Runoff Management Enforcement Handbook

for Manure and Process Wastewater Discharges and Runoff Events

Wisconsin Department of Natural Resources

March, 2016

Approved: Ed Eberle March 16, 2016

Ed Eberle, Assistant Secretary
Office of the Secretary

DATE

Contents

[TOC \o "1-3" \h \z \u]

ED_004625A_00010261-00002

Purpose

To guide department staff in determining appropriate enforcement options for manure and process wastewater discharge or runoff events involving animal feeding operations and/or for-hire manure applicators.

Guidance Summary

Minimization of adverse environmental impacts is a high priority and department staff should make every effort to document and immediately respond to complaints and observations of manure discharge events for follow up investigation and remedial action.

The appropriate agricultural program staff should be notified of all complaints involving a manure discharge event. These staff have the primary responsibility for investigating and documenting complaints relating to manure discharge events.

Department staff should respond immediately to a complaint of a manure or agricultural process wastewater discharge event if they believe such action is necessary to prevent, halt or minimize the effects of a discharge to waters of the state or to ensure collection and documentation of evidence in a timely fashion.

Enforcement actions should be considered when:

- There is deliberate or negligent action or inaction that results in significant adverse water quality impacts, contamination of a public or private water supply well, habitat destruction or a fish kill; or
- There have been repeated significant discharges of manure or process wastewater.

Definitions

Animal feeding operation or AFO – a lot or facility where animals have been, are or will be stabled or confined and will be fed or maintained. [s. NR 243.03(4), Wis. Adm. Code]

Animal unit – determination specifically made in s. NR 243.05, Wis. Adm. Code. One animal unit is roughly equal to 1,000 pounds of live animal weight. There are two methods for calculating animal units in ch. NR 243, Wis. Adm. Code. Agricultural runoff specialists and/or nonpoint source coordinators should be consulted to determine the total number of animal units at an operation. [s. NR 243.03(5), Wis. Adm. Code]

Concentrated animal feeding operation (CAFO) – an animal feeding operation (AFO) with 1,000 animal units or more at any time that stores manure or process wastewater in a below or at grade level storage structure or that land applies manure or process wastewater; or has 300-999 animal units and has a category I discharge under s. NR 243.24(1)(a) from the production area to navigable waters; or an operation that has 1-999 animal units and is designated by the department as having a significant discharge of pollutants to navigable waters or has caused the fecal contamination of a well. [s. NR 243.03(12), Wis. Adm. Code]

Conduit to a navigable water – a natural or man-made area or structure that discharges to a navigable water via channelized flow including: open tile line intake structures, open vent pipes, sinkholes, agricultural well heads, drainage ditches that discharge to navigable waters and grassed waterways that drain directly to a navigable water. [s. NR 243.03(14), Wis. Adm. Code]

For-hire manure applicator – an individual or business who hauls and/or spreads manure or process wastewater for an animal feeding operation for hire.

Large operation or large CAFO – an animal feeding operation that has 1,000 animal units or more at any time. [s. NR 243.03(12) and (31), Wis. Adm. Code]

ED_004625A_00010261-00003

Manure – material that consists primarily of litter or excreta, treated or untreated, from livestock, poultry or other animals and may include materials mixed with runoff, bedding contaminated with litter or excreta, or process wastewater. [s. NR 243.03(36), Wis. Adm. Code]

Manure/process wastewater discharge event – manure discharge, animal waste spill, animal waste runoff event, or process wastewater runoff event, discharge or spill of pollutants from animal feeding operations.

Medium operation or medium AFO or medium CAFO – an animal feeding operation that has 300 to 999 animal units that has a Category I discharge from the production area to navigable waters or that has been "designated" by the department as a CAFO due to a significant discharge of pollutants to navigable waters from land application areas, or because the operation caused the fecal contamination of a well. [ss. NR 243.03(39) and NR 243.26, Wis. Adm. Code]

Process wastewater – wastewater from the production area directly or indirectly used in the operation of animal feeding operations such as spillage or overflow from animal watering systems; washing, cleaning, or flushing pens, barns, manure pits or other animal facilities; direct contact swimming, washing or spray cooling of animals or dust control; or water that comes into contact with raw materials or animal byproducts including manure, feed, milk, eggs or bedding. [s. NR 243.03(53), Wis. Adm. Code]

Small operation or small AFO or small CAFO – an animal feeding operation that has fewer than 300 animal units that has been "designated" by the department as a CAFO due to a significant discharge of pollutants to navigable waters from the production area or because the operation caused the fecal contamination of a well. [ss. NR 243.03(59) and NR 243.26, Wis. Adm. Code]

Waters of the state – means those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdictions, except those waters which are entirely confined and retained completely upon the property of a person. [s. 283.01(20), Wis. Stats.]

Note on Navigable Waters and Navigability: In some sections of this document, there are references to "navigable waters" or "navigability". The definitions associated with these terms for Wisconsin have primarily been set by case law. If clarification or interpretation is needed, please refer to the local water resources specialist for the ch. 30, Wis. Stats., program as well as the [HYPERLINK "http://devlint.dnr.state.wi.us/int/water/fhp/wms/handbook/PDFs/ch_30.pdf"] program guidance.

Procedures

Complaint Investigation

A variety of expertise is available to address manure or process wastewater discharge events. Follow the appropriate programmatic standard operating procedures for site inspections, safety and documentation, including SOP #16 – Agricultural Compliance Inspections and Complaint Response for Manure and Process Wastewater and Documentation Guidance for Agricultural Compliance Inspections and Compliant Response for Manure and Process Wastewater.

Specific staff and responsibilities include:

- CAFO Specialist: The CAFO specialist has the primary responsibility for administering ch. NR 243, Wis. Adm. Code, and investigating manure and process wastewater discharge events associated with WPDES permitted CAFOs. A copy of all complaints/documentation of manure discharge events should be forwarded as soon as possible to the appropriate CAFO specialist. The CAFO specialist and NPS coordinator will work closely together

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during busy seasons to manage workload. Staff should document their investigation in accordance with programmatic standard operating procedures.

- Nonpoint Source (NPS) Coordinator: The NPS coordinator has the primary responsibility for administering chs. NR 243 and NR 151, Wis. Adm. Code, and investigating manure and process wastewater discharge events associated with small and medium AFOs. A copy of all complaints/documentation of manure discharge events should be forwarded as soon as possible to the appropriate NPS coordinator. The NPS coordinator and CAFO specialist will work closely together during busy seasons to manage workload. Staff should document their investigation in accordance with programmatic standard operating procedures.

- Warden (conservation or environmental): Routine complaints received by wardens can be referred to the CAFO specialist and/or NPS coordinator for response. If the warden is unable to contact the appropriate field staff, they should respond immediately to a field observation or complaint if such action is necessary to halt, prevent, or minimize the effects of a significant manure or process wastewater discharge to surface or ground waters (e.g., observation of direct pumping, overflow of a storage structure, significant field runoff, etc.). Field documentation will then be provided to the appropriate program staff for follow-up. Department staff may request the assistance of a warden if necessary for assistance with personal safety issues, proper evidence collection or taking statements. All complaints received by or referred to a warden should be documented on law enforcement complaint form (Form 4100-48E).

- Spills Coordinators: In situations where the Spill Law [s. 292.11, Wis. Stats.] may be applicable, the first responder should contact the Regional Spills Coordinator (weekdays) or the Duty Officer (nights and weekends) for spill notification. Responsible parties are required to report spills to the Spills Hotline at 1-800-943-0003. If the zone contract needs to be activated for containment, recovery or remediation of the site, the spills coordinator or on-call spills coordinator should be contacted as soon as possible and should be the one to initiate the zone contract response. The spills manual can be found at: [HYPERLINK "http://intranet.dnr.state.wi.us/int/aw/rr/team_pages/spill_team/manual.htm"]

- Environmental Enforcement (EE) Specialists: Environmental enforcement specialists are a resource to assist program staff through the enforcement process and to discuss enforcement options. EE staff are directly involved with the formal stepped enforcement process starting typically with notices of violation as well as referrals to the Department of Justice. They act as liaisons through this process between the violator, program staff, and attorneys. At a minimum, the EE specialist assigned to be the program liaison should be consulted as part of the enforcement review team and/or the EE specialist assigned to the enforcement case.

- Program Attorneys: Program attorneys play a primary role in ensuring the enforcement process is consistent with the legal authorities under administrative code and/or statute. The appropriate program attorney should be involved in cases when there are questions interpreting code, legal history, and authorities. A program attorney should be consulted as part of the enforcement review team.

- Drinking Water Staff: In cases where private well contamination is suspected, department Drinking Water & Groundwater (DG) staff and spills coordinators should be notified. If a violation of water quality protection laws is suspected, photographs, samples and other necessary evidence shall be collected. In addition to assisting with investigation, DG staff can help ensure the provision of safe water to affected households.
    - [HYPERLINK "http://intranet.dnr.state.wi.us/int/water/wm/nps/ag/WATER_CONTAMINATION_TOOL_KIT.doc"]: This supporting material is available for investigative staff to review and follow when the initial complaint is received and there is a potential for well contamination or complaints of well contamination are received.

- Other DNR staff: Program staff may elicit the help of department staff as appropriate for the circumstances.
    - In situations of actual or potential surface water discharge, the assistance of fisheries staff, wetland specialists or water quality biologists may be sought.

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- [HYPERLINK "http://intranet.dnr.state.wi.us/int/aw/rr/team_pages/spill_team/organic-waste-guidance.pdf"]: This guidance is available for investigative staff to review and follow when the initial complaint is received and there are potential discharges to surface waters.

Important Reminder regarding entry onto sites: Staff must be aware of inspection authorities, trespass issues and castle doctrine. Refer to [HYPERLINK "http://intranet.dnr.state.wi.us/int/water/safety/"] – Agricultural Compliance Inspections & Complaint Response for Manure and Process Wastewater Discharges for programmatic guidance and safety procedures when responding to events.

Factors to consider when evaluating discharges/runoff events

Department staff should consider the following factors when deciding whether an enforcement action is an appropriate response to a manure or process wastewater discharge or runoff event:

- The volume and strength (concentration) of manure or process wastewater discharged and current stream flow volume
- The size of the operation (animal units)
- The cause and source of the discharge
- The actual impact or imminent threat to public health or drinking water source contamination
- The actual or potential impact to surface waters, wetlands, aquatic life
- The type of waters affected (i.e. impaired waters, outstanding or exceptional resource waters, etc.)
- The number and duration of violations
- The compliance history of the facility or persons involved
- The degree of willful or negligent conduct
- The extent of preventative or corrective actions taken
- The ability of the facility owner or operator to implement the necessary corrective actions
- The knowledge/expertise of the personnel responsible for the discharge event
- The degree to which conduct (or lack thereof) may have been financially motivated
- The degree to which enforcement may be necessary to deter future misconduct by this or other persons/entities
- Other aggravating or mitigating circumstances

Stepped enforcement actions such as Notices of Violation and Enforcement Conferences can be helpful in evaluating more complex situations. For example, the involvement of owners, employees and contractors may raise questions regarding levels of responsibility and culpability for the event. In these situations, an in-depth discussion and review of contracts, interviews and other records may be necessary. Enforcement conferences involving multiple parties provide a venue to openly communicate among all involved parties which should result in the development of management strategies to prevent future discharges.

Enforcement review team

There are a number of codes and statutes that contain regulatory options and enforcement provisions that could be applied to manure or process wastewater discharge events. Prior to initiating regulatory actions or enforcement actions, staff should work with the program coordinators, environmental enforcement specialist and program attorneys as necessary to ensure statewide consistency. The facts surrounding each situation determine whether one or more of the following options may be pursued.

In general, case facts and regulatory options should be discussed with statewide program coordinators on an as needed basis for program consistency. This would typically occur when NR 151 notices, NONs, NOIs, NODs, or NOVs are being considered as regulatory actions or stepped enforcement. Program coordinators will consult with program attorneys if legal interpretations are needed to maintain program consistency.

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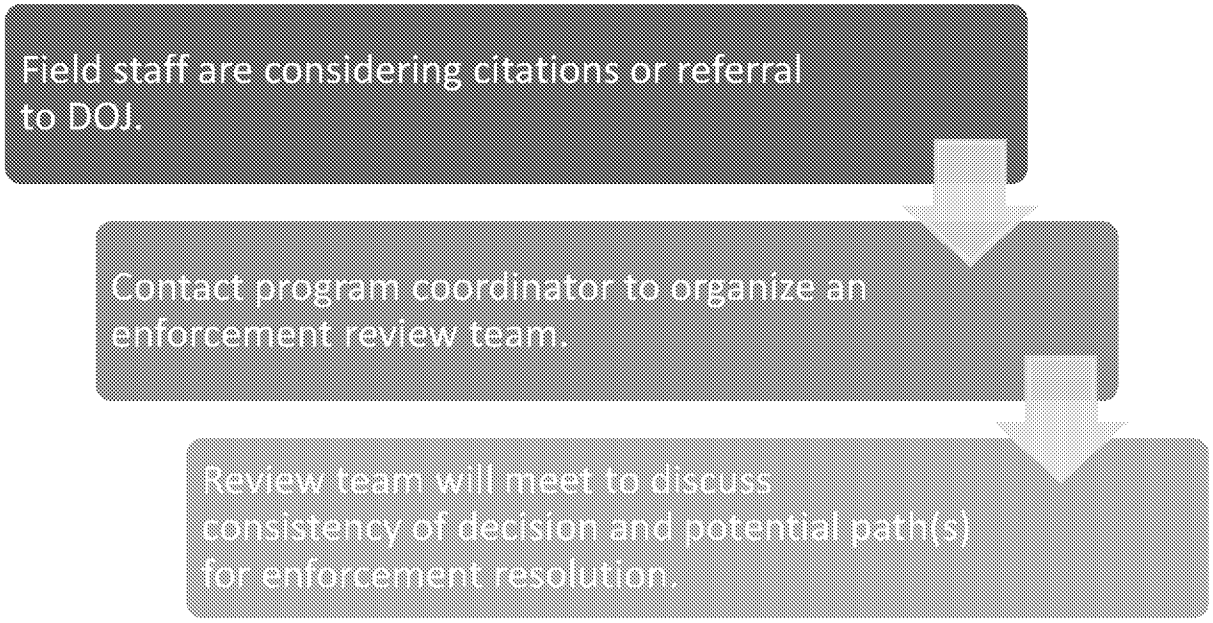
For those cases where citations or referral to the Department of Justice (DOJ) are being considered, an *enforcement review team* should be consulted. The team should consist of representatives from the field as well as central office. This team will review the facts of the case, consider statewide consistency and program policies, and assist the field staff in deciding the appropriate course of action as it relates to issuing a citation or referring a case to DOJ.



The following is a list of suggested members of the enforcement review team. At minimum, there should be four members of the team consisting of the program specialist, statewide program coordinator, program attorney, and environmental enforcement liaison. It may be advantageous to have other members on the team depending on the issue and timing of decisions.

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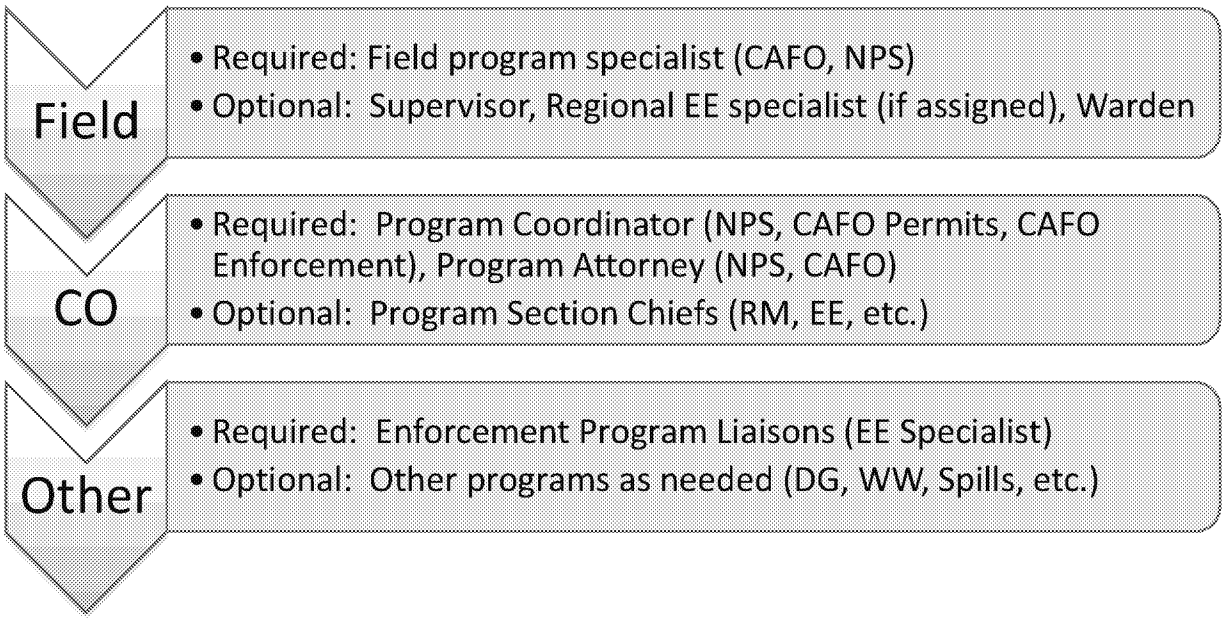

Enforcement options

When staff concludes that a violation rises to the level where penalties or injunctive relief should be sought, the appropriate enforcement option must be selected. Enforcement mechanisms vary depending upon the type of relief sought, the facts and circumstances of the violation(s) and the presence or absence of a WPDES permit. As stated above, prior to taking regulatory or enforcement actions the program coordinator and/or enforcement review team should be consulted.

WPDES Permit Authorities

One of the first items to determine when evaluating a discharge from an animal feeding operation is whether or not the operation is covered under a WPDES permit. Depending on the facts of the case, size of the operation and permit status, enforcement options will vary.

Facilities that hold a WPDES permit

- Event violates one or more WPDES permit conditions: If an animal feeding operation is covered by a WPDES permit, the event violates one or more permit conditions and the department intends to seek penalties or injunctive relief, the case must be referred to DOJ under s. 283.89, Wis. Stats., with review assistance from the enforcement review team. Program staff will consult with the enforcement review team, as necessary, regarding relatively minor violations to determine whether penalties or injunctive relief should be sought and whether the case should be referred to DOJ.

- For-hire manure hauler: If a for-hire manure hauler is involved with a manure discharge event at a WPDES permitted facility, the hauler may also be held accountable for any actions or negligence related to the event. However, the WPDES permittee has the ultimate responsibility for compliance with the WPDES permit, for all notifications of releases and for subsequent clean-up and remediation actions. The enforcement review team should be consulted if staff are considering actions against a for-hire manure hauler working with a WPDES permitted facility.

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- Type of waterbody impacted: In general, if an animal feeding operation is not covered by a WPDES permit, staff must be able to demonstrate that a discharge or spill of manure or process wastewater reached navigable waters in order to allege a violation of ch. 283, Wis. Stats. If the significant discharge or spill did not reach navigable waters, then other enforcement options discussed in this document should be considered.

- Size of the operation and source of the discharge: In general, under federal and state law, the size of the operation (number of animal units) and the source of the discharge (either the production area or land application area) also determine whether there is a violation of ch. 283, Wis. Stats. The production area includes the barnyard, manure or process wastewater storage area, feed storage area, etc. The land application area consists of croplands where manure or process wastewater is applied as a soil amendment. The size of the operation needs to be determined in order to identify the appropriate course of action. There are three size categories for animal feeding operations (AFO): a small operation has 1-299 animal units, a medium operation has 300-999 animal units, and a large operation has 1,000 or more animal units.

  - **Small Operations**
    - *Production area discharges:* First time discharges of manure or process wastewater to navigable waters or discharges to groundwater that originate from the production area of a small AFO may not be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats., unless the discharge was due to direct pumping (i.e., directly through a hose or pipe to a surface water). If the discharge was not due to direct pumping, then other enforcement options discussed in this document should be considered.

    - *Land application area discharges:* First time discharges of manure or process wastewater to navigable waters or to groundwater that originate from the land application area at a small AFO may not be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats., unless the discharge was due to direct pumping (i.e., directly through a hose or pipe to surface waters). If the discharge was not due to direct pumping, then other enforcement options discussed in this document should be considered.

    - *WPDES permit coverage:* When a discharge to navigable waters originates from the production area, the staff may notify the owner in writing that a WPDES permit application must be submitted or corrective measures must be installed. For a small AFO, a discharge to navigable waters from a land application area is not a basis for requiring WPDES permit coverage. Rather, to require permit coverage for a small AFO, there must either be a discharge from the production site to navigable waters that satisfies the point source conveyance criteria or there must be a discharge from either the production area or land application area that causes the fecal contamination of a water supply well.

    - *Repeat discharges:* Subsequent discharges from the production area or a land application area may be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats., if an onsite investigation was conducted for a previous discharge event(s) and the owner or operator was instructed via written correspondence to apply for a WPDES permit or to install practices to prevent additional discharges but did not apply for a permit or install practices.

- **Medium Operations**
  - *Production area discharges*: First time discharges of manure or process wastewater to navigable waters that originate from the production area at a medium AFO may be prosecuted for a discharge without a permit violation under ch. 283, Wis. Stats., if manure or process wastewater is discharged to navigable waters through a conveyance that satisfies the point source criteria in ch. NR 243, Wis. Adm. Code (e.g., manmade device, ditch, direct contact with animals in a feedlot, etc.). Other enforcement options discussed in this document may be considered.

  - *Land application area discharges:* First time discharges of manure or process wastewater to navigable waters that originate from the land application area at a medium AFO may not be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats., unless it was associated with a direct pumping activity (i.e. directly through a hose or pipe to a waterbody). Other enforcement options discussed in this document may be considered.

  - *Discharges to groundwater:* Discharges of manure or process wastewater to groundwater that originate from either the production area or land application are at a medium AFO may not be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats. Other enforcement options discussed in this document may be considered.

  - *WPDES permit coverage:* If the discharge to navigable waters originated from either the production area or the land application area, staff may notify the owner of the AFO in writing that a WPDES permit application must be submitted to cover any future discharges or corrective measures must be installed to abate the discharge. Staff may also notify the owner of the AFO in writing that a WPDES permit application must be submitted if the AFO discharged from either the production area or a land application area and the discharge caused the fecal contamination of a water supply well.

  - *Repeat discharges:* Subsequent discharges from production areas or land application areas can be prosecuted under ch. 283, Wis. Stats., if an onsite investigation was conducted for a previous discharge event(s) and the owner or operator was instructed in writing to apply for a WPDES permit or to install practices but the operation did not apply for a permit or install practices.

- ***Large Operations (no permit)***
  - *WPDES permit coverage:* Discharges of manure or process wastewater to waters of the state that originate from either the production area or land application area at a large CAFO may be prosecuted for discharge without a WPDES permit under ch. 283, Wis. Stats. Staff should send the owner or operator of the large CAFO a WPDES permit application and notify the owner or operator in writing that permit coverage is required.

- ***Miscellaneous Factors***
  - *Pending WPDES permit:* If a discharge of manure or process wastewater came from an AFO with a pending permit application or was due to a direct pumping situation, the review team, as described above, should be consulted when determining whether to seek enforcement actions under chs. 283 or 29, Wis. Stats.

  - *For-hire manure haulers:* If a for-hire manure hauler is involved with a manure discharge event at a non-WPDES permitted facility, the hauler may be held accountable, along with the owner or operator of the AFO, for any actions or negligence related to

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the event. Both the for-hire manure hauler and the owner or operator of the AFO are responsible for making required notifications and for clean-up and remediation actions.

Discharge of a Deleterious Substance to Waters of the State – s. 29.601, Wis. Stats.

- *Issuing citations under s. 29.601, Wis. Stats.* This statute contains both civil citation and criminal authorities, and is intended to prohibit discharges of deleterious substances to surface waters. Civil citations are the most commonly used enforcement option for manure discharges but the monetary penalty may be determined to be inadequate for certain circumstances. For prosecutions under s. 29.601, Wis. Stats.:

  - The warden is responsible for issuing citations and serves as the court officer. The quoted bond or deposit on the citation is required to include the Wild Animal Protection Surcharge specified under s. 29.983, Wis. Stats., for any game fish, game bird, or game animal mortality caused by the unlawful manure discharge event. Consequently, after a manure or process wastewater discharge event, the number of listed species whose death is attributed to the event must be counted and damages calculated using the amounts specified in s. 29.983, Wis. Stats.
  - The program staff are responsible for providing expert testimony and the oversight of corrective actions that may be required through ch. NR 243, Wis. Adm. Code, or as part of a court order.
  - The district attorney normally prosecutes ch. 29 cases; however, the district attorney may also appoint an assistant attorney general from DOJ as a special prosecutor (s. 978.045, Wis. Stats.).
  - In addition to a penalty, the department can seek a court order under s. 23.79(3), Wis. Stats., requiring the defendant to abate a nuisance, restore a resource or take other appropriate action to eliminate or minimize any environmental damage pursuant to ss. 29.977 and 23.79(3), Wis. Stats.

    Note: The department can also recover the costs of removing, terminating, or remedying the adverse effects upon the water environment resulting from the unlawful discharge through s. 283.83, Wis. Stats., including statutory values for dead fish.

- *Significant discharges of manure to surface waters from land application activities due to snowmelt or precipitation.* If manure applied to a cropland is discharged to surface waters during a snowmelt or precipitation event, a s. 29.601, Wis. Stats., citation may be considered in cases where there was negligent or improper application such that manure runoff was likely to occur. Examples of negligent or improper application include, but are not limited to:

  - Manure was over-applied (amount or volume was excessive, ponding occurred, or manure was applied in excess of crop needs) as a result of an individual application or repeated applications to the same field.
  - The method of application was not properly implemented (e.g., manure was not adequately incorporated or manure was injected too close to the surface or not along the contour).
  - Manure was applied to saturated fields or fields with excessively steep slopes (slope beyond the range accepted in a standard nutrient management plan).
  - Manure was applied on, or in close proximity to, the surface water, or applied on areas of concentrated flow that would lead to the surface waters, or on areas subject to flooding.
  - Manure was applied while snow was actively melting or while it was raining or when rain was forecasted.
  - A for-hire manure hauler refused to land apply the manure, so the farmer applied it on his own or found another hauler to apply the manure.

Program staff should be consulted when determining whether manure was improperly or negligently applied. If there is uncertainty with a given case, consider other compelling factors such as documented impacts to the surface water, fish kill, etc. The enforcement review team should be contacted prior to issuing a s. 29.601, Wis.

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Stats., citations. Program staff are responsible for notifying their respective supervisors of a decision to issue a citation.

- *Comparison of ch. 283, Wis. Stats. vs. s. 29.601, Wis. Stats. enforcement options.* If the defendant holds a WPDES permit and the incident can be attributed to violation(s) of the permit requirements, s. 29.601, Wis. Stats., citations should not be issued. Section 283.91(1), Wis. Stats., requires WPDES permit violations to be prosecuted by DOJ. Violations of 283, Wis. Stats., differ from s. 29.601, Wis. Stats., in several respects:

  - The potential penalties for violations of ch. 283, Wis. Stats. are more substantial with forfeitures and fines ranging from $0 to $10,000 and $0 to $25,000 per violation per day, respectively. By contrast, a s. 29.601 citation is $464.10 per day of documented discharge.
  - Section 283.91, Wis. Stats., authorizes the Department to seek temporary or permanent injunctive relief in order to compel compliance with the statute, i.e., to halt a continuing discharge.

  Violations of ch. 283, Wis. Stats., are prosecuted by DOJ. Staff should contact the enforcement review team if a referral to DOJ is being considered, or if there are questions about the best enforcement approach to take.

  As with s. 29.601, Wis. Stats., a court order can be sought requiring the defendant to abate a nuisance, restore a resource or take other appropriate action to eliminate or minimize any environmental damage pursuant to s. 29.977, Wis. Stats. The department can also recover the costs of removing, terminating, or remedying the adverse effects upon the water environment resulting from the unlawful discharge using s. 283.87, Wis. Stats.

Civil Action for Damages – s. 29.977, Wis. Stats.

A civil action for damages under s. 29.977, Wis. Stats., provides an independent means of dealing with an unlawful discharge. Under this section, the State may recover costs for damage or mortality caused to the species specified in the statute. This statute requires that the department show that a violation of another environmental protection statute has occurred (e.g., ch. 283, Wis. Stats., or ss. 29.601 or 292.11, Wis. Stats.), but the department does not necessarily have to complete a prosecution under that statute in order to recover damages. While it could, theoretically, be brought by the district attorney (DA) on behalf of the State, in practice, court actions under this section are normally initiated by a referral to DOJ. In these situations, the enforcement review team should be consulted. Specific issues, concerns and procedures in considering civil action under this statute include:

- The proceeding under s. 29.977, Wis. Stats., is a civil action for damages. Pursuant to s. 29.977(3), Wis. Stats., a civil action for damages under s. 29.977, Wis. Stats., bars criminal prosecution for the same offense. Similarly, a criminal prosecution bars a civil action for damages under s. 29.977, Wis. Stats. Accordingly, for major spill events, department staff should work closely with DOJ to coordinate the proper remedy.
- Department attorneys may also assist district attorneys and DOJ attorneys by directly handling requests for settlements under s. 29.977, Wis. Stats.
- After a spill event, the number of listed species whose death is attributed to the spill must be counted and damages calculated using the amounts set forth in s. 29.977, Wis. Stats. A request for payment can then be sent to the responsible party and/or their insurer. The department does have the authority to negotiate, and can reach a reasonable settlement for an amount less than the maximum allowed under s. 29.977, Wis. Stats. Amounts received for environmental damages from both court actions and settlements may be used for rehabilitation projects designed to restore the environment damaged by the spill.

Hazardous Substance Spills Law – s. 292.11, Wis. Stats.

Section 292.11, Wis. Stats., requires a responsible party to report a hazardous substance discharge and/or take the actions necessary to restore the environment to the extent practicable [s. 292.11(2) and/or (3), Wis. Stats.].

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- **Statutory Requirements.** Under this statute, any person who possesses or controls a hazardous substance, or who causes the discharge of a hazardous substance is required to:

  - Immediately notify the department of any non-exempted discharge, and
  - Take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects of the discharge to the air, lands or waters of the state.

- **Unwilling or Unknown Responsible Party.** In cases where the required action is not being adequately taken to restore the environment or prevent a discharge, or the identity of the person responsible for the discharge is unknown, s. 292.11(7), Wis. Stats., allows the department or its authorized representatives to identify, locate, monitor, contain, remove or dispose of the hazardous substance or take any other emergency action it deems appropriate under the circumstances. This typically results in the spill coordinator hiring a zone contractor.

- **Responsibility for Remediation Expenses.** Under s. 292.11(7)(b), Wis. Stats., the person responsible for the hazardous substance discharge is required to reimburse the department for actual and necessary expenses incurred.

- **Applicability of Spill Law to "Run-Off" Events.** The use of this statute should be considered in situations where the effects of a discharge could have been significantly reduced or eliminated if the responsible party had taken appropriate action upon discovery of the discharge. When considering whether to pursue a violation for a failure to report a spill or failure to take action to minimize the environmental damage from manure land application activities, staff should consider the following:

  - The time lapse between the date(s) manure was applied and the runoff or precipitation event.
  - Whether the manure was applied in accordance with accepted agricultural practices.
  - Whether the owner or person that applied manure had knowledge of the runoff or could reasonably have anticipated that there would be runoff.
  - Potential for environmental impacts or significant risk to public health, groundwater or surface water quality.

- **Prosecution.** Violations of ch. 292, Wis. Stats., are prosecuted by DOJ. Section 292.99., Wis. Stats., provides for penalties ranging from $10 to $5,000 per violation per day.

  Note: Section 292.11(11)(b), Wis. Stats., exclusion may apply.

AGRICULTURAL PERFORMANCE STANDARDS AND PROHIBITIONS – S. 281.16, WIS. STATS.

Applicable statutes and rules for the agricultural performance standards and prohibitions may be found in: ss.281.16 and 281.98, Wis. Stats. and chapters NR 151 and 243, Wis. Adm. Code.

- **Cost Sharing Requirement.** Pursuant to s. 281.16(3)(e), Wis. Stats., an owner or operator of an existing livestock facility or practice does not have to comply with a performance standard, prohibition, conservation practice or technical standard unless cost-sharing is made available to the owner or operator for eligible costs. Chapter NR 151, Wis. Adm. Code should be reviewed when trying to determine whether a facility or practice is existing or new and for the definition of cost share availability.

- **Cost Sharing Requirement.** Section 281.16, Wis. Stats., "exempts" an existing livestock facility or practice from compliance with the prohibitions unless cost sharing is made available or the corrective measures do not involve eligible costs. However, the issuance of a ch. NR 151, Wis. Adm. Code, notice or a Category II NOD under ch. NR 243, Wis. Adm. Code, may be appropriate in many situations where noncompliance with a prohibition or performance standard is causing a discharge. Cost-sharing is not

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required for compliance for new facilities and practices. There can be both new and existing facilities or practices at an operation. If cost-sharing has been made available to an existing facility or the discharge or spill is originating from a new facility or practice, direct enforcement action may be taken if the discharge is associated with a violation of the performance standards or prohibitions. In these cases, a violation would be referred to DOJ for penalties under s. 281.98, Wis. Stats.

- **Compliance Considerations.** It should be noted that there may be regulatory overlap between the nonpoint source pollution program covering the agricultural performance standards and prohibitions and the other programs mentioned above. This can create difficulties in determining the appropriate course of action due to cost-share requirements under ch. 281, Stats. These considerations should be identified when determining whether direct enforcement actions should be pursued. As stated above, direct enforcement action through one of the other statutory requirements or programs specified above may be taken in situations where negligent or deliberate operational or management actions cause significant negative water quality impacts, habitat destruction, a fish kill or well contamination.

  Some examples involving cases that need to be carefully reviewed for cost-share requirements include:

  - One of the prohibitions states that there shall be "no overflow of manure storage structure." If an onsite investigation documents noncompliance with this prohibition, the department must determine why the overflow occurred. If the overflow resulted from a structural problem such as a cracked or collapsing manure pit, etc. that cannot be attributed to deliberate or negligent action and there were no significant impacts to the environment, a ch. NR 151, Wis. Adm. Code notice or a ch. NR 243, Wis. Adm. Code NOD will likely be used to obtain corrective action because capital costs are required to correct the problem. Alternatively, if the overflow results from negligent or deliberate failure to empty the pit (poor management), no capital investment is needed to correct the problem and direct enforcement action may be taken if significant water quality impacts have occurred. Depending on the facts, the department may pursue direct enforcement action through one of the other options discussed in this guidance.
  - Another nonpoint prohibition states that there can be no direct runoff from a feedlot to waters of the state. If a feedlot has direct runoff to navigable waters (a "water of the state") and the feedlot is part of a medium size farm, this discharge can be both an agricultural prohibition violation (cost sharing required) and a violation of the WPDES permit program (cost sharing not required). Consequently, if this discharge from the feedlot to navigable waters satisfies the point source discharge criteria (see ch. NR 243, Wis. Adm. Code), direct enforcement action may be pursued under ch. 283, Wis. Stats. (WPDES permit program) and cost sharing is not required to abate the discharge.

Animal Feeding Operations – chs. 281 and 283, Wis. Stats.

Chapters 281 and 283, Wis. Stats., provide the authorities to regulate animal feeding operations through chapters NR 151 and 243, Wis. Adm. Code. As noted above, when implementing the agricultural performance standards and prohibitions at animal feeding operations, cost-sharing requirements need to be considered for operations without a WPDES permit in order to obtain compliance in those instances where cost-sharing is required. For operations with WPDES permits, considerations need to be made regarding referral to DOJ to seek forfeitures for discharges.

It is important to note that once a violation path is established (i.e. point source violations through ch. 283, Wis. Stats., vs. nonpoint source violations through ch. 281, Wis. Stats.) that the selected path be maintained throughout the enforcement process. Regulations and procedures for both the point source and nonpoint source program for agricultural operations vary greatly and typically cannot overlap. If it is unclear as to whether a case should be implemented through the point source authorities versus the nonpoint source authorities, program staff should discuss the case with the appropriate program coordinator, attorney or enforcement review team.

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- *For small and medium farms without a WPDES permit* that are determined to have discharge violations under ch. 283, Wis. Stats, and ch. NR 243, Wis. Adm. Code, the category of discharge needs to be identified in order to determine the appropriate course of action. Appendices A through C outline when notices of intent or notices of discharge may be used. In general, there are three categories under ch. NR 243.24(1), Wis. Adm. Code, for notices of discharge:
    - *Category I:* an unacceptable practice which causes a point source discharge of pollutants to navigable waters by:
        - Pollutants being discharged into navigable waters through a man-made ditch, flushing system or other similar man-made device
        - Pollutants being discharged into navigable waters that originate outside the operation and pass over, across or through the operation or come into direct contact with animals confined at the operations.
    - *Category II:* an unacceptable practice that causes a discharge of pollutants to waters of the state due to a failure to comply with the agricultural performance standards and prohibitions in ch. NR 151, Wis. Adm. Code.
    - *Category III:* an unacceptable practice that causes a discharge of pollutants to waters of the state that does not fall under Category I or II.

- *For operations that are defined or designated as a CAFO*, enforcement options depend on the facts of the case. The categories of discharge identified above would be evaluated to determine whether an operation would be "by definition" a CAFO or "designated on a case by case basis" as a CAFO.
    - **Defined:** Operations "defined" as a CAFO are medium sized with have a category I discharge and are discharging without a permit under s. 283.31, Wis. Stats. Under this definition, the operation should have applied for a WPDES permit prior to discharging. Depending on the severity of the discharge and ability of the operation to eliminate the discharge in a timely fashion, the department may opt to issue a WPDES permit to obtain compliance. These cases should be discussed with the appropriate program coordinator, at a minimum, and likely an enforcement review team will be consulted.
        - Defining an operation as a CAFO is typically first documented through the issuance of a category I NOD or NOV addressing violations associated with a discharge without a permit.
    - **Designated:** Operations "designated" as a CAFO by the department can be small or medium sized and have discharges from either the production or land application sites depending on the facts of the incident. Compliance options include taking corrective measures to discontinue the discharge or applying for a WPDES permit. These operations are managed on a case-by-case basis and should be discussed with the program coordinator at a minimum to determine enforcement options.
        - Designating an operation as a CAFO is typically first documented through the issuance of a category III NOD or issuance of a NOV for alleged violations associated with spills law or deleterious substance discharges.

- *For large farms without a WPDES permit*, stepped enforcement procedures are typically followed to address the discharge(s) and need for permit coverage. These cases should be reviewed on a case-by-case basis depending on the facts of the violation.

- *For operations with a WPDES permit*, stepped enforcement procedures are typically followed to address permit violations including discharges of manure or process wastewater. Appendix E outlines suggested options for various permit violations. However, each case should still be reviewed on a case-by-case basis depending on the facts of the violation.

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Damage to Water Supplies – s. 281.77 and s. 281.75, Wis. Stats.

This statutory section gives the department order authority when a regulated activity causes a private water supply well to become contaminated, polluted or unfit for consumption by humans or livestock.

Order Authority: The department may order the owner or operator of the regulated activity to treat the water to render it fit for consumption, repair the private water supply or replace it, and to reimburse a municipality for its costs to temporarily replace the water supply under s. 281.77(4), Wis. Stats.

- **Regulated Activity Definition.** Under this statute, a regulated activity is an activity for which the department may issue an order under chs. 281 (except 281.48), 285, or 289 to 299, Wis. Stats. if:

  - The activity has been conducted in violation of chapters 281 (except 281.48), 285, or 289-299; or
  - The activity has been conducted in violation of one of the licenses, permits or special orders or rules promulgated under one of the listed chapters.

  Note: Activities under the WPDES permit program, violations of that program are not considered a regulated activity under s. 281.77, Wis. Stats.

- **Well Compensation Fund – Ch. 281.75, Wis. Stats.** The State Well Compensation Fund may provide assistance to private well owners that have confirmed livestock waste impacts. Prior approval of all costs is required for reimbursement under Well Compensation rules, but an emergency authorization may be granted to private well owners to allow the start of work prior to approval. Well Compensation funds may cover:

  - Bottled or trucked water supplies and storage tanks;
  - New or replacement well construction;
  - Connecting to an existing water supply (public or private);
  - Treatment equipment.

  Field DG staff should coordinate with central office DG staff and assist private well owners with well compensation applications. Central Office DG staff will need to create a 'Special Area of Well Compensation Eligibility' for livestock waste.

  Note: Emergency approval does not guarantee eligibility. Eligibility for funds is based on the confirmed presence of animal waste in the well and income limitations. If a responsible party is identified, the department will seek cost recovery for any Well Compensation funds expended. DG staff will meet with the RP within a reasonable timeframe to discuss impacts to drinking water and potential remedies.

Public Nuisances – Ch. 823, Wis. Stats.

This statute strictly provides injunctive relief and it applies only to specific circumstances. The department must prove that the defendant has caused an uncorrected nuisance condition which poses a substantial threat to public health or safety. Section 823.08(3)(a), Wis. Stats., contains certain protections for agricultural practices. Public nuisance actions for agricultural runoff shall only be pursued after consultation with Environmental Enforcement and Bureau of Legal Services staff.

Other Enforcement Authorities

In certain situations, other entities may have similar or overlapping enforcement authorities such as local governmental units, other state agencies or federal agencies. In these cases, consultation and coordination with the overlapping authority is recommended to identify the lead enforcement agency, appropriate guidance and memorandum of

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understanding procedures are followed, and ensure appropriate enforcement actions are taken. The environmental enforcement review team can assist with determining process and procedures associated with the coordination of enforcement actions with other authorities.

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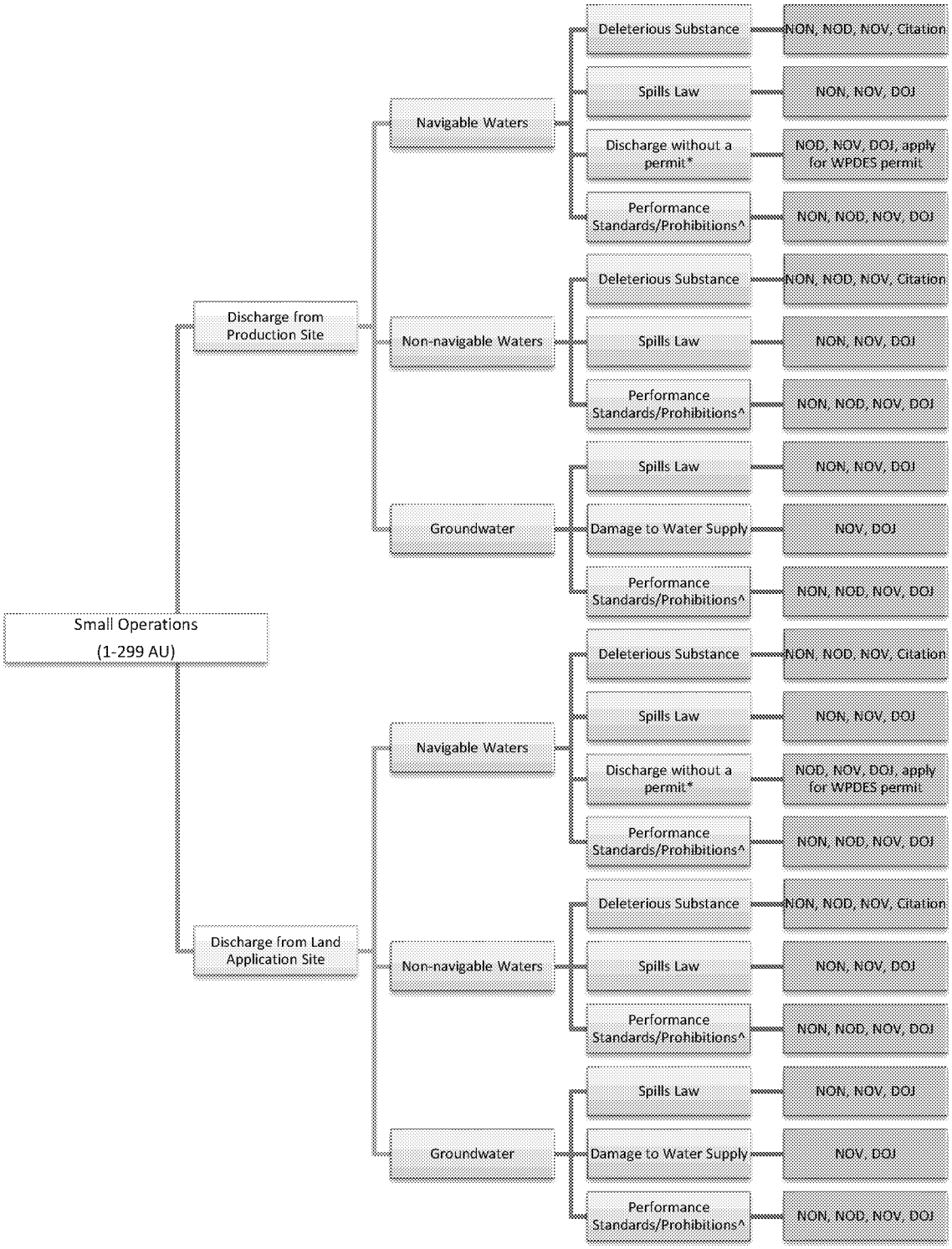
APPENDIX A: Enforcement Decision Tree for Discharges from Small Operations

This chart outlines the suggested enforcement actions associated with various authorities depending on the location of the size of the operation, location of the discharge and waters impacted. Review the options in this guidance document for more detail. Review Appendix C for NR 151 and NOD options. Discuss cases with program coordinator(s) or enforcement review team as needed.



* Ch. 283 discharge without a permit violation is possible in certain cases such as direct pumping. See guidance.

^ Cost-sharing may not be required if there are no eligible costs or if the discharge is from a new facility or practice. See guidance.

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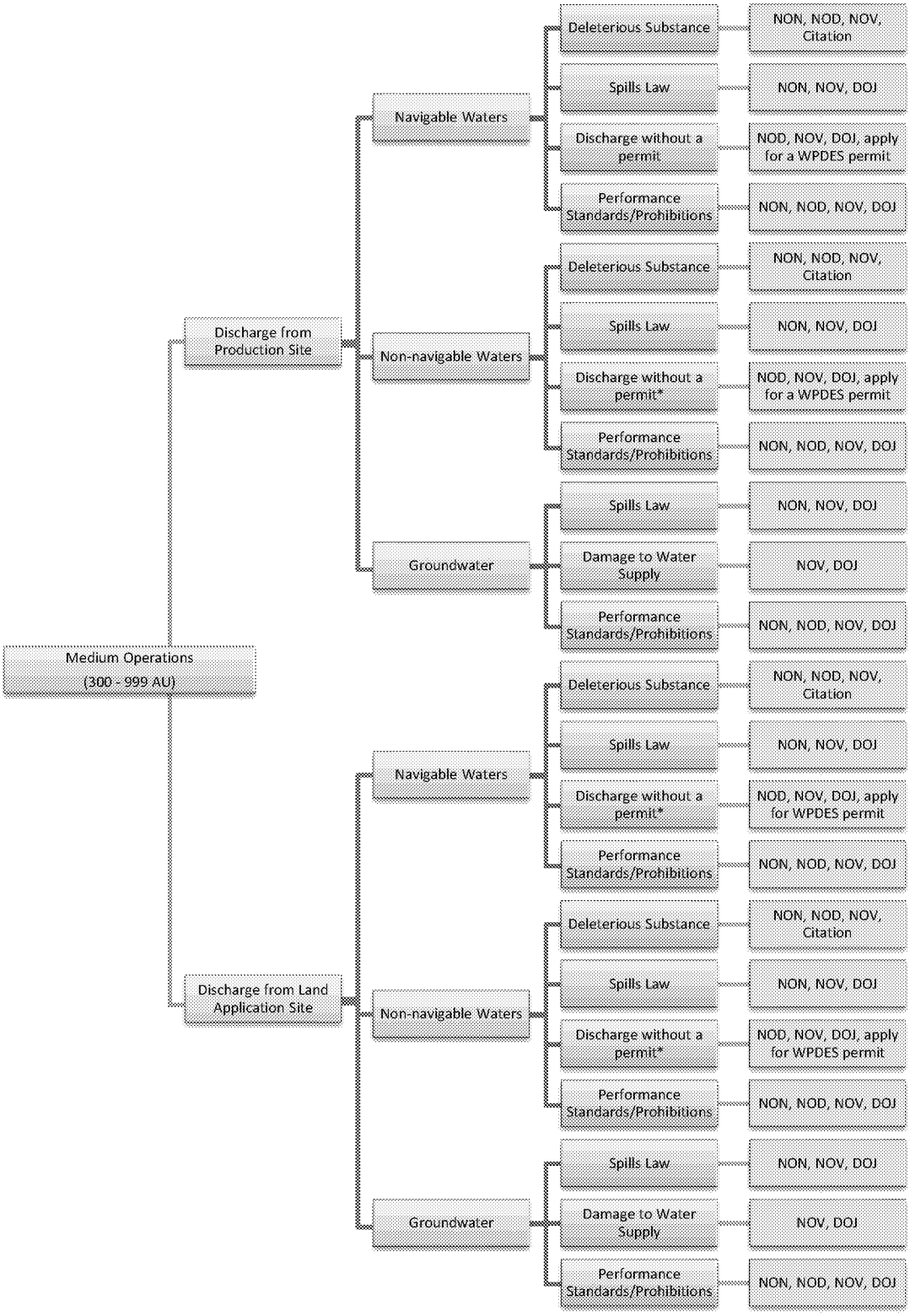
APPENDIX B: Enforcement Decision Tree for Discharges from Medium Operations

This chart outlines the suggested enforcement actions associated with various authorities depending on the location of the size of the operation, location of the discharge and waters impacted. Review the options in this guidance document for more detail. Review Appendix C for NR 151 and NOD options. Discuss cases with program coordinator(s) or enforcement review team as needed.



* Ch. 283 discharge without a permit violation is possible if the discharge is through a discrete conveyance such as direct pumping. See guidance.

^ Cost-sharing may not be required if there are no eligible costs or if the discharge is from a new facility or practice. See guidance.

APPENDIX C: Authorities & Suggested* NOD Issuance Categories for Small and Medium Livestock Operations**

Size (au)	Source	Receiving Water	Pollutant Conveyance to Water	WPDES Permitting Authority	Suggested* NOD Category
<300	Production Area	Navigable Water	Manmade or stream flows through lot.	Yes – If significant [1.]	I
	Production Area	Other Surf. Water	Any type of conveyance.	No	II [3.] or NR 151
	Production Area	Well (fecal contamination)	Any type of conveyance.	Yes [1.]	III or NR 151
	Production Area	General GW pollution	Any type of conveyance.	No	II [3.] or NR 151
	Land Spreading	Navigable Water	Any type of conveyance.	No	II [3.] or NR 151
	Land Spreading	Other Surf. Water	Any type of conveyance.	No	II [3.] or NR 151
	Land Spreading	Well (fecal contamination)	Any type of conveyance.	Yes[1.]	III or NR 151
	Land Spreading	General GW pollution	Any type of conveyance.	No	II [3.] or NR 151
	Pasture, grazing	All	Any type of conveyance.	No	NR 151 only
300 - 999	Production Area	Navigable Water	Manmade or stream flows through lot.	Yes [2.]	I
	Production Area	Navigable Water	Other than man-made conveyance.	Yes [1.]	III or NR 151
	Production Area	Other Surf. Water	Any type of conveyance.	No	II [3.] or NR 151
	Production Area	Well (fecal contamination)	Any type of conveyance.	Yes [1.]	III or NR 151
	Production Area	General GW pollution	Any type of conveyance.	No	II [3.] or NR 151
	Land Spreading	Navigable Water	Any type of conveyance.	Yes – If significant [1.]	III or NR 151
	Land Spreading	Other Surf. Water	Any type of conveyance.	No	II [3.] or NR 151
	Land Spreading	Well (fecal contamination)	Any type of conveyance.	Yes [1.]	III or NR 151
	Land Spreading	General GW pollution	Any type of conveyance.	No	II [3.] or NR 151
	Pasture, grazing	All	Any type of conveyance.	No	NR 151 only

* These are suggested categories, actual decisions of category and permitting options are decided on a case-by-case basis.
** DNR may issue a NOI (Notice of Intent to Issue a Notice of Discharge) to the farmer as a preliminary step.
1. These operations may be designated as CAFOs and WPDES permit coverage may be required (see s. NR 243.26(2), Wis. Adm. Code).
2. These operations are CAFOs by definition; permit coverage required unless the discharge is addressed (see s. NR 243.26(1), Wis. Adm. Code).
3. Category II is recommended only in order to access NOD funding. Otherwise, the site can be pursued under ch. NR 151, Wis. Adm. Code, or Category III. The same cost share requirements apply for Category II NODs and ch. NR 151 Notices.
NOTE: This chart does not address CAFO definition or designation factors. See Section 5 of guidance.

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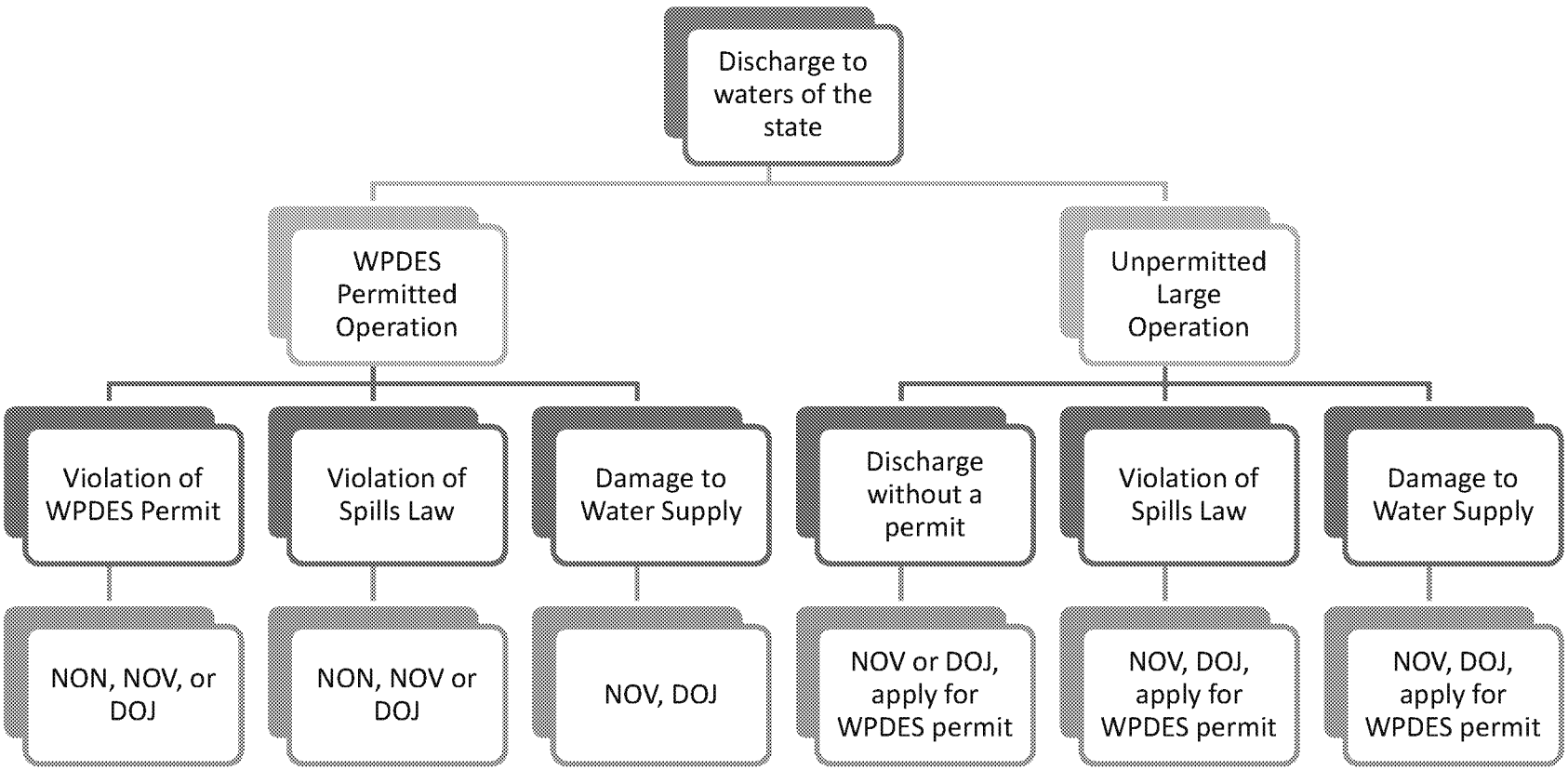
APPENDIX D: Enforcement Decision Tree for WPDES Permitted Operation and Large Unpermitted Operations



NOTE: Review guidance for additional information regarding violation factors and considerations. Discuss cases, as needed, with the program coordinator or enforcement review team. Appendix E provides examples of WPDES permit violations.

APPENDIX E: CAFO WPDES Program Enforcement – Noncompliance Examples

NOTE: Initial enforcement step for noncompliance not impacting waters of the state is typically issuance of a NON; however, repeat or multiple offenses may warrant issuance of a NOV or referral to DOJ.

Land Application

- Failure to meet setbacks to private or community well or other conduits to groundwater (sinkhole)
- Failure to meet setbacks to waters of the state (surface waters/wetlands) or conduits to surface water
- Failure to meet separation on soils within 24 inches to bedrock or groundwater
- Spreading liquid manure or process wastewater on frozen or snow-covered ground (non-emergency)
- Spreading on fields not in approved nutrient management plan
- Other examples: Over application of nutrients, ponding/saturation issues, not stabilizing gully erosion, spreading through grassed waterway, etc.
- Runoff event off intended application site (no impacts to waters of the state)
- Runoff or infiltration event resulting in well contamination*
- Runoff event resulting in discharge to waters of the state*

Production Site Discharge

- Any discharge offsite / failure to properly store and contain waste (no impacts to waters of the state)
- Headland stacking on unapproved sites or sites not meeting requirements
- Headland stacking site discharges to waters of the state*
- Feedlot runoff discharge to waters of the state*
- Feed storage area runoff discharge to waters of the state*
- Waste storage overtopping to waters of the state*

Reporting and Approvals

- Failure to meet permit compliance deadlines (reporting, construction of required practices, etc.)
- Failure to submit plans and specifications prior to construction
- Failure to report changes which result in increased discharges of pollutants (not reporting satellite facilities, planned changes resulting in more animal units, etc.)
- Failure to report waste storage levels exceeding maximum operating levels
- Failure to maintain 180 days of manure or process wastewater storage
- Failure to apply or submit a complete permit application (new or reissue)
- Failure to get approval for distribution of manure or process wastewater
- Failure to get approval for taking offsite generated wastes
- Failure to report spill or permit violation (no impacts to waters of the state)
- Failure to report spill or permit violation (documented impacts to waters of the state)*

**These examples may warrant a NOV and potential DOJ referral depending on the case circumstances. Consult with the program coordinator or enforcement review team, as necessary.*

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