

DRAFT #1
[7-9-2019]

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

The Wisconsin Natural Resources Board proposes an order to **amend** NR 102.01 (1) and 102.06 (7); and to **create** NR 119 relating to the development of site-specific numeric phosphorus water quality criteria for surface waters.

WT-17-12

Analysis Prepared by the Department of Natural Resources

1-3. Statutory Authority, Statutes Interpreted, and Explanation of Agency Authority:

Section 281.15, Stats., provides the authority for the Department of Natural Resources to promulgate by rule water quality standards for surface waters or portions of surface waters in the state. Pursuant to s. 281.15, Stats., water quality standards are comprised of designated uses and criteria. The Department has promulgated designated uses and criteria for various pollutants and parameters in chs. NR 102 through 105, Wis. Adm. Code. The criteria for phosphorus that were approved by USEPA are promulgated in s. NR 102.06, Wis. Adm. Code.

In s. NR 102.06(7), Wis. Adm. Code, the Department recognized that it may be appropriate to promulgate site-specific criteria (SSC) for phosphorus for some surface water segments. These proposed rules will establish detailed procedures and a methodology for developing SSC for a waterbody or portion thereof under s. 281.15, Stats., and allow for more timely revisions as appropriate for individual waterbodies. The proposed rules will also ensure that the requirement in s. 281.15(2)(c), Stats., is met in specific waterbodies or segments. Namely, that proposed rules will help ensure that criteria protect a waterbody's designated uses but are no more stringent than reasonably necessary to assure attainment of the designated use of a waterbody.

4. Related Statutes or Rules: Wisconsin's statewide phosphorus criteria are established in s. NR 102.06. As described above, s. NR 102.06(7), Wis. Adm. Code, recognizes that site-specific phosphorus criteria may be necessary for certain waterbodies. However, this section does not contain an explanation of how such SSC are to be developed. These proposed rules will establish detailed methodology for developing phosphorus SSC.

The proposed rules also reference another rule package currently in progress. Rule package WY-23-13 creates Biocriteria (a new subchapter III in ch. NR 102) and Phosphorus Response Indicators (new s. NR 102.07). Eligibility for an SSC in this proposed rule package is in part dependent on whether a waterbody is attaining its phosphorus response indicators and biocriteria, and an SSC must be set at a concentration that will support both. Because these rule packages work in tandem and cross-reference one another, they are moving simultaneously through the rulemaking process.

Additionally, there is currently a rule package underway proposing phosphorus SSC for three specific waterbodies within the Wisconsin River Basin (WY-09-18). These SSC are being routed separately because they are time-sensitive due to inclusion in a basin with a Total Maximum Daily Load (TMDL) analysis for phosphorus. However, the intent of this rule package (WT-17-12) is to promulgate a standard process that provides a more streamlined path to SSC that would not always require rulemaking for individual waterbodies, but would still allow for rulemaking in cases where requested.

5. Plain Language Analysis: The existing policy for deriving phosphorus SSC is found in s. NR 102.06(7), Wis. Adm. Code, which recognizes that the Department can promulgate by rule phosphorus site-specific criteria. The proposed rule, ch. NR 119, is not a change from past policy, but rather establishes a methodology and process for establishing SSC. Instead of requiring the promulgation of individual numeric phosphorus SSC in separate rule packages, the Department is proposing to promulgate the methodology and a streamlined process for determining an SSC. SSC may be appropriate when the statewide phosphorus criteria are either over- or under-protective of Wisconsin's waters in a given water segment. The existing statewide phosphorus criteria are sufficiently protective in most cases. However, there are instances where the applicable phosphorus criteria under s. NR 102.06, Wis. Adm. Code, need to be adjusted to ensure that the applicable designated uses (such as recreation and aquatic life) are being reasonably protected. If designated uses are not being supported by the statewide criterion, a more stringent SSC may be necessary. In cases where a statewide criterion is more stringent than reasonably necessary to protect the designated uses of the waterbody, a less stringent SSC would likely be warranted. Deriving SSC for these waters may alter WPDES permit limits for point source discharges at or upstream of these specific surface water segments.

This rule specifies the scientifically defensible methods required to derive phosphorus SSC. This rule also identifies the process DNR staff and interested parties should follow to derive phosphorus SSC and participate in SSC decisions. The process includes public participation opportunities and review by the Environmental Protection Agency (EPA). If this rulemaking were not completed, SSC could still be derived for phosphorus. However, expectations would not be clearly defined, which may result in inconsistencies and added complexity for those developing SSC. Additionally, this rule will streamline the SSC process for DNR and the public by promulgating the procedure and methodology for deriving an SSC rather than promulgating each individual SSC by rule. Although the proposed rule does not require rulemaking for each SSC, it does allow for rulemaking on individual SSC when requested by the public.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations: The Federal water quality standards regulation at 40 CFR 131.11(b)(1)(ii) provides states with the opportunity to adopt water quality criteria that are "modified to reflect site-specific conditions." Wisconsin has used this authority, as well as the authority under s. 281.15, Stats., to promulgate the existing narrative phosphorus site-specific criteria language in s. NR 102.06(7), Wis. Adm. Code. The portions of 40 CFR 131 related to establishing water quality standards include:

- 40 CFR 131 Subparts A-C: Requirements for establishing state water quality standards.
- 40 CFR s. 131.4: States are responsible for establishing and revising water quality standards. U.S. EPA approves or disapproves standards under 40 CFR s. 131.5.
- 40 CFR 131.6: Water quality standards consist of designated uses and criteria to protect the designated uses.
- 40 CFR 131.11: States must adopt water quality criteria that protect designated uses. For waters with multiple uses, the criteria must protect the most sensitive use. 40 CFR 131.11(b)(1)(ii) authorizes states to adopt numeric water quality criteria that are "modified to reflect site-specific conditions."
- 40 CFR 131.20: Revision of state water quality standards is subject to public participation procedures and U.S. EPA review and approval under 40 CFR 131.20.

Wisconsin has authority under s. 281.15, Stats., to promulgate and revise water quality standards. Promulgation of site-specific criteria methodology would provide consistency with the federal regulations in 40 CFR 131.6 and 131.11 that require that criteria be based on protecting the designated uses of a waterbody.

7. Comparison with Similar Rules in Adjacent States:

Iowa, Indiana, Michigan and Ohio do not have statewide numeric phosphorus criteria. However, Michigan widely applies a method to derive appropriate site-specific phosphorus targets for waterbodies in the state. Ohio has a longstanding approach for developing site-specific phosphorus targets using a weight of evidence approach based on several eutrophication indicators. The targets set by Michigan and Ohio are applied in TMDLs and permits.

Illinois has adopted partial phosphorus criteria for lakes and reservoirs. Illinois does not have provisions for site-specific criteria.

Minnesota has adopted phosphorus criteria for lakes, reservoirs, rivers and streams. Minnesota allows specific water quality standards, referred to as SSC in Wisconsin, to be adopted when appropriate if information is available to derive standards based on a waterbody's specific characteristics. This process is outlined in Minn. R. 7050.0220 and 7050.0222. Site-specific standards must maintain and protect a waterbody's beneficial uses. Several site-specific phosphorus criteria have been approved in Minnesota.

8. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:

This rule is largely procedural in nature. The Department worked with U.S. EPA and Department water quality standards staff and attorneys to determine the type of information and data necessary to develop an SSC that would be approvable under state and federal regulations. The Department worked with these parties and an external stakeholder committee to develop a process for submittal and review of that information.

9. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:

Because this rule simply clarifies and documents a process for conducting a review already expressly allowed by state statutes and recognized in existing code, the creation of this rule is not expected to incur costs. The processes outlined in this rule are similar to those that the Department has followed under the existing rule, NR 102.06(7) and s. 281.15, Stats. The Department recognizes that during the SSC development process, a person requesting an SSC is likely to incur some costs for monitoring or modeling, but it is their choice whether to request an SSC and incur those costs. Also, by specifying the type of demonstration that needs to be made to support an SSC, the rule may save requestors costs and time by streamlining their study design and reducing the time needed for SSC approval. Once an SSC is developed for a waterbody, there may be alterations to WPDES (Wisconsin Pollutant Discharge Elimination System) permit limits for point source discharges at, or upstream of, these specific surface water segments. However, these are no different from any adjustments that would happen under SSC developed following the rulemaking process.

This process is expected to be applicable to a relatively small proportion of waterbodies. However, the number of waterbodies in the state that may be eligible for SSC, or for which the permittees or other entities would be interested in pursuing an SSC, is unknown.

10. Effect on Small Business (initial regulatory flexibility analysis): As discussed above, this rule is not expected to incur costs other than those that would be incurred under the existing rule.

11. Agency Contact Person:

Kristi Minahan, Wisconsin Department of Natural Resources, Bureau of Water Quality WY/3, P.O. Box 7921, Madison, WI 53707-7921; Kristi.Minahan@Wisconsin.gov; 608-266-7055

12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, or email to:

Kristi Minahan
Department of Natural Resources
Bureau of Water Quality – WY/3
PO Box 7921
Madison WI 53707
Kristi.Minahan@Wisconsin.gov
608-266-7055

Written comments may also be submitted to the Department at
DNRAAdministrativeRulesComments@wisconsin.gov.

A hearing will be held at 10 a.m. on September 12, 2019 by Telepresence at the following two locations:

- Madison: Department of Natural Resources, 101 S. Webster St., Madison, WI 53707, Room G09
- Green Bay: DNR Service Center, 2984 Shawano Ave, Green Bay WI 54313, Lake Michigan Room

The comment submission deadline is September 20, 2019.

SECTION 1. NR 102.01 (1) is amended to read:

NR 102.01 Purpose. (1) The purpose of this chapter is to establish, in conjunction with chs. NR 103 to 105, water quality standards for surface waters of the state pursuant to s. 281.15, Stats. This chapter describes the designated use categories for such waters and the water quality criteria necessary to support these uses. ~~This chapter and chs. NR 103 to 105~~chapter, chs. NR 103 to 105, and 119 constitute the water quality standards for the surface waters of Wisconsin.

SECTION 2. NR 102.06 (7) is amended to read:

NR 102.06 (7) SITE-SPECIFIC CRITERIA. A criterion contained within this section may be modified by rule for a specific surface water segment or waterbody. A site-specific criterion may be adopted in place of the generally applicable criteria in this section where site-specific data and analysis using scientifically defensible methods and sound scientific rationale demonstrate a different criterion is protective of the designated use of the specific surface water segment or waterbody. Procedures for developing site-specific criteria for phosphorus are established in ch. NR 119.

SECTION 3. NR 119 is created to read:

CHAPTER NR 119
PHOSPHORUS SITE-SPECIFIC WATER QUALITY CRITERIA

NR 119.01 General. This chapter establishes standard protocols for developing site-specific water quality criteria for total phosphorus. A phosphorus site-specific criterion may be established to appropriately protect a waterbody's designated uses when the applicable statewide total phosphorus criterion, as specified in s. NR 102.06, is determined by the department to be more or less stringent than necessary to protect the uses of the waterbody due to site-specific conditions. The requirements specified in s. 281.15 (1) and (2) (b) to (e), Stats., shall be met when developing a site-specific criterion under this chapter. Protection of a waterbody's designated uses is evaluated using indicators of the ecosystem's response to phosphorus and overall biotic integrity. After a phosphorus site-specific criterion is adopted, approved by the U.S. environmental protection agency, and takes effect, it becomes the applicable water quality criterion under s. 281.15, Stats., for the approved waterbody or segment.

NR 119.02 Definitions. In this chapter the following definitions apply:

(1) "Biocriterion" means a surface water quality criterion under subch. III of ch. NR 102 that describes the structure and function of aquatic communities in a waterbody necessary to protect its designated aquatic life use.

(2) "Clean Water Act" or "CWA" means the federal Clean Water Act of 1972 and amendments.

(3) "Designated uses" are the uses assigned to Wisconsin's waterbodies as specified in s. NR 102.04.

Note: Pursuant to the Clean Water Act, all of Wisconsin's surface waters are assigned to the following use categories: aquatic life, recreation, public health and welfare, wildlife.

(4) "Less stringent SSC" means a site-specific phosphorus criterion that is established at a concentration higher than a waterbody's statewide phosphorus criterion.

(5) "More stringent SSC" means a site-specific phosphorus criterion that is established at a concentration lower than a waterbody's statewide phosphorus criterion.

(6) "Natural background phosphorus concentration" means the phosphorus concentration from natural sources, including forested and undeveloped lands, and from natural processes such

as weathering and dissolution, that would exist in the absence of measurable impacts from human activity or influence.

(7) “Phosphorus response indicator” means an indicator and its thresholds, as specified in s. NR 102.07 (4) to (7), that characterize the condition or abundance of aquatic organisms that are responsive to phosphorus.

(8) “Section 303(d) list” means a list of waters that do not attain water quality standards and require a total maximum daily load analysis, as specified in Section 303(d) of the Clean Water Act.

(9) “Site-specific criterion” or “SSC” means a phosphorus criterion applicable to a waterbody or segment that differs from the statewide phosphorus criterion due to specific conditions at the waterbody or segment, documented using data for the specific site or a similar reference site.

(10) “Statewide phosphorus criterion” means the statewide phosphorus surface water quality criterion specified in s. NR 102.06 that applies to a specific waterbody in absence of an adopted, approved, and effective site-specific criterion.

(11) “Strahler stream order” is a numerical hierarchy of stream segments increasing from headwaters through downstream reaches.

Note: A map layer showing Strahler stream order is available online on the department’s Surface Water Data Viewer, <https://dnr.wi.gov/topic/surfacewater/swdv/>.

(12) “Total maximum daily load” or “TMDL” has the meaning defined in s. NR 212.72 (11).

(13) “U.S. EPA” means the United States environmental protection agency.

(14) “Weather-controlled ambient total phosphorus concentration” has the meaning defined in s. NR 102.06 (2) (k).

(15) “WPDES permit” means a Wisconsin pollutant discharge elimination system permit issued by the department under ch. 283, Stats.

NR 119.03 Less stringent SSC. A waterbody or segment may be eligible for an SSC that is less stringent than the statewide phosphorus criterion if the requestor demonstrates and the department determines that the designated uses of the waterbody and its affected downstream waters can be protected by a less stringent phosphorus criterion based on the analysis of site-

specific data. For the department to approve a less stringent SSC, the SSC shall be developed using methods specified in ss. NR 119.05 to 119.06 and be protective of downstream uses as specified in s. NR 119.06 (6). The categories of waterbodies that may qualify for less stringent SSC include all of the following:

(1) **BIOLOGICAL METRICS ATTAINED.** A less stringent SSC may be appropriate for a waterbody that is not attaining its statewide phosphorus criterion if all of its phosphorus response indicators and biocriteria are attained.

(2) **BIOLOGICAL METRICS NOT ATTAINED.** A less stringent SSC may be appropriate for a waterbody that is not attaining its statewide phosphorus criterion even if one or more of its phosphorus response indicators or biocriteria are not attained, provided a modeling analysis demonstrates that the phosphorus response indicators are expected to be attained if the waterbody's phosphorus concentration is sufficiently reduced to attain a proposed SSC that is less stringent than the statewide phosphorus criterion.

Note: Certain reservoirs with a statewide phosphorus criterion of 30-40 ug/L may fit in this category. An example of this analysis is the modeling and analysis conducted for Petenwell and Castle Rock Lakes.

(3) **HIGH NATURAL BACKGROUND PHOSPHORUS CONCENTRATION.** A less stringent SSC may be appropriate if a waterbody is not attaining the statewide phosphorus criterion because the natural background phosphorus concentration is higher than the statewide phosphorus criterion.

NR 119.04 More stringent SSC. A waterbody or segment is eligible for an SSC that is more stringent than the statewide phosphorus criterion if the requestor demonstrates and the department determines that the statewide phosphorus criterion is not sufficiently protective of the waterbody's designated uses. A more stringent SSC may be appropriate if a waterbody is in one of the following categories:

(1) **BIOLOGICAL METRICS NOT ATTAINED.** A more stringent SSC may be appropriate if a waterbody attains its statewide phosphorus criterion but does not attain one or more of its phosphorus response indicators or biocriteria. A more stringent SSC is not appropriate under this paragraph if a biocriterion or phosphorus response indicator is not attained due to reasons other than phosphorus.

Note: Because flowing waters may transport algae downstream from where it is produced, an SSC should only be established on the segment of the waterbody where the impairment is being generated. For example, if a river directly downstream of an impoundment attains its phosphorus criterion but receives high algae concentrations passed through from the impounded area, a more stringent SSC for the river segment downstream from the dam may not be appropriate since the source of the algae is upstream. Establishing an SSC downstream from the dam is not likely to achieve attainment of the phosphorus response indicator.

(2) BIOLOGICAL METRICS ATTAINED. A more stringent SSC may be appropriate even if a waterbody attains its statewide phosphorus criterion, phosphorus response indicators, and biocriteria in cases when it is demonstrated that a more stringent SSC than the statewide phosphorus criterion is necessary to maintain attainment of any of these indicators and the level necessary can be demonstrated through modeling.

Note: Certain impounded flowing waters with a statewide phosphorus criterion of 100 ug/L may fit in this category.

NR 119.05 Methods for determining an SSC. An SSC shall be developed using one of the following methods:

(1) SSC BASED ON AMBIENT PHOSPHORUS CONCENTRATION. For cases under s. NR 119.03 (1) when it is demonstrated that a less stringent SSC is appropriate because biological metrics are attained, the department may set the SSC at a concentration not to exceed a flowing water's median ambient concentration, or a lake or reservoir's mean ambient phosphorus concentration. If the weather-controlled ambient total phosphorus concentration can be determined for the waterbody, this value may be used as the ambient phosphorus concentration.

Note: The SSC is set at the waterbody's weather-controlled ambient phosphorus concentration because the long-term ambient concentration is deemed to be protective of designated uses if the waterbody attains its phosphorus response indicators and biocriteria at current concentrations.

(2) SSC DERIVED THROUGH MODELING. (a) *Modeling analysis.* If a statistical or modeling analysis demonstrates that attaining a phosphorus concentration higher or lower than the statewide phosphorus criterion will attain a waterbody's suspended chlorophyll *a* phosphorus response indicators specified in s. NR 102.07 (4) (a) to (b) and (5), the department shall set the

SSC at the modeled phosphorus concentration expected to attain the applicable indicators. The analysis shall be conducted following requirements specified in s. NR 119.06 (4) (b).

Note: Modeling demonstrations are based only on suspended chlorophyll *a* phosphorus response indicators because existing modeling approaches cannot reliably predict responses of fish, aquatic insect, or aquatic plant communities to variation in phosphorus concentration.

(b) *Use of natural background phosphorus concentrations.* An SSC may be set no lower than a waterbody's natural background phosphorus concentration if the background concentration can be determined. The natural background concentration may be estimated using the concentration for similar nearby waterbodies with minimal human impacts or other methods approved by the department. For natural lakes, the background concentration may be determined from a sediment core using paleolimnological methods.

Note: Natural background phosphorus concentrations can be inferred from diatoms deposited in the sediment prior to significant impacts from Euro-American settlement, circa 1850s but variable across the state.

(3) ALTERNATIVE METHODS. An alternative method for setting an SSC may be used in cases that are outside of those described in ss. NR 119.03 to 119.04 or when methods in subs. (1) to (2) are not appropriate or feasible. An SSC based on an alternative method may be approved if the department and U.S. EPA determine that the SSC is protective of the designated uses of the waterbody and downstream waters under s. NR 119.06 (6).

NR 119.06 Minimum requirements for an SSC submittal. Any person may request an SSC or the department may develop an SSC on its own initiative. The requestor is responsible for developing the proposed SSC, including conducting monitoring and modeling if needed. An SSC request submittal shall contain all of the following:

(1) SSC STUDY AREA. Identification of all waterbodies and segments within the SSC study area. The SSC study area includes all waterbodies and segments for which monitoring data are needed to determine whether a proposed SSC would be protective of designated uses. The study area is determined as follows:

(a) For any SSC on an isolated waterbody such as a seepage lake, the isolated waterbody may comprise the entire SSC study area. At least one monitoring site within the waterbody is required.

(b) For a more stringent SSC on a flowing water system, a single waterbody or segment may comprise the SSC study area. In this case, at least one monitoring site within the waterbody is required. A larger study area may also be established.

(c) For a less stringent SSC on a flowing water system, the study area shall include monitoring sites on all of the following upstream and downstream waters:

1. A site upstream from the segment under consideration for an SSC.
2. At least one site within the segment under consideration for an SSC. This site shall be located downstream from any WPDES permitted dischargers present on the segment.
3. Downstream of the SSC segment, one site per Strahler stream order until the terminal waterbody defined in subd. 4 is reached.
4. At least one site within the study area's terminal waterbody, which is the nearest downstream waterbody that has a statewide phosphorus criterion different from the statewide phosphorus criterion applicable to the proposed SSC segment. If no terminal waterbody is reached before the Mississippi River, the Mississippi River is the terminal waterbody.

Note: The combined sites listed in par. (c) should typically result in 6 or fewer sites. If more than one discharger is present, additional sampling sites may be needed.

(2) APPLICABLE WATERQUALITY STANDARDS. For each waterbody or segment identified in sub. (1), identification of all applicable designated uses under s. NR 102.04, phosphorus criteria under s. NR 102.06, phosphorus response indicators under s. NR 102.07 (4) to (7), and biocriteria under subch. III of ch. NR 102.

(3) MONITORING. Sampling data for each of the study area monitoring sites specified in sub. (1). Data shall be collected following the department's monitoring and quality assurance protocols for each metric. If additional relevant data are available beyond the minimum requirements specified in this section, such as more frequent data or a longer-term data record, they shall also be submitted and analyzed under sub. (4). Monitoring data requirements include all of the following:

(a) At least 2 years of total phosphorus data. Sampling frequency at each site shall comply with one of the following:

1. For lakes and reservoirs, a minimum of 12 phosphorus samples are required over a 2-year period. Collection of 12 samples requires 6 samples from June 1 to September 15 each year.

2. For flowing waters, a minimum of 12 phosphorus samples are required over a 2-year period. Collection of 12 samples requires monthly sampling from May to October each year.

3. For sites that are more variable than typical or that are close to the statewide phosphorus criterion, the department recommends more frequent sampling than the minimum. A requestor may consult with the department to determine if a higher sampling frequency is recommended.

(b) At least 2 years of data for each of the applicable phosphorus response indicators and biocriteria. For biological sampling, the department may approve sampling to be conducted by the requestor, conduct the sampling itself, or agree to a designee.

(c) Documentation of the monitoring protocols and quality assurance methods followed.

(d) Depending on site-specific circumstances, for the purposes of making an SSC determination, the department may require an additional number of samples, monitoring sites, or other chemical, biological, or physical metrics in addition to those specified in this section.

Note: The department's monitoring protocols and standard operating procedures, including quality assurance protocols, and existing data housed by the department may be accessed through the department's SWIMS database. Contact the department at DNRSWIMS@wisconsin.gov for access to the database. More information is available by contacting the department's surface water monitoring section or on its surface water monitoring website at <https://dnr.wi.gov/topic/SurfaceWater/monitoring.html>.

(4) ANALYSIS. Analysis of the data, including all of the following:

(a) An analysis of monitoring data following the department's assessment protocols specified in ch. NR 102.52 to indicate current and historic attainment status of all water quality standards identified in sub. (2). This shall include identifying whether any waters are or have been on the section 303(d) list, and any trends observable over time. If any relevant water quality standard is not attained, evaluate whether there is a relationship between phosphorus and the non-attainment, and any other potential factors that may be causing the non-attainment.

Note: The department's surface water assessment protocols are found in guidance titled "Wisconsin Consolidated Assessment and Listing Methodology," or WisCALM, which is available on the department's surface water assessments website at <https://dnr.wi.gov/topic/SurfaceWater/assessments.html>.

(b) A statistical or modeling analysis if needed to determine the appropriate SSC, as specified in s. NR 119.05 (2), and documentation of methods and results. The analysis shall demonstrate a clear link between phosphorus and attainment of a designated use, including characterization of the relationship between phosphorus and the applicable phosphorus response indicators. The analysis shall be based on or calibrated to data from the waterbody that are representative of the range of environmental variability that may influence the applicable phosphorus response indicators. For rivers that contain a reservoir, impounded flowing water, or natural drainage lake, the model may be based on attainment of the applicable chlorophyll *a* criterion specified in ch. NR 102.04 (6) (b), and a demonstration of attainment of the river phosphorus response indicator for chlorophyll *a* specified in ch. NR 102.06 (4) is not required. For rivers without a reservoir, impounded flowing water, or natural drainage lake, modeling shall include a demonstration that the phosphorus response indicator for chlorophyll *a* specified in ch. NR 102.06 (4) is expected to be attained.

Note: The option for rivers with impounded flowing waters, reservoirs, or natural drainage lakes is provided because modeling chlorophyll *a* – phosphorus correlations is more cost-effective for these waters than modeling such correlations in rivers, and attaining the chlorophyll *a* targets for lakes, reservoirs, and impounded flowing waters should ensure that chlorophyll *a* targets are also met within the river.

(5) PROPOSED SSC EXTENT. Identification of the extent of the study area that is eligible for the SSC. For a less stringent SSC, this may include any segments within the study area that do not attain their applicable phosphorus criteria but do attain all phosphorus response indicators and biocriteria. For a more stringent SSC, this may include any segments that are demonstrated to need a more stringent phosphorus criterion to protect designated uses.

Note: Typically, monitoring and analysis under subs. (3) to (4) will need to be completed before the extent of the study area eligible for the SSC can be identified.

(6) DOWNSTREAM PROTECTION. For less stringent SSC, a demonstration that potentially affected downstream waters' uses are protected by the proposed SSC, using one of the following methods:

(a) Waters in the study area under sub. (1) that are downstream of the proposed SSC extent as determined under sub. (5) shall be assessed as follows:

1. If all segments attain their applicable phosphorus criteria, phosphorus response indicators, and biocriteria, the SSC is protective of downstream waters.

2. If the terminal waterbody is a river listed in s. NR 102.06 (3) that is not attaining its phosphorus response indicators or biocriteria, but all segments upstream of the terminal waterbody attain their applicable phosphorus criteria, phosphorus response indicators, and biocriteria, an SSC may be established in the SSC extent. The SSC shall not exceed the phosphorus criterion of the terminal river or the ambient total phosphorus concentration of the SSC extent.

(b) If a demonstration for downstream protection under par. (a) is not appropriate or feasible, an alternative demonstration of downstream protection may be submitted by the requestor to the department.

(7) PROPOSED SSC AND SUPPORTING MATERIALS. The proposed SSC and materials supporting the proposal, including all of the following:

(a) Determination of the SSC that would be appropriately protective of designated uses in the waterbody and downstream, based on the analyses in this section.

(b) Demonstration that there is a statistically significant difference between the proposed SSC and the statewide phosphorus criterion, based on estimation of the uncertainty in the relationships developed under sub. (4) (b).

Note: For example, an SSC is generally not appropriate if the statewide phosphorus criterion is contained within the 2-sided 80% confidence interval around the SSC.

(c) A draft technical support document that contains the information required in this chapter to support the SSC and meets the requirements specified in s. 281.15 (2) (b) to (e), Stats. All raw data and calculations shall also be submitted to the department.

Note: Section 281.15 (2) (b) to (e), Stats., requires information on socioeconomic costs and considerations, a demonstration that the criterion is no more stringent than reasonably necessary to assure attainment of a waterbody's designated uses, application of reasonable statistical techniques, and a technical support document detailing methods used to develop the criterion.

Note: The department recommends that requestors meet with the department early in the process to determine additional data needs and protocols before developing a monitoring or modeling plan or submitting an SSC request. The department may provide technical assistance

as resources allow. Any preliminary advice provided by the department is not binding, but is meant to inform the requestor's decision on whether to develop an SSC and the information needed to do so.

NR 119.07 Decision regarding SSC request. (1) The department shall review the SSC request and make a determination on whether the SSC may be approvable.

(2) If the department denies the request for an SSC at any point under the procedures in this section, it shall notify the SSC requestor in writing and provide an explanation of the reason for the denial.

Note: If the department chooses to deny the SSC request, any person may petition for rulemaking under the procedures specified in s. NR 2.05 and s. NR 227.12, Stats., or may request that U.S. EPA promulgate an SSC under 40 CFR 131.22 (b).

(3) If the department determines that a requested SSC may be approvable, it shall do all of the following:

(a) Document its justification for tentative SSC approval through a technical support document and demonstrate that requirements under s. 281.15 (1) and (2) (b) to (e), Stats., are met.

(b) Provide at least a 45-day public comment period and a public hearing with a 45-day public notice for the proposed SSC and technical support document. The department will post notification on its website and send electronic notification to: the department's water quality standards distribution list, the WPDES permit public notification list specified in s. NR 203.13 (3) (i), dischargers with an individual WPDES permit located upstream from the proposed SSC, and U.S. EPA.

Note: The public may subscribe to the water quality standards electronic notification system on the department's home page at <http://dnr.wi.gov/>. Requests to be placed on the WPDES permit public notification list may be directed to the Department of Natural Resources, WPDES Permits, P.O. Box 7921, Madison, Wisconsin 53707-7921. Notifications to the mailing list will be sent electronically unless the requestor specifies a preference for a mailed copy.

(4) After the public comment period, the department shall take one of the following actions:

(a) If there are no requests for rulemaking for the SSC nor objections to development of the SSC, the department shall issue a final written determination. If the department's final determination is an approval of the SSC, the department shall publish its final determination on its website. No earlier than 30 days after publication on the website, the department shall submit the SSC to U.S. EPA for approval unless the SSC final determination was challenged under ch. 227, Stats., during the 30-day post-publication period. If U.S. EPA approves the SSC, the department shall publish the SSC on the department's website or publicly-accessible data system.

Note: The department's water quality criteria website may be accessed at: <http://dnr.wi.gov/topic/surfacewater/WQC.html>.

(b) If the department receives a request for rulemaking on a proposed SSC or an objection to development of the SSC either at the hearing or in writing by the end of the comment period specified in sub. (3) (b), the department may not proceed with the process under par. (a). The department may either initiate rulemaking for an SSC pursuant to the rulemaking procedures under subch. II of ch. 227, Stats., or choose not to take further action on the SSC. Any person providing an objection to development of an SSC or a request for rulemaking shall provide a written explanation regarding the basis for their request or objection.

Note: If the department chooses to deny the SSC request or not to proceed with rulemaking, any person may petition for rulemaking under the procedures specified in s. NR 2.05 and s. 227.12, Stats., or may request that U.S. EPA promulgate an SSC under 40 CFR 131.22 (b).

Note: An SSC can only be used as the basis for a TMDL after it has been approved by U.S. EPA and taken effect.

NR 119.08 REVISION OF SSC. Any person may request a revision of an approved SSC or the department may revise an approved SSC on its own initiative through the procedures in this chapter or through the procedures for rulemaking under subch. II of ch. 227, Stats.

SECTION 4. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

Preston D. Cole, Secretary

(SEAL)