and include provisions to further address phosphorus discharge from nonpoint sources.

Wisconsin Department of Administration
Division of Executive Budget and Finance
DOA-2048 (R10/2000)

Fiscal Estimate — 2009 Session

☒ Original ☐ Updated	LRB Number	Amendment Number if Applicable
☐ Corrected ☐ Supplemental	Bill Number	Administrative Rule Number WT-25-08

Subject

Phosphorus Water Quality Standards and Effluent Standards and Limitations

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
☐ Create New Appropriation

☒ 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
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☒ Towns ☒ Villages ☒ Cities ☐ Counties ☒ Others Sanitary districts ☐ School Districts ☐ WTCS Districts

Fund Sources Affected: ☒ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Chapter 20 Appropriations: 20.370 (4) (ma)

Assumptions Used in Arriving at Fiscal Estimate

I. RULE SUMMARY

The rule package proposes to implement numeric phosphorus water quality standards criteria for lakes and streams, as required by EPA. If the Department does not adopt phosphorus criteria, EPA has the authority to do so for Wisconsin. On November 23, 2009, EPA received a notice of intent to sue over a lack of numeric criteria for Wisconsin waters.

The rule package also includes procedures for using the phosphorus criteria to develop water quality based effluent limitations for publicly and privately owned wastewater treatment facilities, and implementing those limitations through Wisconsin Pollutant Discharge Elimination System (WPDES) permits. Various options included in these permit procedures are limitations derived from total maximum daily load (TMDL) plans, compliance schedules, interim limitations and variances.

II. STATE FISCAL IMPACT

This rule package has no impact on state revenues; however, the Department would incur costs associated with WPDES permits to implement the provisions of the rule package. An ongoing workload equivalent to about 2.0 FTE statewide is projected for at least five to ten years. Wastewater engineer positions will develop effluent limitations, including consideration of TMDL wasteload allocations, review of variance requests, development of compliance schedules, etc. The workload estimate is based on 100 permits per year at about 40 hours per permit with five years to complete an initial cycle of permit reissuances. Salary and fringe costs are estimated at $220,000 per year (4,000 hours x $35/hour salary + 48.59% fringe + travel and supplies).

Long-Range Fiscal Implications

The fiscal impact on local governments and industries will likely be spread over a 10 to 20 year period with less costly interim limitations being imposed in the initial five to ten years and the more stringent limits being phased in primarily in the 10 to 20 year period.

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[signature]	266-2794	06-11-10

Fiscal Estimate — 2009 Session

Page 2 Assumptions Narrative Continued

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number

Assumptions Used in Arriving at Fiscal Estimate – Continued

III. LOCAL FISCAL IMPACT

The proposed rule package will result in compliance costs for a number of municipal and other publicly owned wastewater treatment facilities. These costs may be in the form of capital expenditures, increased operation and maintenance costs, or both, and will vary considerably by municipality or sanitary district. For some facilities, no additional costs will be needed since they discharge to streams and rivers and already meet the phosphorus criteria. For up to an estimated 163 facilities, the addition of filtrations processes may be needed and a substantial cost could be incurred. The Department estimates that municipalities and sanitary districts will incur costs of between $300 million $1.13 billion to comply with the provisions in the rule package. Costs per unit of phosphorus removed are much lower for larger facilities than for smaller facilities. Furthermore, it should be noted that the estimated cost range does not take into account the possibility that some municipalities and sanitary districts may need to acquire land for locating additional wastewater treatment facilities, and thus incur the corresponding land acquisition costs.

There are a number of factors that could push the costs toward the low end of the range, or even lower. These mitigating factors include nonpoint source control that lessens the need for point source control of phosphorus either in general or through implementation of TMDLs. Other factors include economic variances that limit the degree of control to affordable levels, emerging technology that may lower costs, and pollutant trading. The low end of the range may also be overstated to the extent that facilities have already upgraded their treatment plants and/or treatment processes and have thus already incurred some of the costs.

IV. PRIVATE SECTOR FISCAL IMPACT

The proposed rule package will result in compliance costs for a number of industrial wastewater facilities. These costs may be in the form of capital expenditures, increased operation and maintenance costs, or both. The paper industry and the food processing industry would be most affected. The Department estimates that up to 43 facilities could have stringent effluent limitations. Those discharging wastes to municipal wastewater treatment plants may also face increased service fees. Similar to local governmental entities, there is a great degree of variability in the costs that would be incurred. The Department estimates the cost range to be between $100 million and $460 million.

The same mitigating factors described above for local governmental entities will push costs toward the lower end of the range for private sector facilities.

Wisconsin Department of Administration
Division of Executive Budget and Finance
DOA-2047 (R10/2000)

Fiscal Estimate Worksheet — 2009 Session

Detailed Estimate of Annual Fiscal Effect

☐ Original ☐ Updated	LRB Number	Amendment Number if Applicable
☐ Corrected ☐ Supplemental	Bill Number	Administrative Rule Number WT-25-08

Subject

Phosphorus Water Quality Standards and Effluent Standards and Limitations

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:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations — Salaries and Fringes		$ 208,000	$ - 0
(FTE Position Changes)		(2.00 FTE)	(- 0.00 FTE)
State Operations — Other Costs		12,000	- 0
Local Assistance		0	- 0
Aids to Individuals or Organizations		0	- 0
Total State Costs by Category		$ 220,000	$ - 0
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		$ 220,000	$ - 0
FED		0	- 0
PRO/PRS		0	- 0
SEG/SEG-S		0	- 0
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		$	$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		$	$ -

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	$ 220,000	$ see narrative
Net Change in Revenues	$ 0	$

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Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
Joe Polasek	266-2794	06-11-10

ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
AMENDING, REPEALING AND RECREATING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **amend** ch. NR 217 (title), NR 217.01, 217.02 and 217.03; to **repeal and recreate** NR 102.06; and to **create** NR 217 subchs. I (title), II (title), and III (title), NR 217.10, 217.11, 217.12, 217.13, 217.14, 217.15, 217.16, 217.17, 217.18 and 217.19 relating to phosphorus water quality standards criteria and limitations and effluent standards.

WT-25-08

Analysis Prepared by Department of Natural Resources

1. Statutes Interpreted: Sections 281.15, 283.11, 283.13 (5), 283.15, 283.31, 283.55, 283.84

2. Statutory Authority: Sections 227.11 (2) (a), 281.15, 283.001 (2), 283.13 (5), 283.15, 283.31, 283.35, 283.37

3. Explanation of agency authority: Section 227.11 (2) (a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. The department considers the proposed rules necessary to implement the pollution abatement permit program established in ch. 283, Stats. The phosphorus water quality standard included in the proposed rules is required pursuant to s. 281.15, Stats., which directs the department to promulgate water quality standards for state waters. Section 283.13 (5), Stats., gives the department the authority to establish water quality based effluent limitations based on applicable water quality standards and to require compliance with those limitations consistent with a schedule of compliance or state or federal law. Section 283.15, Stats., provides authority to establish rules for variances to water quality standards, s. 283.31, Stats., provides authority to establish permit terms and conditions for water pollutant discharge elimination system permits, and s. 283.37, Stats., gives the department authority to require the submittal of information as part of a permit application.

4. Related statute or rule: Section 283.11 (3) (am), Stats., and chs. NR 106 and 200

5. Plain language analysis:

The proposed rule has two parts. The first is a set of phosphorus water quality standards criteria for rivers, streams, various types of lakes, reservoirs and Great Lakes. The second is procedures for determining and incorporating phosphorus water quality based effluent limitations into Wisconsin Discharge Pollutant Elimination System (WPDES) permits under ch. 283, Stats. Pursuant to 40 CFR 131.11, states are required to adopt water quality standards criteria that are protective of the designated uses of surface waters. Pursuant to section 303 (c) (4) of the Clean Water Act, US EPA may step in and promulgate the criteria for the state, if the state does not. Development of point source permit procedures is required as part of the state's point source permit delegation agreement. US EPA approval of state water quality criteria is required under 40 CFR ss. 131.5, 131.6 and 131.21.

Phosphorus Water Quality Standards Criteria

The proposed rule establishes phosphorus water quality criteria of 100 ug/l (parts per billion) for rivers specifically identified in the rule and of 75 ug/l for smaller streams and rivers. No criteria are proposed at this time for ephemeral streams or streams identified in ch. NR 104, Wis. Adm. Code as limited aquatic life waters. Both of the criteria are intended to prevent in-stream algae and other plant growth to the extent that is detrimental to fish and aquatic life. For example, extensive algae or macrophyte (large plants growing on the beds of streams) consume oxygen during the night to the extent that may leave too little oxygen for certain fish species and for certain aquatic insects. About half of Wisconsin's rivers and streams meet the proposed criteria.

For lakes and reservoirs, the proposed rule has a suite of criteria for five different types of lake ranging from 15 ug/l for lakes supporting a coldwater fishery, such as lake trout or cisco in its bottom waters, to 40 ug/l for shallow drainage lakes and reservoirs. The criteria are intended to prevent or minimize nuisance algal blooms; prevent shifts in plant species in shallow lakes; maintain adequate dissolved oxygen in the bottom of "two-story" lakes with a warmwater fishery in top waters and coldwater fisheries in bottom waters; and to maintain fisheries. "Toxic" algae concerns may also be addressed. For millponds and similar impoundments, the upstream river or stream criteria would apply. More than half of Wisconsin's lakes meet the proposed criteria with the percent varying by lake type. No criteria are proposed at this time for marsh lakes and other wetlands since they will be part of future wetlands nutrient criteria adoption.

For the Great Lakes, phosphorus criteria are proposed for the open waters of Lake Superior (5 ug/l), the open waters of Lake Michigan (7 ug/l) and the nearshore waters of Lake Michigan (7 ug/l). Presently, for the open waters both Lake Michigan and Lake Superior are meeting the criteria. For the nearshore waters of Lake Michigan, the zone from the beaches to a depth of 10 meters, where there are concerns with the Cladophora algal mats forming on beaches, the criteria may be exceeded in some locations.

Below is a table showing the proposed phosphorus water quality standards criteria by type of water body. The specific water body types are defined in the proposed rules, and there are some exclusions based on size or flow conditions.

Proposed Phosphorus Criteria by Type of Water Body	**Total Phosphorus in ug/l**
Listed rivers	100
All other streams	75
Stratified reservoirs	30
Non-stratified reservoirs	40
Stratified "two-story" fishery lakes	15
Stratified drainage lakes	30
Non-stratified (shallow) drainage lakes	40
Stratified seepage lakes	20
Non-stratified (shallow) lakes	40
Impoundments	Same as inflowing river or stream
Lake Michigan open and nearshore waters	7
Lake Superior open and nearshore waters	5

WPDES Effluent Standards and Limitations

The current regulations for phosphorus establish specific procedures for including technology based limitations and standards in WPDES permits (existing ch. NR 217). There is also an existing rule (s. NR 102.06) that generally states the department may establish water quality based limits for phosphorus in permits on a case-by-case basis using an evaluation of phosphorus sources in a watershed, but this rule is being repealed and replaced with a proposed new subchapter in ch. NR 217 that includes detailed procedures for establishing water quality effluent limitations for phosphorus.

Specifically, there are provisions for determining when a water quality based effluent limitation is needed in a WPDES permit; equations and procedures for calculating effluent limits based on different types of waters and stream flow assumptions; and provisions for expressing permit compliance averaging periods, such as a monthly average. The rule requires concentration limits, as commonly used in permits. However, it also specifies where and how mass limits are required, such as for discharges to impaired waters, where there is a downstream lake and where there is a downstream outstanding or exceptional resource water. The rule also addresses the relationship and procedures for including various types of phosphorus limits in permits such as a phosphorus limit based on a total maximum daily load, a technology based phosphorus limit and a water quality based phosphorus limit calculated under the new procedures in chapter NR 217.

The proposed rule allows the department to include compliance schedules in permits. The compliance schedule provisions specify factors the department may consider when establishing the length of a compliance schedule. In addition to compliance schedules, the rule includes a watershed adaptive management option where interim limits may be phased in, if phosphorus concentrations improve in the receiving water.

The proposed rule also includes provisions for processing variances to phosphorus water quality based effluent limitations for stabilization pond and lagoon systems. The inclusion of these procedures for stabilization pond and lagoon systems should not be interpreted to mean that these are the only types of systems that may obtain a variance. There are standard procedures for variances in statutory language and other administrative codes.

6. Summary of, and comparison with, existing or proposed federal regulation:

The proposed phosphorus criteria for streams of 75 ug/l and rivers of 100 ug/l are similar to US EPA's guidance values for the southern half of Wisconsin. US EPA recommended 70 ug/l of phosphorus for both rivers and streams in the southwestern driftless area of the state and 80 ug/l of phosphorus for both rivers and streams in the remainder of the southern half of the state. US EPA, did however, recommend a criterion of 29 ug/l for a band or area stretching west to east though the middle of the state and 10 ug/l for the forested northern part of the state. All of the US EPA guidance numbers are based on the 25th percentile of available data from a number of states and do not represent a cause-effect situation. We could not find concentrations as low at 10 ug/l even for pristine conditions in most of the forested northern portion of Wisconsin.

For lakes, the proposed criteria that range from 15 to 40 ug/l based on the type of lake are different than US EPA's guidance values that range from 9.7 ug/l for northern lakes to 36 ug/l for driftless area lakes. US EPA's guidance values are based on data from multiple states and represent the 25th percentile of available data. They do not differentiate based on the type of lake.

The proposed criteria for Lake Michigan and Lake Superior are the same as the values derived for the federal Great Lakes Water Quality Agreement.

The proposed WPDES permit procedures, including water quality based effluent limitations, are based on general US EPA regulations and guidelines.

7. Comparison with similar rules in adjacent states:

All states, including adjacent states, are required by US EPA to promulgate nutrient water quality standards criteria under US EPA's Clean Water Act authority. In addition, all states delegated National Pollutant Discharge Elimination System permit authority by US EPA, including all adjacent states, are required to issue point source permits that will meet water quality standards.

To date, Minnesota has promulgated phosphorus criteria for lakes which are very similar to what is proposed in this rule. Minnesota is now in the process of developing proposed criteria for rivers and streams. Illinois has had phosphorus criteria in its water quality standards for some years for lakes and Lake Michigan; and it is in the process of developing phosphorus criteria for streams and rivers. Michigan and Iowa are developing criteria, but to date have not publicly proposed criteria. None of the adjacent states or Wisconsin has proposed criteria for nitrogen, except for ammonia.

All adjacent states have provisions for developing water quality based effluent limits, but none to date have proposed rules that specifically deal with the issues uniquely related to phosphorus.

8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen:

The proposed water quality standards phosphorus criteria for streams and rivers are based on results of a number of Wisconsin studies aimed at determining when biotic effects occur and how these effects relate to protection of designated uses. The primary studies were jointly conducted by department and US Geological Survey (USGS) staff and their results are reported in "Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin", USGS Professional Paper 1722, by Robertson, Graczyk, Garrison, Wang, LaLiberte and Bannerman, 2006; and "Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin", USGS Professional Paper 1754, by Robertson, Weigel and Graczyk, 2008. These studies identified a suite of breakpoints or thresholds for effects of phosphorus on algae, aquatic insects and fish. Based on discussions involving a number of experts in the scientific field, the department used an averaging method of the suite of breakpoints to derive the proposed criteria. These proposed criteria were compared to department's studies of trout streams in southwestern Wisconsin, the early 1980's department's study of phosphorus in streams and studies cited in US EPA's "Nutrient Criteria Technical Guidance Manual: Rivers and Streams", EPA-822-B-00-002, 2000.

The proposed water quality standards phosphorus criteria for lakes and reservoirs are based on methods commonly used for decades in lake management in Wisconsin and adjacent states. Specifically, for most types of lakes, the proposed criteria are based on limiting the risk of nuisance algae conditions (20 ug/l chlorophyll a) to no more than 5 percent of the time (e.g. less than one week per year from June though September) using work by Walmsley (Journal of Environmental Quality, 13:97-104, 1988) and Heiskary and Wilson ("Minnesota Lake Water Quality Assessment Report: Developing Nutrient Criteria", Minnesota Pollution Control Agency, September 2005). These concentrations were also determined to be sufficient to protect sport fisheries in lakes again using information from Heiskary and Wilson ("Minnesota Lake Water Quality Assessment Report: Developing Nutrient Criteria", Minnesota Pollution Control Agency, September 2005). For the relatively few lakes that support a cold water fishery in the lower waters, the department's objective was to maintain 6 mg/l for dissolved oxygen in the lower waters. To determine the appropriate phosphorus concentrations, the department examined sediment cores and current water concentrations to determine undisturbed conditions. The proposed criteria were compared to literature information summarized in US EPA's "Nutrient Criteria Technical Guidance Manual: Lakes and Reservoirs", EPA-822-B-00-001, 2000.

For development of the water quality based effluent limitation procedures for permits, the department reviewed existing state and federal regulations and guidance for the point source discharge permit programs, consulted with US EPA representatives, and received input from a technical advisory committee that met several times in 2008 through 2009. The technical advisory committee was comprised of representatives of municipal and industrial wastewater dischargers, municipal storm water dischargers, agricultural interests, water user groups and environmental groups. Staff from US EPA and USGS also attended committee meetings as advisories to the committee and the department.

9. Analysis and supporting documents used to determine fiscal estimate and effect on small business

The Department's cost estimate for municipal and industrial wastewater treatment plant compliance contains a range of costs based on projected implementation of the requirements of subchapter III of ch. NR 217. The range is appropriate given the number of flexibility elements in the rule, such as the watershed adaptive management option, use of total maximum daily load allocations, economic variances and pollutant trading. The upper end of the range estimate of $1.6 billion anticipates that 163 municipal and 43 wastewater treatment plants will require filtration or other tertiary treatment at a substantial capital expenditure and increased operation and maintenance costs. Not every facility in the state will have stringent water quality based effluent limits and many will not see any change in their current phosphorus limits. The number of facilities anticipates that small communities and industries with lagoon or stabilization pond systems or mechanical systems will receive variances due to widespread adverse social and economic impacts. The number of industrial facilities includes only those that discharge to surface waters and does not include those that discharge phosphorus to municipal wastewater treatment plants, such as some food processing plants. The cost estimates for municipalities are based on cost estimating charts in the US EPA's "Municipal Nutrient Removal Technology Reference Document, September 2008; adjusted upward about 40 percent for current construction costs, northern climate conditions and

other factors. The cost estimates for industries are based on information from various sources. The upper end of the range estimate does not include site-specific costs, such as land purchase to enlarge the facility, that could substantially increase the costs for an individual facility. Also, the upper end of the range estimate does not take into account the subsidy value (about 20%) to municipalities receiving loans from the state's Clean Water Fund which would lower the statewide cost estimate.

Costs may be less that those estimated for the upper end of the range through implementation of total maximum daily load allocations, the watershed adaptive management option and/or pollutant trading. Each of these flexibility approaches has the potential to bring about control of phosphorus from nonpoint sources and urban storm water sources and lessen the need for stringent wastewater treatment plant effluent limits. Emerging technology, starting to be used in eastern states, may also reduce costs for tertiary treatment for phosphorus. These reduced costs were not quantified or factored into the upper end of the range cost estimates.

The lower end of the range anticipates that no wastewater treatment plant will need to go beyond phosphorus removal technology that is commonly used in Wisconsin. Many Wisconsin wastewater treatment plants are discharging phosphorus at concentrations far below their effluent limit with some discharging at concentrations less than half of their limit.

There could be both direct and indirect economic impacts on small businesses. To assess the direct impacts, the department initially identified cheese and other dairy operations that discharge wastewater containing phosphorus to lakes and streams as small businesses potentially impacted by the proposed rules. With the assistance of the Wisconsin Cheese Makers, 11 businesses were identified for analysis. All 11 are likely to have more than $5 million in annual revenue, but may have less than 25 employees. Of the 11, six apply wastes to the land through a variety of methods. The other six discharge their wastes to municipal wastewater treatment plants. Some, however, may discharge non-contact cooling water which may or may not have phosphorus added to the water by the industry or a municipality. Those small businesses that discharge their wastes to municipal wastewater treatment plants or farmers that sell their products to food processing industries may have an indirect economic impact that cannot be quantified at this time since the costs are specific to the facility.

Based on this analysis, the department concluded that there are few small businesses that directly discharge of wastewater containing phosphorus to lakes or streams. If there is an impact, it would likely be an indirect fiscal impact on those small businesses that discharge their wastes to a municipal wastewater treatment facility. If the municipal wastewater treatment plant is required to further remove phosphorus, it is possible that the service fee may increase or the municipality may require some level of pretreatment.

10. Effect on small business:

The department has determined the rule may have an indirect impact on limited number of small businesses, and that impact may be lessened through existing variance procedures. Most of the fiscal impacts from the proposed rules will affect municipalities and industries (with phosphorus discharges to surface waters) that aren't considered small businesses. However, there may be an

effect on small businesses that discharge to municipal wastewater treatment plants; but this impact is very difficult to estimate. Secondary indirect impacts on farmers and other suppliers to small industries are even more difficult to estimate.

As mentioned above, small cheese factories may be the best example of a small business. For those meeting the definition of a small business, many of the facilities land apply all or the majority of their wastewater, and therefore will not be impacted by these rules. If there are any businesses that discharge wastes directly to surface waters that meet the definition of a small business, they may apply for a variance if compliance with water quality based effluent limits for phosphorus would cause significant economic hardship. The proposed rules do not provide for less stringent reporting, longer compliance schedules or completed exemptions for small businesses with phosphorus discharges to surface waters because it would not be allowed under federal regulations or state statutes. There is, however, a variance procedure that is allowed under both state and federal law for all point sources that qualify. Reporting and record keeping requirements are established through permit terms and conditions.

11. Agency contact person:

Jim Baumann, P.O. Box 7921, Madison, WI 53707; telephone number 608/266-9277; e-mail address: james.baumann@wisconsin.gov.

SECTION 1. NR 102.06 is repealed and recreated to read:

NR 102.06 Phosphorus. (1) GENERAL. This section identifies the water quality criteria for total phosphorus that shall be met in surface waters.

(2) DEFINITIONS. In this section:

(a) "Drainage lake" means a lake with an outlet stream that continually flows under average summer conditions based on the past 30 years.

(b) "Ephemeral stream" means a channel or stream that only carries water for a few days during and after a rainfall or snowmelt event and does not exhibit a flow during other periods, and includes, but is not limited to, grassed waterways, grassed swales and areas of channelized flow as defined in s. NR 243.03 (7).

(c) "Mean water residence time" means the amount of time that a volume of water entering a waterbody will reside in that waterbody.

Midwest Environmental ADVOCATES

pro bono publico

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

November 23, 2009

Lisa Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue Administrator of the Environmental Protection Agency for Failure to Perform Its Non-discretionary Duty to Promulgate Numeric Nutrient Criteria for the State of Wisconsin.

Dear Ms. Jackson:

This letter is to provide notice, pursuant to the citizen suit provision of the Federal Clean Water Act, 33 U.S.C. § 1365 ("CWA" or "the Act"), that Clean Water Action Council of Northeastern Wisconsin, Gulf Restoration Network, Milwaukee Riverkeeper, Prairie Rivers Network, River Alliance of Wisconsin, Sierra Club, and Wisconsin Wildlife Federation intend to file suit in the Federal District Court for the Western District of Wisconsin against the Administrator of the United States Environmental Protection Agency ("EPA") for failing to perform its non-discretionary duty under the Act to promulgate numeric nitrogen and phosphorus criteria for the state of Wisconsin.

The citizen suit provision of the CWA provides an opportunity for any citizen to commence a civil action in federal court on his or her own behalf against the EPA Administrator for an alleged failure of the Administrator to perform any non-discretionary duty imposed by the CWA on the Administrator. 33 U.S.C. § 1365(a)(2).

The CWA requires the EPA Administrator to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B).

551 W. Main Street, Suite 200 • Madison, WI 53703
Telephone 608.251.5047 • Fax 608.268.0205

1845 N. Farwell Avenue, Suite 100 • Milwaukee, WI 53202
Telephone 414.688.4171

Email: advocate@midwestadvocates.org • Web: www.midwestadvocates.org

Scientists have known for decades that many marine and fresh water bodies of the United States are being harmed by nitrogen and phosphorus pollution. This pollution causes or contributes to low dissolved oxygen levels and has numerous adverse effects on aquatic life and on the economic, aesthetic, and recreational value of our rivers, lakes, and streams, including contamination of drinking water supplies and the growth of potentially toxic cyanobacteria or "blue-green algae," in lakes and rivers.[1]

Every summer, Wisconsin communities and tourism-related businesses cope with the detrimental effects of nutrient pollution, ranging from foul, smelly water to health threats, such as toxic algae and contaminated drinking water, and from nuisance algae blooms to fish kills and beach closures. Due to increasing nutrient concentrations in Wisconsin's waters, the frequency and duration of toxic algal blooms has severely increased over the past decade. Nitrogen and Phosphorus pollution are listed as the pollutants causing approximately 36% of the 453 Category 5A impairments listed in Wisconsin's 2008 303(d) impaired waters list. By mid-summer 10 beaches in Madison, Wisconsin had been closed for a "combined total of 90 days, mostly because of algae blooms."[2] Amongst various reports of harm caused by excess nutrients in Wisconsin waters this season, at least 3 dogs have reportedly died due to nutrient induced toxic blue-green algae and the Wisconsin Department of Health Services has received 41 complaints related to health concerns with blue-green algae, including rashes, sore throats and eye irritation.[3]

Nitrogen and phosphorus pollution in Wisconsin contributes to downstream water quality impairments including a huge dead zone in the Gulf of Mexico that threatens numerous human and ecological communities as well as the basic health of the Gulf.[4] Nitrogen and phosphorus pollution in Wisconsin also negatively impacts downstream waters that flow out of Wisconsin, such as the Rock River and Fox River. Furthermore, Lake Michigan is also negatively impacted by phosphorous pollution.

On February 1, 2008, almost ten years after EPA told states to develop numeric nutrient water quality standards, the Wisconsin Department of Natural Resources ("DNR") convened a group of interested stakeholders and held its *first* Phosphorus Criteria Advisory Committee meeting. To guide the development of phosphorus criteria for streams in Wisconsin, DNR relied on U.S. Geological Survey ("USGS") data and

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[1] State-EPA Nutrient Innovations Task Group, *An Urgent Call to Action*, 2-11 (Aug. 2009).
[2] Janie Boschma, *Algae, Bacteria Keep Madison Beaches Closed More Than Usual*, Wis. St. J., July 25, 2009, *available at* http://host.madison.com/news/article_42590528-a2ec-5953-a3f1-c85e7cc78a17.html?mode=story.
[3] *Stinky Blue-Green Algae Blamed for Dog Deaths*, Sept. 27, 2009, *available at* http://www.msnbc.msn.com/id/33045773/ns/us_news-environment/ (reporting from Wausau, Wisconsin).
[4] U.S. Geological Survey, *Share of the Nutrient Flux (mass per time) Delivered to the Gulf of Mexico from States in the Mississippi and Atchafalaya River Basins*, http://water.usgs.gov/nawqa/sparrow/gulf_findings/ES&T_states.pdf; R.B. Alexander, *et al., Differences in Phosphorus and Nitrogen Delivery to the Gulf of Mexico from the Mississippi Basin* 42 Envtl. Sci. & Tech. (2008), *available at* http://water.usgs.gov/nawqa/sparrow/gulf_findings/.

reports regarding water quality impacts of nitrogen and phosphorus on the biotic integrity of Wisconsin streams and rivers.[5] Yet DNR has yet to propose that its governing board, the Natural Resources Board, amend the Wisconsin Administrative Code to include numeric criteria for phosphorus. Despite the USGS data related to nitrogen impacts on the biological integrity of Wisconsin streams and rivers, DNR does not expect to begin promulgation of numeric nitrogen water quality criteria until at least 2012.[6] In the meantime DNR refuses to derive water quality based effluent limits in NPDES permits to implement its narrative standard as applied to nitrogen and phosphorus.[7]

More than a decade has passed since EPA, acknowledging the severity of nitrogen and phosphorus pollution, directed states to develop numeric criteria for nitrogen and phosphorus. In 1998 EPA determined that prompt development of numeric standards for the nutrients phosphorus and nitrogen in all states, including Wisconsin, was necessary to meet the requirements of the Clean Water Act. The Clean Water Action Plan ("CWAP") issued on February 19, 1998 explained:

> Excessive nutrient loadings. . . result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms (HAB), leading to oxygen declines, imbalance of aquatic species, public health risks, and a general decline of the aquatic resource. Nutrient over-enrichment has also been strongly linked to the large hypoxic zone in the Gulf of Mexico and to recent outbreaks of *Pfiesterias* along the mid-Atlantic Coast.
>
> State water quality reports indicate that over-enrichment of waters by nutrients (nitrogen and phosphorus) is the biggest overall source of impairment of the nation's rivers and streams, lakes and reservoirs, and estuaries. In the 1996 National Water Quality Inventory, states reported that 40 percent of surveyed rivers, 51 percent of surveyed lakes and 57 percent of surveyed estuaries were impaired by nutrient enrichment.
>
> ...
>
> EPA will develop nutrient criteria – numerical ranges for acceptable levels of nutrients (i.e., nitrogen and phosphorus) in water....EPA will develop nutrient criteria for the various water

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[5] Dale M. Robertson, et al., U.S.G.S., *Nutrient Concentrations and Their Relations to the Biotic Integrity of Wadeable Streams in Wisconsin* (2006) *available at* http://pubs.usgs.gov/pp/pp1722/pdf/PP_1722.pdf; Dale M. Robertson, et al., U.S. Geological Survey, *Nutrient Concentrations and Their Relations to the Biotic Integrity of Nonwadeable Rivers in Wisconsin* (2006) *available at* http://pubs.usgs.gov/pp/1754/pdf/pp1754.pdf.

[6] Wisconsin Dep't of Natural Res., *2008-2011 Triennial Standards Review Cycle: Topic Descriptions* 5, 8 (July 2, 2008) *available at* http://www.dnr.state.wi.us/org/water/wm/wqs/tsr/documents/Topic_Descriptions.pdf.

[7] Memorandum from Russ Rasmussen, Watershed Management, on Determining Reasonable Potential for Narrative Standards to the WPDES Permits Staff 2-3 (Dec. 14, 2006).

> body types and ecoregions of the country by the year 2000. ... Within three years of the EPA issuance of applicable criteria, all states and tribes should have adopted water quality standards for nutrients. Where a state or tribe fails to adopt a water quality standard for nutrients within that three-year period, EPA will begin to promulgate water quality standards for nutrients...[8]

On June 25, 1998 EPA published its *National Strategy for the Development of Regional Nutrient Criteria* in the Federal Register, acknowledging that nutrient pollution had recently been reported to be the leading cause of impairment in lakes and coastal waters and the second leading cause of impairment in rivers and streams.[9] This plan reiterated that all states were required to develop numeric nitrogen standards that supported designated uses by 2003, or EPA would develop standards for them.[10]

EPA did establish recommended numeric nutrient criteria for ecoregions by early 2001.[11] Yet in 2007 EPA's Office of Water issued a report outlining the detrimental affects of nitrogen and phosphorus pollution and the states' general failure to adopt numeric nitrogen and phosphorus criteria.[12] EPA acknowledged that "[v]irtually every State and Territory is impacted by nutrient-related degradation of our waterways" and explained that the adoption of numeric nutrient water quality criteria would allow for:

- easier and faster development of TMDLs;
- quantitative targets to support trading programs;
- easier issuance of protective NPDES permits;
- increased effectiveness in evaluating success of nutrient runoff management programs; and
- measurable, objective water quality baselines against which to measure environmental progress.[13]

EPA stated very clearly that "we cannot afford delayed or ineffective responses to this major source of environmental degradation."[14]

In August 2009 EPA's Office of the Inspector General ("OIG") painted a grim picture of the states' stagnant progress in adopting numeric nutrient criteria in a report titled "EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality

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[8] U.S. EPA, *Clean Water Action Plan: Restoring and Protecting America's Waters* 58-59 (Feb. 2008) [hereinafter CWAP].
[9] U.S. EPA, *National Strategy for the Development of Regional Nutrient Criteria*, iii June 25, 1998).
[10] *Id* at 5-6.
[11] Nutrient Criteria Development; Notice of Ecoregional Nutrient Criteria, 66 Fed. Reg. 1671 (Jan. 9, 2001).
[12] Memorandum from Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, on Nutrient Pollution and Numeric Water Quality Standards, (May 25, 2007), *available at* http://www.epa.gov/waterscience/criteria/nutrient/files/policy20070525.pdf
[13] *Id.*
[14] *Id.*

Standards."[15] Recognizing that "[s]tates have not been motivated to create these standards because implementing them is costly and often unpopular with various constituencies," the report found that under the current approach there are no assurances that States will develop protective standards.[16] OIG recalled that "[h]istorically, EPA has said it would use its authority to set standards as a motivator and then failed to set standards," and reiterated that states upstream of the Gulf of Mexico and the Mississippi River have failed to set nutrient standards for themselves; "consequently, it is EPA's responsibility to act."[17] In response to the OIG's report, EPA explained its view that "numeric nutrient State water quality standards are needed to protect not only those waters already impaired by nutrient pollution, but also to prevent high quality waters from future impairment."[18]

The State-EPA Nutrient Innovations Task Group reiterated the urgency of adopting numeric nitrogen and phosphorus criteria in its August 2009 report *An Urgent Call to Action.* That report, the collaboration of state and EPA water quality and drinking water directors and program managers, recognizes the inadequacy of state and national efforts to control nutrient pollution, and calls for national leadership.[19] Not surprisingly, the Task Group rated "Federally required state WQS numeric nutrient water quality criteria" as one of the top five most effective tools for reducing nitrogen and phosphorus pollution.[20]

Having determined that numeric standards were necessary to meet the requirements of the Act in the Clean Water Action Plan and having reconfirmed this determination in the above referenced documents and in other findings, the Administrator has failed to perform its non-discretionary duty under section 303(c)(4)(B) of the CWA to promptly set numeric nitrogen and phosphorus criteria for the state of Wisconsin.

V. PARTIES GIVING NOTICE

The parties giving notice are:

Clean Water Action Council of Northeastern Wisconsin
2484 Manitowoc Rd.
Green Bay, WI 54311
(920) 468-4243

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[15] U.S. EPA, Office of the Inspector Gen., *EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards,* No. 09-P-0223 (Aug. 26, 2009).
[16] *Id.* at 5-6.
[17] *Id.* at 11.
[18] *Id.* at app. C (Memorandum from Michael H. Shapiro, Acting Assistant Administrator, U.S, EPA on Agency Response to the Draft Evaluation Report to Dan Engelberg, Director, Water Enforcement Issues (July 15, 2009)).
[19] *See supra* note 1, at 33.
[20] *See supra* note 1, at 20-21, tbl. 2.

Gulf Restoration Network
338 Baronne Street, Suite 200
New Orleans, LA 70112
(504) 525-1528

Milwaukee Riverkeeper
Milwaukee Environmental Consortium
1845 N. Farwell Avenue, Suite 100
Milwaukee, WI 53202
(414) 287-0207

Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, Illinois 61820
(217) 344-2371

River Alliance of Wisconsin
306 East Wilson Street, Suite #2W
Madison, WI 53703
(608)257-2424

Sierra Club – John Muir Chapter
222 South Hamilton Street, Suite #1
Madison, WI 53703
(608) 256-0565

Wisconsin Wildlife Federation
W7303 County Highway CS
Poynette, WI 53955
(608) 635-2742

VI. CONCLUSION

The individuals giving notice encourage you to contact them through their attorneys as soon as possible should you desire to discuss the allegations set forth in this letter; if this matter is not resolved to the satisfaction of the individuals giving notice, they will file suit on the sixtieth day following the date of this letter.

Sincerely,

Elizabeth Lawton
Midwest Environmental Advocates
551 W. Main St. #200
Madison, WI 53703
608-251-5047

Albert Ettinger
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601-2110
Phone: 312-673-6500

Counsel for: Clean Water Action Council of Northeastern Wisconsin, Gulf Restoration Network, Milwaukee Riverkeeper, Prairie Rivers Network, River Alliance of Wisconsin, Sierra Club, and Wisconsin Wildlife Federation

Copies To:

Mr. Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Mr. Bharat Mathur
Acting Regional Administrator
U.S. EPA, Region V
77 W. Jackson Blvd.
Chicago, IL 60604

Mr. Matthew Frank, Secretary
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-7921

Mr. Todd Ambs
Wisconsin Department of Natural Resources
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-7921

View the June 2010 Agenda, information briefs (green sheets) on each item, and other meeting materials at:
http://dnr.wi.gov/org/nrboard/2010/June/06-10-NRB-Agenda.htm

NATURAL RESOURCES BOARD

MINUTES

A special meeting of the Natural Resources Board was held on Tuesday, June 22, 2010 in the Ballroom South conference room at The Quality Inn & Suites, 2969 Cahill Main, Madison. The meeting was called to order at 10:00 a.m. for a seminar on climate change. No action was taken. The seminar ended at noon.

Al Shea, Air & Waste Division Administrator gave an overview of the agenda which is focused on science and adaptation. He stated that at a later date, staff will brief the Board on the mitigation side of Climate Change. He then introduced the three speakers. (Handout)

Jack Sullivan, Science Services Bureau Director updated the Board on the Wisconsin Initiative on Climate Change Impacts (WICCI). He then focused on climate science, building environmental resiliency, and adaptation strategies. Additional information can be found on-line at www.wicci.wisc.edu. (PowerPoint)

Discussion followed on land purchases related to building environmental resiliency.

Dr. Thomas thanked Mr. Sullivan for an excellent presentation. He hit them between the eyes with reality but didn't leave them in despair.

Tracey Holloway, UW Professor, Director of Center for Sustainability and the Global Environment (SAGE) briefed the Board on the expected impacts of climate change on human populations, which included heat impacts, vector-borne diseases, water-born diseases, water resources and food supply, and air pollution and allergens, She recognized Professor Jonathan Patz and Professor Chris Kucharik for their contributions to her presentation. (PowerPoint)

Discussion followed on cap and trade legislation.

Mr. Ela thanked Professor Holloway for a very insightful presentation.

Laurie Osterndorf, Lands Administrator briefed the Board on the Department's plan to turn adaptation science into policy and action on the ground through State Adaptation Planning. The Plan is intended to fulfill the requirements of future federal climate legislation, and is scheduled to be completed in May 2012 or sooner if required by legislation. She then reviewed current federal legislation, likely state requirements, and some of the agency's current efforts to move the state's adaptive science to a regional level. The WICCI First Adaptive Assessment Report will be the scientific "backbone" for the Department's *Adaptation Plan.* (PowerPoint and Handout)

Mr. Ela thanked Laurie Osterndorf for her presentation and Al Shea and staff for a very well done seminar.

The regular meeting of the Natural Resources Board was held on Wednesday, June 23, 2010 in the Ballroom South conference room at The Quality Inn & Suites, 2969 Cahill Main, Madison. The meeting was called to order at 8:30 a.m. for action on items 1-7. The meeting adjourned at 2:55 p.m.

ORDER OF BUSINESS

1. Organizational Matters

1.A. Calling the roll

David Clausen – present
Jonathan Ela – present
John Welter – present
Jane Wiley – present
Preston Cole – present
Gary Rohde – present
Christine Thomas – present

1.B. Approval of agenda for June 22, 2010

Dr. Clausen MOVED approval, seconded by Mr. Rohde. The motion carried unanimously.

1.C. Approval of minutes from April 27-28, 2010

Mr. Welter MOVED approval, seconded by Ms. Wiley. The motion carried unanimously.

1.D. Approval of minutes from May 25-26, 2010

Ms. Wiley MOVED approval, seconded by Dr. Clausen. The motion carried unanimously.

Mr. Ela presented a plaque from the Board to Christine Thomas in grateful appreciation for her three years as Board Chair from January 2007 – January 2010.

Dr. Thomas thanked the Board and Department for the plaque and kind words.

Mr. Ela thanked South Central Region staff for the very informative tours on Tuesday and for their hospitality.

2. Ratification of Acts of the Department Secretary

2.A. Real Estate Transactions

Mr. Welter MOVED approval, seconded by Dr. Clausen. The motion carried unanimously.

3. Action Items

3.A. Air, Waste, and Water/Enforcement

3.A.1 Presentation of the Shikar-Safari Club International Wildlife Officer of the Year Award for Wisconsin

Randy Stark, Chief Warden, and **John Pearson**, Shikar-Safari Club International, presented the Wildlife Officer of the Year Award to Carl Mesman, Northeast Region Warden Supervisor.

Mr. Stark recognized John Pearson who has acknowledged the Warden Service for 24 years. He then stated that Warden Mesman leads by example and is always available and willing to assist. He is committed to continuous improvement and is involved in the community.

Warden Mesman thanked the Board and Shikar-Safari Club for this award. He is always amazed at the warden force since there are so many great supervisors. He thanked his team for organizing the award.

INFORMATIONAL ITEM – NO ACTION WAS TAKEN

3.A.2 ~~Request adoption of Board order AM-06-09, proposed rules affecting ch. NR 433 pertaining to the implementation of Best Available Retrofit Technology (BART) requirements~~ DELETED AND MOVED TO AUGUST AGENDA

Matt Frank, DNR Secretary stated that the following two rule packages represent important improvements to Wisconsin's water quality. There has been a gap in our water quality protection dealing with phosphorus, other nutrients, and sedimentation that degrade water quality. These rules include point and non-point sources. He thanked Department staff and the many organizations that worked on this rule.

Bruce Baker, Acting Water Administrator stated these rules have taken a team effort from the Secretary's office to staff to get here today. This package fits Wisconsin and provides unprecedented flexibility for implementation. These rules do not just set water quality standards, they also include implementation.

Mr. Ela suggested for items 3.A.3 and 3.A.4 that the following process be followed: 1) staff presentations be given on each rule, 2) Board discussion, 3) public testimony on each rule, 4) further Board discussion and voting.

3.A.3 Request adoption of Board Order WT-14-08, revisions to NR 151, NR 153, and NR 155 pertaining to performance standards and grant programs to address polluted runoff

Gordon Stevenson, Runoff Management Section Chief, and **Russell Rasmussen**, Watershed Management Bureau Director gave a joint presentation addressing nonpoint sources (NPS). They summarized the revisions as follows:

NR 151, Runoff Management: Proposed revisions create new statewide performance standards (P Index, tillage setback, process wastewater control), require reduction in pollutant discharges to meet the nonpoint source component of an approved total maximum daily load (TMDL) and targeted performance standards promulgated for the TMDL area, modify existing agricultural and non-agricultural performance standards, and make minor changes to the implementation and enforcement provisions of the rule.

NR 153, Targeted Runoff Management (TRM) and Notice of Discharge Grants: Proposed revisions for TRM create four competitive project categories, strengthen links between grant requirements and local implementation performance standards and prohibitions, modify application requirements, and establish limits on the total amount of grant funding that a grantee can receive in a grant year.

NR 155, Urban NPS Pollution Abatement and Storm Water Management Grants: Proposed revisions increase the Department's oversight of subcontracts, increase grantee accountability for final products, provide more flexibility over how grants are used, and limit grantee awards in a given grant period. They requested the Board adopt Board Order WT-14-08. **(PowerPoint and Handout)**

Discussion followed on the full time employee (FTE) estimates to administer the rule changes.

3.A.4 Request adoption of Board Order WT-25-08, revisions to NR 102 and NR 217 related to phosphorus water quality standards criteria and WPDES permit provisions for phosphorus

Russell Rasmussen, Watershed Management Bureau Director stated this rule package proposes to implement numeric phosphorus water quality standards criteria for lakes and streams, as required by EPA. If the Department does not adopt phosphorus criteria, EPA has the authority to do so for Wisconsin. This rule package also includes procedures for using the phosphorus criteria to develop water quality based effluent limitations for publicly and privately owned wastewater treatment facilities, and implementing those limitations through Wisconsin Pollutant Elimination System (WPDES) permits. Various options included in these permit procedures are limitations derived from total maximum daily load (TMDL) plans, compliance schedules, interim limitations and variance. He requested the Board adopt Board Order WT-25-08. **(PowerPoint and Handout)**

Public Appearances for Item 3.A.3 – polluted runoff:

1. **Paul Zimmerman**, Prairie du Sac, representing WI Farm Bureau stated this rule is workable for farmers across state. He expressed their support.

2. **Jordan Lamb**, Madison, representing the Wisconsin State Cranberry Growers Association, the Wisconsin Pork Association, the Wisconsin Potato & Vegetable Growers Association, and the Wisconsin Cattlemen's Association spoke in support of the proposed rule. The Department has made several critical changes that have made this rule much more workable for agriculture. The most important change is the change in the TMDL section that maintains a fair process if and when a lower standard is needed to meet water quality standards.

3. **Lori Grant**, Madison, representing River Alliance of Wisconsin spoke in general support of the proposed rule but recommended that Board adoption include two revisions: 1) Require that construction sites use best management practices to reduce the sediment load carried in runoff by 80% with a maximum allowed discharge of 5 tons per acre per year, and 2) Restore the tillage setback to 20 feet. **(Handout)**

4. **Tom Sigmund**, Green Bay, representing the Green Bay Metropolitan Sewerage District spoke in general support of the proposed rule but requested the Board direct the Department to 1) Secure EPA and Wisconsin legislative committee approvals for NR 102, NR 217, and NR 151, 2) Develop a framework for water quality trading among point and nonpoint sources in conjunction with stakeholder groups by July 2011, and 3) Implement a comprehensive monitoring program to test effectiveness of phosphorus control measures. **(Handout)**

5. **Amber Meyer Smith**, Madison, representing Clean Wisconsin stated their support for this rule as a positive step forward. As with all compromises, there are things that could make the package stronger. For a rule that is subject to cost-share and therefore will be implemented sparingly and only in high-priority areas, a PI of 6 is something that could really be improved on, especially in a TMDL where other stakeholders are taking on much more significant obligations to ratchet down discharge. She also noted that a five foot tillage setback is not protective enough of water quality. **(Handout)**

6. **Lisa Conley,** Village of Lac La Belle, representing Rock River Coalition and Town and Country Resources, Conservation and Development stated their support for the proposed rule but are concerned that the 20 foot tillage setback has been reduced to 5 feet. They would like to see the 20 foot setback restored as a minimum requirement. Their other concern is that the NR 151.005 requirement for rule writing in a TMDL area where stricter standards are needed will lead to long delays of water quality improvements. **(Handouts including Tom Koren letter)**

7. **George Meyer,** Madison, representing the Wisconsin Wildlife Federation (WWF) stated their support for the proposed rule but have the following concerns: 1) The provisions of NR 151.005 which requires that if a more stringent performance standard is necessary for crop producers or livestock producers to meet a load allocation for a TMDL, the enhanced standard must go through a rule-making process will make it virtually impossible to effectively adopt an enhanced performance standard for the TMDL. The Board should remove this unnecessary rule-making requirement. 2) There is a statutory requirement that a producer does not have to implement these practices unless there is seventy percent cost sharing provided. In order for crop and livestock producers to implement these requirements, there needs to be a substantial increase in funding for cost-sharing. **(Handout)**

   Discussion followed on cost-sharing.

8. **Patrick Stevens,** Madison, representing the Wisconsin Builders Association stated that this rule started out mainly as an agriculture rule and since then, this rule has blossomed into something that impacts the non-agriculture part of the performance standards. This rule is

quite significant and impacts housing. In addition to the stormwater side of the equation, the rule also creates a new standard for construction erosion control. They are not supportive of making this standard either the 80% reduction or the 5 tons per year per acre, whichever is more stringent. He then stated that this rule applies to on-going projects. A project based on the current protective areas for wetlands in some instances have been increased from 50 feet to 75 feet. He was concerned as to how this would impact on-going developments and asked that existing projects be grandfathered in.

Discussion followed on clarification to Mr. Stevens' interpretation of the 80% reduction/5 ton change.

Mr. Stevens stated they are not in support of, in essence, creating a cap as was proposed. They prefer to keep one standard rather than having whichever one you hit first is the one you comply with.

9. **Scott Thompson,** Madison, representing Wisconsin Environment support and applaud the Department's efforts in protecting Wisconsin's waterways. Last month they have been knocking on thousands of doors across the state of Wisconsin and have been met with overwhelming support. He distributed a citizen petition. **(Handout)**

10. **David Jelinski,** Madison, representing Dairy Business Association was not in attendance

11. **Shahla Werner,** Madison, representing the Sierra Club spoke in support of the proposed rules but voiced the following concerns: decreasing the tillage setback to only 5', that a PI of 6 leads to a high excessive potential for runoff and should be lowered, and the onerous process of passing administrative rules in order to establish a TMDL with a PI below 6. They would like to see this measure as a positive step to reduce runoff pollution while reducing impacts on farmers and others and their ability to make ends meet in the midst of a tough economic climate. **(Handout)**

Public Appearances for Item 3.A.4 – phosphorus:

1. **Scott Manley**, Verona, representing WI Manufacturers & Commerce (WMC) stated their opposition to the proposed rule in its current form and requested the Board to direct the Department to make the revisions to the rule referenced in his handout prior to adoption. **(Handout)**

2. **Chuck Ledin**, Madison, representing self stated he is a DNR water division retiree and spoke in support of the rule. He has seen tremendous improvements in water quality, except for plant growth stimulated by phosphorus in waterways such as Tainter Lake and Lake Menomin. The long term management goal should really be the elimination of all phosphorus from discharges into our waters. **(Handout)**

3. **Paul Kent**, Madison, representing Municipal Environmental Group (MEG) – Wastewater Division stated they have been active participants in this rule making process and do not oppose the rule. If adopted, it is important that there be the requisite follow through by the Department to ensure that: 1) the Department work to secure EPA approval of this rule, 2) NR 151 be adopted and that DNR continue to work to address nonpoint sources, 3) the Department commit to developing a trading protocol by July 2011, and 4) the Department integrate the NR 217 implementation process into the pending phosphorus TMDLs in the Fox and Rock River basins. **(Handout)**

4. **Tom Sigmund**, Green Bay, representing the Green Bay Metropolitan Sewerage District stated that in addition to his testimony under 3A3, complying with the rule revisions will be challenging for municipal wastewater treatment plants but they believe they are appropriate to achieve Wisconsin's water quality objectives. Working together, we will get maximum

benefit for the environment using innovative and cost-effective approaches. They support the adoption of this rule as proposed. **(Handout)**

5. **Kevin Shafer**, Fox Point, representing the Milwaukee Metropolitan Sewerage District (MMSD) stated they are dedicated to improving their region's waterways and have the foundation in place to take the next step toward this goal. These rule revisions support their regional efforts. MMSD supports these rules but requests that: 1) NR 151 revisions move forward cohesively with NR 102 and NR 217, 2) the implementation of the rule revision be performed in a watershed-based, cost effective manner, 3) existing and future TMDL implementation strategies and phosphorus strategies be linked, and 4) the Department develop a statewide framework for water quality trading within one year. **(Handout)**

6. **David Taylor**, Verona, representing the Madison Metropolitan Sewerage District stated they support clean water and recognize nutrients such as phosphorus impact the quality of Wisconsin's lakes and streams. They support adoption of the proposed rules relating to NR 102, NR 151, and NR 217. He stated the Department's work is not yet done. The Department needs to 1) work diligently to secure EPA approval for NR 102 and NR 217, 2) develop and implement a comprehensive water quality monitoring to evaluate the effectiveness of phosphorus control strategies, and 3) place a high priority on developing a protocol/ infrastructure that guides water quality trading in Wisconsin. **(Handout)**

7. **Amber Meyer Smith**, Madison, representing Clean Wisconsin stated their support for this rule, which goes hand in hand with 3A3. These changes will represent a positive step forward in addressing phosphorus. They have concerns with the rule as follows 1) for discharges to the Great Lakes, the language is potentially inadequate. The language relies on regulations based on modeling that has not been done yet and waiting until modeling is done could delay this provision. It should require interim effluent limits based either on a more stringent limit if necessary to protect designated uses in the near shore, and 2) The effluent flows under NR 217.13(2)(c) should have shorter averaging times. One year averaging is double what the stakeholder committee had discussed and allows high phosphorus discharges in waterways during the most vulnerable times of the year and denies citizens access to monitoring reports in a reasonable amount of time. **(Handout)**

   Discussion followed on the Great Lakes concern.

8. **Lisa Conley**, Village of Lac La Belle, representing Rock River Coalition and Town and Country Resources, Conservation, and Development. On behalf of their water issues team, she expressed their strong support for the proposed rule. It is truly historic that these come together with the nonpoint provisions they talked about earlier. This has been a long time in coming. Good farming practices, clean lakes, and good urban practices should support each other and provide a life-sustaining resource base for generations to come. **(Handout – see 3A3-6)**

9. **Denny Caneff**, Madison, representing the River Alliance of Wisconsin stated their support for these rules. They were active in developing both rule packages (3A3 and 3A4) going back several years when the advisory committees were put together by the Department. He feels the adaptive management language is the bridge between these two rule packages. Inside adaptive management is the possibility and great promise of where this issue of nonpoint and point sources can be worked out.

10. **George Meyer**, Madison, representing the Wisconsin Wildlife Federation (WWF) stated their strong support for the proposed rule. WWF fully endorses the proposed changes to the rule from upcoming speakers representing Midwest Environmental Advocates and Environmental Law and Policy Center. **(Handout)**

11. **Don Hammes**, Middleton, representing self spoke in support of these rules. He belongs to the Yahara Fishing Club. While fishing throughout the state, their members have seen the substantial impact that excessive nutrients such as phosphorus can have on Wisconsin's waterways, including the deadly blue-green algae. Phosphorus discharges via stormwater run off and other sources adversely affect water quality in our lakes and streams which adversely affects fishing.

12. **Mike Arrowood**, Oakfield, representing self was not in attendance.

13. **Betsy Lawton**, Madison, representing Midwest Environmental Advocates stated that clean water is not free, but it is essential. There are significant costs of doing nothing. Algae growth fueled by phosphorus keeps many Wisconsin citizens from enjoying Wisconsin's most public resources for recreation, fishing, and boating. Clean water is associated with reduced health costs and increased property values. While the proposed regulations are a vast improvement, they have a few concerns related to the year-long averages proposed for the lower water quality based effluent limits. Problems associated with year-long averaging would be related to the ability to ensure compliance the other concern relates to discharges to the Great Lakes.

    Discussion followed on the 8 year averages versus seasonal differences on a one-year averaging basis and the Great Lakes issue.

14. **Bill Davis**, Madison, representing Environmental Law & Policy Center stated their support for 3.A.3 and 3.A.4. He stated it is important to control phosphorus. The adaptive management section should serve as a model for many other states. He reiterated the connection between NR 217 and NR 151. They will go hand in hand and are the most economic and effective way to control phosphorus in Wisconsin. They would like to see the following changes: 1) on the language regarding direct discharges to the Great Lakes, the Department has to have the ability to ensure that water quality criteria are met and his understanding of the language in the errata sheet, they are not convinced the Department will retain that authority. Setting an interim limit is fine but language should be added that would allow the Department to set more stringent limits should they be required. 2) Another section is on new discharges to impaired waters. He encourages the Board to look at this language and work with EPA to fix that language. 3) They also agree with comments from Ms. Lawton in terms of the annual limits vs. monthly limits. They understand flexibility but are concerned that having a 3x limit in permits could potentially lead to algae blooms in certain water bodies. **(Handout)**

15. **David Jelinski,** Madison, representing Dairy Business Association was not in attendance

16. **Shahla Werner,** Madison, representing the Sierra Club stated that addressing both point and nonpoint run-off will make Wisconsin a nation-wide leader in addressing nutrient pollution. Adopting stronger nutrient standards is long overdue. They concur with the other concerns raised by Environmental Law & Policy Center and the Midwest Environmental Associates about the need for monthly over annual averaging and the need to comply with precedents set under the Pinto Creek vs. EPA decision on prohibiting new discharges in an impaired waterbody in the absence of a larger plan to bring that into compliance. However, once those concerns are addressed and the EPA accepts those, the Sierra Club strongly favors the adoption of NR 217 and NR 102. **(Handout)**

Mr. Ela thanked the public for their cooperation and thoughtful comments. He continued the meeting with discussion and voting on the nonpoint source rule (3.A.3).

Mr. Rasmussen distributed and discussed the errata sheets for both rules.

Discussion followed on hydrologic unit codes (HUC's), the 5' tillage setback, buffer zone, further clarification to the 80% reduction/5 tons rule change, implications for cost-sharing, nutrient trading, and the implementation schedule for this rule.

Dr. Clausen MOVED approval, including the errata, seconded by Dr. Thomas of Board Order WT-14-08, revisions to NR 151, NR 153, and NR 155 pertaining to performance standards and grant programs to address polluted runoff.

Errata:

1. **At page 20 of the Order, revise NR 151.04 (2) (b) as follows:**
   (b) Except as provided under sub. (3), for purposes of compliance with this section the phosphorus index shall be calculated using the version of ~~SNAP-Plus software~~ the Wisconsin Phosphorus Index available as of ~~[insert effective date of this section]~~ the effective date of this rule . . . [legislative reference bureau inserts effective date].
   Note: ~~SNAP-Plus software~~ The Wisconsin Phosphorus Index is maintained by the University of Wisconsin department of soil science and can be found at http://wpindex.soils.wisc.edu/. ~~Copies are on file with the department, the secretary of state and the revisor of statutes.~~
   Note: Soil test phosphorus concentration may be used to help identify fields that are high priority for evaluation with ~~SNAP-Plus~~ the Wisconsin Phosphorus Index. For example, croplands with soil test phosphorus concentrations of 35 parts per million or greater should be given a higher priority for evaluation.
   Note: Best management practices developed by the department of agriculture, trade and consumer protection may be used alone or in combination to meet the requirements of this section.
2. **At page 45 of the Order, revise NR 151.13 (2) (b) 3. b. as follows:**
   b. Any agreements with an adjacent municipality, or with municipalities within a ~~12~~ 10 digit hydrologic unit code level, to implement the 40 percent total suspended solids reduction on a regional basis per s. NR 216.07 (6).

Discussion followed on tillage setbacks and buffer zones.

Mr. Welter MOVED, seconded by Mr. Cole to amend NR 151.03 (2) to change the no tillage requirement from 5' to 20' as follows: "No tillage operations may be conducted within ~~5~~ 20 feet of the top of the channel of surface waters. ~~Tillage setbacks greater than 5 feet but no more than 20 feet may be required to meet this standard.~~

Mr. Rohde suggested an amendment to the amendment to provide for a contraction of the tillage setback to 5 feet where it is deemed appropriate. Mr. Welter and Mr. Cole accepted Mr. Rohde's provision as a friendly amendment. The amendment to NR 151.03 (2) read: "No tillage operations may be conducted with 20 feet of the top of the channel of surface waters unless it is deemed that a lesser distance, to a minimum of 5 feet, is appropriate."

The motion to amend failed on a roll call vote of 2-5.

David Clausen – no	**Preston Cole – yes**
Jonathan Ela – no	**Gary Rohde – no**
John Welter – yes	**Christine Thomas – no**
Jane Wiley – no	

The original motion with errata carried unanimously.

Mr. Ela continued the meeting with discussion and voting on the phosphorus rule (3.A.4).

Discussion followed on the errata and whether they were discussed with stakeholders, whether EPA is on-board with these changes, and the process of setting an interim model.

Dr. Thomas MOVED approval, including the errata, seconded by Dr. Clausen of Board Order WT-25-08, revisions to NR 102 and NR 217 related to phosphorus water quality standards criteria and WPDES permit provisions for phosphorus.

Errata:

1. At page 22 of the Order, revise NR 217.13 (4) as follows:

(4) DISCHARGES DIRECTLY TO GREAT LAKES. For discharges directly to the Great Lakes, the department shall set effluent limits consistent with nearshore or whole lake model results approved by the department. The department may set an interim effluent limit based on the best readily available phosphorus removal technology commonly used in Wisconsin ~~if nearshore or whole lake model results are not available at the time a permit is reissued~~.

2. At page 34 of the Order, revise NR 217.18 (3) (e) 1. as follows:

(e) Numerical effluent limitations as follows:

1. All permits issued under the adaptive management option in this section shall include water quality based effluent limitations calculated consistent with ~~clean water act requirements~~ the federal water pollution control act, s. 33 USC 1251 to 1387, that are established according to s. NR 217.13 or a US EPA approved TMDL. These limitations shall take effect in accordance with the timeframe established in this paragraph, or pursuant to par. (g) if the adaptive management option is terminated.

Discussion followed on the compliance schedule.

Mr. Rohde MOVED to amend, seconded by Mr. Welter to strike 217.17 (1) (c) 3 on page 30 of the Order:

~~3. The likelihood that a TMDL will be developed and approved within the permit term and whether the wasteload allocation for the facility will likely be less stringent than a water quality based effluent limit calculated under s. NR 217.13.~~

Discussion followed on clarification of the monthly limits.

The motion to amend carried unanimously.

The original motion with errata as amended carried unanimously.

Mr. Cole MOVED, seconded by Ms. Wiley, to direct the Department to develop guidance in consultation with stakeholders regarding TMDL implementation so that such implementation is consistent with NR 217. The motion carried unanimously.

Mr. Cole MOVED, seconded by Mr. Welter, to direct the Department to immediately assemble a stakeholder group of those interested parties in watershed based trading issues to develop a trading framework including any recommended rules or guidance to facilitate watershed based trading, and report back to the Board no later than July 1, 2011. The motion carried unanimously.

3.A.5 Request adoption of Board Order WA-30-09, revisions to NR 660, hazardous waste management rules

Ann Coakley, Waste and Materials Management Bureau Director stated that the proposed changes create definitions for large quantity generators (LQGs) of hazardous waste and small quantity generators (SQGs) of hazardous waste. The 2009 Wisconsin Act 28 (2009-11 Budget) created new statutory fees for the two types of generators, and required that the Department define these generators in administrative rules. She requested the Board adopt Board Order WA-30-09.

Dr. Thomas MOVED approval, seconded by Dr. Clausen. The motion carried unanimously.

3.A.6 ~~Request authorization for public hearing for Board Order AM-34-05, proposed rules affecting NR 411 pertaining to the indirect source air permit program~~ **(MOVED TO SEPTEMBER AGENDA)**

3.B. Land Management, Recreation, and Fisheries/Wildlife

3.B.1 Request adoption of Board Order FR-04-10, forestry housekeeping rules package for Chapter 46, Wis. Admin. Code

Ken Symes, Forest Tax Enforcement and Operations Specialist stated that the proposed rule package would include the following changes to clarify and streamline the MFL program: 1) Create a process to allow landowners who purchase expiring forest crop law lands within 18 months prior to the end of the forest crop law expiration the opportunity to apply for the July 1 petition deadline or later for good cause to be considered for designation effective the following January 1. 2) Clarify the requirements for additions to existing managed forest law lands. 3) Amend the certified plan writer reporting requirements for plan preparation costs and requirements for making an offer to landowners for management plan writing services. 4) Amend the department billing requirements when invoicing landowners for plan preparation fees. 5) Amend the minimum medium density stocking requirements for management of plantations from 600 seedlings per acre to 400 seedlings per acre. He requested the Board adopt Board Order FR-04-10.

Discussion followed on the decrease in the minimum medium density stocking requirement from 600 seedlings to 400 seedlings per acre.

Mr. Welter MOVED approval, seconded by Ms. Wiley. The motion carried unanimously.

3.B.2 Request adoption of Board Order WM-15-10 and Emergency Board Order WM-30-10(E) related to the use of archery deer hunting carcass tags

Jason Fleener, Acting Deer Specialist stated that this proposal would limit the areas where the antlerless carcass tag is valid to only management units for which an antlerless deer harvest quota has been established and CWD units. Under current rules, firearm season hunters are not allowed to harvest antlerless deer in zero quota units but archery hunters may. Eliminating archery hunter's ability to harvest antlerless deer in units for which no antlerless quota has been established will make regulations more consistent between the firearm and archery seasons. In deer management units that are below their overwinter population goals, reduced antlerless harvest will help to achieve overwinter goals by allowing additional population growth.

This proposed rule does not create license types or new license issuance procedures. It will require updating printed instructions on carcass tags which can be done when annual updates are made and will result in no fiscal impact. It is not anticipated that this change will have an impact on license sales because the harvest of antlered bucks is still allowed in all units statewide. The ability to harvest an antlered deer is, for most hunters, the primary feature of the archery deer hunting license. Additionally, the harvest of antlerless deer will still be allowed in most units. He requested the Board Adopt Board Order WM-15-10 and Emergency Board Order WM-30-10(E). **(Powerpoint)**

Public Appearances:

1. **George Meyer,** Madison, representing the Wisconsin Wildlife Federation stated their strong support for this proposed rule. Both archers and gun hunters alike understand the depressed number of deer in the area and are willing to accept zero antlerless deer harvest in those units in order to restore the deer population in the area. **(Handout)**

Mr. Rohde MOVED approval, seconded by Dr. Clausen. The motion carried unanimously.

3.B.3 Easement purchase - Forest Legacy Program - Forest County

Discussion followed on whether the state should consider a fee title purchase on this property.

Opinion
Editorial

Adopt these rules

New regulations on phosphorus will help clean the state's waters - and that's good for business, the environment and citizens.

July 26, 2010 |(11) Comments

Legislative committees in Madison are looking at proposed regulations aimed at limiting the amount of phosphorus in the state's waterways. The rules would make significant improvements and would carry significant costs, and they deserve to be put in place.

The committees and the state Department of Natural Resources, which is proposing the rules, should make sure the costs that will be imposed by the regulations are not borne unfairly by any one group. But on the whole, these are well-crafted regulations that address the threat posed by non-point pollution - such as agricultural runoff - as well as pollution from industry and municipal wastewater treatment systems.

To its credit, the state has been moving forward on phosphorus for some time, as DNR Secretary Matt Frank pointed out in a meeting with the Editorial Board last week. And it crafted the rules only after meeting with industry groups, municipalities and environmental groups. The regulations allow for a certain flexibility in dealing with polluters and an approach Frank called "adaptive management" that will deal with entire watersheds.

That's all good, and Frank is right when he says such a process is better than waiting for a federal judge to order such rules, as has happened in Florida and could well happen here. The federal Environmental Protection Agency is making a concerted push for such rules. Frank also makes a good case for the state's comprehensive approach that covers both non-point and point pollution over a more piecemeal approach that other states seem to be taking.

Phosphorus comes from manure, agricultural and residential fertilizers and soil erosion. It contributes to problems such as Cladophora on Lake Michigan and deadly blue-green algae on some inland lakes. Phosphorus also plays a role in robbing lakes of oxygen. The DNR considers 172 lakes and streams as "impaired waters" because of the pollutant.

The DNR says its proposed rules are science-based, and for the first time it set water quality standards for phosphorus. Some rules will go into effect in the next year, but in some cases, compliance will be phased in over perhaps 15 years because the agency agreed to delays after industry and municipalities said they needed more time to pay for improvements.

Some questions remain on whether there is adequate state funding for a cost-sharing program to help farmers deal with their runoff, although Frank indicated to the board that he believes the funding will be there.

The legislative committees should make sure that's the case and make any other necessary suggestions. But the bottom line is that these rules will help clean the state's waters, which are critical to quality of life and future economic development.

Do you support regulations to limit the amount of phosphorus in the state's waterways? To be considered for publication as a letter to the editor, e-mail your opinion to the Journal Sentinel editorial department.

Find this article at:
http://www.jsonline.com/news/opinion/99272874.html

☐ Check the box to include the list of links referenced in the article.

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP3235

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, THOMAS SYDOW, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

Petitioners-Appellants,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent-Petitioner.

AMICUS BRIEF BY GEORGIA-PACIFIC CONSUMER PRODUCTS, LP, WISCONSIN PAPER COUNCIL, INC., MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN INDUSTRIAL ENERGY GROUP, INC., WISCONSIN DAIRY BUSINESS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW OF A COURT OF APPEALS DECISION DATED APRIL 13, 2010, FILED BY THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES

May 26, 2010

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Dated: May 26, 2010

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INTERESTS OF THE MOVANTS

As explained in more detail in the accompanying motion for leave to file this *amicus* brief, Georgia-Pacific Consumer Products LP ("G-P") succeeded to certain assets of Fort James Operating Company, including the paper mill located at 1919 S. Broadway Street, in the City of Green Bay, whose water discharge permit is at the heart of this dispute.

The moving trade associations have a long history of active advocacy for their members in water pollution control and other environmental policy, and represent their members' interests before the Legislature, state agencies and the Courts. They all have an interest in the efficient and orderly administration of the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit program, including stability in the rules that govern the program.

The movants offer this *amicus* brief to bring the perspective of the regulated community before the Court as it considers whether to grant DNR's Petition for Review of the Court of Appeals decision in the above matter.

SUMMARY OF POSITION

The five citizens and environmental group who challenged DNR's reissuance of the Fort James WPDES permit disagree with the

policy contained in two administrative rules – § NR 217.04(1)(a)2, Wis. Admin. Code, relating to controlling phosphorous, and § NR 106.145, Wis Admin. Code, relating to trace level mercury discharges. They seek to use the permit review mechanism under Wis. Stat. § 283.63 as a vehicle for advancing their policy challenge.

The Wisconsin Department of Natural Resources does not issue WPDES permits in a vacuum. Instead, it acts as the duly delegated agent of the U.S. Environmental Protection Agency pursuant to very specific procedures and grants of authority contained in the federal Clean Water Act.

In order to obtain delegated authority, a state must show that it has the necessary legal framework, including administrative rules, to administer the program in a manner that is consistent with federal law. Changes in a state's legal framework, including administrative rules, must be submitted to the U.S. Environmental Protection Agency for review and approval. The federal approval is subject to its own specific notice and comment procedures, and the opportunities for judicial review of EPA's actions are both detailed and limited. All of this is detailed below.

By holding that the administrative hearing on a petition to review a WPDES permit must consider whether state administrative rules comply with federal law, the Court of Appeals did not give proper

deference to the federal approvals of state rules, and created a collateral challenge pathway to the validity of the rules even though such challenges were already time barred under applicable federal law.

Reduced to its most simple terms, in order to operate the federal Clean Water Act in the first instance, DNR must show to EPA's satisfaction that its administrative rules comply with the corresponding provisions of the federal Clean Water Act. EPA must specifically make these consistency findings and issue its approval.

The EPA approval is subject to strict limitations on the timeframe and mechanisms for challenge, described below. Congress intended to bring finality to EPA determinations about state program compliance with federal Clean Water Act requirements. Because DNR is acting as the delegate of EPA in issuing WPDES permits, Congress was fully within its rights to set forth mandatory challenge mechanisms for EPA consistency findings, and by extension, prevent collateral attacks in state proceedings long after EPA action was final.

The Court of Appeals decision has the effect of overriding federal limitations on the time for challenging EPA's consistency determinations and replaces the Congressional policy of finality after 120 days of an EPA decision with a process that provides a new

challenge opportunity with every newly issued or reissued WPDES permit.[1]

Moreover, the consistency and uniformity policy of state administrative rules, described in the Argument section, below, is lost if Administrative Law Judges make case-by-case exceptions to duly promulgated state administrative rules. As a matter of state law, such a ruling would replace the statutory policy of uniform applicability of duly promulgated administrative rules with a patchwork quilt of *ad hoc* specialized exceptions to those rules which develop over time. Rather than applying uniformly to all similarly situated persons, the review opportunities opened by the Court of Appeals decision could result in numerous case specific exceptions to what should otherwise be uniformly applicable rules. It impermissibly shifts the power of the Natural Resources Board to promulgate rules to an administrative law judge in the Department of Administration Division of Hearings and Appeals.

The Court of Appeals decision means that every time DNR issues or reissues a WPDES permit, those who have policy

[1] WPDES permits are issued for a term of up to 5 years. Wis. Stat. § 283.53(1). After initial permit issuance, an industrial or municipal discharger must apply for reissuance of its permit at least 180 days before permit expiration. Wis. Stat. § 283.53(3)(a). If there is a delay in permit reissuance, a person may continue to operate under the expired permit if "timely and sufficient application for the renewal" has been submitted. Wis. Stat. § 227.51(2).

disagreements with our state's administrative rules have a new opportunity for a collateral attack on EPA's prior review and approval of the state rules. As documented in detail below, such collateral attacks would, among other things, violate the very federal law under which DNR operates the state program.

For these reasons, the Movants respectfully urge the Supreme Court to grant DNR's petition for review of this issue and decide the issue after full briefing.

ARGUMENT

I. THE FEDERAL CLEAN WATER ACT AS AN EXERCISE IN "COOPERATIVE FEDERALISM"

A. Congressional Policy Directives

The federal Clean Water Act prohibits the discharge of any pollutant by any person into navigable waters (i.e., waters of the United States) except in compliance with the Clean Water Act, including 33 U.S.C. § 1342, the National Pollution Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a) and 1342.

Congress did not want EPA to issue all municipal and industrial water permits nationwide. Instead, the Clean Water Act encourages states to apply to EPA for a delegation of authority to administer the federal Clean Water Act on behalf of EPA at the state level.

States retain flexibility to address local issues in their own rule-making provided they stay within the framework of the Clean Water Act. Simply parroting the corresponding federal regulation bypasses state expertise in crafting local solutions that protect water quality while maintaining consistency with Federal requirements.

In 1973, the Wisconsin legislature created Wis. Stat. Chapter 147 (later renumbered as Ch. 283) to provide the statutory framework for the Wisconsin DNR to administer the federal program at the state level.[2] DNR, in turn, has promulgated administrative rules that fill two ring binders of the Wisconsin Administrative Code to provide the necessary procedures and performance specifications for WPDES permit holders, all with the goal of protecting Wisconsin's surface and groundwater quality. EPA approved Wisconsin's program in 1973.[3]

The Clean Water Act's delegation mechanism has also been employed by the federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*, and the Resource Conservation and Recovery Act (hazardous waste regulatory program), 42 U.S.C. § 6921, *et seq.* The delegation of federal administrative authority to states has been described in a widely

[2] Ch. 74, Laws of 1973.

[3] Wisconsin Request for State Program Approval for Control of Discharges of Pollutants to Navigable Waters, 38 Fed. Reg. 31333 (Nov. 13, 1973).

quoted phrase as a "scheme of cooperative federalism." *Aminoil U. S. A., Inc. v. Cal. State*, 674 F.2d 1227, 1229-30 (9th Cir. 1982).

B. Requirements for State Administration of the Federal Program

The Governor of a state desiring to administer its own wastewater permit program is required to submit to the EPA Administrator a detailed description of the program it wishes to administer under state law, a statement from the Attorney General (or the attorney for those state water pollution control agencies which have independent legal counsel) that the laws of the state provide adequate authority to carry out the described program, a Memorandum of Agreement with the EPA Regional Administrator, and copies of all applicable state statutes and regulations, including those governing state administrative procedures.[4] 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.21 - .24. The Administrator must approve the state program unless the Administrator determines that adequate authority does not exist for the state to issue permits that apply and insure compliance with applicable sections of the Clean Water Act, including section 1311, and to take other actions specified in the Act. 33 U.S.C. § 1342(b)(1) - (9); 40 C.F.R. §§ 123.25 -.30.

[4] Wisconsin is located in EPA's Region 5, headquartered in Chicago.

C. EPA's Procedures for Initial Approval of State-Administered Programs

EPA's approval process for state programs also contains public notice and comment requirements, as well as deadlines for EPA to take certain actions and for interested persons to petition for review of these actions.

After determining that a state program submission is complete, EPA must publish notice of the state's application in the Federal Register and newspapers in the state and mail notice to known interested persons. 40 C.F.R. § 123.61(a). The notice must provide for a comment period of at least 45 days, a public hearing to be held within the state no less than 30 days after notice is published in the Federal Register, and other information related to where the submission can be reviewed and the approval process. *Id.*

Within 90 days of receiving a complete application, the Administrator must approve or disapprove the program based on the requirements of 40 C.F.R. Part 123 and the Clean Water Act, and after taking into consideration all comments EPA received. *Id.* § 123.61(b).

If the Administrator approves the state's program, the Administrator must notify the state and publish notice in the Federal Register. *Id.* § 123.61(c). If the Administrator determines that the state permit program does not meet the requirements of 33 U.S.C. § 1342(b)

or does not conform to the guidelines issued under § 1314(i)(2), the Administrator must inform the state of any revisions or modifications that the state must make to conform to such requirement or guidelines. 33 U.S.C. § 1342(c)(1); 40 C.F.R. § 123.61(d).

D. EPA Retains Continuing Oversight of State Programs

Wisconsin received initial approval for its delegated program in 1973, *see* n. 3. That however was the beginning, rather than the end of EPA oversight of the state program.

1. EPA Review of Proposed WPDES Permits

Once a state program is approved by EPA, the state must send the EPA Regional Administrator a copy of each permit application and notice every action related to the consideration of such application, including each permit proposed to be issued by the state, unless more limited review is provided in a Memorandum of Understanding between EPA and the state. 33 U.S.C. §§ 1342(b)(4) and (d)(1); 40 C.F.R. § 123.44. The Regional Administrator has 90 days to object in writing to the issuance of a proposed permit as being outside the guidelines and requirements of the Clean Water Act. 33 U.S.C. § 1342(d)(2); 40 C.F.R. § 123.44(a) and (c). The state or any interested person may request that EPA hold a public hearing on the objection. *Id.* § 123.44(d)(3)(e).

After the Regional Administrator makes a final determination on the objection, an interested person may obtain review of the Regional Administrator's objection in Federal District Court under Section 10 of the Administrative Procedure Act. *Washington v. U.S. EPA*, 573 F.2d 583, 587 (9th Cir. 1978) (Administrator's objection to issuance of permit by an approved state is subject to judicial review under Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706).

Of most significance here, an interested person may challenge the Administrator's decision not to object to a permit if the proposed permit allegedly violates applicable federal requirements, or if EPA has failed to consider if other unlawful factors have tainted its decision making. *Save the Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1296 (5th Cir. 1977). Rather than use this federally mandated mechanism to review EPA's determinations on the Fort James permit and underlying state administrative rules, the challengers have convinced the Court of Appeals to create a new challenge pathway that contradicts federal law.

2. EPA Review of New and Changed State Administrative Rules

Revisions to approved state programs follow a procedure similar to the initial application. Program revision may be necessary when state administrative rules are revised. 40 C.F.R. § 123.62(a). Either EPA or

the approved state may initiate program revision, although states must keep EPA fully informed of proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. *Id.*

To revise a state program, the state submits modified program documents to EPA. *Id.* § 123.62(b)(1). If EPA determines the revision is substantial, it issues public notice (in the Federal Register, state newspapers and mail to interested persons) and provides at least a 30 day public comment opportunity. *Id.* § 123.62(b)(2). Program revisions become effective upon approval of EPA's Regional Administrator, and notice of approval of any substantial revision is published in the Federal Register. *Id.* § 123.62(b)(4).

3. Challenge Opportunities for EPA Decisions to Approve State Programs

Any interested person may apply for review of the Administrator's action in making any determination as to a state permit program issued under 33 U.S.C. § 1342(b), and must seek review in the U.S. Court of Appeals for the federal judicial circuit in which such person resides or transacts business which is directly affected by such action. 33 U.S.C. § 1369(b)(1); 5 U.S.C. § 703 (providing that the form of proceeding for judicial review under the Administrative Procedure Act is the special statutory review proceeding relevant to the subject

matter in a court specified by statute).[5] A petition for review of such an action must be filed within 120 days of the Administrator's action. *Id.* No such challenge was filed when EPA approved the two administrative rule provisions in dispute here, and found them to be consistent with federal Clean Water Act requirements.

E. Effect on Comprehensive Planning.

The Clean Water Act has an extensive planning component. *See*, 33 U.S.C. §§ 1288 and 1290. A detailed discussion is impractical in an *amicus* brief; it is worth noting that planning agencies rely on finality and predictability in state rules in conducting their functions. Wastewater treatment upgrades often require years of planning, large capital outlays and significant annual operating expenses. If there is no limit to challenging federally approved rules, orderly planning for enhanced wastewater treatment by both municipalities and industry becomes much more difficult.

II. RELATIONSHIP TO WISCONSIN LAW AND PROGRAMS.

The Court of Appeal's decision opens a new door to the collateral attack on state administrative rules that have been approved

[5] *American Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 295 (5th Cir. 1998) ("The [Clean Water Act] grants the federal courts of appeals original jurisdiction over challenges to determinations regarding state permitting programs under [Clean Water Act] § 402(b) [33 U.S.C. § 1342(b)]."); *Washington v. U.S. EPA*, 573 F.2d 583, 587 (9th Cir. 1978) (federal court of appeals has jurisdiction to review items listed in the Clean Water Act § 509(b)(1) (33 U.S.C. § 1369(b)(1)).

by EPA each time a WPDES permit is issued or reissued. To better illustrate how review opportunities open and close, this section provides a summary of the Wisconsin administrative rule making process and ties that back to the federal approval of those rules under Clean Water Act delegation procedures.

A. Wisconsin Administrative Rule Making Procedures

Under the Wisconsin Administrative Procedure Act, a "rule" is defined as "a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency…" Wis. Stat. § 227.01(13).

The statutes and case law require agencies to "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute…." Wis. Stat. § 227.10(1).

Subchapter II of Wis. Stat. Chapter 227 sets forth an extensive set of requirements for agency promulgation of administrative rules. Proposed rules are reviewed by the Legislative Council's Clearing House (Wis. Stat. §§ 227.14 and 227.15). Public comment and often public hearings are required. Wis. Stat. §§ 227.16 and 227.18. The Legislature has its own process for reviewing administrative rules prior

to promulgation, Wis. Stat. § 227.19. Upon final adoption, rules must be filed with the Legislative Reference Bureau (Wis. Stat. § 227.20) and published as directed in Wis. Stat. § 227.21. DNR rules must be approved by the Natural Resources Board. Wis. Stat. § 15.34(1).

Amendments to existing rules must go through the same steps described above before they can become effective.

B. Finality of EPA Determinations

EPA's process for reviewing and approving both new and changed administrative rules dealing with WPDES permit issuance is described in detail above. In making its findings, EPA is determining that the state rules which underwent the Wis. Stat. Ch. 227 process described in the prior section, comply with the corresponding requirements of the federal Clean Water Act and federal regulations adopted thereunder.

EPA's decision to approve new or modified state rules can only be challenged in federal court, and only within 120 days of EPA's determination. The challenge opportunity in Wis. Stat. § 227.40 is confined to non-federal issues, as Congress has pre-empted the field for review of federal issues by virtue of the mandatory federal mechanisms described above for reviewing EPA program approvals.

CONCLUSIONS

For all of the reasons stated above, the movants respectfully request that the Court grant the DNR Petition for Review of the Court of Appeals decision so that the issues raised above can be more fully developed for consideration and determination by the Court.

Respectfully submitted this 26th day of May, 2010.

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CERTIFICATION

I hereby certify that this amicus brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(c)(2) and 809.19(7)(b) for a non-party brief submitted in support of a petition for review produced with proportional serif font. The length of this amicus brief is 2,980 words.

Dated this 26th day of May, 2010.

*/s*_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this amicus brief in support of a petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic amicus brief is identical in content and format to the printed form of the amicus brief filed as of this date.

A copy of this certificate has been served with the paper copies of Motion seeking leave to file an amicus brief, and the brief, filed with the court and served on all opposing parties.

Dated this 26th day of May, 2010.

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP3235

CURT ANDERSEN, JOHN HERMANSON, REBECCA LEIGHTON KATERS, CHRISTINE FOSSEN RADES, NATIONAL WILDLIFE FEDERATION AND CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN, INC.,

Petitioners-Appellants,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent-Petitioner.

AMICUS APPENDIX

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Permit Reissuance Fact Sheet

General Information

Permittee Name and Facility Address:	**Fort James Operating Company** **Green Bay Broadway** 1919 South Broadway Green Bay, Wisconsin
Permit Number:	WI-0001848-07-0

Receiving Water:	The Broadway Mill discharges to the Fox River approximately four miles from its mouth at Green Bay. (See sampling point descriptions on page 6 for the specific location of each outfall.)
Stream Flow and Classification:	The Fox River at Green Bay is classified for full fish and aquatic life (warmwater sport fishery) and recreational uses, is not classified as a public water supply, and has a $_7Q_{10}$ of 660 cfs.

Facility Description

Fort James Operating Company, a wholly owned subsidiary of Georgia-Pacific Corporation, produces tissue paper from wastepaper at its Broadway Mill. The Mill's five pulping systems process approximately 1,600 tons per day (TPD) of post- and pre-consumer wastepaper. The Mill deinks the wastepaper and bleaches approximately 85 percent of the resulting pulp. Bleaching processes include the use of hypochlorite, sodium hydroxide, oxygen, hydrogen peroxide and sodium hydrosulfite. While most of the pulp used by the Mill is produced on site, the Mill also purchases some virgin pulp.

The Broadway Mill produces approximately 1,100 TPD of various tissue and toweling paper grades on eight paper machines. The Mill also produces an average of 85 TPD of nonwoven material on two dry form machines and one carded machine. The nonwoven materials are produced from binder and purchased fiber.

The majority of the paper produced by the Mill is converted on site. Converting operations include printing.

Ancillary facilities include six boilers and five steam-driven turbine/generator sets that produce 85 megawatts of electricity. The boilers burn coal and petroleum coke and produce 850,000 pounds of steam per hour.

Fort James no longer operates a chlor-alkali plant at the Broadway Mill. The Mill purchases all hypochlorite and sodium hydroxide that is used in its paper making processes.

Discharge Description

Paper making Wastewaters: The Broadway Mill treats process wastewaters from paper making and pulping separately. Paper making wastewaters receive primary clarification with a single clarifier (Mill Sewer Clarifier #5). Pulping wastewaters and intake water treatment wastes receive chemically assisted primary clarification, activated-sludge secondary treatment, and chemically assisted phosphorus removal. Components include two primary clarifiers operated in parallel (Deink Primary Clarifiers #2 and #3), a cooling tower for primary effluent, three aeration basins operated in parallel, a secondary clarifier (Secondary Clarifier #1), a tertiary clarifier (Tertiary Clarifier #2), and six belt filter presses. Phosphoric acid and aqua ammonia are added as nutrients to the aeration basins. Ferric sulfate and an anionic flocculant are added to the tertiary clarifier to remove phosphorus.

The Broadway Mill routes settled solids from Mill Sewer Clarifier #5 and Tertiary Clarifier #2, and waste activated sludge from Secondary Clarifier #2 to Deink Primary Clarifiers #3 and #4. Settled solids from the primary clarifiers are dewatered on six belt filter presses.

Of the 450 tons of sludge that the Broadway Mill's wastewater treatment system generates daily, 125 tons are hauled to the Mill's landfill, 200 tons are incinerated in #10 Boiler for energy recovery, and 125 tons are sent to Grantek, which produces a granular carrier for pesticide products.

During the 12-month period from February 2004 through January 2005, effluent from the Broadway Mill's wastewater treatment system (Outfall 001) averaged 9.68 MGD (million gallons per day), <2.1 mg/L BOD_5 (five-day biochemical oxygen demand), 5.3 mg/L TSS (total suspended solids) and 0.71 mg/L of phosphorus. This is excellent effluent quality for paper mill wastewater. Additional data on the Broadway Mill's wastewater discharges are provided in Table A1, page 15.

Beginning approximately July 1, 2004, the Broadway Mill decreased the amount of wastewater that it was recycling back to pulp and paper production processes. Consequently, the volume of discharge at Outfall 001 increased. For the period from July 2004 through February 2005, the Broadway Mill's discharge from Outfall 001 averaged 11.9 MGD.

The Broadway Mill continues to recycle approximately 65 percent of its paper making and deink pulping wastewaters. Approximately 95 percent of all paper making process wastewaters, 15.25 MGD, are recycled. Approximately 40 percent of deink pulping process wastewaters, 8.7 MGD, are recycled. (These data were taken from the flow diagram that the Broadway Mill included in its permit reissuance application.)

Power Plant Wastewaters: Process wastewaters from the Broadway Mill's power plant include boiler blowdown, boiler water treatment wastes and, occasionally, overflow from an ash pit. Fly and bottom ash sluice waters, bearing cooling waters and floor drainage are discharged to the ash pit. All of these wastewaters are discharged to the Mill Sewer Clarifier #5 and recycled.

The power plant also discharges condenser cooling water and other noncontact cooling waters directly to the Fox River (Outfall 002). To combat zebra mussels, the Broadway Mill operates a chlorination/dechlorination system. The Mill chlorinates its condenser cooling water for approximately two weeks each fall and, occasionally, in the spring. The cooling water is chlorinated as it is withdrawn from the Fox River and is dechlorinated prior to being returning to the River.

During the period from February 2004 through January 2005, the discharge of once-through condenser cooling water averaged 62.9 MGD. Due to the dechlorination process, residual chlorine has remained below the limits of detection during the current permit's term. Additional data on the Broadway Mill's discharge of once-through condenser cooling water are provided in Table A1, page 15.

Currently, the Broadway Mill is replacing its Number 8 steam turbine/generator set. The new steam turbine/generator set will increase the electrical generating capacity of the Mill's power plant by 11 megawatts. Due to the greater efficiency of the new steam turbine/generator set and the conversion of the oldest and least efficient steam turbine/generator set to emergency standby, condenser cooling water pumping capacity is not being increased.

Stormwater: Since 1997, the Broadway Mill has collected stormwater runoff from facilities and surrounding yard areas east of South Broadway. The Mill stores the collected stormwater in a retention basin and then combines it with paper mill wastewaters to be treated and recycled.

Sanitary Sewer Discharge: The Broadway Mill discharges leachate from its landfill and sanitary wastes from its production facilities to the Green Bay Metropolitan Sewerage District.

General Approach for Some Permit Conditions

Proposed Permit Format: The Department's computer program, the System for Wastewater Applications, Monitoring and Permits (SWAMP), was used to generate the proposed permit reissuance. The Department also uses SWAMP to generate discharge monitoring report forms, track compliance and store discharge data. SWAMP greatly affects the proposed permit's format and, occasionally, its content.

SWAMP organizes all WPDES permits in the same order. Following the permit's title page and table of contents are monitoring requirements for in-plant sampling points, monitoring and effluent limitations for surface water discharges, schedules of compliance, standard requirements, and a summary of reporting dates.

Another characteristic of SWAMP is its use of sampling points versus outfalls. Throughout this fact sheet, the terms "outfall" and "sampling point" have the following meanings. An outfall is a point source, which means a discernible, confined and discrete conveyance from which pollutants may be discharged to Wisconsin's surface waters and groundwater. For example, a pipe that discharges to a river is an outfall.

Generally, sampling points represent the location at which an influent, in-plant waste stream, or effluent is sampled or monitored. Sampling points may or may not be located at the actual point of discharge to the surface water or groundwater. For example, a Parshall flume that measures effluent flow from a final clarifier and is located upgradient from the mouth of the pipe that discharges the effluent to a river is identified as a sampling point. The discharge pipe, or more specifically the mouth of the discharge pipe, is identified as the outfall.

Customarily, the same number identifies the outfall and the first sampling point up gradient from the outfall's point of discharge. For example, the Broadway Mill's 001C Sample House is the nearest sampling location to Outfall 001. Consequently, the Sample House is identified as Sampling Point 001 in the permit. Additional sampling points located upgradient from a sampling point are customarily identified as in-plant sampling points. For example, the proposed permit identifies the flow monitoring devices for Secondary Clarifier #1, Tertiary Clarifier #2 and Mill Sewer Clarifier #5, which are located upgradient from Sampling Point 001, as in-plant Sampling Points 111, 112 and 105, respectively. (Note that the last digit of each in-plant sampling point number is the same as the clarifier number.)

SWAMP uses sampling points for more than identifying sampling locations, however. Sampling points may also be used to represent wasteload allocation data, field blank results, and mathematically combined loadings from more than one outfall.

Mercury Permit Conditions: The proposed permit reissuance addresses the discharge of mercury pursuant to s. NR 106.145, Wis. Adm. Code, which became effective during the term of the Broadway Mill's current permit. Section NR 106.145 provides a phased approach for regulating mercury in WPDES discharge permits. The mercury rule is based on the concept that source reduction is preferable to treatment, which could result in substantial adverse social and economic impacts and could produce a waste stream that can be an environmental liability.

When fewer than twelve monitoring results are available for mercury at the time of permit reissuance, the mercury rule requires either monthly or quarterly mercury monitoring as a condition of the reissued permit. Monthly monitoring is required if the Department determines that a net discharge of mercury is likely. Lacking evidence of a net discharge, quarterly monitoring is required unless the Department determines there is little risk that the discharge contains any mercury. If a net discharge is likely, the rule also requires permit conditions that trigger a pollutant minimization plan (PMP) if the first 24 months of permit-required monitoring demonstrate a need for water quality-based effluent limits. The monitoring frequency may be reduced from monthly to quarterly after a least twelve representative results have been generated.

For the following reasons, the proposed permit reissuance requires quarterly mercury monitoring:

- Fewer than twelve monitoring results are available at this time. As part of its application for permit reissuance, the Broadway Mill submitted three test results for mercury that meet the collection and analysis requirements of the mercury rule.

- The Broadway Mill appears to be discharging mercury. Test results indicate quantifiable levels of mercury are present in the Mill's effluent (see Table A2, page 16).
- There does not appear to be a net discharge of mercury. The average intake concentration of 27.9 ng/L exceeds the average discharge concentration of 5.78 ng/L.

The proposed permit also requires the Broadway Mill to collect and analyze samples for mercury according to the requirements of ss. NR 106.145 (9) and (10). That is, 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." An analytical method capable of quantifying mercury at the concentrations found in the discharge sample or 1.3 ng/L, whichever is greater, must be used (i.e., EPA Method 1631). (A concentration of 1.3 ng/L equals the lowest water quality criterion for mercury pursuant to ch. NR 105, Wis. Adm. Code.) Finally, a field blank must be collected each day that a discharge sample is collected for mercury. The proposed permit reissuance identifies Sampling Point 110, MERCURY FIELD BLANK, for this purpose.

Fort James is encouraged, but not required, to collect and analyze untreated river water (intake) samples for mercury at the same time that effluent samples are collected. Unfortunately, it is quite common to find mercury in Wisconsin's surface waters at concentrations that exceed water quality criteria. The Broadway Mill's intake data appear to indicate this is true for the Fox River at Green Bay. Since the Department normally imposes water quality-based effluent limitations only when discharge levels exceed intake levels, it will be advantageous for the Mill to perform intake testing for mercury. The proposed permit reissuance identifies Sampling Point 601, FOX RIVER INTAKE, for reporting river water intake sample results.

Proposed Permit Reissuance Title Page

Permittee: While Georgia Pacific owns the Broadway Mill, it subsidiary, Fort James Operating Company, has direct control over the facility and its operation. Therefore, the proposed permit reissuance identifies the permittee as Fort James Operating Company.

Expiration Date: The Department anticipates reissuing the permit with an effective date of July 1, 2005. To provide the maximum allowed permit term of five years, the Department proposes an expiration date of June 30, 2010.

1 In-Plant Requirements

Note: The following sections of the fact sheet are numbered consistently with the numbering of corresponding conditions of the proposed permit. Shaded cells in the following tables indicate permit conditions that are new or are different from those found in the current permit. This fact sheet refers to the Broadway Mill's current WPDES discharge permit, which will remain in effect until June 30, 2005, as the "current permit." The proposed permit reissuance is addressed as the "proposed permit."

1.1 Sampling Point

Sampling Point No.	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
105	At Sampling Point 105, which is located at a 3-foot Parshall flume adjacent to Mill Sewer Clarifier #5, effluent from Mill Sewer Clarifier #5 shall be monitored for flow prior to combining with effluent from either Secondary Clarifier #1 or Tertiary Clarifier #2. Only effluent directed to Outfall 001 must be monitored.
110	Field blank to accompany mercury monitoring.

Sampling Point No.	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
111	At Sampling Point 111, which is located at a 2-foot Parshall flume adjacent to Secondary Clarifier #1, effluent from Secondary Clarifier #1 shall be monitored for flow prior to combining with effluent from either Tertiary Clarifier #2 or Mill Sewer Clarifier #5. Only effluent directed to Outfall 001 must be monitored.
112	At Sampling Point 112, which is located at a 1.5-foot Parshall flume adjacent to Tertiary Clarifier #2, effluent from Tertiary Clarifier #2 shall be monitored for flow prior to combining with effluent from either Secondary Clarifier #1 or Mill Sewer Clarifier #5. Only effluent directed to Outfall 001 must be monitored.

Changes from Previous Permit:

Sampling Points 105, 111 and 112: The Broadway Mill does not measure effluent flow at Sampling Point 001, which is located at the 001C Sample House. Rather, the Mill separately measures the flow from three possible sources: overflow from Secondary Clarifier #1 that bypasses tertiary treatment, overflow from Tertiary Clarifier #2 and overflow from Mill Sewer Clarifier #5 that is not recycled to pulp processing. The Mill reports the sum of the measured flows as the flow for Sampling Point 001. The proposed permit recognizes and allows this practice by identifying the individual flow monitoring locations as Sampling Points 111, 112 and 105, respectively, and defining the flow rate at Sampling point 001 as the sum of flows as measured at Sampling Points 111, 112 and 105.

The proposed permit renumbers the effluent monitoring point for Mill Sewer Clarifier #5 yet again. The current permit identifies the monitoring point as Sampling Point 007. The previous permit identified the monitoring point as Sampling Point as 501. From January 1999 through July 2000, discharge monitoring report forms identified the monitoring point as Sampling Point 105. The proposed permit identifies the monitoring point as Sampling Point 105.

The Broadway Mill's permit reissuance application makes it clear that the monitoring point is located upgradient from Sampling Point 001, which makes it an in-plant sampling point. The Department's numbering convention requires in-plant sampling points to be identified by numbers between 101 and 199 (it's a SWAMP thing). It will be easier for the Department to move the discharge data currently stored in SWAMP under Sampling Point 007 to Sampling Point 105 rather than moving the data from Sampling Points 007 and 105 to an entirely new in-plant sampling point number.

Sampling Point 110 (Footnote 1.2.1.1): As explained previously, the proposed permit establishes Sampling Point 110 for reporting field blank results for mercury. The Department will include Sampling Point 110 on quarterly discharge monitoring reports.

1.2 Monitoring Requirements and Limitations

1.2.1 Sampling Point 110 - MERCURY FIELD BLANK

Monitoring Requirements and Limitations					
Parameter	Limit Type	Limit and Units	Sample Frequency	Sample Type	Notes
Mercury, Total Recoverable		ng/L	Quarterly	Blank	

Changes from Previous Permit:

Sampling Point 110 (Footnote 1.2.1.1): Pursuant to s. NR 106.145 (9), Wis. Adm. Code, one mercury field blank is required for each day that the Broadway Mill samples its discharge to the Fox River. Since quarterly mercury monitoring is proposed for the Mill's discharge to the Fox River (Sampling Point 001), at least one field blank must be collected each calendar quarter.

Flow Monitoring at Sampling Points 105, 111 and 112: The proposed permit does not require the Broadway Mill to report flow data for Sampling Points 111 and 112 and eliminates the reporting requirement for Sampling Point 105 (currently Sampling Point 007). The amount of Mill Sewer Clarifier #5 overflow that is discharged rather than recycled has been minimal (see Table A3, page 16). The Broadway Mill currently directs all Secondary Clarifier #1 overflow to Tertiary Clarifier #2. Unless flows from Clarifiers #5 and #1 increase, the Department sees no need for the Mill to report any flow other than the total flow from Outfall 001.

Should the Broadway Mill increase the discharge of Clarifier #5 overflow to the Fox River via Outfall 001 or decrease the amount of overflow from Clarifier #1 that receives tertiary treatment, the Mill must notify the Department. Standard Requirement 4.2.6 in both the current and proposed permits requires the Mill to report such process changes.

By specifying continuous flow monitoring at Sampling Points 111, 112 and 105 (Footnote 2.2.1.1), the proposed permit requires the Broadway Mill to continuously record the flow and retain flow records. Consequently, flow data will be available for Department review should it become necessary.

2 Surface Water Requirements

2.1 Sampling Points

Sampling Point No.	Sampling Point Location, Waste Type/Sample Contents and Treatment Description (as applicable)
001	At Sampling Point 001, which is located in the 001C Sample House, the combined discharge from Secondary Clarifier #1, Tertiary Clarifier #2 and Mill Sewer Clarifier #5 shall be sampled after mixing, but prior to discharge to the Fox River via Outfall 001. Outfall 001 is located just off the west bank of the Fox River 1.1 miles downstream (north) of the Highway 172 bridge. The outfall has three submerged outlets. (Note: Outfall 001 actually has four outlets, but one is blocked off leaving only three functional outlets.)
002	At Sampling Point 002, power plant noncontact cooling water shall be sampled prior to discharge to the Fox River via Outfall 002. Sampling Point 002 consists of an inline flow meter and a turning basin where effluent samples are collected. The flow meter is located east of 51 Building and the turning basin is located north of 55 Building. Outfall 002 is located just off the west bank of the Fox River 1.25 miles downstream (north) of the Highway 172 bridge.
601	Sampling Point 601 represents the sampling location for untreated (intake) river water.

Changes from Previous Permit:

Sampling Point 601: As explained previously, the proposed permit establishes Sampling Point 601 for the voluntary reporting of river water sample results for mercury. The Department will include Sampling Point 601 on quarterly discharge monitoring reports.

2.2 Monitoring Requirements and Effluent Limitations

2.2.1 Sample Point (Outfall) 001 - TREATED EFFLUENT

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limit and Units**	**Sample Frequency**	**Sample Type**	**Notes**
Flow Rate		MGD	Daily	Calculated	See "Flow Sample Type" below.
BOD5, Total	Monthly Avg.	15,537 lbs/day	3/Week	24-Hr Flow Prop Comp	
BOD5, Total	Daily Max.	29,854 lbs/day	3/Week	24-Hr Flow Prop Comp	See "Wasteload Allocation Water Quality Related Effluent Limitations" below for additional BOD_5 limits.
Suspended Solids, Total	Monthly Avg.	21,051 lbs/day	3/Week	24-Hr Flow Prop Comp	
Suspended Solids, Total	Daily Max.	39,189 lbs/day	3/Week	24-Hr Flow Prop Comp	
Temperature, Average		degree F	Daily	Grab	
Phosphorus, Total	Rolling 12-Month Avg.	1.0 mg/L	1/Week	24-Hr Flow Prop Comp	
Cyanide, Amenable		µg/L	Quarterly	Grab	Amenable cyanide monitoring is required only during 2009.
Cyanide, Total		µg/L	Quarterly	Grab	Total cyanide monitoring is required only during 2009.
Mercury, Total Recoverable		ng/L	Quarterly	Grab	
PCB Total		ug/L	Annual	24-Hr Flow Prop Comp	
Acute WET		TUa	Quarterly	24-Hr Flow Prop Comp	WET testing is required only during calendar quarters specified below.
Chronic WET		rTUc	Quarterly	24-Hr Flow Prop Comp	WET testing is required only during calendar quarters specified below.
Flow River		cfs	Daily	Continuous	WLA monitoring is required May through October only.

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limit and Units**	**Sample Frequency**	**Sample Type**	**Notes**
WLA Previous 4 Day Avg River Flow		cfs	Daily	Calculated	WLA monitoring is required May through October only.
WLA Previous Day River Temp		degree F	Daily	Continuous	WLA monitoring is required May through October only.
WLA Value		lbs/day	Daily	Calculated	WLA monitoring is required May through October only.
WLA Adjusted Value		lbs/day	Daily	Calculated	WLA monitoring is required May through October only.
WLA BOD5 Discharged	Daily Max. – Variable	lbs/day	3/Week	24-Hr Flow Prop Comp	WLA monitoring is required May through October only.
WLA 7 Day Sum of WLA Values		lbs/day	Daily	Calculated	WLA monitoring is required May through October only.
WLA 7 Day Sum of BOD5 Discharged	Daily Max. – Variable	lbs/day	Daily	Calculated	WLA monitoring is required May through October only.
pH (Continuous)			Daily	Continuous	See "Continuous pH Monitoring" below for pH limits and allowed excursions.

Changes from Previous Permit

Flow Sample Type (Footnote 2.2.1.1): In recognition that discharge flow rates are monitored upgradient from Sampling Point 001, the proposed permit changes the flow sample type at Sampling Point 001 from continuous to calculated. The proposed permit defines "calculated" flow monitoring as the sum of the following flows, overflow from Secondary Clarifier #1 that bypasses tertiary treatment, overflow from Tertiary Clarifier #2, and overflow from Mill Sewer Clarifier #5 that is not recycled to pulp processing as measured at Sampling Points 111, 112 and 105, respectively. Further, the proposed permit requires continuous flow monitoring at Sampling Points 111, 112 and 105.

BOD_5, TSS and Phosphorus Monitoring Frequencies:

The proposed permit retains the monitoring frequency of 3 times per week for BOD_5 and TSS, but increases the monitoring frequency for phosphorus from 3 times per week to 4 times per week. When the current permit was issued, the monitoring frequency for BOD_5 and TSS was reduced from daily to 3 times per week and the monitoring frequency for phosphorus was retained at three times per week due to the exceptional quality of the Broadway Mill's wastewater discharge. Exceptional quality was defined as less than 10 mg/L of BOD_5, less than 10 mg/L of TSS and less than 1 mg/L of total phosphorus when expressed as long-term averages. When the current permit was issued, the Broadway Mill's discharge averaged 5.2 mg/L BOD_5, 9.5 mg/L TSS and 0.90 mg/L total phosphorus. The Mill's effluent continues to meet the definition of exceptional quality as demonstrated below:

- Based on the most recent 12 months of data, the Broadway Mill's current discharge of BOD_5, TSS and phosphorus averaged <2.1 mg/L, 5.3 mg/L and 0.71 mg/L, respectively. (See Table A1, page 15, for more discharge data.)
- During the term of the current permit, the greatest long-term average discharge concentration when calculated as a 365-day rolling average equaled 6.6 mg/L for BOD_5, 9.9 mg/L for TSS, and 0.72 mg/L for phosphorus.

In addition to providing exceptional effluent quality, the Broadway Mill discharges BOD_5 and TSS at levels that are far below permit limits.

- During the term of the current permit, the greatest single day of discharge equaled a mere 8 percent of the BOD_5 daily maximum technology-based effluent limit, and 14 percent of the daily maximum TSS technology-based effluent limit.
- During the term of the current permit, the greatest monthly average discharge equaled only 3 and 5 percent of respective BOD_5 and TSS monthly average technology-based effluent limits.
- The greatest single day of BOD_5 discharged during wasteload allocation seasons equaled only 8 percent of the daily maximum wasteload allocation limit.
- The greatest 7-day sum of BOD_5 discharged during wasteload allocation seasons equaled only 4 percent of the 7-day sum of wasteload allocation values.

The Broadway Mill is unique among Wisconsin mills for the amount of wastewater that it recycles and the level of wastewater treatment that it provides.

- The Broadway Mill recycles 95 percent of its paper making wastewaters and 40 percent of its deink pulping wastewaters.
- The Mill provides chemically-assisted tertiary clarification.

In recognition of the Broadway Mill's continued efforts to provide high quality effluent, the proposed permit retains the monitoring frequency of 3 times per week for BOD_5 and TSS. Monitoring 3 times per week is less frequent than that indicated by Department guidance, but greater than that indicated by EPA guidance. (See Attachment B, page 18 for more information on the evaluation for reduced monitoring frequencies.)

The proposed permit increases the monitoring frequency for phosphorus to 4 times per week, however. While the Department would like to recognize the Broadway Mill's efforts to reduce its phosphorus discharge, the Department will not specify a monitoring frequency less frequent than that indicated by EPA guidance. Based on the Mill's discharge of phosphorus compared to its phosphorus limit, EPA guidance indicates a phosphorus monitoring frequency of 4 time per week. (See Attachment B, page 18 for more information on the evaluation for reduced monitoring frequencies.)

Reduced monitoring frequencies are contingent on effluent quality remaining high. Similar to the current permit, the proposed permit (Footnote 2.2.1.2) states that the Department may modify the permit without public notice to increase the monitoring frequency up to daily for BOD_5, and/or TSS should the Broadway Mill exceed respective technology-based effluent limitations. Also, the Mill must increase its monitoring frequency to 5 times per week for BOD_5 or TSS during the month that follows a month with an average BOD_5 or TSS concentration greater than 10 mg/L, receptively. A monthly average concentration above 10 mg/L occurred 9 out of 54 months for TSS during the term of the current permit, but did not occur even once for BOD_5. Modifying a permit without public notice to increase a parameter's monitoring frequency is allowed pursuant to s. NR 203.015, Wis. Adm. Code.

Temperature Monitoring: In recognition that the Broadway Mill provides continuous temperature monitoring at Sampling Point 001, the proposed permit specifies the parameter "Average Temperature." This parameter implies that the daily average temperature should be reported, rather than an instantaneous maximum, when continuous monitoring is provided. While procedures for establishing thermal limits have not yet been promulgated, it is more likely that resulting temperature limits will be imposed as daily maximums rather than instantaneous maximums.

Consequently, it will be preferable that the temperature data used to determine the need for a temperature limit be in the form of a daily average.

The temperature sample type of grab remains unchanged. Should the Broadway Mill collect a single temperature reading, which a sample type of grab allows, the result should be reported on the discharge monitoring report. Should the Mill collect more than one temperature reading, the average temperature should be reported.

Copper, Cyanide and Zinc Monitoring: The current permit required monthly monitoring for copper, total cyanide and zinc during 2004 to enable the Department to evaluate the need for water quality-based effluent limitations upon permit reissuance. The Department has reviewed the discharge data for these three parameters and concludes that effluent limitations are not necessary for any of the three pollutants and no further monitoring is required for copper and zinc. Additional monitoring is proposed for cyanide, however. The proposed permit requires quarterly monitoring during 2009 for both total cyanide and cyanide amenable to chlorination. The cyanide data will aid the Department in its evaluation for water quality-based effluent limitations when the proposed permit is reissued in 2010. (See the Department's April 28, 2005 water quality-based effluent limitations recommendation memo for more information.)

Mercury Permit Conditions (including Footnote 2.2.1.3): As discussed previously, the proposed permit requires quarterly mercury monitoring at Sampling Point 001 and the use of a field blank with each effluent sample pursuant to s. NR 106.145, Wis. Adm. Code.

PCB Monitoring Frequency: The proposed permit reduces the monitoring frequency for PCBs (polychlorinated biphenyls) from quarterly to once each year. The Broadway Mill has not detected PCBs in nearly a decade of monitoring. During the term of the previous permit (5th issuance), the Broadway Mill sampled weekly and did not detect PCBs. During the term of the current permit, the Broadway Mill samples quarterly, but has yet to detect PCBs. The Mill's current limit of detection for PCBs equals 0.06 µg/L.

Typically, monitoring would not be required for a parameter that has not been detected for several years. However, in light of the fact that the Broadway Mill did historically discharge PCBs and due to the fact that the Mill's major source of pulp is post-consumer wastepaper, which could conceivably contain PCBs, the proposed permit continues to require monitoring for PCBs, albeit at a minimal frequency.

Whole Effluent Toxicity (WET) Monitoring (including Footnote 2.2.1.4): The monitoring frequency for acute and chronic WET testing remains the same at once each year for a total of five sets of tests during the permit's term. The Department's *WET Guidance Document* (http://www.dnr.state.wi.us/org/water/wm/ww/biomon/_g_toc.htm) was used to establish this requirement. Basically, the guidance recommends annual acute and chronic WET testing for all primary industries, which includes paper mills.

Department guidance suggests that permits should require WET testing in rotating calendar quarters. Therefore, the proposed permit requires acute and chronic WET testing during the first quarter of 2006, the fourth quarter of 2007, the third quarter of 2008, the second quarter of 2009, and the first quarter of 2010. Such a schedule avoids having the Broadway Mill perform the first WET test immediately after permit issuance and allows time for the results of the last WET test to be submitted to the Department prior to reissuance of the proposed permit in 2010.

The proposed permit's monitoring requirements and effluent limitations table for Sampling Point 001 specifies quarterly monitoring for WET testing while a footnote to the table specifies one quarter per year during which WET testing is required (a SWAMP quirk). To help prevent any misunderstanding, only one set of acute and chronic WET tests is required each year.

The proposed permit increases the instream waste concentration (IWC) for the discharge from Outfall 001 from 8.0 percent to 8.5 percent. This change is due to an increase in the Broadway Mill's discharge from 8 MGD to 9.21 MGD and to the recognition that the Broadway Mill uses sources other than the Fox River for its water supply (82% from the Fox River and 12 percent from other sources). (See the Department's April 28, 2005 water quality-based effluent limitations recommendation memo for the derivation of the IWC.)

Shortly after water quality-based effluent limitations recommendations were finalized, the Broadway Mill informed the Department that it uses three additives in its wastewater treatment system that it did not included in its

application for permit reissuance. However, when the three additives are included in the WET testing checklist, the recommended testing frequency does not change. While points for additives in the checklist increase from 5 to 12, total points remain with the range for which annual acute and chronic WET testing is specified.

Explanation of Limits

Technology-based Effluent Limitations for BOD_5 and TSS: The proposed permit leaves unchanged technology-based effluent limitations for BOD_5 and TSS. The derivation of the Broadway Mill's limits, which are based on ch. NR 284, Wis. Adm. Code, is provided in Attachment C, page 22.

The Mill's current production rates exceed those used to derive the proposed permit's technology-based effluent limits. While the Mill is entitled to effluent limits that are based on current production rates, Wisconsin's water quality antidegradation requirements must be met before BOD_5 and TSS permit limits may be increased.

Technology-based Effluent Limitations for Pentachlorophenol (PCP) and Trichlorophenol (TCP): Fort James has certified that the Broadway Mill does not use chlorophenolic-containing biocides. Therefore, pursuant to s. NR 284.12 (2)(b) and (c), the proposed permit does not contain technology-based effluent limitations for either PCP or TCP.

Wasteload Allocated Water Quality Related Effluent Limitations for BOD_5 (Footnote 2.2.1.6): The proposed permit does not alter wasteload allocated effluent limitations for BOD_5. The limits are derived from Table 1-c (river mile 7.3 to 0.0) of ch. NR 212, Wis. Adm. Code, a baseline load for the Broadway Mill of 28,505 lbs/day BOD_5, and a total baseline load for the Cluster III river segment of 97,623 lbs/day BOD_5.

pH Effluent Limitations and Continuous pH Monitoring (Footnote 2.2.1.5): No changes are proposed for pH effluent limitations. The limits of 5.0 s.u. daily minimum and 9.0 s.u. daily maximum are taken from ch. NR 284, Pulp and Paper Manufacturing, Wis. Adm. Code, and represent best practicable technology currently available.

Both the current and proposed permits allow brief excursions of the pH limits for a total of 446 minutes in one month, but no continuous excursion for more than sixty minutes and no excursion outside of the range of 4.0 to 11.0 s.u. Such excursions are allowed pursuant to s. NR 205.06, Wis. Adm. Code, when pH is monitored continuously. The pH limits of 4.0 s.u. minimum and 11.0 s.u. maximum are water quality-based pursuant to s. NR 102.05 (3)(h), Wis. Adm. Code.

Phosphorus Effluent Limitation: The proposed permit, as does the current permit, imposes a 12-month rolling average effluent limitation of 1 mg/L for phosphorus. Chapter NR 217, Wis. Adm. Code, specifies such a limit for industrial facilities that discharge more than 60 pounds of phosphorus per month. The Broadway Mill's monthly discharge of phosphorus exceeds 1,700 pounds of phosphorus per month when calculated as a 12-month average. (From Table A1, page 15, the phosphorus discharge equals 9.68 MGD x 0.71 mg phosphorus/L x 8.34 (a conversion factor with units of (lbs•L)/(MG•mg)) x 30 days/month = 1,720 lbs of phosphorus per month.)

2.3 Sample Point Number: 002- POWER PLANT NCCW

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limit and Units**	**Sample Frequency**	**Sample Type**	**Notes**
Flow Rate		MGD	Daily	Total Daily	
Temperature, Average		degree F	Daily	Grab	

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limit and Units**	**Sample Frequency**	**Sample Type**	**Notes**
Chlorine, Total Residual	Daily Max.	0.2 mg/L	Weekly	Grab	Total residual chlorine monitoring is required only during the chlorination of once-through condenser cooling water.
Chlorine, Total Residual Discharge Time	Daily Max.	120 min/day	Daily	Total Daily	Monitoring for total residual chlorine discharge time is required only during the chlorination of once-through condenser cooling water.
Acute WET		TUa	Quarterly	Grab	WET testing is required only during the calendar quarter specified below.
Chronic WET		rTUc	Quarterly	24-Hr Flow Prop Comp	WET testing is required only during the calendar quarter specified below.

Changes from Previous Permit

Temperature Monitoring: In recognition that the Broadway Mill provides continuous temperature monitoring at Sampling Point 002, the proposed permit specifies the parameter "Average Temperature." The reasons for this change and the implications of the requirement in light of the grab sampling type remaining unchanged are the same for Sampling Point 002 as they are for Sampling Point 001 (see above).

Sample Type for Total Residual Chlorine Discharge Time (Footnote 2.2.2.1): Monitoring requirements for total residual chlorine discharge time remain unchanged. However, in recognition that the Broadway Mill provides continuous chorine monitoring, the proposed permit clarifies its use with respect to demonstrating compliance with permit limits. The proposed permit allows the Mill to report the time of chlorine discharge as either the total time that chlorine is added to the condenser cooling water or the total time that detectable levels of total residual chlorine are present in the cooling water discharge as determined by continuous monitoring. To qualify, the method for continuous chlorine monitoring must duplicate an analytical method approved in ch. NR 219, Wis. Adm. Code.

The proposed permit changes the sample type for chlorine discharge time from "Count" to "Total Daily." The latter sample type is customarily used in WPDES discharge permits that regulate once-through condenser cooling water.

Whole Effluent Toxicity (WET) Monitoring (Footnote 2.2.2.2): Unlike the current permit, which does not require WET testing, the proposed permit specifies one acute and one chronic WET test for the noncontact cooling water discharge from Outfall 002. The large volume of cooling water, a lack of historical WET testing data, and the Mill's use of water treatment additives dictate the WET testing requirements. (See the Department's April 28, 2005 water quality-based effluent limitations recommendation memo.)

To evaluate the toxicity of the additives used by the Broadway Mill, the proposed permit requires the WET testing to be performed during the addition of hypochlorite, bisulfite and, if possible, defoamer. In recognition that the Broadway Mill treats its condenser cooling water in the spring and fall, the proposed permit requires the WET testing to be performed during the second quarter of 2009.

The proposed permit's monitoring requirements and effluent limitations table for Sampling Point 002 specifies quarterly monitoring for WET testing while a footnote to the table specifies testing only during the second quarter of 2009 (a SWAMP quirk). To clarify any misunderstanding this may cause, only one set of acute and chronic WET tests is required and that set must be performed during the second quarter of 2009.

The proposed permit sets the instream waste concentration (IWC) for the once-through condenser cooling water discharge from Outfall 002 at 61%. The IWC was calculated as follows:

$$IWC\ (as\ \%) = 100 \times Q_e \div \{(1 - f)Q_e + Q_s\}$$

Where:

Q_e = annual average actual flow = 65.41 MGD = 101.3 cfs
f = fraction of the Q_e withdrawn from the receiving water = 1
Q_s = ¼ of the 7-Q_{10} = 660 ÷ 4 = 165 cfs

Bypassing of Flow Meter (Footnote 2.2.2.3): In its application for permit reissuance, Fort James indicates that piping is in place which allows noncontact cooling water from the power plant to bypass the flow meter that is used to monitor the rate of cooling water discharge. Such piping is necessary when the flow meter is undergoing repairs or maintenance. In recognition of the potential for bypassing, the permit requires the Broadway Mill to report to the Department each time a bypass occurs. At a minimum, the duration and reason for the bypass should be reported. The Mill may continue its practice of reporting such events on monthly discharge monitoring report forms.

Explanation of Limits and Monitoring Requirements

Chlorine Effluent Limitations: The proposed permit, like the current permit, restricts the discharge of total residual chlorine in once-through condenser cooling water to a maximum concentration of 0.2 mg/L and a maximum duration of 2 hours per day per generating unit. Since the Broadway Mill chlorinates all of its condensing units simultaneously, the latter limit is expressed in the permit as 2 hours per day. These limitations were derived using best professional judgement pursuant to s. NR 220.20, Wis. Adm. Code, and are based on technology-based effluent limitations for the steam electric power generating industrial category, ch. NR 290, Wis. Adm. Code.

The proposed permit changes the format of the limit for chorine discharge time from 2 hours per day to 120 minutes per day. The latter term is customarily used in WPDES discharge permits that regulate once-through condenser cooling water.

Like the current permit, the proposed permit does not impose water quality-based effluent limitations for chlorine. When the Broadway Mill chlorinates its once-through condenser cooling water, it also dechlorinates the cooling water prior to discharge. As a result, the Mill's continuous chlorine monitoring indicates no detectable levels of chlorine in the discharge. Pursuant to s. NR 106.05, Wis. Adm. Code, when discharge concentrations are less than the limit of detection, the necessity for a water quality-based effluent limitation cannot be demonstrated.

In addition, the Broadway Mill continues to qualify for an exclusion from water quality-based effluent limitations for chlorine pursuant to s. NR 106.10, Wis. Adm. Code. The Mill successfully demonstrates that it adds chlorine to its once-through condenser cooling water, which is a noncontact cooling water, at a rate and quantity equal to or less than that characteristically used to provide a safe drinking water supply. Pursuant to s. NR 106.10, water quality-based effluent limitations may be imposed for only those compounds added to a noncontact cooling water that differ in type or quantity applied from those used to produce a public drinking water supply.

At maximum annual average and peak month usage rates of 35.8 and 58.8 pounds of chlorine per million gallons of cooling water (see Table A4, page 16), the Broadway Mill's usage rate is similar to that of a municipality that provides drinking water. For example, recent data show the Menasha water utility used 50.2 pounds of chlorine per million gallons on average and 67.3 pounds of chlorine per million gallons during the peak month of use. The Neenah water utility used 33.6 pounds of chlorine per million gallons on average and 51.7 pounds of chlorine per million gallons during the peak month of use.

When chlorine is intentionally introduced into a discharge, the Department customarily imposes water quality-based effluent limits for chlorine even when the discharge is dechlorinated. The Department's intent is to ensure that the permittee continues to dechlorinate its discharge. In the case of the Broadway Mill, however, the Department

concludes that the technology-based effluent limits imposed on the Mill's cooling water discharge adequately serve this purpose.

3 Schedules of Compliance

3.1 Report on Chlorine Use for Noncontact Cooling Water Treatment

Like the current permit, the proposed permit requires the Broadway Mill to report the addition rates of chlorine to the condenser cooling water that is discharged via Outfall 002. Beginning January 15, 2007, a report on the previous year's chlorine use is due by January 15th of each year during the term of the permit. The Department uses this information to evaluate the appropriateness of continuing an exemption from water quality-based effluent limitations for chlorine pursuant to s. NR 106.10, Wis. Adm. Code.

While the Broadway Mill uses sodium hypochlorite to treat its condenser cooling water, the Mill should convert sodium hypochlorite addition rates to chlorine addition rates when reporting chlorine use. Annual average (average of daily addition rates for the calendar year) and peak month (greatest monthly average addition rate) chlorine use should be reported each year.

4 Standard Requirements

General Approach: For the most part, standard requirements in both the current permit and the proposed permit are taken from Chapter NR 205, Wis. Adm. Code. Chapter NR 205, as well as other chapters of the Wisconsin Administrative Code, can be found at http://www.legis.state.wi.us/rsb/code/nr/nr200.html.

Proposed changes include a rewriting of the unscheduled bypassing requirement to make it consistent with federal regulations. Also, the Departments hotline for reporting hazardous substance spills in included in the spill reporting standard requirement.

Water Treatment Additives: Both the current permit and the proposed permit require the Broadway Mill to obtain the Department's written approval prior to initiating the use of a new noncontact cooling water treatment additives or increasing the use of an additive above that level indicated in the permit reissuance application. Additive usage rates specified in the application include:

- A maximum of 1,990 gallons per day of 15% sodium hypochlorite for two months per year;
- A maximum of 1,395 gallons per day of 40% sodium bisulfite for two months per year; and
- A maximum of 5 mg/L of Bubreak 4462, a defoamer, for two months per year.

Prepared By:

SIGNED 5/19/05

Michael Hammers Wastewater Engineer

Date:

Attachment A
Discharge Monitoring Results

Table A1. Summary of Discharge Monitoring Reports

Sampling Point	Wastewater Description	Parameter	Discharge Data[1,2]
001	Treated Effluent	Flow:	15.57 MGD peak day 9.68 MGD average (n=366)
		BOD_5:	970 lbs/day peak day <169 lbs/day average (n=313, 279 NDs)(<2.1 mg/L)
		TSS:	2,365 lbs/day peak day 424 lbs/day average (n=313)(5.3 mg/L)
		pH:	6.6 s.u. minimum (n=365) 7.9 s.u. maximum (n=365)
		Temperature:	98 °F summer maximum (n=183) 90 °F winter maximum (n=182)
		Phosphorous, Total:	3.27 mg/L peak day 0.71 mg/L average (n=365)
		Copper, Total Recoverable:	23.8 µg/L peak day <8.8 µg/L average (n=12, 2 ND @ 4 µg/L)
		Cyanide, Total:	167 µg/L peak day <28 µg/L average (n=12, 1 ND @ 5 µg/L)
		PCBs, Total:	<0.19 µg/L peak day <0.076 µg/L average (n=5, 5 ND @ 0.031 to 0.19 µg/L)
		Zinc, Total Recoverable:	87.6 µg/L peak day 60 µg/L average (n=12)
002	Power Plant NCCW	Flow:	83.3 MGD peak day 62.9 MGD average (n=366)
		Temperature:	100 °F summer maximum (n=182) 80 °F winter maximum (n=182)
		Chlorine, Total Residual:	<0.01 mg/L peak day <0.01 mg/L average (n=7, 7 ND @ 0.01 mg/L) 0 hours of discharge (n=24)[a]
007	Paper Mill Clarifier Effluent	Flow:	0.79 MGD peak day 0.223 MGD average (n=4; i.e., discharge occurred on only 4 days during the 12-month period)

[1] Discharge data were taken from discharge monitoring reports submitted by Fort James. For copper, cyanide, PCBs and zinc, discharge data for 2004 were used since Fort James monitored these parameters only during that year. For all remaining parameters, discharge data for the period from February 2004 through January 2005 were used.

[2] When calculating the average of a data set, the detection limit was used for all non-detectable test results.

[a] Chlorine was applied for only 24 days during the 12-month period. Dechlorination reduces the discharge of chlorine to non-detectable levels, however.

"n" equals the number of data points that were used to calculate an average.

Table A2. Summary of Mercury Discharge Data for Outfall 001

Sample Location	Sampling Date			Average
	10/19/2004	10/26/2004	11/5/2004	
Field Blank	0.242 ng/L	<0.197 ng/L	<0.197 ng/L	—
Intake	30.7 ng/L	25.0 ng/L	—	27.9 ng/L
Primary Clarifier Effluent #3 Clarifier #4 Clarifier	 18.4 ng/L 42.8 ng/L	 — —	 — —	 — —
001 Treated Effluent	6.15 ng/L 7.24 ng/L	5.18 ng/L	5.45 ng/L	5.78 ng/L

Mercury data were taken from Broadway Mill's permit reissuance application. The sample of treated effluent on 10/19/2004 was split prior to analysis.

Table A3. Summary of Discharge from Mill Sewer Clarifier #5[1]

Year	Number of Days That Discharge Occurred	Peak Day Discharge (MGD)	Total Discharge (MG/year)
1999	5	1.42	2.55
2000	35	5.09	47.85
2001	1	0.04	0.04
2002	3	1.38	2.43
2003	5	4.42	5.71
2004	4	0.79	0.89

[1] Discharge data were taken from discharge monitoring reports submitted by Fort James.

Table A4. Summary of Chorine Usage to Treat Once-through Condenser Cooling Water[1]

Year	Annual Average Usage (pounds chlorine/MGD)	Peak Month Usage (pounds Chlorine/MGD)
2000	35.8	43.14
2001	33.6	58.8
2002	33.9	42.5
2003	14.56	14.62
2004	18.8	24.8

[1] These data were taken from annual reports submitted by the Broadway Mill.

Table A5. Operation of Once-through Condenser Cooling Water Chlorination, Dechlorination and Defoamer Systems[1]

Period of Chlorination/Dechlorination	Total Time of Total Residual Chlorine Discharge[2] (hours)	Peak Total Residual Chlorine Concentration during Period of Chlorination/Dechlorination[3] (mg/L)	Defoamer Usage Rate	
			Period Average (mg/L)	Peak Day (mg/L)
5/18/00 through 5/31/00	0	<0.01 (n=3)	0.99	1.35
10/10/00 through 10/28/00	0	<0.01 (n =3)	0.46	0.66
6/25/01 through 7/12/01	0	<0.01 (n=5)	0.51	0.88
10/30/01 through 11/13/01	0	<0.01 (n=5)	0.46	0.53
10/22/02 through 11/7/02	0	<0.01 (n=6)	—	—
10/27/03 through 11/11/03	0	<0.01 (n=6)	—	—
6/2/04 through 6/13/04	0	<0.01 (n=4)	—	—
10/27/04 through 11/8/04	0	<0.01 (n=3)	—	—

[1] These data were taken from monthly discharge monitoring reports submitted by the Broadway Mill.
[2] These data represent the results of continuous monitoring for total residual chlorine during each chlorination/dechlorination period.
[3] These data represent results of grab samples collected during each chlorination/dechlorination period. "n" equals the number of grab samples that were collected during the period of chlorination/dechlorination.

Attachment B

BOD_5, TSS and Phosphorus Monitoring Frequency Reduction Evaluation

Criteria for this evaluation were taken from EPA's April 1996 guidance, "Interim Guidance for Performance-based Reduction of NPDES Permit Monitoring Frequencies," EPA's March 1991 guidance, "Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001," and the Department's May 1999 draft guidance. The greater monitoring frequency is selected when EPA and Department guidance differ.

Applying EPA's guidance requires the comparison of the long-term average discharge for a parameter to its monthly average effluent limit. Consequently, the guidance is applicable to BOD_5 and TSS, which have technology-based, monthly average effluent limitations. In this evaluation, however, the guidance is also applied to phosphorus after the 12-month rolling average limit is converted to an equivalent monthly average limit. Similarly, EPA's guidance is applied to BOD_5 and wasteload allocation effluent limits after the most restrictive wasteload allocation value is converted to an equivalent monthly average limit.

The 12-month rolling average phosphorus limit of 1.0 mg/L was converted to an equivalent monthly average limit as follows. The most recent two years of phosphorus discharge data were used to calculate a coefficient of variation (standard deviation divided by the mean) of 0.45. Pursuant to EPA's technical support document, a log-normal distribution of daily discharge data is assumed and the monthly average limit is customarily set equal to the 95th percentile of the discharge data. Using the above information, a 30-day average limit of 1.1 mg/L would be equivalent to a 365-day limit of 1.0 mg/L. That is, if the Broadway Mill monitors its discharge daily and complies with a monthly average limit of 1.1 mg/L 95 percent of the time, the Mill will most likely comply with an annual limit of 1.0 mg/L.

Similarly, the Broadway Mill's most restrictive wasteload allocation value of 8,979 pounds of BOD_5 was converted to an equivalent monthly average limit as follows. The most recent two years of BOD_5 discharge data provide a coefficient of variation of 0.61. Using EPA's approach and the above coefficient of variation, a daily maximum effluent limitation of 8,979 pounds per day is equivalent to a 30-day average effluent limit of 3,366 pounds per day at the 95th percentile level. (At the 99th percentile level, the equivalent 30-day effluent limit would equal 3,483 pounds per day.)

Timing of Decision

A permit reissuance is currently being drafted. Any change in monitoring requirements may be accommodated with the permit reissuance.

Entry Criteria for Participation

1. **Facility Enforcement History**

Criminal Actions (all environmental statutes)

- No criminal convicted under Federal or State environmental statutes of falsifying monitoring data or committing violations that presented an imminent and substantial endangerment of public health or welfare.
- No conviction for any other criminal violation under any Federal or State environmental statute.
- No individual, while employed by the Broadway Mill was convicted of a criminal violation under any Federal or State environmental statute.

Civil Judicial Actions (Clean Water Act/WPDES related)

No civil judicial action with respect to the Clean Water Act and the Broadway Mill's current WPDES permit occurred in the last year.

Administrative Actions (Clean Water Act/WPDES related)

No Administrative Penalty Order (APO) or Administrative Order (AO) is currently in effect or will be in effect when the Broadway Mill's permit is reissued.

2. **Parameter-by-Parameter Compliance**

Reporting Violations and Significant Noncompliance during the Last Two Years

- No reporting violations, with respect to DMRs (discharge monitoring reports), occurred during the 24-month period (February 2003 through January 2005).
- The Broadway Mill had no significant noncompliance violations of BOD_5 effluent limitations (technology-based) during the period from February 2003 through January 2005.
- The Broadway Mill had no significant noncompliance violations of BOD_5 effluent limitations (wasteload allocated) during the period from February 2003 through January 2005.
- The Broadway Mill had no significant noncompliance violations of TSS effluent limitations during the period from February 2003 through January 2005.
- The Broadway Mill had no significant noncompliance violations of the phosphorus effluent limitation during the period from February 2003 through January 2005.

Effluent Violations during the Last Year

- No violation of BOD_5 effluent limitations (technology-based) occurred during the period from February 2004 through January 2005.
- No violation of BOD_5 effluent limitations (wasteload allocated) occurred during the period from February 2004 through January 2005.
- No violation of TSS effluent limitations occurred during the period from February 2004 through January 2005.
- No violation of the phosphorus effluent limitation occurred during the period from February 2004 through January 2005.

3. **Parameter-by-Parameter Performance History**

Long-term Average Discharge Values

- The long-term average (LTA) of the Broadway Mill's BOD_5 discharge is less than 187 pounds per day. (The LTA was calculated by averaging 626 BOD_5 discharge values as reported for Sampling Point 001 for the period from February 2003 through January 2005. The detection limit was used to calculated a mass discharge value when BOD_5 was not detected.)
- The LTA of the Broadway Mill's TSS discharge equals 531 pounds per day. (The LTA was calculated by averaging 628 TSS discharge values as reported for Sampling Point 001 for the period from February 2003 through January 2005.)
- The LTA of the Broadway Mill's phosphorus discharge equals 0.70 mg/L. (The LTA was calculated by averaging 728 phosphorus discharge values as reported for Sampling Point 001 for the period from February 2003 through January 2005.)

Ratio of Long-term Effluent Average to Monthly Average Limit

- The ratio of the BOD_5 LTA to the Broadway Mill's monthly average technology-based effluent limitation equals <1.2 percent (<187 lbs/day ÷ 15,537 lbs/day × 100).
- The ratio of the BOD_5 LTA to the Broadway Mill's equivalent monthly average wasteload allocated effluent limitation equals <5.6 percent (<187 lbs/day ÷ 3,366 lbs/day × 100).
- The ratio of the TSS LTA to the Broadway Mill's monthly average technology-based effluent limitation equals 2.5 percent (531 lbs/day ÷ 21,051 lbs/day × 100).
- The ratio of the phosphorus LTA to the Broadway Mill's equivalent monthly average phosphorus effluent limitation equals 64 percent (0.70 mg/L ÷ 1.1 mg/L × 100).

4. **Monitoring Frequency Recommendations**

- Since the ratio of the BOD_5 LTA to the BOD_5 monthly average technology-based effluent limit is less than 25 percent and the baseline monitoring frequency is equivalent to 6 times per week (626 samples in 730 days), Table 1 in EPA's guidance suggests that the monitoring frequency may be once per week.

- Since the ratio of the BOD_5 LTA to the BOD_5 equivalent monthly average wasteload allocation limit is less than 25 percent and the baseline monitoring frequency is equivalent to 6 times per week (626 samples in 730 days), Table 1 in EPA's guidance suggests that the monitoring frequency may be once per week.
- Since the ratio of the TSS LTA to the TSS monthly average limit is less than 25 percent and the baseline monitoring frequency is equivalent to 6 times per week (628 samples in 730 days), Table 1 in EPA's guidance suggests that the monitoring frequency may be once per week.
- Since the ratio of the phosphorus LTA to the equivalent monthly average limit is less than 65 percent but greater than 50 percent, and the baseline monitoring frequency is equivalent to 7 times per week (728 samples in 730 days), Table 1 in EPA's guidance suggests that the monitoring frequency may be 4 times per week.

  NOTE: Using discharge data that were collected after July 1, 2004, when the Broadway Mill increased its volume of discharge, results in the same monitoring frequency recommendations.
- The Department's guidance specifies a minimum monitoring frequency of 5 times per week for TSS, phosphorus and BOD_5 during the non-allocation season since the Broadway Mill has an effluent flow rate greater than 2 MGD. The guidance also specifies daily monitoring during wasteload allocation seasons.

5. Residency Criteria for Continued Participation

EPA's guidance specifies that to remain eligible for monitoring frequency reductions, the permittee:

- Must not have any significant noncompliance violations of effluent limitations for the parameters for which reductions have been granted;
- Must not fail to submit discharge monitoring reports; and
- Must not be subject to a new, formal enforcement action.

6. Relative Monitoring Frequencies

This factor of the Department's guidance suggests that the monitoring frequency for a parameter should be indirectly proportional to the averaging period of the parameter's effluent limitation. For example, parameters with weekly average limits should be monitored more frequently than parameters with monthly average limits.

Averaging periods and monitoring frequencies for parameters included in the proposed permit reissuance are provided below.

Limit Averaging Period	Parameter	Suggested Monitoring Frequency	
		DNR Guidance	EPA Guidance
Daily Maximum or Daily Minimum	pH at Sampling Point 001	Daily[1]	Daily[1]
	BOD_5 during wasteload allocation season at SP 001	Daily	1/Week
Daily Maximum and Monthly Average	BOD_5 during non-wasteload allocation season at SP 001	5/Week	1/Week
	TSS at Sampling Point 001	5/Week	1/Week
12-Month Rolling Average	Total phosphorus at Sampling Pont 001	5/Week	4/Week

[1] Monitoring frequency not evaluated.

7. Variability of the Treatment Process

There does not appear to be a wide variability in treatment efficiency.

8. **Ease of Performing the Test**
   There is no reason to believe that the Broadway Mill's wastewater treatment system will be inadequately staffed or improperly operated and maintained should the monitoring frequencies for BOD_5 and TSS be reduced to 5 times weekly.

Special Considerations

Only those special considerations from EPA's guidance that are applicable to the Broadway Mill's discharge of BOD_5 and TSS are listed below.

- **Discontinuous Data:** The Broadway Mill continuously reported its effluent data for the years 2003 through 2004. The Mill's wastewater discharge is neither intermittent nor short-term.
- **Exceptions:** The discharge of BOD_5, TSS and phosphorus from the Broadway Mill does not appear to be particularly critical from the standpoint of protecting human health
- **Endangered Species or Sensitive Aquatic Environment:** The discharge of BOD_5, TSS and phosphorus from the Broadway Mill does not appear to impact any endangered species or sensitive aquatic environment.

Conclusion

When different monitoring frequencies result from the application of EPA and Department guidance, the more frequent monitoring is customarily applied in the permit. In this evaluation, application of Department guidance results in the more frequent monitoring for all parameters; i.e., 5 times per week for TSS, phosphorus and BOD_5 during non-allocation seasons, and daily for BOD_5 during wasteload allocation seasons. If these monitoring frequencies are applied in the permit, the following conditions should be met:

- That the following footnote, or one similar, is included in the reissued permit:

  Continued Eligibility for Reduced Monitoring Frequencies: If the permittee exceeds effluent limitations for BOD_5, TSS or phosphorus, 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 monitoring frequency for BOD_5, TSS, phosphorus or any combination of the three.
- That the Broadway Mill's eligibility for reduced monitoring is reevaluated when the permit is reissued in five years.

NOTE: Due to the exceptional quality of the Broadway Mill's effluent, the proposed permit retains the monitoring frequency of 3 times per week for BOD_5 and TSS, and increases the monitoring frequency for phosphorus to 4 times per week as explained in the body of the fact sheet.

Attachment C

Calculation of Technology-based Effluent Limitations for BOD_5 and TSS

Production

842.8 TPD Tissue Paper (1977 production rate)

793.9 TPD Deink Pulp (1977 production rate)

BPT Effluent Limits (from ch. NR 284, Wis. Adm. Code)

Subcategories	BOD_5 lbs/Ton		TSS lbs/Ton	
	Monthly Average	Daily Maximum	Monthly Average	Daily Maximum
Deink	18.8	36.2	25.9	48.1
Nonintegrated Tissue Papers	12.5	22.8	10.0	20.5

Sample Calculation

Monthly Average BOD_5:

(18.8 lbs BOD_5/Ton x 793.9 TPD) + [12.5 lbs BOD_5/Ton x (842.8 TPD - 793.9 TPD)] = 15,537 lbs BOD_5/day

Calculated Treatment Technology Based Effluent Limitations

	BOD_5 (lbs/d)	TSS (lbs/d)
Monthly Average	15,537	21,051
Daily Maximum	29,854	39,189

Production Increases:

The Broadway Mill's current production rates exceed those used to derive technology-based effluent limits (approximately 1,000 TPD deinked pulp, 1,100 TPD of tissue and toweling paper, and 85 TPD of nonwoven material). While the Mill is entitled to effluent limits that are based on current rates of production, Wisconsin's water quality antidegradation requirements must be met before BOD_5 and TSS permit limits may be increased.

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National Wildlife Federation and
Clean Water Action Council of
Northeastern Wisconsin, Inc.,

Petitioners-Appellants,

v. Case No. 2008AP003235

Department of Natural Resources,

Respondent-Respondent-Petitioner

AMICUS BRIEF OF WISCONSIN WILDLIFE FEDERATION, MILWAUKEE RIVERKEEPER, CLEAN WISCONSIN, AND SOKAOGON CHIPPEWA COMMUNITY OF MOLE LAKE IN SUPPORT OF PETITIONERS-APPELLANTS ANDERSEN ET AL.

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TABLE OF AUTHORITIES

Wisconsin Statutes

Federal Statutes & Regulations

Wisconsin Wildlife Federation, Milwaukee Riverkeeper, Clean Wisconsin and the Sokaogon Chippewa Community of Mole Lake ("Amici") urge this Court to affirm the Court of Appeals and reject the Wisconsin Department of Natural Resources' (DNR's) attempt to vastly expand its authority by, *inter alia*, rewriting state water law.

The primary law in question here is Wis. Stat. § 283.31(3)(d)2., which unambiguously requires that Wisconsin Pollution Discharge Elimination System (WPDES) permits contain conditions "necessary to comply with any applicable federal law or regulation"—namely, the federal Clean Water Act (CWA).[1] Consistent with this statute, Clean Water Action Council of Northeastern Wisconsin et al. ("the Council") requested that DNR

[1] Wis. Stat. § 283.31(3) states in part:

> **(3)** 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 all the following, whenever applicable:
>
> . . . .
>
> (d) Any more stringent limitations, including those:
> 1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
> 2. *Necessary to comply with any applicable federal law or regulation* . . .

(emphasis added).

conduct the default "reasonable potential" analysis required by federal regulations and include appropriate limits for mercury and phosphorus in the Fort James permit. 40 C.F.R. § 122.44(d)(1)(i). DNR refused to do so. Accordingly, the Court of Appeals remanded the permit back to DNR to hold a hearing on Respondents' request.

This Court should similarly reject DNR's attempt to secure broad and unprecedented power to:

- Rewrite unambiguous statutes enacted by the Legislature
- Upset the state-federal partnership that implements the CWA and ensures protection of Wisconsin's rivers, lakes, and streams
- Avoid review of DNR decisions regarding WPDES permits issued in violation of Wisconsin law.

I. THIS COURT SHOULD REJECT DNR'S BOLD ASSERTION OF AUTHORITY TO REWRITE STATE STATUTES.

As noted above, Wis. Stat. § 283.31(3)(d)2. requires that WPDES permits contain conditions "necessary to comply with any applicable federal law or regulation." Yet DNR claims it is entitled to ignore this plain language and insert words into the statute that are not there; to wit, that Wis. Stat. § 283.31(3)(d)2. only applies to federal requirements which EPA has "overpromulgated" by rule. (DNR Br. at 22-26.) DNR justifies its power grab by

asserting that "DNR's interpretation is due great weight deference regardless of whether the statute is ambiguous." (DNR Reply at 6.) If DNR is free to contradict unambiguous language enacted by the Legislature, DNR is almost literally above the law.

The DNR is flatly wrong when it says the Court must defer to its interpretation of Wis. Stat. § 283.31(3)(d)2. regardless of whether it is ambiguous. Statutory interpretation begins with the language of the statute. *State* ex rel. *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If analysis of the language yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning. *Id*.

"Only when a statute is ambiguous do courts apply rules of statutory construction or look to extrinsic evidence of the legislature's intent, *such as an agency's interpretation*." *Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶27, 299 Wis. 2d 561, 729 N.W.2d 396 (citing *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996)) (emphasis added); *see also id*. ¶32 ("We are not bound by an agency's interpretation of statutory language, but we do at times defer to an agency *when presented with an ambiguous statute*.") (emphasis added). Furthermore, inserting language into a statute, as the DNR has done here, needlessly complicates statutory interpretation and undermines legislative intent. *See Kalal*, 2004 WI 58, ¶47 ("Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.") (quoting *Bruno v.*

Milwaukee County, 2003 WI 28, ¶25, 260 Wis. 2d 633, 660 N.W.2d 656).

Like Wisconsin courts, the U.S. Supreme Court has stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* that if "Congress has directly spoken to the precise question at issue …, that is the end of the matter." 467 U.S. 837, 842-43 (1984).[2] Based on this framework, the federal courts have frequently struck down interpretations of the Clean Water Act by EPA that were found to contradict the unambiguous language of the statute. *See, e.g.*, *Waterkeeper Alliance, Inc. v. Am. Farm Bureau*, 399 F.3d 486, 498 (2nd Cir. 2005) (striking down EPA interpretation which failed to take into account statutory language requiring permits to "assure compliance with all applicable requirements"); *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145-46 (D.C. Cir. 2006) (holding "daily" load means daily load even if EPA believes calculating loads on a different time basis would be better policy); *see also Columbus & Franklin County Metropolitan Park District v. Shank*, 600 N.E.2d 1042, 1054, 1074-75 (Ohio 1992) (rejecting state agency interpretation of state implementing statute when it conflicted with unambiguous language of statute). This Court should similarly reject the DNR's interpretation of Wis. Stat. §

[2] To the extent this case concerns agency interpretations of federal statutes, the *Chevron* analysis applies. *See Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶28, 284 Wis. 2d 264, 700 N.W.2d 158 (applying *Chevron* to agency interpretation of federal statute prohibiting "patient dumping").

283.31(3)(d)2. as completely at odds with the clear statutory language.

Amici also disagree with DNR's attempt to re-cast this case as a simple statutory construction issue, not an issue of the DNR's own authority. (DNR Reply at 2-6.) Here, DNR is interpreting Wis. Stat. § 283.31(3)(d)2. to argue that it has authority to issue permits that the statutory language explicitly prohibits it from issuing. No deference is owed to that interpretation. *Wis. Power & Light Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994) ("courts owe no deference to an agency's determination concerning its own statutory authority"); *see also Froebel v. DNR*, 217 Wis. 2d 652, 663-64, 579 N.W.2d 774 (Ct. App. 1998) ("[i]f there is any reasonable doubt as to the existence of an implied power of an administrative agency, it should be resolved against the exercise of such authority").

Even if Wis. Stat. § 283.31(3)(d)2. were ambiguous and this case did not concern DNR's authority, DNR is still not entitled to great weight deference under *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶16, 292 Wis. 2d 549, 717 N.W.2d 184. (DNR Reply at 4.) Most glaringly, and contrary to DNR's representation, the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. is not "long standing." The documents DNR cites in its appendix for its supposed "long-standing" interpretation all post-date the August 24, 2005, Fort James permit decision at issue here and thus could not have been the basis for that decision. (DNR Reply at 5.) Further, interpreting the language of Wis. Stat. § 283.31(3)(d)2. requires no

specialized expertise, well positioning the courts to address this issue. Citations to the Federal Register and other documents showing that state CWA permitting rules need not exactly track or parrot the federal language (DNR Reply at 8; Amicus Brief of Georgia-Pacific Consumer Products at 3), are simply irrelevant. The fact that states may formulate rules that meet or exceed the requirements of the CWA is completely consistent with the Wisconsin Legislature acting through Wis. Stat. § 283.31(3)(d)2. to assure that Wisconsin's permit program not fall below minimum federal requirements.

DNR's attempt to rewrite the clear language of Wis. Stat. § 283.31(3)(d)2. is owed no deference, and its interpretation of this statute should be rejected.

II. THE CWA PERMITTING SCHEME REQUIRES THAT STATE AGENCIES AND COURTS APPLY FEDERAL LEGAL PRINCIPLES.

Aside from contradicting the plain language of Wis. Stat. § 283.31(3)(d)2., DNR's interpretation upsets the state-federal partnership relied on in implementing the CWA.

As prior briefs submitted in this case have agreed, the CWA observes a system of cooperative federalism to achieve its goals—including administration and enforcement of the water discharge permitting

programs—where a state demonstrates that its program complies with the Act. 33 U.S.C. § 1342(b) (2006). This regulatory scheme allows a state to enact rules that exceed the CWA's requirements and that suit the unique features of the state, but also requires that state statutes, regulations, and permits conform to the Act's minimum requirements and implementing regulations. 33 U.S.C. § 1311(b)(1)(C); *see PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994).

Wis. Stat. § 283.31(3)(d)2. is a critical mechanism in ensuring Wisconsin's permitting rules comply with the minimum requirements of federal water law. It allows DNR to refer to federal regulations to fill gaps in Wisconsin law on a permit-by-permit basis where Wisconsin has failed to create rules addressing certain aspects of federal law.[3] That is exactly what happened here, where Wisconsin rules did not mandate water quality-based permit limits for mercury and phosphorus. The Council properly requested that DNR conduct a reasonable potential analysis for these pollutants pursuant to 40 C.F.R § 122.44(d)(1)(i) and set permit limits accordingly.

Amici's interpretation of the statutory scheme is not unique. Cases from numerous other jurisdictions have held that their states' laws explicitly or by implication should be read to require adherence to federal CWA

[3] DNR agrees that such gap-filling occurs, but incorrectly concludes that it only occurs at the federal rule-making level. (DNR Reply at 9.)

minimum requirements. *E.g.*, *Hughey v. Gwinnett County*, 609 S.E.2d 324, 327 (Ga. 2004) (Georgia's regulations "mirror and incorporate the federal regulations"); *Columbus & Franklin County Met. Park Dist. v. Shank,* 600 N.E.2d 1042, 1056 (Ohio 1992) (employing federal regulations and interpretation under CWA to interpret state statutes); *Sierra Club Mackinac Chapter v. Dept. of Envtl. Quality*, 747 N.W.2d 321 (Mich. Ct. App. 2008) (applying CWA to strike down state agency-issued permit); *Peabody Coal Co. v. Pollution Control Bd.*, 344 N.E.2d 279, 283 (Ill. App. Ct. 1976) (Illinois law requires state board to comply with federal law).

These cases also support the proposition that DNR and Wisconsin courts are capable of applying federal water law, and can be expected to do so as uniformly across the state as they apply Wisconsin law. *See Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000) (noting Wisconsin administrative law judge would have been competent to hear federal CWA claims if appellant had raised those claims at the state level). As the Alabama Supreme Court pointed out in rejecting an argument that Alabama courts cannot interpret the CWA, state courts must routinely interpret the Federal Constitution and a variety of federal statutes. *Ex parte Fowl River Protective Assoc., Inc.,* 572 So. 2d 446, 449-50 (Ala. 1990); *see also Am. Paper Inst., Inc. v EPA*, 890 F.2d 869, 875 (7th Cir. 1989) ("The state courts are perfectly competent to decide questions of federal law.").

DNR and other amicus parties in this case have suggested only EPA may review whether WPDES permits violate federal law. (*E.g.*, DNR Br. at 16-20.) It is true that

EPA is not helpless to prevent DNR permitting from wandering below what is required by federal law, but in practice EPA does not often intervene in DNR permitting. The DNR and EPA periodically create agreements setting forth each agency's role in environmental programs, including water discharge programs. *See* FY 2009-2011 Environmental Performance Partnership Agreement, Wis. Dep't of Nat. Res.-U.S. EPA, (Apr. 15, 2010)[4]; 40 C.F.R. § 123.24 (providing for agreements between states and regional administrator). Under the current agreement, EPA reviews only a fraction of the WPDES permits, and EPA even allows DNR to decide what permits EPA should review. Environmental Performance Partnership Agreement at 123-24 (providing that EPA will only review ten to twelve major permits every year and specifying permits for review in 2010). EPA's non-objection to the Fort James permit was consistent with its discretionary decision to limit its review of DNR-issued permits.

If, however, DNR is allowed to detach WPDES permitting from any direct contact with federal law and regulations, this hands-off approach will necessarily change. In order to ensure compliance with federal law, EPA will be forced to either micromanage the WPDES permit program by reviewing far more permits than it now reviews, 40 C.F.R. § 123.44, or EPA will have to take back direct control of NPDES permitting in Wisconsin, *see* 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63(a). Either of these scenarios would require that local permit disputes be

[4] *Available at* http://dnr.wi.gov/environmentprotect/enppa/EnPPA2009-11.pdf.

resolved at EPA's Region 5 offices in Chicago or at EPA headquarters in Washington D.C. Such an arrangement is not attractive to anyone concerned, including the regulated community, citizens seeking tighter permits limits, DNR, and likely EPA.

In sum, DNR's novel interpretation of Wis. Stat. § 283.31(3)(d)2. would upset the longstanding state-federal partnership in administering the WPDES permit program, and would result in federal micromanagement of Wisconsin's program. That interpretation should be rejected.

III. PARTIES AGGRIEVED BY DNR WPDES PERMIT DECISIONS MUST BE ALLOWED AN EFFECTIVE AVENUE OF APPEAL WITHIN DNR AND TO THE COURTS.

Federal law clearly requires that there be an opportunity for review in state forums of both the approval and the denial of NPDES permits, 40 C.F.R. § 123.30, and no one has claimed that Wisconsin law fails to allow such review. Nonetheless, the DNR and other amicus parties suggest the Council somehow pursued the wrong remedy in appealing a permit that it believed would harm the environment. The alternative remedies proposed by DNR and other amicus parties in this case are unworkable and cannot be what the Legislature intended. *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶16, 325 Wis. 2d

135, 785 N.W.2d 302 ("Statutory language is read to . . . avoid absurd results.").

DNR and Amicus Georgia Pacific Consumer Products *et al*. suggest that the Council should have sued EPA for failing to object to the Fort James permit, although DNR concedes that the public's opportunity to challenge EPA review, or lack of review, of WPDES permits is "limited." (DNR Reply at 11; Amicus Brief of Georgia-Pacific Consumer Products at 9.) In fact, considerable authority indicates that there is never an opportunity to challenge EPA decisions with regard to state issued NPDES permits. *E.g.*, *Am. Paper Institute,* 890 F.2d at 874; *Sierra Club Mackinac Chapter*, 747 N.W.2d at 330. In any case, no one claims that an action can be brought for judicial review in the routine case, like this one, where EPA exercised its discretion not to use its limited resources to object. *Save the Bay, Inc. v Admin'r*, 556 F.2d 1282, 1295 (5th Cir. 1977).

Additionally, it is well-established that appealing state permit decisions in federal court would create a "most improbable and awkward division of review." *Am. Paper Inst.*, 890 F.2d at 874. It makes little more sense to ask parties aggrieved by permit decisions to sue EPA in federal court on federal issues while raising state issues in state administrative appeals or state court.

Misconstruing this case as a challenge to a rule, the Municipal Environmental Group amici suggest that the Council is pursuing the wrong remedy, and that it is somehow being impatient by appealing a WPDES permit

that the Council believes violates the law. Instead, the Council should go through the three or four year process of trying to get a new Wisconsin rule enacted that changes the law. (Municipal Environmental Group Amicus Br. at 12-13.) Once this rulemaking is completed, after years of arguably illegal pollution had occurred, the Council could ask that the permit be modified or renewed with changes.

The municipalities' argument is absurd. Indeed, if DNR had construed a Wisconsin statute to *deny* a permit or impose a condition in a permit that a member of the Municipal Group found onerous, Amici doubt the Group would tell its members to buck up and put up with the illegal permit decision for however many years it took to establish a new rule.

The Georgia-Pacific Consumer Products Amici argue that the last chance for members of the public to challenge the Wisconsin program's compliance with federal law was within 120 days of EPA's approval of the program in 1973. (Georgia-Pacific Amicus Br. at 14.) This claim is entirely off point. The Council is not claiming in this case that there is anything wrong with the Wisconsin statutes or rules. It asks only that DNR properly apply Wisconsin law by observing federal law as directed in Wis. Stat. § 283.31(3)(d)2.

In fact, if a challenge to the Wisconsin program had been filed in 1973 on the basis that the Wisconsin permitting program allowed permits to be granted that violated federal law, that challenge should have been rejected on the ground that the Legislature had

unambiguously provided that no permits could be granted that failed to comply with "any applicable federal law or regulation." The program may not have been approvable in 1973 if Wisconsin statutes were as mutilated as DNR now proposes, and it will not be maintainable in the future if DNR is allowed in effect to drop compliance with federal law as an element of WPDES permitting.

CONCLUSION

Amici respectfully request that this Court uphold the decision of the Court of Appeals in this case.

Respectfully submitted this ___ day of October, 2010.

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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 is 2,942 words.

Dated this 11th day of October, 2010.

_____

Christa Westerberg

CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed this date.

A copy of this certificate is (or will be) served with the paper copies of this brief filed with the court and served on the opposing parties.

Dated this 11th day of October, 2010.

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Christa Westerberg