

State of Wisconsin



2013 Senate Bill 547

Date of enactment: **April 23, 2014**
Date of publication*: **April 24, 2014**

2013 WISCONSIN ACT 378

AN ACT *to amend* 283.63 (1) (am) and 283.63 (4); and *to create* 283.13 (7) and 283.16 of the statutes; **relating to:** adaptive management plans for reducing discharges of phosphorus and total suspended solids to the waters of the state and a statewide variance to the water quality standard for phosphorus for certain dischargers.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 283.13 (7) of the statutes is created to read:

283.13 (7) ADAPTIVE MANAGEMENT. (a) In this subsection, "adaptive management option" means an approach to achieving compliance with a water quality standard adopted under s. 281.15 or a total maximum daily load under 33 USC 1313 (d) (1) (C) approved by the federal environmental protection agency under which a permittee implements a plan to achieve the water quality standard or total maximum daily load through verifiable reductions in the amount of water pollution from point sources and nonpoint sources, as defined in s. 281.16 (1) (e), in a basin or other area specified by the department and uses monitoring data, modeling, and other appropriate information to adjust the plan if needed to achieve compliance.

(b) The department may authorize a permittee to use an adaptive management option to achieve compliance with the water quality standard for phosphorus or an approved total maximum daily load for total suspended solids, and if it does so, the department may specify a date under sub. (5) that provides 4 permit terms for the permittee to comply with its water quality based effluent limitation for phosphorus or total suspended solids.

SECTION 2. 283.16 of the statutes is created to read:
283.16 Statewide variance for phosphorus. (1)

DEFINITIONS. In this section:

(a) "Basin" means the drainage area identified by an 8-digit hydrologic unit code, as determined by the U.S. Geological Survey.

(b) "Category" means a class or category of point sources specified by the department under s. 283.13 (1) or publicly owned treatment works.

(d) "Existing source" means a point source that was covered by a permit on December 1, 2010.

(e) "Major facility upgrade" means the addition of new treatment equipment and a new treatment process.

(g) "Nonpoint source" has the meaning given in s. 281.16 (1) (e).

(h) "Target value" means the following:

1. For a point source in a watershed for which a federally approved total maximum daily load under 33 USC 1313 (d) (1) (C) is in effect on the effective date of this subdivision [LRB inserts date], the number of pounds of phosphorus that would be discharged from the point source during a year if the point source complied with its effluent limitation based on the total maximum daily load in effect on the effective date of this subdivision [LRB inserts date].

2. For a point source in a watershed for which no federally approved total maximum daily load under 33 USC

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

1313 (d) (1) (C) is in effect on the effective date of this subdivision ... [LRB inserts date], the number of pounds of phosphorus that would be discharged from the point source during a year if the average concentration of phosphorus in the effluent discharged by the point source during the year was 0.2 milligrams per liter.

(i) "Water quality based effluent limitation" means an effluent limitation under s. 283.13 (5), including an effluent limitation based on a total maximum daily load under 33 USC 1313 (d) (1) (C) approved by the federal environmental protection agency.

(2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR PHOSPHORUS. (a) The department of administration, in consultation with the department of natural resources, shall determine whether attaining the water quality standard for phosphorus, adopted under s. 281.15, through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible because it would cause substantial and widespread adverse social and economic impacts on a statewide basis. The department of administration may make separate determinations under this paragraph for statewide categories of point sources.

(b) The department of administration shall include all of the following in its determination under par. (a), based on water quality based effluent limitations for phosphorus determined by the department of natural resources:

1. A calculation of the statewide cost of compliance with water quality based effluent limitations for phosphorus by point sources that cannot achieve compliance without major facility upgrades.

2. A calculation of the statewide per household cost for water pollution control by publicly owned treatment works that cannot achieve compliance with water quality based effluent limitations for phosphorus without major facility upgrades, including the projected costs of compliance with those water quality based effluent limitations, and a calculation of the percentage of median household income the per household cost represents.

4. A determination of whether the cost of compliance with water quality based effluent limitations for phosphorus by point sources that cannot achieve compliance without major facility upgrades would cause substantial adverse social and economic impacts on a statewide basis.

5. A determination of whether the cost of compliance with water quality based effluent limitations for phosphorus by point sources that cannot achieve compliance without major facility upgrades would cause widespread adverse social and economic impacts on a statewide basis.

(c) The department of administration shall make a preliminary determination under par. (a) no later than the 240th day after the effective date of this paragraph ...

[LRB inserts date]. The department of administration shall provide public notice, through an electronic notification system that it establishes or selects, of its preliminary determination and shall provide the opportunity for public comment on the preliminary determination for at least 30 days following the public notice.

(d) The department of administration shall consider any public comments in making its final determination under par. (a) and shall make the final determination no later than the 30th day after the end of the public comment period.

(e) The department of administration shall send a notice that describes its final determination under par. (a) to the legislative reference bureau for publication in the administrative register.

(em) If the department of administration determines under par. (a) that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible, the department of natural resources shall seek approval under 40 CFR Part 131 from the federal environmental protection agency for the variance under this section.

(f) If the department of administration determines under par. (a) that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible, the determination remains in effect until the department of administration finds under sub. (3) (c) that the determination is no longer accurate.

(2m) WATER QUALITY STANDARDS REVIEW. Every 3 years as part of the review of water quality standards required by 33 USC 1313 (c) (1), if the variance under this section is in effect, the department shall determine whether formal review under sub. (3) should be undertaken, considering any comments it receives on the variance under this section.

(3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE. (a) In 2024, if a determination under sub. (2) (a) that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible is in effect, or upon a determination under sub. (2m) that review under this subsection should be undertaken, the department of administration, in consultation with the department of natural resources, shall prepare a report, no later than September 1, to evaluate whether the determination under sub. (2) (a) remains accurate. The department of administration shall consult with permittees that would be subject to water quality based effluent limitations for phosphorus and other interested parties in preparing the report.

(b) The department of natural resources shall provide all of the following to the department of administration for the report under par. (a):

1. A determination of whether technology is reasonably available for point sources to comply with effluent limitations for phosphorus that are more stringent than those in sub. (6) (a).

2. A determination of whether technology is reasonably available for any category of point sources to comply with effluent limitations for phosphorus that are more stringent than those in sub. (6) (a).

3. A determination of whether any technology that is reasonably available for compliance with effluent limitations for phosphorus that are more stringent than those in sub. (6) (a) is cost effective.

(c) Based on its report under par. (a), the department of administration, in consultation with the department of natural resources, shall decide whether the determination that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible remains accurate.

(cm) If the department of administration decides under par. (c) that the determination remains accurate, the department of natural resources shall decide whether it is appropriate to apply more stringent effluent limitations than those in sub. (6) (a) to all point sources or to any category of point sources, based on the availability and cost effectiveness of technology for compliance and, if so, specify those more stringent effluent limitations based on the report under par. (a).

(d) The department of administration shall provide public notice of its preliminary decisions under par. (c) no later than the 60th day after preparing the report under par. (a) and shall provide the opportunity for public comment on the decisions for at least 30 days following the public notice.

(e) The department of administration shall consider any public comments in making its final decisions under par. (c) and shall make the final decisions no later than the 30th day after the end of the public comment period.

(f) The department of administration shall send a notice that describes its final decisions under par. (c) to the legislative reference bureau for publication in the administrative register.

(g) If the department of administration decides under par. (c) that the determination described in that paragraph remains accurate, the department of natural resources shall seek approval from the federal environmental protection agency under 40 CFR 131.21 for renewal of the variance under this section.

(4) AVAILABILITY OF VARIANCE. (a) When a determination under sub. (2) (a) that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations by point sources that

cannot achieve compliance without major facility upgrades is not feasible and approval of the variance under this section by the federal environmental protection agency are in effect, a permittee is eligible for a variance to the water quality standard for phosphorus for an existing source if all of the following apply:

1. The determination applies to the existing source.

2. Subject to par. (am) 1., the permittee certifies that the existing source cannot achieve compliance with the water quality based effluent limitation for phosphorus without a major facility upgrade.

3. The permittee agrees to comply with the requirements under sub. (6).

(am) 1. The department shall approve an application for a variance if the requirements in pars. (a) and (b) are complied with, unless the department determines that the certification under par. (a) 2. is substantially inaccurate.

2. The department shall act on an application for a variance under this section no later than the 30th day after the day on which the department receives the application for the variance.

3. If the department does not act on the application for a variance by the deadline under subd. 2., the application is approved.

(b) A permittee may apply for the variance under this section in any of the following ways:

1. By requesting the variance in the application for reissuance of the permit.

2. By requesting the variance within 60 days after the department reissues or modifies the permit to include a water quality based effluent limitation for phosphorus.

3. If the department issued a permit to the permittee before the effective date of this subdivision [LRB inserts date], that includes a water quality based effluent limitation for phosphorus, by requesting a modification of the permit.

4. If the department issued a permit to the permittee before the effective date of this subdivision [LRB inserts date], that includes a water quality based effluent limitation for phosphorus and that requires the permittee to submit to the department options for complying with the water quality based effluent limitation, by submitting a request for the variance as a compliance option.

(c) After an application for a variance is submitted to the department under par. (b) 2., 3., or 4., and until the last day for seeking review of the department's final decision on the application or a later date fixed by order of the reviewing court, the water quality based effluent limitation for phosphorus and any corresponding compliance schedule are not effective. All other provisions of the permit continue in effect except those for which a petition for review has been submitted under s. 283.63.

(d) The variance under this section remains in effect for a point source until the permit is reissued, modified, or revoked and reissued.

(e) Notwithstanding s. 227.42, there is no right to a hearing under this subsection.

(f) If the department approves a variance under this section and the department issues a modified water quality based effluent limitation under s. 283.63 for phosphorus, the permittee shall comply with the least stringent of the 2 effluent limitations.

(6) VARIANCE PROVISIONS. (a) Except as provided in par. (ae) or (am) or sub. (7), in the permit for a point source for which the department approves the variance under this section the department may include a requirement that the permittee optimize the performance of the point source in controlling phosphorus discharges and shall include the following interim limits:

1. In the first permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to 0.8 milligrams per liter as a monthly average.

2. In the 2nd permit for which the department approves the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to 0.6 milligrams per liter as a monthly average.

3. In the 3rd permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with an effluent limitation for phosphorus equal to 0.5 milligrams per liter as a monthly average.

4. In the 4th permit for which the department includes the variance, a requirement to achieve, by the end of the term of that permit, compliance with the water quality based effluent limitation for phosphorus.

(ae) If a permittee who chose an option for complying with a water quality based effluent limitation for phosphorus other than the variance under this section applies for the variance under this section, the department shall count a permit that included the other compliance option as though the permit had included the variance, for the purposes of par. (a), including determining the applicable interim limit.

(am) If a permittee certifies that the point source cannot achieve compliance with an interim limit in par. (a) 1., 2., or 3. without a major facility upgrade, the department shall include in the permit a requirement to achieve compliance with the most stringent achievable interim limit, except that the department may not include an interim limit that is higher than the limit established under s. 283.11 (3) (am).

(b) In the permit for a point source for which the department approves the variance under this section, in addition to the requirements under par. (a) or (am) or sub. (7), the department shall require the permittee to implement the permittee's choice of the following measures to reduce the amount of phosphorus entering the waters of the state:

1. Making payments to counties as provided in sub. (8).

2. Entering into a binding, written agreement with the department under which the permittee constructs a project or implements a plan that is designed to result in an annual reduction of phosphorus pollution from other sources in the basin in which the point source is located, in an amount equal to the difference between the annual amount of phosphorus discharged by the point source and the target value.

3. Entering into a binding written agreement, that is approved by the department, with another person under which the person constructs a project or implements a plan that is designed to result in an annual reduction of phosphorus pollution from other sources in the basin in which the point source is located, in an amount equal to the difference between the annual amount of phosphorus discharged by the point source and the target value.

(7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department determines under sub. (3) (cm) that it is appropriate to apply more stringent effluent limitations than those in sub. (6) (a) to all point sources or to a category of point sources, the department shall include the more stringent effluent limitations specified under sub. (3) (cm) in permits reissued, modified, or revoked and reissued after that determination for all point sources or for the category of point sources to which the more stringent effluent limitations apply.

(8) PAYMENTS TO COUNTIES. (a) 1. A permittee that chooses to make payments for phosphorus reduction under sub. (6) (b) 1. shall make the payments to each county that is participating in the program under this subsection and that has territory within the basin in which the point source is located in proportion to the amount of territory each county has within the basin. The permittee shall make a total payment by March 1 of each calendar year in the amount equal to the per pound amount under subd. 2. times the number of pounds by which the amount of phosphorus discharged by the point source during the previous year exceeded the point source's target value or \$640,000, whichever is less. If no county that has territory within the basin is participating in the program under this subsection, the department shall direct the permittee to make payments to participating counties selected by the department.

2. The per pound payment for this subsection is \$50 beginning on the effective date of this subdivision ... [LRB inserts date]. Beginning in 2015, the department shall adjust the per pound payment each year by a percentage equal to the average annual percentage change in the U.S. consumer price index for all urban consumers, U.S. city average, as determined by the federal department of labor, for the 12 months ending on the preceding December 31. The adjusted amount takes effect for permits reissued on April 1. The per pound payment in effect

when a permit is reissued applies for the term of the permit.

(b) 1. A county shall use payments received under this subsection to provide cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce the amount of phosphorus entering the waters of the state, for staff to implement projects to reduce the amount of phosphorus entering the waters of the state from nonpoint sources, or for modeling or monitoring to evaluate the amount of phosphorus in the waters of the state for planning purposes.

2. A county shall use at least 65 percent of the amounts received under this subsection to provide cost sharing under s. 281.16 (3) (e) or (4).

2m. No later than March 1 of each year, a county shall develop a plan for using the payments received under this subsection in the previous year that is consistent with the county's land and water resource management plan under s. 92.10. A county shall do all of the following in the plan under this subdivision:

a. Identify projects that have, or watersheds in which there exists, the greatest potential to reduce the amount of phosphorus per acre entering the waters of the state, based on an assessment of the land and land use practices in the county.

b. Describe the measures it will take to ensure that each project that it funds is completed and evaluated.

3. No later than May 1 of the 2nd year following a year in which a county receives payments under this subsection, the county shall submit an annual report to the department of natural resources, the department of administration, the department of agriculture, trade and consumer protection, and each permittee from which it received those payments. In the annual report, the county shall describe the projects for which it provided cost sharing, quantify, in pounds, the associated phosphorus reductions achieved using accepted modeling technology, and identify any staff funded with the payments.

4. The department shall evaluate reports submitted under subd. 3. If the department determines that a county is not using the payments to effectively reduce the amount of phosphorus entering the waters of the state from nonpoint sources, the department may require permittees who made the payments to eliminate or reduce future payments to the county.

5. A county shall notify the department by January 1 of each year if it chooses not to participate in the program under this subsection.

(8m) PROJECTS OR PLANS. (a) A person who constructs a project or implements a plan under an agreement under sub. (6) (b) 2. or 3. that involves activities for which performance standards and prohibitions have been prescribed under s. 281.16 (2) or (3) shall comply with those performance standards and prohibitions and any associated technical standards.

(b) A person who constructs a project or implements a plan under an agreement under sub. (6) (b) 2. or 3. shall annually submit a report to the department that quantifies, in pounds, the phosphorus reductions achieved through the project or plan, using accepted modeling technology. The department shall review reports submitted under this paragraph. If the department determines, based on the results of the modeling, that a project or plan is not effectively reducing the amount of phosphorus entering the waters of the state, the department shall terminate or modify the agreement.

SECTION 3. 283.63 (1) (am) of the statutes is amended to read:

283.63 (1) (am) After a verified petition for review is filed and until the last day for seeking review of the department's decision or a later date fixed by order of the reviewing court, any term or condition, thermal effluent limitation or water quality based effluent limitation which is the subject of the petition is not effective. All other provisions of the permit continue in effect except those for which an application for a variance has been submitted under s. 283.15 or 283.16. For those provisions for which a petition for review has been submitted under this section, the corresponding or similar provisions of the prior permit continue in effect until the last day for seeking review of the department's final decision or a later date fixed by order of the reviewing court.

SECTION 4. 283.63 (4) of the statutes is amended to read:

283.63 (4) Subsections (1) and (2) do not apply to the modification of a permit which implements a decision under s. 283.15 or 283.16 or the denial of a request for a variance under s. 283.15 or 283.16. A proceeding under subs. (1) and (2) shall not be delayed pending completion of the review of a variance request under s. 283.15 or 283.16.