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

The statement of scope for this rule, WT-12-12, was approved by the Governor on May 29, 2012, published in Register 678 on June 14, 2012 and approved by the Natural Resources Board on June 27, 2012.

The Wisconsin Natural Resources Board proposes an order to: to repeal NR 106.13, 221.05, 225.05, 228.05, 231.05, 236.05, 239.05, 240.05, 245.05, 247.05, 250.05, 258.05, 261.14, 268.05, 269.05, 275.05, 276.05, 277.05, 280.05, 281.05, 284.13, 286.05, 290.13, 294.05, 295.05, and 296.05; to renumber and amend NR 200.21 and 220.12; to amend NR 106.117, 200.065 Table 1, 200.21, 205.01, 205.03(27) and (28), 207 Chapter (title), 207.01, 220 Subchapter III Title, 220.10 and 220.12; repeal and recreate NR 106.117(1), 220.13 and 220.15; to create NR 106.08(6)(e) and (f), 200.07(5), 200.21(2) and (2) (Note), 205.067, 205.10, 205.14, 207 Subchapter I (title), 207 Subchapter II, 210.05(5), 220.12(1) and (2), and 220 Subchapter IV; all relating to the WPDES permits, and affecting small businesses.

WT-12-12

Analysis Prepared by the Department of Natural Resources

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1. Statutes interpreted:

Sections 283.01(12), (13) and (14) and 283.31 .

2. Statutory authority:

Sections 227.11(2)(a), 283.11, 283.13, 283.15, 283.19, 283.21, 283.31, 283.37, 283.45, 283.53, 283.55 and 283.83 Stats.

3. Explanation of agency authority:

Chapter 283, Stats, grants authority to the department to establish, administer and maintain a Wisconsin Pollutant Discharge Elimination System (WPDES).

Sections 283.11 and 283.31, Stats, provide authority to promulgate rules to administer the WPDES permit program consistent with federal requirements and to include terms and conditions in permits consistent with federal regulations.

Section 283.13 provides authority to establish technology based effluent limitations in permits as well as more stringent water quality-based effluent limitations to comply with any state or federal law, rule or regulation.

Section 283.15, Stats, authorizes variances to water quality based effluent limitations.

Sections 283.19 and 283.21, Stats, grant authority to the department to establish new source performance standards and toxic effluent standards.

Section 283.37, Stats, provides authority to establish rules for permit applications, and s. 283.45, Stats, provides authority for rules for fact sheets.

Section 283.53, Stats, provides authority for permit modifications, revocation and reissuances and terminations.

Section 283.55 grants authority to the department to establish monitoring requirements in permits and s. 283.83 provides authority for a continuing planning process which includes schedules of compliance for limitations.

The department also has authority to promulgate rules under s. 227.11 (2) (a), Stats., to administer the specific statutory requirements in ch. 283, Stats.

4. Related statute or rule:

These rules relate directly to the WPDES permit program that regulates wastewater discharges. Related rules include all other rules that comprise the WPDES permit program and include Chapters NR 100 to 106 and 200 to 299, Wis. Adm. Code.

5. Plain language analysis:

The purpose of the proposed rule changes is to ensure that the state's regulations are consistent with federal regulations. Minor clarifications and corrections will also be made to these chapters.

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Since 1974, Wisconsin has been approved by the U.S. Environmental Protection Agency to conduct a National Pollutant Discharge Elimination System permit program under the provisions of the Clean Water Act. State NPDES programs are required to include certain minimum federal requirements. On July 18, 2011, the department received a letter from the EPA identifying 75 issues and potential inconsistencies with Wisconsin's authority to administer its approved WPDES permit program. There have been several rule packages initiated and adopted to address the 75 issues. This rule package (commonly referred to as Rule Package 5) contains provisions to address the following issues.

New Source Performance Standards and other ELGs (Issue 7):
Federal law requires EPA to promulgate New Source Performance Standards (NSPS) and other Effluent Limitation Guidelines (ELGs). NSPS are technology based ELGs that apply to new sources. Under federal law (40 CFR ss. 123.25(15) and 122.44(a)(1)), state NPDES programs must have the legal authority to include permit conditions meeting the federal NSPS standards and other ELGs. In the July 18, 2011 letter, EPA questioned whether Wisconsin has the authority to include limits in permits based on federal NSPS standards and other ELGs. This issue was addressed through an Attorney General's statement dated January 19, 2012. This rule package proposes revisions to clarify the authority provided in state statutes as interpreted by the Attorney General's Office and as required under federal law.

Where any ELGs, including NSPS, for a given industrial category of dischargers are promulgated federally but the category of dischargers is not listed in the Wis. Adm. Code, the department must include a limitation based upon the federal ELGs in a WPDES permit issued to a discharger that fits within the applicable category. Similarly, if federal ELGs for a listed industrial category are more stringent than the state's promulgated ELGs, the state must include limitations based upon the federal ELGs. This proposed

rule clarifies this federal requirement.

Reasonable Potential (Issue 11):
Under federal regulations (40 CFR ss. 123.25(15) and 122.44 (d)), a state is required to include a water quality based effluent limitation in a permit for a pollutant in a discharge if there is reasonable potential for the discharge to cause or contribute to an exceedance of a water quality standard. Wis. Stats. s. 283.31 requires that WPDES permits contain water quality based effluent limitations (WQBELs) when necessary to achieve water quality standards. Existing state regulations establish reasonable potential procedures for toxic and organoleptic substances as well as for phosphorus in chs. NR 106 and 217, respectively. The proposed rule package expands these requirements to all pollutants, including whole effluent toxicity (WET), and to narrative standards as required under federal regulations. The proposed rules also delineate processes for determining what constitutes "reasonable potential" to exceed water quality standards and for establishing limits in the absence of state water quality criteria for specific pollutants.

Best Management Practices for Permits (Issue 13):
Best management practices (BMPs) are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. They can include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

Existing rules contain best management practice requirements for land application activities, storm water runoff, and runoff from Concentrated Animal Feeding Operations (CAFOs). Federal rules (40 CFR 122.44 (k)) identify certain other circumstances when BMPs must be included in permits.

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The proposed rule contains provisions to conform to federal requirements for when the department must include best management practices (BMPs) in permits to control or abate the discharge of pollutants. The proposed rule states that BMPs will be included when numeric effluent limitations are infeasible or when BMPs are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act, consistent with 40 CFR 122.44(k)(3) and (4).

Antibacksliding (Issue 14):
Pursuant to 40 CFR 122.44 (l) and the Clean Water Act, 33 USC 1342(o), the water quality based effluent limitations, best professional judgment limitations, and interim limitations, standards, or conditions in any reissued permit must be at least as stringent as those in the previous permit, with some exceptions. These provisions are referred to as "antibacksliding" provisions. Existing state rules contain antidegradation procedures to prevent lowering of water quality in surface waters unless necessary, but existing rules do not specifically contain the antibacksliding requirements in 40 CFR 122.44 (l) and the Clean Water Act 33 USC 1342(o). The proposed rules add provisions to conform to federal requirements.

Compliance Schedules (Issues 15 and 29):
Federal rules contain requirements for compliance schedules that are applicable to state programs (see 40 CFR 123.25(18) and 122.47(a)) and Great Lakes states (40 CFR 123.25(38) and 40 CFR Part 132)). Existing state rules contain specific provisions for compliance schedules for toxic and organoleptic substances, ammonia, temperature, and phosphorus. The proposed rule adds a new section for compliance schedule requirements to ch. NR 205, expanding the compliance schedule provisions to all appropriate situations, not just upgrades to meet limits for toxic and organoleptic substances, ammonia, temperature, or phosphorus. The proposed rule also revises the compliance schedule requirements in chapter 106 for consistency with 40 CFR 122.47 and with 40 CFR 132, Appendix F, Procedure 9 for Great Lakes dischargers.

The proposed rule also repeals s. NR 106.13, which allows a compliance schedule for POTWs accepting leachate from a solid waste facility. This specific allowance is not present in 40 CFR 122.47.

The proposed rule also clarifies that if a permitted facility has an effective water quality based limitation for a pollutant in a permit and the facility is treating the pollutant to comply with the limitation, there is continued reasonable potential to exceed the water quality standard and the limit must remain in a reissued permit.

Expression of Limits in Permits when Permittee Disposes of Pollutants into Wells or Publically Owned Treatment Works or by Land Application (Issue 20):
The federal rule at 40 CFR 122.50 provides for an adjustment to effluent limitations when part of a discharger's process wastewater is disposed of to a POTW, a well, or to a land application site and the other part is discharged to a surface water. Since state law doesn't allow injection of wastewater directly into a private or public well, the proposed rules do not include adjustments to limitations for a direct well injection.

The proposed rule codifies the department's current operating procedure for calculating limitations in these circumstances and establishes consistency in state rules with federal regulations.

Definitions of "Point Source" and "Pollutant" (Issue 44):
Federal law (40 CFR 122.2) contains definitions of "point source" and "pollutant." These definitions apply to the requirements for state programs in 40 CFR 123.25. EPA raised a question about whether state law definitions were consistent with federal law. This issue was addressed through an Attorney General's Statement dated January 19, 2012. To clarify state rules, the proposed rule adds "landfill leachate collection system" to the definition of "point source" and "filter backwash" to the "definition of "pollutant." The proposed revisions to the definitions in rules are consistent with the Attorney General's interpretation of the state statutory definitions provided in the January 19, 2012 Statement.

Expedited Variances (Issue 46):
Federal regulations at 40 CFR 122.21 (o) allow permit variance applications to be submitted before a permit is reissued and time extensions for filing variance requests. The federal variance procedures are applicable to state programs. (40 CFR 123.25(4)). The proposed rule allows the department to accept variance applications before a permit is reissued. This is consistent with the federal regulations and is an existing practice for variances to water quality based effluent limitations pursuant to s. 283.15 (2) (a), Wis. Stats. The proposed rules also establish expedited variance request procedure for variances to technology based limitations in chapter NR 220, consistent with 40 CFR 122.21(o) and (m).

Application Materials for Categories of Industries and New Sources and New Dischargers (Issue 61):
Section 40 CFR 122.21 contains permit application requirements for specific industrial categories of dischargers. These requirements apply to state programs (40 CFR 123.25(4)). The department has authority in state rules and statutes to require any additional necessary information in a permit application. The proposed rule sets forth specific additional permit application materials required from the following categories of dischargers: existing manufacturing, commercial, mining, and silvicultural dischargers; aquatic animal production facilities; and new sources and new dischargers. This rule revision reflects current department requirements but will add specificity consistent with the federal requirements. The proposed rules also include the application requirements for variances to technology based requirements.

Fundamentally Different Factors Variances and other ELG Variances (Issues 7, 46, 61):

The proposed rule offers the option to apply for a fundamentally different factors variance (FDFV) to all industrial categories of dischargers and other technology based variances, except that this does not apply to the BPT for steam electric power generation. Federal law allows a facility to apply for a FDFV based on certain requirements (see 33 USC 1311(n) and 40 CFR 125 subpart D). The FDFV requirements in 40 CFR 125, subpart D are applicable to state programs (40 CFR 123.25(36)). Wisconsin Adm. Code currently offers this variance option to 25 out of 46 industrial categories identified in ch. NR 220. The proposed rule allows more industrial dischargers flexibility when effluent limitation guidelines (ELGs) apply to their industrial category as a whole but the given discharger's facilities, equipment or other factors related to the discharger are fundamentally different from the factors considered by the department or by EPA in developing the ELGs..

WET Exemption (Issue 11):
Federal rules at 40 CFR 122.44(d) and 40 CFR 123.25(15) pertain to the establishment of effluent limitations based on water quality standards. The federal code (40 CFR 122.44(d)(1)(v)) states that limits on whole effluent toxicity (WET) are not necessary where chemical-specific limits are sufficient to attain and maintain applicable water quality standards. Wisconsin Adm. Code s. NR 106.08 contains requirements for whole effluent toxicity (WET) testing. Consistent with federal law, the proposed rule eliminates the requirement for WET limitations where chemical-specific limits for the effluent are sufficient to attain and maintain applicable water quality standards.

6. Summary and comparison with existing and proposed federal regulations:

Following the revisions contained in this rule package, the department rules will be consistent with existing federal regulations:
40 CFR 122.2 - Definitions;
40 CFR 122.21 (g, i, k, m and o) -Application requirements;
40 CFR 122.44 (d, k, and l) - Permit limitation requirements, including reasonable potential requirements, compliance with federal ELGs, and antibacksliding;
40 CFR 122.47 Compliance Schedule requirements ;
40 CFR 122.50 – Adjustment to Limit Calculations;
40 CFR 125.30-32 – Fundamentally Different Factors Variances;
40 CFR 132, Appendix F, Procedure 9 – Great Lakes Compliance Schedules;
Clean Water Act sections 303 (d) (4) and 402 (o) - Antibacksliding.

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7. Comparison of similar rules in adjacent states:

All the other EPA Region 5 states (Illinois, Indiana, Michigan, Minnesota and Ohio) are subject to the EPA regulations that apply to the NPDES permit program and that are delegated to the states for implementation. Wisconsin's rules for permit processing and other permit issuance procedures should essentially be the same as those in the other states.

8. Summary of factual data and analytical methodologies:

Not applicable.

9. Analysis and supporting documentation used to determine effect on small business or in preparation of an economic impact analysis:

Impacts to small businesses, if any, are expected to be the same as impacts to other businesses. Since

most of the revisions are consistent with existing department practices, department staff do not expect significant impacts. This rule package simply incorporates federal requirements into state rules, none of which provide special exceptions for small businesses. The federal regulations do not grant the department authority to promulgate less stringent requirements based on a facility's ability to pay or handle reporting burdens, except that in some cases businesses may quality for economic variances. Economic variances to water quality standards are allowed in Wis. Stats. ss. 283.15 and 283.16.

10. Effect on small business:

The rule may have minor economic impacts on small businesses in isolated cases, but no broad, significant impacts are expected. Economic impacts are not expected because the department is already required under state statutes to include conditions in permits that are consistent with federal regulations and therefore most of the revisions are consistent with existing department practices. The impacts to small businesses, if any, are expected to be the same as impacts to other businesses. The proposed rules did not provide less stringent requirements for small businesses because federal regulations do not allow exceptions for small businesses. The rule will primarily impact WPDES permittees, including publically owned treatment plants (municipalities) and industrial wastewater dischargers such as power plants, pulp and paper mills, cheesemakers, food processors, and others. In some isolated cases, it is possible the rule changes may inhibit the ability of permittees to receive relaxed limits, but the department already has antidegradation procedures in place which also include restrictions on relaxing limitations that may lower water quality. It also may allow industrial dischargers to receive alternative (more or less stringent) technology based limits due to factors that make the individual discharger fundamentally different from the industrial category to which it belongs by definition. All dischargers whose permits include new limitations will be subject to updated compliance schedule regulations, as well. The department does not anticipate an increase in monitoring, reporting or compliance costs. In most cases, changes in this rule package simply codify existing practices. See the EIA for further discussion of impacts and benefits.

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SECTION 1. NR 106.08 (6) (e) and (f) are created to read:

NR 106.08 (6) (e) *Exception.* WET limits are not necessary under this subsection when the department determines chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative water quality standards, taking into consideration all of the following:

1. Existing controls on the discharge.
2. Controls on the pollutant discharged by nonpoint source pollution in the watershed.
3. The variability of the pollutant or parameter in the effluent discharged.
4. Sensitivity of species to toxicity testing when evaluating whole effluent toxicity as defined in s. NR 106.03.
5. Dilution of the effluent in the receiving water.

(f) *Fact sheet.* If the department determines WET limitations are not necessary under par. (e), all of the factors that are required for the determination must be specifically discussed in the fact sheet for the permit.

SECTION 2. NR 106.117 is repealed and recreated to read:

NR 106.117 Schedules of compliance. (1) SCHEDULES FOR FIRST PERMIT ISSUANCE.

(a) In this subsection, the following definitions apply:

1. "New source" has the meaning given in 40 CFR 122.2.
2. "New discharger" has the meaning given in 40 CFR 122.2.
3. "Recommencing discharger" means a permitted source that recommences discharge after terminating its operations.

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(b) The first permit issued by the department to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with state or federal limitations promulgated after commencement of construction but less than 3 years before commencement of the discharge.

Note: The department recognizes pollution control equipment start-up problems may arise at the commencement of a new discharge. Enforcement discretion may be used in the 90 days following commencement of discharge, in such cases.

(c) For recommencing dischargers, a schedule of compliance shall be included in the permit only when necessary to allow a reasonable opportunity to attain compliance with limitations promulgated less than 3 years before recommencement of the discharge.

(2) SCHEDULES FOR REISSUED OR MODIFIED PERMITS. A reissued or modified permit may, when appropriate, include a schedule for compliance with new or more stringent effluent limitations that are established by this chapter.

(3) SCHEDULE REQUIREMENTS. A schedule of compliance included in a permit shall meet all of the following conditions:

(a) *Time for compliance.* Any schedule of compliance under this section shall require compliance as soon as possible but may not extend beyond any applicable federal or state statutory deadlines.

The schedule also may not extend beyond 5 years from the date that the permit is reissued or modified to include the new or more stringent effluent limitation, except as provided in par. (b) or as provided in other chapters.

(b) *Great Lakes dischargers.* For an existing discharger to the Great Lakes system with a permit that was originally issued before March 23, 1997, if the effluent limitation is based on a secondary value under s. NR 105.03(25), the permit shall require compliance with the secondary value based limitation within a reasonable period of time, no later than 5 years after permit reissuance or modification to include the limitation. The compliance schedule may allow the permittee additional time to conduct studies for the purpose of revising the secondary value or to develop a criterion if requested by the permittee in accordance with s. NR 106.07 (8). The time period allowed for such studies may not exceed 2 years. In cases where the permittee wishes to conduct a study on the secondary value, the permit also shall contain a reopener clause, requiring a permit modification if the department determines the specified studies demonstrate that a revised limitation is appropriate. Any revised limitation shall be incorporated through a permit modification and a reasonable time period, up to 5 years, may be allowed for compliance, but in no case may the compliance schedule for the revised limitation extend beyond 7 years from the date the secondary value based limitation was initially included in the permit.

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(c) *Interim dates.* If a permit establishes a schedule of compliance that exceeds one year from the date of permit reissuance or modification, the schedule shall set forth interim requirements and the dates for their achievement as follows:

1. The time between dates for the achievement of interim requirements may not exceed one year, except in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between dates for the achievement of interim requirements shall not exceed 6 months.

2. If the time necessary for completion of any interim requirement is more than one year and is not readily divisible into stages for completion, the permit shall specify dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(d) *Pollution and waste minimization measures.* The schedule of compliance may require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation.

(e) *Extension beyond permit expiration.* If a permit is modified to include a limitation, the schedule of compliance may extend beyond the expiration date of the permit if an interim permit

limit that is effective upon the permit's expiration date is included in the permit. In such cases, the department shall also specify in the permit the final water quality based effluent limit and its associated date of effect.

(f) *Reporting*. No later than 14 days following each interim date and the final date of compliance, the permittee shall notify the department in writing of its compliance or noncompliance with the interim or final requirements or, if par. (c) 2. is applicable, submit progress reports.

Note: An interim permit requirement is not necessarily a numerical effluent limitation.

Note: Compliance schedule provisions for TMDL-based limits, technology-based limits, and phosphorus limits may differ from the requirements of this section. These provisions may be found in ss. NR 212.75 (5), 205.14, and 217.17, respectively

SECTION 3. NR 106.13 is repealed.

SECTION 4. NR 200.065 Table 1 is amended to read:

NR 200.065

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 215.031 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

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	1	BOD5 (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	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, cooling water, manufacturing, commercial, mining, or silvicultural discharge ~~or cooling water discharge, or both~~	4	Copper, ammonia, phosphorus and hardness
	1	BOD5 (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, BOD5 (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.

SECTION 5. NR 200.07 (5) is created to read:

NR 200.07 (5) (a) *Applications for new or existing manufacturing, commercial, mining, silvicultural, and non-contact cooling water dischargers, sewage sludge generators, and publicly owned treatment works.* In addition to any other information required under ch. 283, Stats., or other WPDES permit application regulations, an owner or operator of a facility applying for a WPDES permit shall submit the information specified in 40 CFR 122. 21(f) through (h), (j), (k) and (q) that is required for the applicant's type of discharge. The applicant shall submit this information on the application form in sub. (1), or as an attachment to the form.

(b) *Applications for discharges from aquatic animal production facilities.* In addition to any available monitoring data, owners or operators of aquatic animal production facilities shall include the all of following information in the permit application:

1. The maximum daily and average monthly flow from each outfall.
2. The number of ponds, raceways, and similar structures.
3. The name of the receiving water and the source of intake water.
4. For each species of aquatic animal, the total yearly and maximum harvestable weight.
5. The calendar month of maximum feeding and the total mass of food fed during that month.

Note: Application requirements for concentrated animal feeding operations are included in ch. NR 243. Additional application requirements for stormwater sources are found in ch. NR 216. Application requirements for facilities with cooling water intake structures may be found in 40 CFR 122.21 (r).

SECTION 6. NR 200.21 is renumbered NR 200.21 (1) and amended to read:

NR 200.21 Time deadline for filing variance requests. (1) APPLICATIONS. A permittee who wishes to apply for a variance from a water quality based effluent limitation shall submit an application for a variance within the time period specified in s. 283.15 (2) (am) (1), Stats~~60 days after the department issues, reissues, or modifies the permit~~.

SECTION 7. NR 200.21 (2) and (2) (Note) are created to read:

(2) EXPEDITED VARIANCE. As an alternative to sub. (1), a permittee may apply for a variance as part of the application for permit reissuance under s. 283.15 (2) (a), Stats. Any application for a variance under s. 283.15, Stats., shall comply with application requirements of s. NR 200.20. The department may notify a permit applicant before the permit application for reissuance is submitted that

the permittee may apply for a variance to the water quality based effluent limitations that are likely to be included in the final permit or may seek renewal of a variance that has already been granted.

Note: Submittal of a variance application with the application for permit reissuance is the preferred method for submittal.

SECTION 8. NR 205.01 is amended to read:

NR 205.01 Purpose. The purpose of this chapter is to set forth the definitions applicable to and abbreviations used in chs. NR 200 to 299 to avoid repetition in those chapters. This chapter also sets forth permit general conditions for all WPDES permits, procedures for establishing permit limits in WPDES permits, effluent limitations applicable to ~~non-POTW's~~ non-POTWs where pH is continuously monitored, and procedures to be used for issuing general WPDES permits.

SECTION 9. NR 205.03 (27) and (28) are amended to read:

NR 205.03 (27) "Point source" as defined in s. 283.01 (12), Stats., means any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, landfill leachate collection system, 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 does 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 does 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.

(28) "Pollutant" as defined in s. 283.01 (13), Stats., means any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, heat, filter backwash, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

SECTION 10. NR 205.067 is created to read:

NR 205.067 Reasonable potential for water quality based effluent limitations. (1) GENERAL. (a) The department shall include an effluent limitation for a pollutant in a WPDES permit when the department determines that the discharge of the pollutant causes, has the reasonable potential to cause, or contributes to an excursion above the allowable ambient concentration of a numeric water quality criterion in chs. NR 102 to 104 in the receiving water or a downstream water.

Note: Downstream water includes downstream waterbodies in other states or tribal waters that have EPA approved standards under 40 CFR 130.

(b) Limitations shall control all pollutants or pollutant parameters, including conventional, nonconventional, and toxic pollutants, that the department determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard in chs. NR 102 to 104, including narrative criteria for water quality.

(2) FACTORS TO CONSIDER. When determining under sub. (1) or (4) whether a pollutant discharged causes, has the reasonable potential to cause, or contributes to an exceedance of a numeric or narrative water quality standard, the department shall consider all of the following factors:

(a) Existing controls on the discharge.

(b) Controls on the pollutant discharged by nonpoint source pollution in the watershed.

(c) The variability of the pollutant or parameter in the effluent discharged.

(d) Sensitivity of species to toxicity testing when evaluating whole effluent toxicity as defined in s. NR 106.03 (14).

(e) Dilution of the effluent in the receiving water.

(3) WATER QUALITY BASED EFFLUENT LIMITATIONS. If the department determines a limitation is necessary under this section, the limitation shall:

(a) Be consistent with a total maximum daily load as defined in s. NR 217.11 (7) if a total maximum daily load has been approved by the EPA for the receiving waterbody.

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(b) Ensure achievement of a level of water quality derived from, and in compliance with, the applicable water quality standard.

(4) IN ABSENCE OF NUMERIC WATER QUALITY CRITERIA. (a) When a chemical pollutant, for which a numeric water quality criterion does not exist, is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable water quality standard, effluent limits shall be established using one or more of the following options:

1. Establish effluent limits using a calculated numeric water quality criterion for the pollutant that the department demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using data for a proposed criterion or other relevant information such as EPA's Water Quality Standards Handbook, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents.

Note: EPA's Water Quality Standards Handbook is available at the following link: https://www.epa.gov/wqs-tech/water-quality-standards-handbook.

2. Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published

under 33 USC 1314(a), supplemented when necessary by other relevant information.

3. Establish effluent limits on an indicator parameter for the pollutant of concern, provided that all of the following are true:

a. The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation.

b. The fact sheet sets forth the basis for the limit, including a finding that compliance with the effluent limit of the indicator parameter will result in controls on the pollutant of concern that are sufficient to attain and maintain applicable water quality standards.

c. The permit requires all effluent and ambient monitoring necessary to show that, during the term of the permit, the limit on the indicator parameter continues to attain and maintain applicable water quality standards.

d. The permit contains a reopener clause allowing the department to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(b) If there is reasonable potential under par. (a) to exceed a narrative criterion and if required under s. NR 106.08, a limitation for whole effluent toxicity shall be included in the permit.

Note: Limitations and procedures for whole effluent toxicity are established in subch. II of ch. NR 106.

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(5) LIMIT CONTINUATION. (a) Subject to paragraph (b), if a permit includes a water quality based effluent limitation for a pollutant because the limitation is required under this section or is required under the procedures in another chapter, the water quality based effluent limitation for the pollutant shall be included in a subsequently reissued permit if all of the following apply:

1. Treatment or pollutant control measures were added to comply with the water quality based effluent limitation for the pollutant and the water quality based effluent limitation took effect in a prior permit.

2. The facility has the ability to alter or suspend the treatment or pollutant control measures for the pollutant to the degree that there is continued reasonable potential to exceed the applicable standard.

(b) If the department determines a more stringent limitation is necessary to comply with water quality standards, a more stringent water quality based effluent limitation may be included in the permit for the pollutant. Also, the department may include a less stringent limitation provided water quality standards, including antidegradation, as well as antibacksliding

requirements in ch. NR 207 are met.

(6) EXCEPTION. Subsections (1) to (4) do not apply to pollutants or limitations that are subject to the procedures in chs. NR 106 or 217.

SECTION 11. NR 205.10 is created to read:

NR 205.10 Best management practices. Best management practices to control or abate the discharge of pollutants shall be included in a WPDES permit issued by the department in all of the following cases:

(1) When the permit is authorized under section 33 USC 1314(e) for the control of toxic pollutants and hazardous substances from ancillary industrial activities.

(2) When numeric effluent limitations are infeasible.

(3) When the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of ch. 283, Stats and the Clean Water Act.

Note: Chapters NR 216 and 243 also include regulations requiring best management practices for WPDES permittees for control of stormwater discharges and concentrated animal feeding operations (CAFOs).

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SECTION 12. NR 205.14 is created to read:

NR 205.14 Schedules of compliance. A WPDES permit may, when appropriate, include a schedule of compliance leading to compliance with permit limitations. Any schedule of compliance for water quality based effluent limitations for phosphorus shall be consistent with all of the requirements in s. NR 217.17. Any other schedule of compliance included in a permit shall be consistent with all of the requirements in s. NR 106.117.

SECTION 13. NR 207 Chapter (title) is amended to read:

CHAPTER NR 207

~~WATER QUALITY~~ ANTIDEGRADATION AND ANTIBACKSLIDING

SECTION 14. NR 207 Subchapter I (title), inserted before NR 207.01, is created to read:

SUBCHAPTER I

ANTIDEGRADATION

SECTION 15. NR 207.01 is amended to read:

NR 207.01 Purpose and applicability. (1) PURPOSE. The purpose of this ~~chapter~~subchapter is to establish implementation procedures for the antidegradation policy in s. NR 102.05 (1) (a). This ~~chapter~~subchapter sets procedures applicable to proposed new or increased discharges to outstanding resource waters, exceptional resource waters, Great Lakes system waters, fish and aquatic life waters, and waters listed in tables 3 through 8 in ss. NR 104.05 to 104.10.

(2) APPLICABILITY. This ~~chapter~~subchapter applies to any person proposing to increase an existing discharge or create a new discharge to the surface waters of the state.

SECTION 16. NR 207 Subchapter II, inserted after NR 207.05, is created to read:

SUBCHAPTER II

ANTIBACKSLIDING

NR 207.10 Purpose and applicability. (1) PURPOSE. The purpose of this subchapter is to establish antibacksliding requirements for the WPDES permit program.

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(2) APPLICABILITY. This subchapter applies to any permittee that requests in a WPDES permit modification or reissuance application an increased or less stringent limitation that limits the discharge of a pollutant to a surface water. This subchapter does not apply to a request for an increased limitation that limits the discharge of a pollutant to groundwater. This subchapter is not applicable when the department increases a limitation that has not yet taken effect in a WPDES permit.

NR 207.11 Definitions. In addition to the definitions in ch. NR 205, the following definitions apply to this subchapter:

(1) "Best professional judgment limitation" means technology based effluent limitations established on a case-by-case basis by the permit drafter when there are no applicable promulgated effluent guidelines for the category of discharge. These limitations are established under s. NR 220.21 and 33 USC 1342(a)(1)Bt.

(2) "Effluent limitation guidelines" or "effluent guideline standard" or "ELGs" means guidelines for establishing technology based effluent limitations under 33 USC 1313(b) including, but not limited to, guidelines for best practicable control technology currently available, best conventional pollutant control technology, best available technology currently available, and new source performance

standards.

(3) "Impaired water" has the meaning in s. 151.002 (16m).

(4) "State technology based treatment standard" means a technology based treatment standard promulgated by the state that is not an ELG.

Note: The department's state statutory authority for establishing technology based guidelines and standards is found in ss. 283.11, 283.13, 283.19, and 283.21, Stats. An example of a state treatment technology based standard is a standard promulgated under s. 283.11 (3) or (4), Stats.

(5) "Total Maximum Daily Load" or "TMDL" has the meaning in s. 151.002 (46m).

NR 207.12 Antibacksliding. (1) GENERAL. Except as provided in this section, effluent limitations or standards in a reissued, revoked and reissued, or modified permit shall be at least as stringent as the effective effluent limitations or standards in the previous permit. If one of the exceptions in subs. (2) to (4) is satisfied to relax or backslide a limitation, the limitation may only be made less stringent if both of the following apply:

(a) The less stringent limitation is at least as stringent as required by the effluent limitation guideline in effect at the time the permit is reissued, revoked and reissued, or modified.

(b) The less stringent limitation complies with state water quality standards, including the antidegradation requirements in subch. I.

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Note: The requirements in sub. (1) is commonly referred to as the "safety clause" provision of the antibacksliding requirements in the Clean Water Act, and these requirements apply to any relaxation of any limitation. See 33 USC 1342 (o) (3).

(2) RELAXING A BEST PROFESSIONAL JUDGMENT LIMITATION. Best professional judgment limitations established under s. NR 220.21 (1) that have taken effect in a permit may be made less stringent in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are satisfied and one or more of the following apply:

(a) Material and substantial alterations or additions to the permitted facility occurred after the best professional judgment limitation was initially imposed in the permit, which justify the application of a less stringent effluent limitation,

(b) New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this paragraph does not include revised regulations, guidance, or test methods.

(c) The department determines that technical mistakes or mistaken interpretations of law were made when the best professional judgment limitation was initially imposed in the permit.

(d) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.

(e) The permittee has received department approval for any of the following:

1. A modified technology based limitation under s. 283.13 (3), Stats.

2. An extended compliance schedule under s 283.13 (6), Stats.

3. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

4. An alternate thermal effluent limitation under s. 283.17 (1), Stats.

(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the best professional judgment limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

Note: Subsection (2) is based on the requirement in 33 USC 1342 (o) (1).

(3) RELAXING A WATER QUALITY BASED LIMITATION OR A LIMITATION BASED ON A STATE TECHNOLOGY BASED TREATMENT STANDARD. (a) *General.* Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit the requirements of sub. (1) (a) and (b) are met and, for an increased water quality based effluent limitation, one of the following requirements is satisfied:

1. *Impaired waters and TMDL based limitations.* For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant, any water quality based effluent limitation that is based upon a federally approved total maximum daily load for the pollutant may be made less stringent, provided at least one of the following applies:

a. Other wasteload allocated limitations for one or more dischargers to the impaired receiving water or downstream water are also adjusted so, cumulatively, the total maximum daily load allocations will still assure the attainment of water quality standards.

b. The designated use that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA.

2. *Impaired water and no federally approved TMDL developed.* For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant but where a total

maximum daily load has not yet been developed and approved by USEPA for the pollutant, a water quality based effluent limitation for the pollutant may not be relaxed unless _____.

3. *Other waters.* For discharges of a pollutant to a surface water where neither the immediate receiving water or downstream water is an impaired water, any water quality based effluent limit, including a limitation based upon a total maximum daily load or other wasteload allocation, may be made less stringent provided water quality standards, including designated uses and antidegradation, are met.

Note: The requirements in sub. (3) (a) (1) and (3) are based on the provisions of 33 USC 1313(d)(4) and still require compliance with sub. (1), which requires antidegradation requirements be satisfied.

(b) *Listed Exceptions*. Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may also be relaxed in a reissued, revoked and reissued, or modified permit if sub. (1) (a) and (b) are satisfied and at least one of the following applies:

1. Material and substantial alterations or additions to the permitted facility occurred after the limitation was initially imposed in the permit that justify the application of a less stringent effluent limitation.

2. New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this subdivision includes the establishment of an EPA approved total maximum daily load for the pollutant and receiving water. New information under this subdivision does not include revised regulations, guidance, or test methods. The relaxation of a water quality based effluent limitation under this subdivision that is based upon a revised wasteload allocation, a revised TMDL, or any alternative grounds for translating water quality standards into effluent limitations, is permissible only if the cumulative effect of the revised allocation results in a decrease in the amount of pollutants discharged into the receiving waters, and such revised allocations are not the result of a discharger completely or substantially eliminating its discharge of pollutants.

3. The department determines that technical mistakes or mistaken interpretations of law were made in the previous imposition of the effluent limitation. The relaxation of a water quality based limitation under this subdivision that is based upon a revised wasteload allocation used to calculate the water quality based effluent limitation, a revised TMDL, or any alternative grounds for translating water quality standards into effluent limitations, is permissible only if the cumulative effect of the revised allocation results in a decrease in the amount of pollutants discharged into the receiving waters, and such revised allocations are not the result of a discharger completely or substantially eliminating its discharge of pollutants.

4. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonable available remedy.

5. The permittee has received department approval for any of the following:

a. A modified technology based limitation under s. 283.13 (3), Stats.

b. An extended compliance schedule under s 283.13 (6), Stats.

c. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

d. An alternate thermal effluent limitation under s. 283.17 (1), Stats.

6. The initial water quality based limit was based on protection of a receiving water or a downstream water that did not meet the applicable water quality standard and the previously impaired water has now met or exceeded the water quality standard.

7. The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

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Note: These exceptions are listed in 33 USC 1342 (o) (2).

(4) RELAXING AN INTERIM EFFLUENT LIMITATION OR AN ELG-BASED LIMITATION OR STANDARD. Interim effluent limitations, standards, and conditions and ELG-based effluent limitations and standards that have taken effect in a permit may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements in sub. (1) (a) and (b) are met and both of the following are met:

(a) Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued.

(b) Changes have occurred that would constitute cause for a permit modification or revocation and reissuance under ch. NR 203.**Note:** Subsection (4) addresses the requirements in 40 CFR 122.44 (l) (1)

SECTION 17. NR 210.05 (5) is created to read:

(5) When determining whether more stringent effluent limitations are required under this section to meet water quality standards in the receiving water or downstream waters, the department shall apply the reasonable potential procedures in s. NR 205.067.

SECTION 18. NR 220.10 is amended to read:

NR 220.10 Purpose. The purpose of this subchapter is to provide for the incorporation of effluent limitations into discharge permits required under s. 283.31, Stats., as soon as possible after the promulgation of regulations establishing ~~BCT or BAT~~ effluent limitation guidelines.

SECTION 19. NR 220.12 is renumbered 220.12 (intro.) and is amended to read:

NR 220.12 Definitions. Terms used in this subchapter are defined in s. NR 205.03. Abbreviations used in this chapter are defined in s. NR 205.04. Other terms for this chapter are defined as follows:

SECTION 19m. NR 220.12 (1) and (2) are created to read:

(1) "Effluent Limitation Guidelines" or "ELGs" are federal or state technology based guidelines or standards that are used to establish effluent limitations for industrial categories or classes of dischargers. They include federal guidelines, standards, and limitations that are established under 33 USC 1311, 1314, 1316, 1318, 1342 and 1361 and state promulgated guidelines, standards, and limitations in chs. NR 221 to 298.

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(2) "Fundamentally different factors variance" or "FDFV" means a variance or an adjustment to an effluent limitation when data specific to a permittee indicates the presence of factors that are fundamentally different from the factors considered by EPA in development of the effluent limitation guidelines 33 USC 1311 and 1314.

SECTION 20. NR 220.13 is repealed and recreated to read:

NR 220.13 Establishment of limitations based upon federal regulations. (1) LISTED INDUSTRIAL CATEGORIES. In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources listed in s. NR 220.02 that is more stringent than the promulgated effluent limitation guideline for that category or class, the department shall include an effluent limitation based on the EPA-promulgated effluent limitation guideline in an issued, reissued, or modified WPDES permit for a point source that belongs to the federal category or class of point sources in accordance with the federally required compliance date.

(2) INDUSTRIAL CATEGORIES NOT SPECIFICALLY LISTED. In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources not listed in s. NR

220.02, the department shall include an effluent limitation based on the EPA-promulgated effluent limitation guideline in an issued, reissued, or modified WPDES permit for a point source that belongs to the federal category or class of point sources in accordance with the federally required compliance date.

(3) LESS STRINGENT LIMITATIONS. If a promulgated federal effluent limitation guideline results in an effluent limitation that is less stringent than an existing applicable technology based limitation contained in a WPDES permit, the department may only include the less stringent limitation if the antibacksliding requirements in ch. NR 207 are satisfied.

(4) COMPLIANCE. Prior to any permit modification, revocation and reissuance, or reissuance to incorporate a limitation for a toxic substance based on a revised federal effluent guideline promulgated under 33 USC 1317, the permittee shall comply with the federally promulgated guideline by the required compliance date even if the permit has not yet been modified, revoked and reissued, or reissued to include a limitation based on the revised guideline.

SECTION 21. NR 220.15 is repealed and recreated to read:

NR 220.15 Disposal of pollutants into publicly owned treatment works, land treatment systems, or land application of wastewater. (1) When part of a discharger's process wastewater is not being discharged into surface waters of the state because it is disposed into a POTW, into a land treatment system, or via land application of wastewater, thereby reducing the flow or level of pollutants being discharged into surface waters of the state, applicable effluent standards and limitations for the discharge in a WPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(a) If none of the waste from a particular process is discharged into surface waters of the state, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(b) In all cases other than those described in par. (a), effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into surface waters of the state, and dividing the result by the total wastewater flow. This method is expressed algebraically as:

Where:

P is the final, adjusted permit effluent limitation,

E is the limitation derived by applying effluent guidelines to the total wastestream,

N is the wastewater flow to be treated and discharged to surface waters, and

T is the total wastewater flow.

(c) In addition to the adjustment in par. (b), effluent limitations and standards may be further adjusted under a fundamentally different factors variance under s. NR 220.20 to make them more or less stringent if discharges to POTWs or land treatment systems change the character or treatability of the pollutants being discharged.

Note: "Land treatment system" is defined in s. NR 214.03 (24). Wells as defined in s. NR 812.05 (1) (b) are not land treatment systems. Disposal of pollutants into wells is prohibited by s. NR 812.05.

(2) Sub. (1) does not apply to the extent that effluent limitations guidelines do any of the following:

(a) Control concentrations of pollutants discharged but not mass.

(b) Specify a different specific technique for adjusting effluent limitations to account for land application or disposal into POTWs.

(3) This section does not alter a permittee's obligation to meet any more stringent limitations or requirements established under other WPDES permit program regulations, including those under chs. NR 204 and 214.

SECTION 22. Subchapter III title of chapter NR 220 is amended to read:

SUBCHAPTER III <u>BEST PROFESSIONAL JUDGMENT</u> EFFLUENT LIMITATIONS FOR ~~UNCATEGORIZED~~ POINT SOURCES

SECTION 23 Subchapter IV, inserted after NR 220.21, is created to read:

SUBCHAPTER IV
VARIANCES TO EFFLUENT LIMITATION GUIDELINES

NR 220.30 Purpose. The purpose of this subchapter is to establish the criteria and standards to be used in determining whether effluent limitations alternative to those required by chs. NR 221 to 298 or by federal effluent limitation guidelines should be included in a WPDES permit for a discharger because factors relating to the discharger's facilities, equipment, processes, or other factors related to the discharger are fundamentally different from the factors considered by the department or the EPA in development of the effluent limitation guidelines. This subchapter also provides expedited variance procedures for fundamentally different factors variances and for other variances under 33USC 1311(c).

NR 220.31 Fundamentally different factors variances. (1) GENERAL. The department may adjust an effluent limitation that is based on a requirement in chs. NR 221 to 298 or based on a federal effluent limitation guideline established under 33 USC 1311 and 1314 on a case-by-case basis to make the limitation more or less stringent for a permittee within an industrial category or subcategory. An FDFV may only be approved for a limitation if data specific to the discharger indicates the presence of factors fundamentally different from those considered by EPA or the department in developing the limitation at issue. Any request for a variance and department approval of a variance shall comply with the requirements in 33 USC 1311(n) and 40 CFR 125 subpart D.

(2) WHO MAY REQUEST AN FDFV. Any interested person, including the permittee, believing that the factors relating to a discharger's facilities, equipment, processes, or other facilities related to the discharger are fundamentally different from the factors considered during the development of the effluent limitation guidelines may request an FDFV. An FDFV may also be proposed by the department in the draft permit.

(3) FDFV RESTRICTIONS. A fundamentally different factors variance may not be granted for any new source performance standard and does not apply to the BPT limitations for steam electric power generating, contained in s. NR 290.12 (1). The department may not include an alternative limitation based on a fundamentally different factors variance in a permit unless the EPA has approved the variance under 40 CFR 124.62.

NR 220.32 Criteria for fundamentally different factors variances. (1) APPROVABLE FDFV REQUESTS. A request for the establishment of effluent limitations under this subchapter may be approved only if all of the following apply:

(a) There is an applicable effluent limitation guideline that applies and specifically controls the

pollutant for which alternative effluent limitations or standards have been requested.

(b) Factors relating to the discharge controlled by the permit are fundamentally different, as specified in sub. (4), from those considered by EPA or the department in establishing effluent limitation guidelines.

(c) The request for alternative effluent limitations or standards is made as part of the permit application.

(2) LESS STRINGENT FDFV LIMITATIONS. A request for the establishment of effluent limitations less stringent than those required by effluent limitation guidelines shall be approved only if all of the following apply:

(a) The alternative effluent limitation or standard requested is no less stringent than justified by the fundamental difference.

(b) The alternative effluent limitation or standard will be consistent with any applicable areawide waste treatment management plan under ch. NR 121 and with any more stringent limitations.

(c) Compliance with the effluent limitation guidelines, either by using the technologies upon which the effluent limitation guidelines are based or by other control alternatives, would result in any of the following:

1. A cost wholly out of proportion to the removal cost considered during development of the effluent limitation guidelines.

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2. A non-water quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the effluent limitation guidelines.

(3) MORE STRINGENT FDFV LIMITATIONS. A request for an alternative limitation that is more stringent than required by effluent limitation guidelines shall be approved only if all of the following apply:

(a) The alternative effluent limitation or standard requested is no more stringent than justified by the fundamental difference.

(b) Compliance with the alternative effluent limitation or standard would not result in any of the following:

1. A removal cost wholly out of proportion to the removal cost considered during development of the effluent limitation guidelines.

2. A non-water quality environmental impact, including energy requirements, fundamentally more adverse than the impact considered during development of the effluent limitations.

(4) FUNDAMENTALLY DIFFERENT FACTORS. Factors that may be considered fundamentally different are limited to any of the following:

(a) The nature or quality of pollutants contained in the raw waste load of the applicant's process wastewater.

(b) The volume of the discharger's process wastewater and effluent discharged.

(c) Non-water quality environmental impact of control and treatment of the discharger's raw waste load.

(d) Energy requirements of the application of control and treatment technology.

(e) Age, size, land availability, and configuration as they relate to the discharger's raw waste load.

(f) Cost of compliance with required control technology.

(5) UNAPPROVABLE FDFV REQUESTS. A variance request or portion of such a request under this section shall not be granted on any of the following grounds:

(a) The infeasibility of installing the required waste treatment equipment within the time specified in the effluent limitation guidelines or standards or Clean Water Act.

Note: A variance may be approved based on the discharger's inability to ultimately achieve effluent limitations, but not based on the discharger's ability to meet a limit within statutory deadlines.

(b) The assertion that the effluent limitation guidelines cannot be achieved with the appropriate waste treatment facilities installed if the assertion is not based on factors listed in sub. (4).

(c) The discharger's ability to pay for the required waste treatment.

(d) The impact of a discharge on local receiving water quality.

NR 220.33 Variance application process. (1) ELG VARIANCE APPLICATION DEADLINES. (a) *FDFV deadline.* A written request for an alternative limitation based on a fundamentally different factors variance shall be submitted no later than 180 days after the date on which an effluent limitation guideline is published in the federal register, and any of the following apply:

1. For a variance from an effluent limitation that is based on the best practicable control technology currently available under 33 USC 1311(b)(1)(A) and 1314(b)(1), the request shall be submitted by the close of the public comment period under s. 283.39, Stats.
2. For a variance from an effluent limitation that is based on the best control technology available for conventional pollutants under 33 USC 1311(b)(2)(E) and 33 USC 1314 (b)(4), or for variances from an effluent limitation that is based on the best available treatment technology economically achievable under 33 USC 1311(b)(2) and 33 USC 1314(b)(2), the request shall be submitted as part of the permit application for reissuance or modification.

(b) *Other technology based limitation variance deadlines.* Requests for a variance to an effluent guideline limitation under 33 USC 1311(c) or (g) shall comply with the deadlines and requirements in 40 CFR 122.21(m).

(c) *Advanced notification.* Before public notice of a draft permit modification or reissuance is given under s. 283.39, Stats., the department may notify a permitee or applicant in writing that the draft permit will likely contain limitations based on effluent limitation guidelines or standards that may be eligible for a variance under par. (a) or (b). In the written notice to the permittee, the department may require that the permittee submit a variance request within a reasonable time period if the permittee is interested in applying for a variance under par. (a) or (b). If the permittee wishes to request a variance, the variance application shall explain how the requirements for the variance have been met and the application shall be submitted within the reasonable time period specified in the written notice. The department may send the written notice to a permittee prior to submittal of a permit application for reissuance. If the department determines the variance is approvable, the draft permit or final permit may contain an alternative limitation that takes effect upon approval by the department and the EPA.

(2) CONTENT OF FDFV APPLICATION. Any permittee requesting an FDFV shall demonstrate and explain each of the following in the application:

(a) How the appropriate criteria of s. NR 220.32 have been met.

(b) How the factors listed in s. NR 220.32 regarding the discharger's facility are fundamentally different from the factors EPA or the department considered in establishing the effluent limitation guidelines. The requester shall reference all relevant material and information such as the published development documents in support of the effluent limitation guidelines, all associated technical and economic data collected for use in developing each effluent limitation guideline, all records of legal proceedings, and all written and printed documentation including records of communication that relevant to the regulations that are kept as public records by the department.

(c) How the alternative limitations requested are justified by the fundamental difference alleged in par. (b).

SECTION 24. NR 221.05, 225.05, 228.05, 231.05, 236.05, 239.05, 240.05, 245.05, 247.05, 250.05, 258.05, 261.14, 268.05, 269.05, 275.05, 276.05, 277.05, 280.05, 281.05, 284.13, 286.05, 290.13, 294.05, 295.05, and 296.05 are repealed.

SECTION 25. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 26. BOARD ADOPTION.

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

Dated at Madison, Wisconsin _____DRAFT_____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By__DRAFT_____
Cathy Stepp, Secretary

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