Report From Agency

REPORT TO LEGISLATURE

NR 106, 200, 205, 207, 210, 220, 221, 225, 228, 231, 236, 239, 240, 245, 247, 250, 258, 261, 268, 269, 275, 276, 277, 280, 281, 284, 286, 290, 294, 295, and 296, Wis. Adm. Code
Board Order No. WT-12-12
Clearinghouse Rule No. 17-002

Basis and Purpose of the Proposed Rule

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.

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 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. Section 283.31, Stats., 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.

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, 11, 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 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 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.

Summary of Public Comments, Department Responses, and Modifications

The notice for public hearing was dated January 6, 2017. Two public hearings were held. The first was held in Madison, Wisconsin on February 6, 2017, and the second held was held in Green Bay, Wisconsin on February 7, 2017. Two members of the public attended the Madison hearing, and none gave oral comments. No members of the public attended the Green Bay hearing. Written comments were received from the United States Environmental Protection Agency (USEPA), Wisconsin Manufacturers & Commerce (WMC), WE Energies, and Midwest Environmental Advocates (MEA) during the comment period that concluded on March 1, 2017. The Wisconsin Legislative Council Rules Clearinghouse provided comments on February 2, 2017.

Included below are the comments submitted and the department's responses.

US EPA Comments:
US EPA provided comments by letter dated February 28, 2017. The department has made changes to the proposed rule in response to US EPA's comments.

On February 28, 2017, US EPA made the following comments:

1) Title of s. NR 200.21 - Applications Provision: Wis. Admin. Code NR § 200.21 is titled, "APPLICATIONS FOLLOWING PERMIT REISSUANCE." However, the rule's language concerns variance requests when a department issues, reissues, or modifies a permit. For clarity, EPA recommends a different title given the content of the rule.

> **Response:** Change made. The title was changed from "APPLICATIONS FOLLOWING PERMIT REISSUANCE" to "APPLICATIONS."

2) Variance Application Timeline: Wis. Admin. Code NR § 200.21 (1) provides for a variance request deadline, "60 days after the department issues, reissues, or modifies

the permit to include a water quality based effluent limitation." The federal rules provide that a water quality based variance be," . . . requested no later than the close of the public comment period under § 124.10 . . . " 40 C.F.R. §§122.21 (m) (5) and (n) (3). Because permit issuance comes after the public comment period, Wisconsin's variance request deadline is inconsistent with federal requirements. Further, Wisconsin's 60 day deadline has a statutory basis (Wis. Stat.§ 283.15(2) (am) (l)) and cannot be corrected by a rule change alone. One way that WDNR could provisionally address this inconsistency in its rule, while awaiting the statutory change, is to edit Wis. Admin. Code NR §200.21 as follows:

> 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 set out in Wis. Stat. 283.15 (2) (am) (l) ~~60 days after the department issues, reissues, or modifies the permit to include a water quality based effluent limitation~~.

With the above rule change, the necessary legislative modification of Wis. Stat., 283.15 (2) (am) (l) – setting the variance deadline at the end of the public comment period will simultaneously correct this rule. Until the statutory correction can be completed, Wisconsin should clarify that permits issued under this statutory or regulatory provision will contain final limits based on the federally effective water quality standard or that permits issued with effluent limitations based on a variance will not be effective until the variance is approved.

Response: Change made.

3) Variance Applications: Wis. Admin. Code NR § 200.21 (2) provides "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 *proposed in the permit . . .* " [emphasis added.] EPA recommends Wisconsin edit the language as follows: "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 ~~proposed in the permit~~…"

Response: Change made.

4 & 5) Reasonable Potential and WQBEL Continuance: Wis. Admin. Code NR § 205.067 (5) requires the maintenance of existing water quality based effluent limits in reissued permits with certain conditions. However, this provision does not take into consideration situations where a new more stringent water quality based effluent limitation is required compared to the previous permit's limit. Wisconsin should add language to

address this situation such as adding the following condition as subsection (c) of Wis. Admin. Code NR § 205.067 (5): "A new more stringent water quality based effluent limitation is not required under this section or the procedures in another chapter."

Read alone, Wis. Admin. Code NR § 205.067 (5) could also suggest that it is the only means to maintain a water quality based effluent limitation in reissued permits. However, the Wisconsin's proposed antibacksliding rules, Wis. Admin. Code NR §§ 207.10 and 207.12, provide additional means to maintain the limits. Wisconsin should add the note suggested below:
"Note: For additional rules that require the continuance of water quality based effluent limitations in reissued permits, see Wis. Admin. Code NR § § 207 .10 and 207 .12 (antibacksliding)."

> **Response:** In order to address these two comments, the department added the following provision in proposed s. NR 205.067 (5) (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 shall 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) General Reasonable Potential Provisions: Wis. Admin. Code NR § 205.067 (6) provides an exception to the rules at Wis. Admin. Code NR §§ 205.067 (1-4) that require water quality based regulations for toxic substances, organoleptic substances, and phosphorus. EPA recommends removing the exception and adding the following note: "Note: Detailed procedures for developing water quality based limits for certain toxic substances, certain organoleptic substances, and phosphorus can be found at chs. NR 106 and 217."

> **Response:** The department did not make this suggested change. The proposed rule language in the exception clarifies that there are additional specific reasonable potential procedures for toxics and other pollutants in chs. NR 106 and 217, Wis. Adm. Code. In interest of clarity, the department believes this should be included in the text of the rule rather than in a note.

7) Application Monitoring Requirements: Wis. Admin. Code NR § 200.065 at Table 1 provides permit application monitoring requirements. The federal regulations at 40 C.F.R. §§ 122.21G) (4) (iv), (vi) and (vii) state that publically owned treatment works with a design flow > 1 million gallons a day (major municipal dischargers) must include a minimum of three samples of effluent data for certain parameters taken within 4.5 years prior to the date of the permit application. Unlike the federal regulations, Wis.

Admin. Code NR § 200.065 at Table 1 (column 2, row 2) only requires one such sample. Wisconsin must revise Table 1 to include the federal application requirement to report 3 samples within 4.5 years prior to the date of the permit application. Additionally, EPA did not find total phenolic compounds in the list of pollutants required to be monitored in major municipal discharges. 40 C.F.R. §§ 122.21G) (4) (vi) Appendix J, Table 2. Therefore, Wisconsin must add total phenolic compounds to the monitored chemicals (Table 1, column 3, row 2).

> **Response:** The department did not make this suggested change because it is outside the scope of the rule package and the scope of Issue 61 of the 75 Issues. Issue 61 required the addition of application requirements for permittees belonging to certain industrial categories, whereas this comment applies to application requirements for municipalities. With that said, the department does already have broad authority in Wis. Stat. § 283.55 (1) to request additional monitoring information.

8) 316(b) Application Requirements: Wisconsin created Wis. Admin. Code NR § 200.07 (5) to establish permit application requirements--consistent with the federal rules-for existing manufacturing, commercial, mining, and silvicultural dischargers (40 C.F.R. § 122.2l (g)); aquatic animal production facilities (40 C.F.R. § 122.21 (i)); and new sources and dischargers (40 C.F.R. § 122.2l (k)). However, Wisconsin must also establish permit application requirements for facilities with cooling water intake structures consistent with 40 C.F.R. § 122.2l (r). While EPA understands that Wisconsin will include these requirements in a separate cooling water intake rule package that is currently under development, EPA recommends adding a note to Wis. Admin. Code NR § 200.07 (5) that references the location of Wisconsin's 40 C.F.R. § 122.21 (r) analog.

> **Response:** Change made. The department added the following note below s. 200.07 (5) (b): "Application requirements for facilities with cooling water intake structures may be found in 40 CFR 122.21 (r)." EPA concurred that this change "looks appropriate" in a June 14, 2017 email to the department.

9) Best Management Practices: 40 C.F.R. § 122.44 (k) (4) refers to the purposes and intent of the Clean Water Act (CWA). However, Wisconsin's analogous rule at Wis. Admin. Code NR § 205.10 (3) only mentions the "purposes and intent of ch. 283, Stats.". As Wisconsin's statute Chapter 283 only covers "Pollution Discharge Elimination", i.e., WPDES permits, Wisconsin should revise the rule to provide for a similar level of protection.

> **Response:** Change made. The proposed rule language in s. NR 205.10 (3) now reads, "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."

10) ELG Definition in Antibacksliding Subchapter: EPA recommends that Wisconsin edit Wis. Admin. Code NR § 207.11 (2) for improved clarity and consistency with the federal regulations as follows: "'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 achievable, best conventional pollutant control technology, best available technology currently available, and new source performance standard."

Following EPA-DNR discussions, in a June 14, 2017 email, EPA updated this comment to replace "best available technology currently available" with "best available technology economically achievable."

Response: Change made.

11) Note in Antibacksliding Subchapter: EPA recommends that Wisconsin edit the note at Wis. Admin. Code NR § 207.12 (2) to clarify that new effluent limitation guidelines (ELGs) apply regardless of whether the facility's operation is existing production or future expansion. One way that Wisconsin could edit this note is as follows:
Note: If ~~a~~ the initial permit contains ~~limits based on~~ BPJ limitations and subsequent to permit issuance an applicable effluent limitation guideline is ~~are subsequently~~ promulgated, limitations in the permit reissuance or modification may not be less stringent than the comparable effluent limitation guideline limitation or the BP J limitation, whichever is more stringent. ~~for future production expansions will be based on the effluent guide~~

Response: The department chose to remove the proposed note in order to address EPA's concern. EPA noted in its June 14, 2017 email that this was an appropriate response.

12) "Previous Permit" in Antibacksliding Subchapter: EPA recommends that Wisconsin define the term "initial permit" or "previous permit" and use consistent language throughout the section to describe the permit immediately preceding the version being reissued, revoked and reissued, or modified throughout the antibacksliding subchapter. To the extent that earlier permits have more stringent limits, this recommended change will remove any doubt that the rule intends the discharger to apply antibacksliding to the most current effective permit. For example, Wisconsin could address this comment by editing the rule at Wis. Admin. Code NR § 207.12 (1) (a) as follows:

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 initial permit *(i.e.* the permit being

reissued, revoked and reissued, or modified). 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 that required by the Applicable effluent limitation guideline in effect at the time the permit is reissued, revoked and reissued, or modified.

Similar changes could also be made in Wis. Admin. Code NR §§ 207.12 (2) (a), 207.12 (2) (c), 207.12 (3) (a) (l), 207.12 (3) (a) (3).

> **Response:** The department did make clarifying changes to the proposed antibacksliding provisions, but the department did not use the phrase "initial permit" due to concerns that this may be interpreted to mean the first issuance of a permit. Instead, the department consistently used the phrase "previous permit." EPA and DNR discussed DNR's interpretation of the phrase "previous permit" and agreed that it is consistent with federal program requirements at CWA section 402 (o) in that it refers to the permit preceding a reissued or proposed permit with backslid limits. EPA confirmed this in a June 14, 2017 email.

13) "Attainment" and "Nonattainment" in Antibacksliding Subchapter: CWA § 402 (o) includes language referring to:

> "… *any revised waste load allocations* or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act or for reasons otherwise unrelated to water quality [*emphasis* added]."

It appears that Wis. Admin. Code NR §§ 207.12 (3) (b) and 207.12 (3) (c) were modified to provide an analog to these federal requirements. However, EPA questions whether the terms "attainment" and "nonattainment" waters are consistent with the federal requirements. As such, EPA strongly recommends that Wisconsin further analyze this section for consistency with the federal requirements. This review should include, but should not be limited to, ensuring that the rule only allows relaxation of a water quality-based effluent limit derived from a waste load allocation in a total maximum daily load consistent with the provisions in the antibacksliding rule.

> **Response:** The department revised and reorganized the proposed language in subsection (3). The term "nonattainment waters" was replaced with "impaired

waters," and the term "attainment waters" was replaced with "other waters that attain the water quality standard."

14) Use of Term "Surface Waters:" Wis. Admin. Code NR § 220.15 (1) (b) defines the variable 'N' as the wastewater flow to be treated and discharged to "surface waters" whereas the federal regulations at 40 C.F.R. §122.50 (a) (l) defines the same variable as the wastewater flow to be treated and discharged to "waters of the United States." Wisconsin's "waters of the State" defined at Wis. Admin. Code NR § 103.2 (4), not "surface waters," is the analog of the federal "waters of the United States." WDNR must revise "surface waters" in the State rule to "waters of the State" so that it is consistent with the federal regulation.

Response: Because Wisconsin's definition of "waters of the state" includes groundwater, this change could not be made as suggested. After discussing this comment with EPA, the department agreed to use the term "waters of the state, excluding groundwater."

15) Pollutant Minimization and Compliance Schedules: Wis. Admin. Code NR § 106.117 (3) (d) provides that schedules of compliance may require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation. EPA recommends that Wisconsin also ensure implementation of the pollution and waste minimization measures.

Response: The department did not make the suggested change because this is outside the scope of Issue 15, and the department cannot mandate minimization measure in a compliance schedule, given that some measures may be cost-prohibitive or infeasible.

16) Compliance Schedules Extending Beyond Permit Term: Wis. Admin. Code NR § 106.117 (3) (e) allows schedules of compliance to go beyond the expiration date of the permit. In situations like this, Wisconsin should show the need and reasonableness of the schedule and include the final effluent limit in the permit with its effective date tied to the final date in the schedule.

Response: In order to address this comment, the department amended the proposed language in s. NR 106.117 (3) (e) as follows: "*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 effective date." The proposed language in s. NR 106.117 (3) (a) already requires that schedules of compliance be as short as possible, and the proposed language in s. NR 106.117 (2) only allows schedules

"when appropriate." The department believes that this sufficiently restricts the use of compliance schedules extending beyond permit expiration to cases where need and reasonableness exist.

Public Comments:
Midwest Environmental Advocates (MEA) submitted written comments in support of the rule package and the exception to antibacksliding of water quality based effluent limits (WQBELs) in the event of a technical mistake. The comments were signed by Tressi Kamp and Jimmy Parra of MEA, on behalf of 16 citizen-petitioners to the PCA, and by Bill Davis of the Sierra Club – John Muir Chapter. The department responds to these comments below.

1) MEA's Support of WT-12-12 and Future Rule Packages Related to the 75 Issues: The referenced rule package brings the WPDES Program toward compliance with the Clean Water Act, particularly in light of Act 21 and its impact upon agency authority. Signatories to MEA's comment urge the DNR, to the extent necessary and not already completed, to utilize rulemaking updates to resolve all issues outlined in the 2012 Attorney General Statement that addressed the 75 Issues. MEA asks that the department provide the interested public with further clarification regarding whether the DNR intends to continue relying upon the 2012 Statement as resolving any of the "75 Issues," particularly without any corresponding rulemaking updates. MEA appreciates that the majority of this rule package parallels language in the Clean Water Act.

Response: The department concurs that the rule package makes significant progress toward resolution of the 75 Issues and appreciates MEA's concurrence. The department and EPA are in ongoing discussions regarding the status of Issues viewed by EPA as unresolved. Once those discussions have concluded, the department will provide MEA with an update on any plans for rulemaking.

2) Antibacksliding Exception for Technical Mistakes Made in Setting WQBELs: The proposed rule changes must clarify that the exception identified in s. NR 207.12 (3) (a) (3) does not apply to water quality based effluent limits. Under the Clean Water Act, the exception for "technical mistakes or mistaken interpretations of law" does not apply to WQBELs.

Response: Change made. The exception to antibacksliding in situations where technical mistakes or mistaken interpretations of law were made in issuing the permit (33 USC 1342 (o) (2) (B) (ii)) only applies to limits established under 33 USC 1342 (a) (1) (B), which does not include WQBELs. In a June 14, 2017 email to the department, EPA concurred with this assessment.

Wisconsin Electric Power Company and Wisconsin Gas LLC (d.b.a. WE Energies) and Wisconsin Public Service Corporation (WPS), subsidiaries of WEC Energy Group, Inc., submitted two written comments regarding the antibacksliding provisions proposed in s. NR 207.12 (3), Wis. Adm. Code. The comments were signed by Bruce W. Ramme of WE Energies.

1 & 2) Antibacksliding – s. NR 207.12 (3): Subsection (3) of s. NR 207.12 relates to antibacksliding restrictions to relaxing water quality based effluent limitations (WQBELs). First, WE Energies believes there are two separate and independent options for receiving approval for an increased WQBEL: i.) a WQBEL may be increased if antidegradation allows increase or ii.) a WQBEL may be increased if one of the listed exceptions in s. 402 (o) (2) of the Clean Water Act (33 USC 1342 (o) (1)) is met (regardless of whether the facility discharges to an "attainment" water or "nonattainment" water). WE Energies requests that the department revise proposed s. NR 207.12 (3) to reflect this. Second, WE Energies requests clarification regarding the definition of a "nonattainment water" and the specific requirements that would apply in cases where a facility requests a relaxed limitation for the discharge of a pollutant to a surface water that does not meet applicable water quality standards, but the surface water was not specifically listed as impaired (or the surface water is listed as impaired, but no TMDL has been developed and approved).

> **Response:** EPA also had comments on this same subsection. WDNR considered the comments from both EPA and WE Energies and made revisions to address both comments on s. NR 207.12 (3). WDNR made changes in response to the comment and reorganized subsection (3). The Department concurs that a water quality based limitation may be increased (relaxed) if antidegradation is satisfied, or if one of the exceptions listed in in 33 USC 1342(o) (3) is used. However, if one of the listed exceptions in 33 USC 1342 (o) (2) is used as a basis for increasing a limit, the "safety net" provisions of 33 USC 1342 (o) (3) still apply, which include compliance with water quality standards (including antidegradation) and effluent limitation guidelines (ELGs) as a ceiling. In other words, in every situation where any limitation is increased, antidegradation must be satisfied and increased limits may not be less stringent than allowed by effective ELGs. Additionally, the Department included an option to address the situation where a facility requests an increased limitation for the discharge of a pollutant to a surface water that that is listed as impaired for the pollutant but where a TMDL has not been developed and approved by the EPA for the pollutant. In this case, a WQBEL may be made less stringent if the increased discharge will be offset through a trade or the designated use has been revised or removed in accordance with state regulatory procedures and approved by the EPA. This is consistent with EPA's interpretation and the Clean Water Act provisions.

Wisconsin Manufacturers & Commerce (WMC) submitted three written comments regarding the proposed rule package. The comments were signed by Lucas Vebber of WMC.

1) The proposed changes to New Source Performance Standards and Effluent Limitation Guidelines (NSPS/ELGs or Issue 7) and definitions of "Point Source" and "Pollutant" (Issue 44) are unnecessary. The January 19, 2012 Attorney General's letter to the department concluded that existing code and statutory provisions were broad enough to provide authority to comply with the requirements of federal law with regard to these topics. As a result, these proposed changes are unnecessary, and the code should be left as-is in order to provide regulatory certainty for permitted businesses and permit applicants.

> **Response:** The department did not make changes to the proposed rule package in response to this comment. The department agrees that the rule revisions are consistent with the Attorney General's statement and federal regulations but respectfully disagrees that they are not necessary and will create confusion. To the contrary, the department believes that including these revisions will increase regulatory certainty now and in the future. Members of the public and department staff will should not be expected to need to refer to both administrative code and the Attorney General's statement to determine regulatory requirements. The revisions provide clarity to the regulated community and resolve the issues raised in EPA's 75 Issues Letter.

2) WMC asserts that the comparison with approaches used by neighboring states (Illinois, Iowa, Michigan, and Minnesota) included in the Fiscal Estimate & Economic Impact Analysis does not provide sufficient detail.

> **Response:** The department documented in the Fiscal Estimate & Economic Impact Analysis (EIA) that the requirements in this rule are consistent with federal code, including the GLI. All neighboring states (Illinois, Iowa, Michigan, and Minnesota) are subject to the federal Clean Water Act and EPA regulations. Like Wisconsin, the states of Illinois, Michigan, and Minnesota are subject to the GLI requirements for those portions of the state that are within the Great Lakes system (defined in 40 CFR 132.2 as "all the streams, rivers, lakes, and other bodies of water within the drainage system of the Great Lakes within the United States"). Because Iowa is not within the Great Lakes system, the GLI requirements do not apply to the Iowa implementation program.

Department staff read and analyzed administrative code from Illinois, Iowa, Michigan, and Minnesota and have provided a brief comparison below. Note that the comparison, while thorough, is not necessarily exhaustive; some regulations that the department was unable to locate in other states' codes may indeed exist.

Issue 7: NSPS/ELGs

All of the states analyzed include similar provisions for incorporation of NSPS and ELGs. Iowa adopts specific federal NSPSs and ELGs by reference in 567 IAC 62.4 and requires use of best professional judgment to set effluent limitations for categories of dischargers that are not subject to adopted federal effluent standards (567 IAC 62.6(3)). Minnesota adopts all federal NSPSs and ELGs (40 CFR 401-469) by reference in s. 7053.0225, Minn. Admin. Code. Michigan requires that permits contain terms and conditions to comply with effluent limitations and standards promulgated by the administrator of EPA pursuant to sections 301, 302, and 307 of the Clean Water Act (Mich. Admin Code. r 323.2137(a)), which includes NSPSs and ELGs. Illinois prohibits the discharge of pollutants in violation of any federal or state effluent standard or guideline unless a limitation has been set forth in an applicable NPDES permit (Ill. Admin. Code s. 304.141).

Issue 11: Reasonable Potential

Each of the states reviewed have similar reasonable potential provisions as in the Wisconsin proposed rule. Iowa, in 567 IAC 62.8(2), requires inclusion of WQBELs in a permit for any discharger that has reasonable potential to exceed water quality standards. Minn. Admin. Code s. 7052.0220 contains a reasonable potential provision applicable to GLI pollutants, and s. 7053.0205, subpart 8 authorizes Minnesota to include WQBELs in permits when necessary to maintain water quality standards. Michigan has reasonable potential provisions for chemical-specific water quality-based effluent limits in Michigan Admin. Code r. 323.1211, and for whole effluent toxicity in in Mich. Admin. Code r. 323.1219. Additionally, Michigan adopted the federal reasonable potential provisions by reference in 40 CFR 122.44 (Mich. Admin. Code r. 323.2189). Similarly, the Illinois Admin. Code contains reasonable potential provisions for all pollutant or pollutant parameters in s. 309.143.

Issue 13: Best Management Practices

Each of the individual states researched approach BMPs differently. Michigan adopted 40 CFR 122.44 by reference, making it consistent with federal regulations on this issue (r. 323.2189, Mich. Admin. Code). Minnesota Admin. Code s. 7001.1080 subpart 3 contains a provision similar to the one proposed in this rule package. Illinois has similar language in s.

309.141, Ill. Adm. Code, but this language only applies to chloride discharges. The department was unable to find language paralleling 40 CFR 122.44 (k) in the Iowa Administrative Code, however Best Management Practices is defined at 567 IAC 60.2 for wastewater treatment and disposal

Issue 14: Antibacksliding

Antibacksliding procedures vary among the states. Minnesota established antibacksliding provisions in 7053.0275, Minnesota Admin. Code, and references 33 USC 1342 (o). Michigan adopted 40 CFR 122.44 by reference, making it consistent with federal regulations on the issue of antibacksliding (r. 323.2189, Mich. Admin. Code). While the department was unable to locate antibacksliding provisions in the Iowa Administrative Code, it did find numerous examples of antibacksliding reviews in permit fact sheets from Iowa. Likewise, the department was unable to locate antibacksliding provisions in Illinois Admin. Code.

Issue 15: Compliance Schedules

Iowa Administrative Code contains compliance schedule provisions in 567 IAC 64.7(4), although the department was unable to locate the "when appropriate clause."

Michigan has regulations for establishing compliance schedules in rr. 323.2145 and 323.1217, Mich. Admin. Code and adopted 40 CFR 122.47 by reference in r. 323.2189, Mich. Admin. Code. Illinois Admin. Code includes provisions for compliance schedules in s. 309.148. Minnesota also has regulations for establishment of compliance schedules at Minn. Admin. Code. s. 7001.0150.

Michigan, Minnesota, and Illinois allow up to two years for study of secondary values within the Great Lakes basin. Illinois differs in that it only allows 9 months between compliance milestones, whereas other states and federal regulations allow one year. Iowa, because it is not a Great Lakes state, does not allow two additional years for purposes of studying secondary values.

Issue 29: Compliance Schedules for POTWs receiving leachate

No neighboring states appear to have code that explicitly allows compliance schedules to address POTWs' inabilities to meet effluent limitations due to leachate.

Issue 20: Disposal of Pollutants into Wells, by Land Application, or to POTWs

Minnesota Admin. Code contains a similar provision in s. 7001.1080 subpart 2. C. (4). The department was unable to locate language paralleling 40 CFR 122.50 in Michigan, Illinois, or Iowa Administrative

Code. Of note, Iowa DNR staff indicated that their current practice is consistent with federal requirements on this topic.

Issue 44: Definitions of Point Source and Pollutant

Each of the states reviewed have slight differences in their definitions from one another and Wisconsin. Michigan, Minnesota, and Iowa's definitions of "point source" do not expressly include "landfill leachate collection system, and their definitions of "pollutant" do not expressly include "filter backwash," although Minnesota and Iowa's definitions of "pollutant" broadly include "other waste" (r. 323.2104 and r. 323.2302 (v), Mich. Admin. Code, 567 IAC 60.2, and 7001.1010, Minn. Admin. Code). Illinois' definition of "pollutant" does not include "filter backwash" (301.341, Ill. Admin. Code). The department was unable to find a definition of "point source" in the Illinois Administrative Code.

Issue 46: Expedited Variances

Variance procedures are different in each of the states reviewed. Because Michigan adopted 40 CFR 122.21 by reference, Mich. Adm. Code is consistent with federal requirements on this issue. The department was unable to find timelines or deadlines established for variance timelines in the administrative codes of Illinois, Iowa, or Minnesota. However, Iowa DNR staff indicated that Iowa does accept variance applications at the time of application for permit reissuance. Illinois Admin. Code s. 309.184 requires the Illinois EPA to issue or modify a permit when a variance has been granted, but it must be consistent with the Clean Water Act, federal regulations, and the Illinois Environmental Protection Act. Minnesota has extensive procedural rules for variance submittals in 7000.7000 and 7050.0190, Minn. Admin. Code.

Issue 61: Application Materials for Categories of Dischargers

Michigan Admin. Code r. 323.2108 requires that permit applications be completed in accordance with and subject to the guidelines in 40 CFR 122.21 (adopted by reference), which encompasses requirements for all categories of dischargers federally identified. Iowa lists application requirements for NPDES permits in 567 IAC 64.8 (1), but the department was unable to locate specific application requirements for categories of dischargers in Iowa Administrative Code. Minn. Adm. Code ss. 7001.1050 and 7001.1060 contain application requirements for manufacturing, commercial, mining, and silvicultural discharges, but the department was unable to locate specified application requirements for new sources and new discharges, aquatic animal production facilities, or facilities with cooling water intake structures. The department was unable to locate

application requirements for categories of dischargers in the Illinois Administrative Code.

Fundamentally Different Factors Variances:
Iowa authorizes less or more stringent effluent limits where factors related to a discharge are fundamentally different than factors considered by the administrator in the development of effluent limitation guidelines. *See* 567 IAC 62.7 and 62.8(1). Michigan, Minnesota, and Illinois allow fundamentally different factors variances for pretreatment industrial users (R 323.2313, Mich. Adm. Code, 7049.0485, Minn. Adm. Code, and 310 Subpart G, Ill. Admin. Code), but the department was unable to find a similar provision for direct dischargers in those states' administrative codes.

*Disclaimer: Although the department was not able to locate all of the above provisions in neighboring states' administrative codes, this does not necessarily mean that those provisions are not present or are not consistent with current practices.

3) WMC had two comments on antibacksliding that were substantively the same as those provided by WE Energies. Please see WE Energies' above comment and department response.

Appearances at the Public Hearing

At the hearing on February 6, 2017, two members of the public attended, and no oral comments were received. Both attendees indicated that their support/opposition of the rule was undecided at the time of the hearing. No members of the public attended the February 7, 2017 hearing.

Changes to Rule Analysis and Fiscal Estimate

No changes were made to the rule analysis or fiscal estimate.

Response to Legislative Council Rules Clearinghouse Report

Wisconsin Legislative Council Rules Clearinghouse comments (17-002): All Clearinghouse comments were related to form, style, placement, punctuation, or language clarity and were incorporated into the rule language as suggested, with one exception noted below. The department made other nonsubstantive changes related to style, rule referencing, or language clarity.

The department did not incorporate the following Clearinghouse comment:

2d. Comment 2a. suggests that the word "currently" should be deleted from s. NR 220.33 (1) (a) 1.

Response: The word "currently" is part of a formal term "best practicable control technology currently available," which has a specific meaning defined in section 304 (b) (1) of the Clean Water Act.

The department did address the following Clearinghouse comments but did so in manners other than those proposed by Clearinghouse:

2b. Comment 2b. suggests that the phrase "shall not" should be changed to "may not" in s. NR 106.117 (3) (b) 1. and 220.32 (5).

Response: The change was made in s. NR 220.32 (5). However, the comment references s. NR 106.117 (3) (b) 1., which does not exist in the proposed board order. The department believes the intent was for the change to apply to s. NR 106.117 (3) (c) 1. and made the change to that subdivision instead.

2g. Comment 2g. suggests that the terms "total maximum daily load" and "TMDL" be defined in chs. NR 205 or 207 or that the definition in s. NR 121.03 (16) be cited.

Response: The department chose to define "total maximum daily load" and "TMDL" in ch. NR 207 by citing the definition in s. NR 151.002 (46m) rather than s. NR 121.03 (16).

5e. Comment 5e. suggests that, in the note following s. NR 207.12 (2) (e) 2., "BPJ" should be changed to "best professional judgment."

Response: The department chose to delete this note in response to a different comment.

Final Regulatory Flexibility Analysis

The impacts and benefits to small businesses are expected to be minimal and the same as the impacts and benefits for all facilities, consistent with federal requirements. The rule will primarily impact WPDES permittees, including publicly owned treatment plants (municipalities) and industrial wastewater dischargers such as power plants, pulp and paper mills, cheesemakers, food processors, and others. The majority of changes in this rule package are consistent with current department practices. In some isolated cases, the rule changes may inhibit the ability of permittees to receive relaxed limits. They 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. In most other cases, changes in this rule package simply codify existing practices. See the economic impact analysis for further discussion of impacts and benefits. The department does not anticipate an increase in monitoring or compliance costs as a result of these proposed changes.

It is not possible to provide a quantified estimate of impacts or benefits only affecting small businesses because the rule changes will only have implications in isolated instances, and it is impossible to predict where, when, or how often these instances will occur in the future. Because the rule language must be consistent with federal regulations, the department was unable to provide regulatory flexibility or exemptions for small businesses above and beyond what already exists in federal regulations. Accordingly, there will be neither additional costs to the department nor any impacts to public health, safety, or welfare as a result of any added regulatory flexibility or exemptions. However, some of the federal regulations, such as the compliance schedule provisions, allow for discretion (e.g. in length of schedule) that may be used to lessen the regulatory burden on small businesses.

No small businesses provided economic reports or comments on the rule package, although Wisconsin Manufacturers and Commerce (WMC), which represents businesses of varying sizes, did provide three comments. See the Summary of Public Comments, Department Responses, and Modifications section above for summaries of WMC's comments and the department's responses.