Chapter ATCP 31

GROUNDWATER PROTECTION PROGRAM

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Note: Chapter Ag 161 was renumbered ch. ATCP 31 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Prefatory Note: (1) The department of agriculture, trade and consumer protection has authority to regulate fertilizer and pesticide bulk storage under s. 94.645, Stats., and pesticide use under ss. 94.67 through 94.71, Stats. Activities subject to department regulation may, under some circumstances, result in the presence of fertilizer substances or pesticide substances in groundwater. Under ch. 160, Stats., the department of natural resources is required to establish numerical standards, consisting of enforcement standards and preventive action limits, for certain substances in groundwater. If a fertilizer substance or pesticide substance is found in groundwater, the department will consider whether the presence of the fertilizer substance or pesticide substance has resulted from, or may be aggravated by an activity subject to department regulation. If the presence of the fertilizer or pesticide substance has resulted from a violation of an existing statute, rule or order administered by the department, the department may seek appropriate enforcement action against the violator, whether or not the contamination exceeds an enforcement standard or preventive action limit adopted by the department of natural resources. If, at a point of standards application, the concentration of a fertilizer substance or pesticide substance in groundwater attains or exceeds an enforcement standard or preventive action limit, the department may take site–specific regulatory action to prevent further groundwater degradation or restore groundwater quality, whether or not the substance concentration has resulted from a violation of an existing statute, rule or order. Site–specific regulatory action will be consistent with ch. 160, Stats., and this chapter. The department will also adopt substance–specific rules, as appropriate under ss. 94.69, 160.19 and 160.21, Stats., for each pesticide substance for which an enforcement standard and preventive action limit are established by the department of natural resources. Rules may include preventive measures designed to minimize the presence of pesticide substances in groundwater statewide. Rules may also include requirements for the implementation of site–specific regulatory responses under specified conditions.

(2) This chapter establishes certain elements of the department's program for the prevention and control of groundwater contamination where it appears that groundwater contamination has resulted from or may be aggravated by activities subject to department regulation. This chapter includes:

(a) Standards for the collection, handling and analysis of official groundwater samples, to ensure the reliability of sample test results used by the department as a basis for regulatory or enforcement action.

(b) The points of standards application at which concentrations of a fertilizer substance or pesticide substance in groundwater may be measured to determine whether an enforcement standard or preventive action limit has been attained or exceeded. These points of standards application are defined, pursuant to s. 160.21 (2), Stats., for activities subject to department regulation.

(c) The preliminary investigative steps to be taken by the department upon receipt of groundwater sample test results which indicate the presence of a fertilizer substance or pesticide substance in Wisconsin groundwater.

(d) The enforcement options which are available to the department if the department finds, upon investigation, that the presence of a fertilizer substance or pesticide substance in groundwater has resulted from a violation of an existing statute, rule or order administered by the department under s. 94.645, Stats., or ss. 94.67 through 94.71, Stats.

(e) The site–specific regulatory options which are available to the department under s. 94.645, Stats., or ss. 94.67 through 94.71, Stats., if, at a point of standards application, the concentration of a fertilizer substance or pesticide substance is found to attain or exceed an enforcement standard or preventive action limit.

(f) The general criteria to be considered by the department in its choice of a site–specific regulatory response, or in the adoption of rules which require non–discretionary site–specific responses under specific conditions.

(g) Requirements and limitations governing the prohibition of pesticide uses, whether by site–specific regulatory responses or by rule.

(h) A commitment to adopt substance–specific rules, as appropriate under ss. 94.69, 160.19 and 160.21, Stats., for each pesticide substance for which an enforcement standard and preventive action limit are adopted by the department of natural resources. Rules may include preventive measures designed to minimize the presence of pesticide substances in groundwater statewide. Rules may also include requirements for the implementation of site–specific regulatory responses under specified conditions.

(3) This chapter does not limit the department's rulemaking authority under ss. 94.645, 94.69, 160.19, or 160.21, Stats. In the exercise of its rulemaking authority, the department may consider any information which may be relevant to the rulemaking proceeding, whether or not the information is derived from Wisconsin groundwater samples. The finding of a fertilizer or pesticide substance in groundwater, at a level which equals or exceeds an enforcement standard or preventive action limit, is not a prerequisite to the exercise of the department's rulemaking authority under ss. 94.645, 94.69, 160.19, or 160.21, Stats.

(4) This chapter does not limit the department in the exercise of any of its statutory authority, where the department determines that the exercise of its authority is necessary to comply with a statutory mandate, or to safeguard the public health, safety or welfare.

(5) General rules governing pesticide use and control are contained in ch. ATCP 29. Rules adopted under s. 94.645, Stats., to regulate fertilizer and pesticide bulk storage are contained in ch. ATCP 33.

ATCP 31.01 Definitions. As used in this chapter:

(1) "Activity subject to department regulation" means:

(a) The bulk storage of fertilizer or pesticides, to the extent that the bulk storage is subject to possible regulation by the department under s. 94.645, Stats.

(b) Pesticide use, to the extent that the pesticide use is subject to possible regulation by the department under ss. 94.67 through 94.71, Stats.

(2) "Department" means the state of Wisconsin department of agriculture, trade and consumer protection.

(3) "Enforcement standard" means a numerical value expressing the concentration of a substance in groundwater which is adopted under ss. 160.07 and 160.09, Stats.

(4) "Fertilizer" means a fertilizer as defined in s. 94.64 (1) (e), Stats., except that it does not include anhydrous ammonia.

(5) "Fertilizer substance" means either of the following for which an enforcement standard or preventive action limit has been adopted by the department of natural resources:

(a) A fertilizer; or

(b) A degradation product or metabolic product of fertilizer.

(6) "Groundwater" means any of the waters of the state, as defined in s. 280.01 (2), Stats., occurring in a saturated sub–surface geological formation of rock or soil.

(7) "Official groundwater sample" means a groundwater sample from which an official groundwater test result is obtained.

(8) "Official groundwater test result" means a groundwater test result which is:

(a) Obtained by department analysis of a groundwater sample collected by the department or its agent; or

(b) Reported and certified to the department by the department of natural resources pursuant to s. ATCP 31.02.

(9) "Nonpotable water supply" means an excavation or opening into the ground made by digging, boring, drilling, driving or other methods for the purpose of obtaining groundwater for a use other than human consumption or preparation of food products.

(10) "Pesticide" means a pesticide as defined in s. 94.67 (25), Stats., or a pesticide active ingredient as defined in s. 94.67 (1), Stats.

(11) "Pesticide substance" means any of the following for which an enforcement standard or preventive action limit has been adopted by the department of natural resources:

(a) A pesticide;

(b) An isomer of a pesticide; or

(c) A degradation product or metabolic product of a pesticide.

(12) "Pesticide use" means the mixing, use, application, handling, transport, storage or disposal of a pesticide.

(13) "Point of standards application" means a location at which the concentration of a substance in groundwater may be measured to determine whether a preventive action limit or enforcement standard has been attained or exceeded, as provided in s. 160.21 (2) (b), Stats., and s. ATCP 31.03.

(14) "Preventive action limit" means a numerical value expressing the concentration of a substance in groundwater which is adopted under s. 160.15, Stats.

(15) "Property boundary" means the boundary of a total contiguous parcel of land owned by a common owner, regardless of whether public or private roads run through the parcel.

(16) "Secretary" means the secretary of the department.

(17) "Site–specific response" means a localized regulatory response by the department to groundwater sample findings obtained at a point of standards application, as provided in s. ATCP 31.07.

(18) "Special order" means an order of the department which is directed to an individually named or identified respondent.

(19) "Substance" means any solid, liquid, semisolid, dissolved solid or gaseous material, naturally occurring or synthetic chemical, parameter for measurement of water quality or biological organism which, in its original form, or as a metabolic or a degradation or waste product, may decrease the quality of groundwater.

History: Cr. Register, September, 1985, No. 357, eff. 10–1–85; correction made under s. 13.93 (2m) (b) 5., Stats., Register, February, 1993, No. 447**;** corrections in (6) made under s. 13.93 (2m) (b) 7., Stats., Register, January, 1998, No. 505.

ATCP 31.02 Groundwater test results; use by department. (1) USE OF OFFICIAL GROUNDWATER TEST RESULTS. An official groundwater test result is presumed to be reliable for purposes of regulatory or enforcement action under this chapter whether or not the department collected or analyzed the official groundwater sample.

(2) USE OF UNOFFICIAL GROUNDWATER TEST RESULTS. A regulatory or enforcement action under this chapter may be based on a groundwater test result which is not an official groundwater test result only if the department determines that the unofficial groundwater test result is reliable for purposes of the regulatory or enforcement action.

Note: If an unofficial groundwater sample is not determined to be reliable for purposes of regulatory or enforcement action under this chapter, the department may nevertheless:

1. Refer the unofficial groundwater test result to the department of natural resources, with or without a recommendation for official sampling and testing.
2. Inform affected persons of the unofficial groundwater test result.
3. Refer the unofficial groundwater test result to state or local health authorities, and to county agricultural extension agents.
4. Initiate further investigation or research related to the unofficial groundwater sample result.

(3) MEMORANDUM OF UNDERSTANDING. Pursuant to ss. 160.21 (2) (e) and 160.27, Stats., the department shall enter into a memorandum of understanding with the department of natural resources to ensure the reliability of official groundwater test results used by the department for purposes of regulation and enforcement under this chapter. The memorandum of understanding shall govern the reporting and certification of official groundwater test results to the department by the department of natural resources. It shall also govern the collection, handling and analysis of official groundwater samples by the department of natural resources or its designated agents. The memorandum of understanding shall include:

(a) Standards for the collection of official groundwater samples, including standards related to:

1. Collection equipment and containers.
2. Collection procedures.
3. Collection records.

(b) Standards for the handling of official groundwater samples, including:

1. Temperature conditions under which samples are to be kept.
2. Time periods within which samples are to be analyzed.
3. Chain of custody requirements.

(c) Standards for the analysis of official groundwater samples, including:

1. Required quality assurance programs for laboratories engaged in the analysis of official groundwater samples under this chapter.
2. Control sample requirements.
3. Required analytical methods.
4. Required confirmation of analytical results.
5. Instrument calibration and maintenance requirements.
6. Required analytical worksheets and documentation.
7. Chain of custody requirements in the laboratory.
8. Requirements for the timely reporting of analytical results.
9. Continuing sample custody requirements.
10. Access to laboratory records by the department and the department of natural resources.

(d) Contract requirements applicable to designated agents engaged in the collection or analysis of official groundwater samples under this chapter.

(e) Reports and certifications required to accompany official groundwater samples and test results obtained by designated agents of the department of natural resources.

(f) Standards for the reporting and certification of official groundwater test results to the department by the department of natural resources.

(4) DEPARTMENT CONTRACTS WITH AGENTS DESIGNATED TO COLLECT OR ANALYZE OFFICIAL GROUNDWATER SAMPLES. Every person or entity designated to collect or analyze an official groundwater sample as the agent of the department, rather than as the agent of the department of natural resources, shall first enter into a written contract with the department. Contracts shall include specific standards for the collection, handling and analysis of official groundwater samples, to ensure the reliability of official groundwater test results used by the department for purposes of regulation and enforcement under this chapter. Agents contracting directly with the department shall be held to the same requirements which are applicable to agents designated by the department of natural resources pursuant to a memorandum of understanding under sub. (3).

History: Cr. Register, September, 1985, No. 357, eff. 10–1–85.

ATCP 31.03 Points of standards application. (1) To determine whether an enforcement standard or preventive action limit for a fertilizer substance or pesticide substance has been attained or exceeded, the concentration of the fertilizer substance or pesticide substance shall be measured at a point of standards application. Except as otherwise provided in this section, points of standards application for fertilizer substances and pesticide substances include:

(a) A community water system covered under ch. NR 811.

(b) A private water supply, high capacity water system, school water system or public water system covered under ch. NR 812.

(c) A monitoring well or other groundwater sample source, regardless of whether the well or source is covered under par. (a) or (b), if the well or source is reasonably designed and of adequate depth to permit the collection of representative groundwater samples.

(d) A monitoring well approved by the department under s. ATCP 31.08 (4) (a) 1. as a substitute for another point of standards application which is no longer available for testing.

(2) Except with the consent of the property owner, neither a high capacity water system covered under ch. NR 812, nor a well or source not covered under sub. (1) (a) or (b) may be considered a point of standards application for a fertilizer substance or pesticide substance for purposes of a site−specific response under s. ATCP 31.07 (5) if:

(a) The system, well or source is located within the property boundary of a parcel of land on which an activity subject to department regulation is conducted; and

(b) The activity subject to department regulation is a potential source of the fertilizer substance or pesticide substance in groundwater; and

(c) The system, well or source is not used as a source of potable water. A system, well or source under this subsection shall be clearly posted to warn potential users that the system, well or source is not a potable water supply. The system, well or source shall be locked when not in use, to prevent any use of the system as a potable water supply.

(3) A private water supply system or high capacity water supply system covered under ch. NR 812 shall, upon request of the system owner, be excluded as a point of standards application for purposes of a site−specific response under s. ATCP 31.07 (5) if the system is located within the property boundary of a parcel of land on which an activity subject to department regulation is conducted, and if:

(a) Use of the system has been discontinued, and the discontinued system is locked or otherwise secured to prevent any use of the system; or

(b) The system is used solely as a nonpotable water supply. A nonpotable water supply system under this paragraph shall be clearly posted to warn potential users that the system is not a potable water supply. The system shall also be locked or otherwise secured when not in use, to prevent any use of the system as a potable water supply.

(4) A well or system shall be excluded as a point of standards application if the department or the department of natural resources determines that groundwater samples collected from the well or system do not reliably reflect groundwater conditions, because of the design or construction of the well or system.

Note: Since groundwater monitoring is not usually required under existing rules for activities subject to department regulation, the points of standards application in this section are specified pursuant to s. 160.21 (2) (b), Stats.

History: Cr. Register, September, 1985, No. 357, eff. 10−1−85; Register, January, 1998, No. 505; correction made under s. 13.93 (2m) (b) 7., Stats.; cr. (1) (d), Register, March, 1998, No. 507, eff. 4−1−98.

ATCP 31.04 Preliminary investigation based on groundwater sample test results. (1) Upon receipt of groundwater test results indicating the presence of a fertilizer substance or pesticide substance in groundwater, the department shall undertake a preliminary investigation to determine whether the presence of the fertilizer substance or pesticide substance may have resulted from, or may be affected by an activity subject to department regulation. The department may investigate on the basis of unofficial groundwater test results if the test results are sufficiently reliable to warrant investigation.

(2) If, upon preliminary investigation, the department finds that the presence of a fertilizer substance or pesticide substance in groundwater has resulted from, or may be affected by an activity subject to department regulation, the department shall investigate to determine:

(a) Whether the presence of the fertilizer substance or pesticide substance in groundwater has resulted from a violation of an existing statute, rule or order administered by the department under s. 94.645, Stats., or ss. 94.67 through 94.71, Stats.

(b) Whether the concentration of the fertilizer substance or pesticide substance attains or exceeds an enforcement standard or preventive action limit.

Note: If an unofficial groundwater test result is not sufficiently reliable to warrant investigation, the department may nevertheless:

1. Refer the groundwater test results to the department of natural resources, with or without a recommendation for official sampling or other action.

2. Refer the groundwater test results to another regulatory agency, with or without a recommendation for action.

3. Refer the groundwater test results to state or local health authorities, and to county agricultural extension agents.

4. Inform affected persons of the groundwater test results, and suggest voluntary measures to prevent, limit or reduce any substance concentrations which may exist in groundwater.

5. Initiate further investigation or research related to the groundwater test results.

History: Cr. Register, September, 1985, No. 357, eff. 10−1−85.

ATCP 31.05 Violation of existing statute or rule; enforcement options. (1) FERTILIZER AND PESTICIDE BULK STORAGE; VIOLATION OF EXISTING RULES. If, upon investigation under s. ATCP 31.04 (2), the department finds that the concentration of a fertilizer substance or pesticide substance in groundwater has resulted from a violation of rules adopted by the department under s. 94.645, Stats., the department may proceed against the violator using any of the following enforcement options, even if the concentration does not exceed an enforcement standard or preventive action limit:

(a) A court action to recover a civil forfeiture from the violator, as provided under s. 94.645 (5), Stats.

(b) An administrative special order proceeding, as provided under s. 94.645 (4) (a), Stats. Upon violation of a department special order issued under s. 94.645 (4) (a), Stats., the department may seek an injunction under s. 94.645 (4) (b), Stats., or a civil forfeiture under s. 94.645 (5), Stats.

(c) A warning notice under s. 93.06 (10), Stats.

Note: Rules adopted under s. 94.645, Stats., to regulate fertilizer bulk storage are contained in ch. ATCP 33. Rules adopted under s. 94.645, Stats., to regulate pesticide bulk storage are contained in ch. ATCP 33.

(2) PESTICIDE USE; VIOLATION OF EXISTING STATUTES OR RULES. If, upon preliminary investigation under s. ATCP 31.04 (2), the department finds that the concentration of a pesticide substance in groundwater has resulted from a violation of any provision of ss. 94.67 through 94.71, Stats., or any rule adopted under s. 94.69, Stats., the department may proceed against the violator using any of the enforcement options set forth under s. 94.71, Stats., as appropriate, or may issue a warning notice to the violator under s. 93.06 (10), Stats., as appropriate. The concentration of a pesticide substance in groundwater need not attain or exceed an enforcement standard or preventive action limit in order for the department to take enforcement action under this subsection.

(3) This section does not limit the department's responsibility under ss. ATCP 31.06 and 31.07.

History: Cr. Register, September, 1985, No. 357, eff. 10−1−85.

ATCP 31.06 Fertilizer or pesticide bulk storage; groundwater contamination exceeding enforcement standard or preventive action limit; regulatory options. (1) RULEMAKING. If, upon investigation under s. ATCP 31.04 (2), the department finds that the concentration of a fertilizer substance or pesticide substance in groundwater attains or exceeds an enforcement standard or preventive action limit, and that the concentration has resulted from or may be affected by bulk fertilizer or bulk pesticide storage activities which are not currently regulated by the department, the department shall review its rules adopted under s. 94.645, Stats., to determine whether the rules should be amended pursuant to s. 160.19, Stats. Rule amendments, if any, shall be general in application, and may not be limited in their application to a single bulk fertilizer or bulk pesticide storage facility.

Note: Rules adopted under s. 94.645, Stats., to regulate fertilizer bulk storage are contained in ch. ATCP 33. Rules adopted under s. 94.645, Stats., to regulate pesticide bulk storage are contained in ch. ATCP 33.

(2) SPECIAL ORDERS; STATUTORY LIMITATIONS ON USE. The department may not regulate the storage of bulk fertilizer or bulk pesticides by special order under s. 94.645 (4) (a), Stats., except to prohibit or correct a violation of existing rules under s. 94.645, Stats. This does not prevent the department from regulating the storage or other use of bulk pesticides by special order under s.

94.71 (3) (c), Stats., and this chapter, whether or not the storage or use violates existing rules under s. 94.645, Stats.

Note: If groundwater contamination is related to fertilizer bulk storage, but the department is unable to respond by rule or special order, the department may refer the matter to the department of natural resources for possible site–specific action under ch. 292, Stats.

History: Cr. Register, September, 1985, No. 357, eff. 10–1–85.

ATCP 31.07 Pesticide use; groundwater contamination exceeding enforcement standard or preventive action limit; site–specific response. (1) SITE–SPECIFIC RESPONSE; GENERAL. If, upon investigation under s. ATCP 31.04 (2), the department finds that the concentration of a pesticide substance in groundwater attains or exceeds an enforcement standard or preventive action limit, and that the concentration has resulted from or may be affected by a pesticide use, the department shall implement an appropriate site–specific response to regulate the pesticide use, pursuant to the applicable provisions of ss. 160.21 (3), 160.23 and 160.25, Stats., and this section. A site–specific response may take any of the forms described under sub. (2). A site–specific response may be implemented to regulate a pesticide use, whether or not the pesticide use violates an existing statute or rule administered by the department. Except as otherwise provided under s. 160.23 or 160.25, Stats., the site–specific response shall be designed to minimize the concentration of the pesticide substance where technically and economically feasible and to restore and maintain compliance with the preventive action limit at the point of standards application, and at other downgradient points to which the pesticide substance may migrate. A site–specific response may be implemented pursuant to substance–specific rules adopted under s. ATCP 31.09.

(2) SITE–SPECIFIC RESPONSE; FORM OF REGULATORY ACTION. (a) *Special orders.* 1. A site–specific response may include one or more special orders issued under s. 94.71 (3) (c), Stats. The department may issue a special order to a respondent, whether or not the respondent has previously engaged in the use of the pesticide, if the department finds that the special order is necessary to achieve the objectives under sub. (1). The department may, by substance–specific rules under s. ATCP 31.09, prescribe the scope and contents of special orders, and the conditions under which special orders are to be issued. Special orders may be issued on a summary basis, according to criteria set forth under s. 94.71 (3) (c), Stats., and any substance–specific rules adopted under s. ATCP 31.09. Summary special orders are subject to a right of hearing before the department upon request. Special orders required by rule may be signed by a department employee designated in the rule. All other special orders shall be signed by the secretary, or a person individually designated by the secretary.

2. A special order may include:

a. A prohibition against the use of a pesticide, subject to s. ATCP 31.08.

b. Limitations on the purposes for which a pesticide may be used, including limitations on the crops or target pests for which a pesticide may be used.

c. Limitations on the rate at which a pesticide is applied.

d. Limitations on the time or frequency of pesticide use.

e. Limitations on the method of pesticide use.

f. Requirements for the training or certification of pesticide applicators or other persons using a pesticide.

(b) *Rules applicable to a specific locality.* A site–specific response may include the adoption of rules whose geographic scope is limited to a specific locality if, in the department's judgment, the conditions in that locality justify the geographically limited rules. Within the designated locality, rules shall be general in their application, and may not be limited to a single pesticide user. Rules may be adopted on an emergency basis as necessary, pursuant to s. 227.24, Stats. Site–specific rules under this paragraph may supplement, or be incorporated into more general substance–specific rules under s. ATCP 31.09. Site–specific rules may include any of the provisions set forth under s. ATCP 31.09 (2), as applicable.

(c) *Denial, suspension or revocation of permits.* If a permit is required by statute or rule for the use of a pesticide, a site–specific response may include the denial, suspension or revocation of pesticide use permits for the locality covered by the site–specific response. The department may, by substance–specific rules under s. ATCP 31.09, prescribe the terms and conditions under which permits are to be denied, suspended or revoked. If the denial, suspension or revocation of a pesticide use permit is required by rule under certain conditions, the order denying, suspending or revoking the permit may be signed by a department employee designated in the rule. All other orders denying, suspending or revoking permits shall be signed by the secretary, or by a person individually designated by the secretary. Where necessary in an emergency, permits may be summarily suspended, pursuant to s. 227.51, Stats. Circumstances constituting an emergency may be specified by rule. The denial, suspension or revocation of a permit is subject to a right of hearing before the department upon request.

Note: In addition to any of the site–specific regulatory responses identified under this paragraph, the department may take other actions in response to a finding of pesticide contamination which attains or exceeds an enforcement standard or preventive action limit. The department may, for example:

1. Review its rules governing pesticide use, pursuant to s. 160.19, Stats., and s. ATCP 31.09

2. Disseminate information concerning the groundwater contamination, and notify affected persons.

3. Notify state or local health authorities and county agricultural extension agents of the groundwater contamination.

4. Initiate or recommend further investigation or research concerning the groundwater contamination.

(3) SITE–SPECIFIC RESPONSE; MAXIMUM GEOGRAPHIC SCOPE. A site–specific response required under this section does not include a regulatory action which extends beyond the groundwater recharge zone of the aquifer from which the groundwater sample was collected at the point of standards application. If the pesticide substance has migrated, or may migrate through more than one aquifer, a site–specific response may extend, at a maximum, to the boundary of the outermost recharge zone providing recharge to an affected aquifer. If the natural boundary of a groundwater recharge zone is not readily definable, a site–specific response may extend, at a maximum, to the whole of every land parcel which, in the judgment of the department, may be wholly or partially located within the relevant groundwater recharge zone. All or a portion of any land parcel may be exempted from a site–specific response upon proof that the parcel or portion is located outside the groundwater recharge zone to which the site–specific response is applicable. Within the maximum geographic limits specified under this section, the department may determine the geographic scope of the site–specific response, based on the objective of restoring and maintaining compliance with the preventive action limit and minimizing the concentration of the pesticide substance in groundwater where technically and economically feasible, at the point of standards application and other downgradient points to which the pesticide substance may migrate. For purposes of administrative efficiency, the geographic scope of a site–specific response may be delineated according to a regular geometric pattern.

(4) SITE–SPECIFIC RESPONSES; FACTORS TO BE CONSIDERED. (a) In the department's choice of a site–specific response, or in its adoption of substance–specific rules under s. ATCP 31.09 prescribing nondiscretionary site–specific responses, the department shall consider the general risks and benefits of the possible actions to the extent authorized by relevant law, and shall consider the following specific factors to the extent feasible:

1. The concentration of the pesticide substance in groundwater at the point of standards application, and any known changes in concentration.

2. The concentration of the pesticide substance at other points of standards application, if known, and any known changes in concentration.

3. The extent, age and reliability of groundwater sample data indicating the presence of the pesticide substance in groundwater.

4. The specific activities or practices from which the pesticide contamination originated, if known, and the locations at which the source activities or practices are conducted.

5. The previously demonstrated propensity, if any, for the pesticide substance to leach to groundwater as a result of normal use.

6. Environmental conditions which may reasonably affect the risk of groundwater contamination, including soil conditions, depth to groundwater, and subsurface geological conditions. Differences in local environmental conditions may not be used to justify a difference in site−specific responses between localities unless the differences in environmental conditions are reasonably known to affect the relative risk of groundwater contamination between localities.

7. Differences in local pesticide use practices which are reasonably known to affect the risk of groundwater contamination.

8. The environmental fate of the pesticide substance in soil and groundwater, to the extent known.

9. The direction and rate of groundwater movement within the affected groundwater recharge zone, if known.

10. The potential uses of the affected groundwater.

11. The extent and likelihood of human exposure to the pesticide substance in groundwater.

12. The alternative measures which are available to prevent or control groundwater contamination, the relative cost and effectiveness of each alternative, and the risks associated with each alternative including the risk of adverse environmental effects.

(b) Except as otherwise required by law, the department is not required to make a written record of its consideration under this subsection. This subsection may not be construed to limit the department's responsibility under s. 160.19 or 160.25, Stats.

(5) SITE−SPECIFIC RESPONSE; PROHIBITIONS AGAINST PESTICIDE USE. If a site−specific response under this section prohibits a pesticide use in the locality covered by the site−specific response, the prohibition shall comply with the applicable provisions of s. ATCP 31.08.

History: Cr. Register, September, 1985, No. 357, eff. 10−1−85; correction in (2) (c) and (d) made under s. 13.93 (2m) (b) 7., Stats., Register, March, 1993, No. 447.

ATCP 31.08 Prohibitions against pesticide use. **(1)** SITE−SPECIFIC PROHIBITION IN RESPONSE TO GROUNDWATER CONTAMINATION WHICH EXCEEDS AN ENFORCEMENT STANDARD. If, at a point of standards application, the concentration of a pesticide substance in groundwater attains or exceeds an enforcement standard, and if the concentration has resulted from or may be affected by a pesticide use, the department shall, as a site−specific response under s. ATCP 31.07, prohibit the pesticide use on a site−specific basis unless the department is shown, and determines to a reasonable certainty by the greater weight of the credible evidence, that an alternative response will achieve compliance with the enforcement standard. The scope and duration of the site−specific prohibition shall be reasonably designed to achieve and maintain compliance with the enforcement standard at the point of standards application, and at other downgradient points to which the pesticide substance may migrate. A prohibition may remain in effect indefinitely unless the department is shown, and determines, that resumption of the pesticide use is not likely to cause a renewed or continued violation of the enforcement standard. The department's responsibility to initiate a site−specific prohibition under s. 160.25, Stats., and this subsection is not affected by sub. (2), or by contemporaneous findings that concentrations of the same pesticide substance at other points of standards application fall below the enforcement standard.

(2) SITE−SPECIFIC PROHIBITION IN RESPONSE TO GROUNDWATER CONTAMINATION WHICH EXCEEDS A PREVENTIVE ACTION LIMIT, BUT NOT AN ENFORCEMENT STANDARD. If, at a point of standards application, the concentration of a pesticide substance in groundwater attains or exceeds a preventive action limit but not an enforcement standard, the department may not implement a site−specific response under s. ATCP 31.07 prohibiting a pesticide use unless the department:

(a) Determines, pursuant to s. 160.23 (4), Stats., that no less restrictive response would prevent the violation of an enforcement standard at the point of standards application.

(b) Establishes the basis for the geographic scope and duration of the prohibition; and

(c) Limits the scope and duration of the prohibition to that which is reasonably necessary to maintain compliance with the enforcement standard at the point of standards application.

(3) STATEWIDE OR REGIONAL PROHIBITION. The department may, by rule under s. ATCP 31.09, prohibit a pesticide use on a statewide or regional basis, as well as on a site−specific response basis, if the department does all of the following:

(a) Determines that groundwater contamination has occurred or is likely to occur on a statewide or regional basis as a result of the pesticide use.

(b) Determines that a statewide or regional prohibition is necessary to achieve or maintain compliance with an enforcement standard. In determining the need for a statewide or regional prohibition, the department shall consider:

1. The extent, age, reliability, and geographical distribution of groundwater sample test data; and

2. The extent to which local conditions and circumstances can reliably be considered characteristic of a larger region, or of the state as a whole.

(c) Determines that compliance with the enforcement standard cannot reasonably be achieved and maintained by other, less restrictive measures.

(d) Establishes the basis for the scope and duration of the prohibition.

(e) Limits the scope and duration of the prohibition to that which is reasonably necessary to achieve and maintain compliance with the enforcement standard.

(4) REPEALING A SITE−SPECIFIC PROHIBITION. (a) The department may repeal or modify a site−specific prohibition under sub. (1) if all of the following conditions are met:

1. Tests on at least 3 consecutive groundwater samples, drawn from each point of standards application in the prohibition area at which the concentration of the pesticide substance previously attained or exceeded the enforcement standard, show that the concentration of that pesticide substance at that point of standards application has fallen to and remains at a level which is at or below the level specified by the department under par. (c). The 3 consecutive samples shall be collected from each point of standards application at intervals of at least 6 months, with the first sample being collected at least 6 months after the effective date of the site−specific prohibition. A monitoring well approved by the department may be substituted for any point of standards application which is no longer available for testing, provided that the monitoring well qualifies as a point of standards application under s. ATCP 31.03.

2. Tests of groundwater samples drawn from other points of standards application in the prohibition area during the retesting period under subd. 1., if any, reveal no other concentrations of the pesticide substance that exceed the level specified by the department under par. (c).

3. The department determines, based on credible scientific evidence, that renewed use of the pesticide in that prohibition area is not likely to cause a renewed violation of the enforcement standard.

Note: If a site−specific prohibition is created by rule, it can only be repealed or modified by rule. If a site−specific prohibition is created by special order under s. 94.71 (3) (c), Stats., it can only be repealed or modified by special order. This subsection establishes conditions which must be met before the department adopts a rule or

issues a special order repealing or modifying a site–specific prohibition. The subsection does not, by itself, repeal or modify any site–specific prohibition.

The department plans to continue its program of groundwater research, and will continue to monitor groundwater in areas where there is significant potential for repealing or modifying a prohibition. However, the department is not legally obligated to conduct specific groundwater research or perform specific groundwater tests at the request of a person who wishes to have a site–specific prohibition repealed or modified.

The department may accept test results from other sources if the department considers those test results reliable. Persons who question the reliability of test results used to maintain, modify or repeal a prohibition may submit information showing why the test results are unreliable. If the department finds that there are reasonable grounds to question the reliability of any test result, the department will attempt to perform additional sampling and testing to verify the test result.

(b) As a condition to repealing or modifying a site–specific prohibition under par. (a), the department may do any of the following:

1. Provide for continued groundwater monitoring at points of standards application where the concentration of the pesticide substance previously attained or exceeded the enforcement standard, or at monitoring wells substituted for those points of standards application under par. (a) 1. At a minimum, groundwater from those points of standards application or monitoring wells shall be sampled and tested during the second and fifth years after the department repeals a site–specific prohibition.

2. Impose pesticide use modifications that are reasonably designed to achieve and maintain compliance with the preventive action limit at all points of standards application in the prohibition area where concentrations of the pesticide substance attained or exceeded that limit, and at all downgradient points to which that pesticide substance may migrate from those points of standards application. The department may continue to prohibit pesticide use in portions of the original prohibition area where, because of conditions unique to those smaller areas, a prohibition is justified under sub. (2).

Note: For example, as a condition to repealing a pesticide use prohibition, the department may limit pesticide application rates and methods of application where appropriate, to achieve and maintain compliance with the preventive action limit. The department may continue to prohibit pesticide use in portions of the original prohibition area where, because of conditions unique to those smaller areas (e.g., unique soil types), nothing short of a prohibition will prevent a renewed violation of the enforcement standard.

The repeal of a prohibition area does not affect any responsibility which the department has under s. ATCP 31.07 to take other appropriate action to minimize the concentration of the pesticide substance where technically and economically feasible, and to restore and maintain compliance with the preventive action limit. The department may also reinstate a repealed prohibition area if groundwater testing at a point of standards application shows an increasing trend of pesticide contamination, suggesting that contamination may again attain or exceed the enforcement standard.

(c) The department shall by rule specify a level to which concentrations of a pesticide substance must fall before the department may repeal or modify a site–specific prohibition under par. (a). The specified level shall be sufficiently below the enforcement standard so that, when groundwater test results under par. (a) 1. and 2. fall at or below the specified level, the department can reasonably conclude that groundwater concentrations in the prohibition area are below and can be expected to remain below the enforcement standard.

History: Cr. Register, September, 1985, No. 357, eff. 10–1–85; cr. (4), Register, March, 1998, No. 507, eff. 4–1–98.

ATCP 31.09 Rulemaking to control pesticide contamination of groundwater; general. (1) SUBSTANCE–SPECIFIC RULES. If an enforcement standard and preventive action limit are adopted by the department of natural resources for any pesticide substance, the department shall review its existing rules and adopt new or amended rules as necessary to comply with s. 160.19, Stats. The department may adopt rules on a substance–specific basis as appropriate, pursuant to ss. 94.69, 160.19, and 160.21, Stats. Except as otherwise provided under ch. 160, Stats., the rules shall be designed, to the extent technically and economically feasible, to minimize the level of the pesticide substance in groundwater and maintain compliance with the preventive action limit for the pesticide substance statewide. Rule provisions may apply on a statewide or localized basis, and on a temporary or permanent basis, as necessary to address varying state or local conditions.

(2) RULE PROVISIONS. Substance–specific rules under this section may include:

(a) Prohibitions against the use of a pesticide, subject to s. ATCP 31.08.

(b) Limitations on the purposes for which a pesticide may be used, including limitations on the crops and target pests for which a pesticide may be used.

(c) Limitations on the rate at which a pesticide is applied.

(d) Limitations on the time or frequency of pesticide use.

(e) Limitations on the method of pesticide use.

(f) Reporting or permit requirements applicable to the use of a pesticide.

(g) Requirements for the training or certification of pesticide applicators or other persons using a pesticide.

(h) Required site–specific responses to be implemented by the department if an enforcement standard or preventive action limit for a pesticide substance is attained or exceeded at a point of standards application. Rules may specify the form and scope of the site–specific responses, and the specific conditions under which the site–specific responses are to be implemented.

(3) SITE–SPECIFIC RESPONSES REQUIRED BY RULE. Site–specific responses required by rule under this section shall comply with s. ATCP 31.07. Before adopting rules to require site–specific responses, the department shall consider the factors set forth under s. ATCP 31.07 (4), to the extent feasible. If, by rule, the department requires site–specific responses which will prohibit the use of a pesticide in affected localities, the rule shall comply with s. ATCP 31.08.

(4) SCOPE OF RULEMAKING AUTHORITY; GENERAL. The section does not limit the department's rulemaking authority under s. 94.69, 160.19 or 160.21, Stats. In the exercise of its rulemaking authority, the department may consider any information which may be relevant to the rulemaking proceeding, whether or not the information is derived from Wisconsin groundwater samples. The finding of a pesticide substance in groundwater, at a level which equals or exceeds an enforcement standard or preventive action limit, is not a prerequisite to the exercise of the department's rulemaking authority under s. 94.69, 160.19 or 160.21, Stats.

History: Cr. Register, September, 1985, No. 357, eff. 10–1–85.