



State of Wisconsin
2013 - 2014 LEGISLATURE

Monday, 10/7, if possible



LRB-3079/P1
RCT:cjs:jf
stays

stays

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RB
Note

Gen Cat

1 **AN ACT to create** 283.16 of the statutes; **relating to:** phosphorus discharges to
2 the waters of the state and a statewide variance from the water quality
3 standard for phosphorus for certain dischargers.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

Insert 1-4

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

4 **SECTION 1.** 283.16 of the statutes is created to read:
5 **283.16 Statewide variance for phosphorus.** (1) **DEFINITIONS.** In this
6 section:

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

***NOTE: The federal term for the 8-digit hydrologic unit is "subbasin." ~~Should~~
the draft use the term "subbasin"?

Do you want



to

1 (b) “Category” means a class or category of point sources specified by the
2 department under s. 283.13 (1).

****NOTE: The list is in NR 220.02, Wis. Adm. Code. The categories in the rule differ somewhat from the federal categories. Is this approach acceptable?

3 (c) “Conventional control technology” means optimal use of a technology for
4 controlling phosphorus discharges that is appropriate for a point source and that is
5 in use at point sources in the same category in the majority of states adjoining this
6 state.

****NOTE: Might there be more than one technology that would satisfy this definition for a particular point source? If so, I assume that the technologies might not be equally effective at removing phosphorus. Would a permittee be allowed to select any of these technologies to use as the basis for setting an interim limit under sub. (6)? Should it be “the optimal use of the most effective technology for controlling phosphorus discharges ...” or something like that?

7 (d) “Existing source” means a point source that was covered by a permit on
8 December 1, 2010.

****NOTE: Please note that “permit” is a defined term for ch. 283.

9 (e) “Major facility upgrade” means construction or installation, including
10 installation of a filtration system, for which the permittee must acquire a substantial
11 amount of property or for which the permittee must the develop an extensive
12 financing plan and obtain financing.

****NOTE: Please consider whether this definition is sufficiently clear to ensure that it will have the effect that is wanted where the term is used in the draft (sub. (5) (b)).

13 (f) “Minor source” means a point source with a discharge from a lagoon
14 treatment work or with a discharge of less than 100,000 gallons per day.

****NOTE: I used “treatment work” because it is a defined term for ch. 283. It might be helpful to define “lagoon treatment work” or “lagoon system.” NR 217.19 (1) (a), Wis. Adm. Code, refers to a system “that consists primarily of a stabilization pond system or a lagoon system.” Perhaps the draft should include the “consists primarily of” requirement. Should this also mention stabilization pond systems?

15 (g) “Nonpoint source” has the meaning given in s. 281.16 (1) (e).

1 (h) “Target value” means the number of pounds of phosphorus that would be
2 discharged from a point source during a year if the average concentration of
3 phosphorus in the effluent discharged by the point source during the year was 0.2
4 milligrams per liter.

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

9 (2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR
10 PHOSPHORUS. (a) No later than the 60th day after the effective date of this paragraph
11 [LRB inserts date], the department of administration shall determine whether
12 attaining the water quality standard for phosphorus, adopted under s. 281.15,
13 through compliance with water quality based effluent limitations is not feasible
14 because it would cause substantial and widespread adverse social and economic
15 impacts on a statewide basis.

****NOTE: Does federal law require notice and opportunity for public comment for
this initial determination?

16 (b) The department of administration shall include all of the following in its
17 determination under par. (a):

18 1. A calculation of the statewide cost of compliance with water quality based
19 effluent limitations for phosphorus.

20 2. A calculation of the statewide per household cost for water pollution control
21 by publicly owned treatment works after complying with water quality based
22 effluent limitations for phosphorus and a calculation of the percentage of median
23 household income the per household cost represents.

****NOTE: The request seemed to be referring only to the additional costs that would be incurred because of WQBEL's for phosphorus, but my impression is that EPA looks at what the total costs of sewage treatment would be after the technology for complying with the WQBEL is installed.

1 3. A calculation of the statewide cost for minor sources to comply with water
2 quality based effluent limitations for phosphorus.

3 4. A determination of whether the cost of compliance with water quality based
4 effluent limitations for phosphorus would cause substantial adverse social and
5 economic impacts on a statewide basis.

6 5. A determination of whether the cost of compliance with water quality based
7 effluent limitations for phosphorus would cause widespread adverse social and
8 economic impacts on a statewide basis.

9 (c) The department of administration shall send a notice that describes its
10 determination under par. (a) and the information under par. (b) to the legislative
11 reference bureau for publication in the administrative register.

12 (d) If the department of administration determines under par. (a) that
13 attaining the water quality standard for phosphorus through compliance with water
14 quality based effluent limitations is not feasible, the determination remains in effect
15 until the department of administration finds under sub. (3) (c) 1. that the
16 determination is no longer accurate.

17 **(3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE.** (a) Every 3 years,
18 beginning in 2016, if a determination under sub. (2) (a) that attaining the water
19 quality standard for phosphorus through compliance with water quality based
20 effluent limitations is not feasible is in effect, the department of natural resources
21 shall submit a report, no later than September 1, to the department of
22 administration regarding any changes in the technology available for controlling
23 phosphorus discharges from point sources and regarding the effluent limitations for

1 phosphorus that are reasonably achievable. The department of natural resources
2 shall consult with permittees that would be subject to water quality based effluent
3 limitations for phosphorus and other interested parties in preparing the report.

****NOTE: The variance for sources other than minor sources will terminate (after applying for 4 permit terms), so at some point this determination should only apply to minor sources. The draft does not yet reflect that. Does federal law or EPA practice affect whether “reasonably achievable” is a standard that is acceptable here?

4 (b) The department of natural resources shall include all of the following in
5 each report under par. (a):

6 1. A determination of whether technology is reasonably available for point
7 sources to comply with effluent limitations for phosphorus that are more stringent
8 than those in sub. (5) or (6) (a).

9 2. A determination of whether technology is reasonably available for any
10 category of point sources to comply with effluent limitations for phosphorus that are
11 more stringent than those in sub. (5) or (6) (a).

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

15 (c) The department of administration shall review each report under par. (a)
16 and, within 3 months of receiving the report, do all of the following:

17 1. Decide whether the determination that attaining the water quality standard
18 for phosphorus through compliance with water quality based effluent limitations is
19 not feasible remains accurate.

20 2. If the department decides under subd. 1. that the determination remains
21 accurate, decide whether it is appropriate to apply more stringent effluent
22 limitations than those in sub. (5) or (6) (a) to all point sources or to any category of

1 point sources, based on the availability and cost effectiveness of technology for
2 compliance and, if so, decide what those more stringent effluent limitations are.

3 (d) The department of administration shall provide public notice of its decisions
4 under par. (c) and shall provide the opportunity for public comment on the decisions
5 for at least 30 days following the public notice.



****NOTE: Should this require preliminary decisions before notice and comment
and then final decisions? In other words, should there be an opportunity for the public
comments to have an effect on DOA's decisions? *Insert 6-5-note*

6 (e) The department of administration shall send a notice that describes its
7 decisions under par. (d) to the legislative reference bureau for publication in the
8 administrative register.

9 (4) AVAILABILITY OF VARIANCE. (a) When a determination under sub. (2) (a) that
10 attaining the water quality standard for phosphorus through compliance with water
11 quality based effluent limitations is not feasible is in effect, a permittee may apply
12 for the variance under this section for an existing source in any of the following ways:

- 13 1. By requesting the variance in the application for reissuance of the permit.
- 14 2. By requesting a modification of the permit.



****NOTE: Does the modification statute need to be amended? *e*

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

20 (b) 1. The department shall approve an application under par. (a) for a minor
21 source *Insert 6-21*

21



****NOTE: Might a lagoon treatment ~~work~~ have more than one lagoon?

1 2. The department shall approve an application under par. (a) for a point source
2 that is not a minor source if the permittee includes in its application an analysis that
3 demonstrates that through optimizing the operation of the point source to control the
4 discharge of phosphorus, the permittee will comply with the requirements of the
5 variance that are applicable to the point source.

Insert
7-5

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

8 (5) VARIANCE PROVISIONS FOR MINOR SOURCES. Except as provided in sub. (7), the
9 department shall include all of the following in the permit for a minor source for
10 which the department approves the variance under this section:

11 (a) In the first permit for which the department approves the variance, an
12 initial effluent limitation for phosphorus that is equal to the performance of the
13 minor source on the effective date of this paragraph [LRB inserts date].

****NOTE: I think that the draft should be more specific about what is meant by "the performance of the facility on the effective date."

14 (b) In the first permit for which the department approves the variance, a
15 requirement to implement, before the end of the term of that permit, a plan to
16 optimize the operation of the minor source to limit the amount of phosphorus
17 discharged to the extent possible without a major facility upgrade.

18 (c) In the second permit for which the department approves the variance, a
19 requirement to achieve, by the end of the term of that permit, compliance with an
20 effluent limitation for phosphorus equal to the concentration of phosphorus achieved
21 by optimizing the operation of the minor source as provided in the plan under par.

22 (b), calculated as a monthly average.

****NOTE: I think that the language should be more specific about what "by the end of the term of that permit" means. Something like "to achieve, by the last month of the term of that permit," might work, if that is what is intended.

1 (d) In the third and each subsequent permit for which the department approves
2 the variance, a requirement to maintain compliance with the effluent limitation for
3 phosphorus described in par. (c).

* ~~****NOTE: Where to put language about useful life of lagoon system?~~

4 (6) VARIANCE PROVISIONS FOR OTHER DISCHARGERS. (a) Except as provided in sub.
5 (7), the department shall include all of the following in the permit for a point source,
6 other than a minor source, for which the department approves the variance under
7 this section:

8 1. In the first permit for which the department approves the variance, a
9 requirement to achieve, by the end of the term of that permit, compliance with an
10 effluent limitation for phosphorus equal to the greater of 0.8 milligrams per liter as
11 a 6-month average or a concentration as a 6-month average that is 20 percent lower
12 than the average concentration of phosphorus in the source's effluent for the past 5
13 years.

****NOTE: Is this what is intended? Might there be an existing source that would
not have operated for 5 years when the effluent limitation must be established?

14 2. In the 2nd permit for which the department approves the variance, a
15 requirement to achieve, by the end of the term of that permit, compliance with an
16 effluent limitation for phosphorus equal to the greater of 0.6 milligrams per liter as
17 a 6-month average or the concentration of phosphorus that can be achieved by the
18 use of conventional control technology.

****NOTE: Might a limit based on conventional control technology be higher than
a limit under subd. 1. based on the source's past performance? If so, might there be a
problem with getting EPA approval of a waiver that allows a source to discharge a higher
concentration of phosphorus than allowed in the earlier permit term?

Should "as a 6-month average" also be included for a limit based on
conventional control technology?

19 3. In the 3rd permit for which the department includes the variance, a
20 requirement to achieve, by the end of the term of that permit, compliance with an

1 effluent limitation for phosphorus equal to the greater of 0.5 milligrams per liter as
2 a 6-month average or the concentration of phosphorus that can be achieved by the
3 use of conventional control technology.

4 4. In the 4th permit for which the department includes the variance, a
5 requirement to achieve, by the end of the term of that permit, compliance with an
6 effluent limitation for phosphorus equal to the greater of 0.5 milligrams per liter as
7 a 6-month average or the concentration of phosphorus that can be achieved by the
8 use of conventional control technology and a compliance schedule that requires the
9 permittee to achieve compliance with the water quality based effluent limitation for
10 phosphorus not more than 5 years after the end of the term of that permit.

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

16 1. Making payments to a county or other entity as provided in sub. (8).

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

****NOTE: Is this intended to be limited to reductions from nonpoint sources?

23 3. Entering into a binding written agreement, that is approved by the
24 department, with another person under which the person constructs a project or

1 implements a plan that is designed to result in an annual reduction of phosphorus
2 entering the waters of the state ^{of pollution} from other sources in the basin in which the point
3 source is located, in an amount equal to the difference between the annual amount
4 of phosphorus discharged by the point source and the target value.

5 (7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department of administration
6 determines under sub. (3) (c) 2. that it is appropriate to apply more stringent effluent
7 limitations than those in sub. (5) or (6) (a) to all point sources or to a category of point
8 sources, the department of natural resources shall include the more stringent
9 effluent limitations specified under sub. (3) (c) 2. in permits reissued, modified, or
10 revoked and reissued after that determination for all point sources or for the category
11 of point sources to which the more stringent effluent limitations apply.

12 (8) PAYMENTS TO COUNTIES OR OTHER ENTITIES. (a) 1. A permittee that chooses
13 to make payments for phosphorus reduction under sub. (6) (b) 1. shall make the
14 payments to a county that is participating in the program under this subsection and
15 that has territory within the basin in which the point source is located or, with the
16 approval of the department, to another county participating in the program or to
17 another entity. The permittee shall make a payment by March 1 of each calendar
18 year in the amount equal to the per pound amount under subd. 2. times the number
19 of pounds by which the amount of phosphorus discharged by the point source during
20 the previous year exceeded the point source's target value.

21 2. The per pound payment for this subsection is \$50 beginning on the effective
22 date of this subdivision [LRB inserts date]. Beginning in 2015, the department
23 shall adjust the per pound payment each year by a percentage equal to the average
24 annual percentage change in the U.S. consumer price index for all urban consumers,
25 U.S. city average, as determined by the federal department of labor, for the 12

1 months ending on the preceding December 31. The adjusted amount takes effect for
2 permits reissued on April 1. The per pound payment in effect when a permit is
3 reissued applies for the term of the permit.

****NOTE: I assumed that the per pound payment should not be adjusted in 2014.
Please let me know if this should be changed.

4 (b) 1. A county or other entity shall use payments received under this
5 subsection to provide cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce
6 the amount of phosphorus entering the waters of the state or for staff to implement
7 projects to reduce the amount of phosphorus entering the waters of the state from
8 nonpoint sources.

9 2. A county or other entity shall use at least 60 percent of the amounts received
10 under this subsection to provide cost sharing under s. 281.16 (3) (e) or (4). If, during
11 a year, a county or other entity uses payments received under this subsection to fill
12 one or more full-time equivalent positions, the county or other entity shall use at
13 least 75 percent of the payments received under this subsection in the next year to
14 provide cost sharing under s. 281.16 (3) (e) or (4).

15 3. A county or other entity receiving payments under this subsection shall
16 submit an annual report to the department of natural resources, the department of
17 administration, and to each permittee from which it received payments during the
18 previous year. In the annual report, the county or other entity shall describe the
19 projects for which it provided cost sharing, quantify the associated phosphorus
20 reductions achieved using accepted modeling technology, and identify any staff
21 funded with the payments.

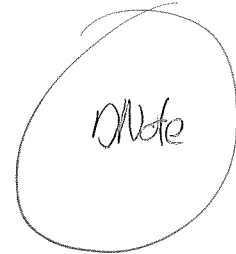
****NOTE: There should probably be a deadline for submitting the annual report.

22 4. The department shall evaluate reports submitted under subd. 3. If the
23 department determines that a county or other entity is not using the payments to

1 effectively reduce the amount of phosphorus entering the waters of the state from
2 nonpoint sources, the department may require permittees who made the payments
3 to make future payments to a different county or entity.

4 5. A county shall notify the department if it chooses not to participate in the
5 program under this subsection.

6 (END)



Note

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P1ins
RCT:.....

1 **Insert 1-4**

2 **SECTION 1.** 283.15 (7) of the statutes is created to read:

3 283.15 (7) COMPLIANCE WITH WATER QUALITY STANDARD FOR PHOSPHORUS (a) In
4 this subsection, "adaptive management option" means an approach to achieving
5 compliance with a water quality standard under which a permittee implements a
6 plan to achieve ^{the} a water quality standard ^{CS} adopted under s. 281.15 ^{MOVE} through verifiable
7 reductions in the amount of water pollution from point sources and nonpoint sources,
8 as defined in s. 281.15 (1) (e), in a watershed and uses monitoring data and other
9 information to adjust the plan if needed to achieve compliance.

10 (b) If the department authorizes a permittee to use an adaptive management
11 option to achieve compliance with the water quality standard for phosphorus, the
12 department may specify a date under sub. (5) that provides 5 permit terms for the
13 permittee to comply with its water quality based effluent limitation for phosphorus.

14 **Insert 6-5-note**

15 * ^{no 9} Or is the intent that the public be given the opportunity to comment on the issues
(rather than on DOA's decisions) ^{and that} with the comment period ^{take} taking place within the 3
months that DOA is given to make its decisions?

15 **Insert 6-21**


16 ^{no 9} , except that for a minor source with a discharge from a lagoon treatment work,
17 the department may only approve the application before the end of the useful life of
18 the lagoon that exists on the effective date of this subdivision [LRB inserts date]

19 **Insert 7-5**

20 3. The department shall approve the request of a permittee for an effluent
21 limitation under sub. (6) (a) 2., 3., or 4. based on conventional control technology, if
22 the permittee demonstrates that it cannot reasonably achieve the numeric limit in

1 sub. (6) (a) 2., 3., or 4. and provides sufficient information for the department to
2 determine the concentration of phosphorus that can be achieved by the use of
3 concentration of conventional control technology.

***NOTE: Is this consistent with the intent of the proposal?



**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3079/P1dn

RCT./:....

gjs

- late -

This is a preliminary draft of the proposal for a statewide variance from the water quality standard for phosphorus. The draft is quite complex and it should be reviewed carefully. There are notes in the draft raising issues about specific provisions in the draft.

This draft does not allow a minor source to increase its phosphorus discharge above the level achieved on the effective date of the bill, but the provisions for establishing interim effluent limitations for other sources could allow those sources to increase the concentration of their phosphorus discharges. Is that intended? If so, might that cause any problem in obtaining EPA approval of the waiver? ✓

The proposed language included a statement that the right to a hearing on variance decisions is limited to the right to a hearing under s. 283.63. That is not necessary and should not be included unless there is another provision that provides a right to a hearing. Please let me know if there is another provision. ✓

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3079/P1dn
RCT:cjs:jf

October 7, 2013

This is a preliminary draft of the proposal for a statewide variance from the water quality standard for phosphorus. The draft is quite complex and it should be reviewed carefully. There are notes in the draft raising issues about specific provisions in the draft.

This draft does not allow a minor source to increase its phosphorus discharge above the level achieved on the effective date of the bill, but the provisions for establishing interim effluent limitations for other sources could allow those sources to increase the concentration of their phosphorus discharges. Is that intended? If so, might that cause any problem in obtaining EPA approval of the waiver?

The proposed language included a statement that the right to a hearing on variance decisions is limited to the right to a hearing under s. 283.63. That is not necessary and should not be included unless there is another provision that provides a right to a hearing. Please let me know if there is another provision.

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

Tradewell, Becky

From: Brabender, Lindsey
Sent: Thursday, October 24, 2013 10:31 AM
To: Tradewell, Becky
Subject: Phosphorous Bill Draft - LRB 3079/P1
Attachments: 201310241021.pdf

Attorney Tradewell,

We received a copy of the preliminary draft referenced above relating to phosphorous regulation. Attached I have responses to the inquiries you framed in your drafter's note and throughout the draft. Please let me know if you have any other questions or if clarification is needed on any of the responses attached.

Sincerely,
Lindsey

Lindsey Brabender
Research Coordinator and Legal Counsel
Office of State Senator Paul Farrow 6-9174
33rd Senate District

**Responses to Questions from Legislative Reference Bureau
Draft LRB-3079/P1**

Response to Drafter's Cover Note

1. The note asks whether a discharger may be able to increase its discharge if it is given an interim limit higher than its current discharge; and if so whether that creates any issues under the Clean Water Act (CWA). It should not for several reasons. First, the anti-degradation provisions of the CWA apply to permit *limits* not actual *discharge* levels. If the interim limit is lower than the current limit there should be no CWA issue, and under the bill all the interim limits are below the current 1.0 mg/l limit from NR 217. The fact that the actual discharge varies should not matter if it is below the applicable limit. Second, under the bill there is a financial incentive to discharge at the lowest level, because any discharge above 0.2 mg/l requires payments or other actions.
2. The note asks whether the reference to 283.63 is necessary. We included that to ensure that a hearing is not available under 227.42 and to clarify the applicable procedures.

Response to LRB's Imbedded Questions on Preliminary Draft

1. **Page 2, After Line 11:** Basin is the term that is typically used in Wisconsin even though it is not consistent with the federal term of a HUC-8. Recommend no change.
2. **Page 2, After Line 13:** This reference should be ok because these are the categories used for WPDES permits. Recommend no change.
3. **Page 2, After Line 17:** The language "optimal use" of the most effective technology would expand the definition beyond what was intended. We would however, recommend some clarification such as "the optimal use of the technology most commonly in use at point sources in the same category in the majority of the states adjoining this state."
4. **Page 3, at top of page:** The definition of permit is consistent with the intent of the proposed definition. Recommend no change.
5. **Page 3, After Line 4:** The definition uses language that has been used in permits and therefore is familiar to both permit drafters and permittees. Recommend no change.

6. **Page 3, After Line 6:** Agree with note. Recommend revising the definition to read: "Minor source" means a point source with a discharge from a lagoon treatment work that consists primarily of a stabilization pond system or a lagoon system or with a discharge of less than 100,000 gallons per day."
7. **Page 4, After Line 2:** Yes. Recommend adding provision similar to section (3)(d).
8. **Page 4, After Line 10:** Agree with note. Recommend revising section to read: A calculation of the statewide per household cost for water pollution control by publicly owned treatment works after ~~complying with water quality based effluent limitations for phosphorus~~ and a calculation of the percentage of median household income the per household cost represents.
9. **Page 5, After Line 15:** The variance for major sources ends after 4 permit terms, but does not end for minor sources. We agree that review of findings and requirements for a variance will still have to be done for minor sources after that point. However, this is a matter best left to DNR discretion at that time. Recommend no change.
10. **Page 6, After Line 16:** The public notice should allow for comments on the preliminary decision. Therefore this section should be revised as follows:
 - (d)
 1. The department of administration shall provide public notice of its preliminary decisions under par. (c) and shall provide the opportunity for public comment on the decisions for at least 30 days following the public notice.
 2. All written comments submitted during the period for comment shall be retained by the department of administration and considered in the formulation of the final decision.
 3. The department of administration shall issue the final decision within 30 days of the close of the public comment period.
 - (e) The department of administration shall send a notice that describes its final decisions under par. (d) to the legislative reference bureau for publication in the administrative register.
11. **Page 7, After Line 13:** Agree with note. Recommend revising the section as follows:
 - (b) 1. The department shall approve an application under par. (a) for a minor source, except that for a minor source with a discharge from a lagoon ~~treatment work~~ treatment work that consists primarily of a stabilization pond system or a

lagoon system, the department may only approve the application before the end of the useful life of the lagoon treatment work that exists on the effective date of this subdivision[LRB.inserts date].

12. **Page 8, at top of page:** Yes. Recommend no change.
13. **Page 8, After Line 8:** No, this is language that will be understood by permit drafters and permittees. Recommend no change.
14. **Page 8, After Line 17:** This is consistent with language in the phosphorus guidance as well as the language in the permits. Recommend no change.
15. **Page 9, After Line 10:** The scenario discussed in the note would not happen because these variances are only available for existing sources as of the date the phosphorus limits became effective in 2010. A source that started in 2010 (and is considered an existing source) would have 5 years of data by the time its permit was up for reissuance. Recommend no change.
16. **Page 9, After Line 15:** First question: No, see answer to Drafter's Notes 1. Recommend no change.

Second question: Upon further review all of the references in this subsection to 6 month average should be changed to "monthly average" to ensure consistency with EPA regulations. This would include Page 8 Lines: 8, 14 and 19, and Page 9 Line 4
17. **Page 10, After Line 18:** No, should not be limited only to nonpoint sources. Recommend no change.
18. **Page 12, at top of page:** No, the first year for adjustment should be 2015. Recommend no change.
19. **Page 12, After Line 18:** Yes. Recommend the following revision: 3. By May 1 of the following year, a county or other entity receiving payments under this subsection shall submit an annual report...

Additional Suggested Revisions and Comments

1. **Page 2, lines 1-2:** Amend this section to read:

...nonpoint sources, as defined in 281.16(1)(e), in a watershed basin or area defined by the department and uses monitoring data, modeling and other appropriate information to adjust the plan if needed to achieve compliance.

2. **Page 2, line 18:** revise definition to read "Existing source" means a point source that was subject to ~~covered by~~ a permit issued on or before December 1, 2010.
3. **Page 3, lines 12-15:** The definition of water quality based effluent limitation includes TMDLs. In the comparison of the drafter's version and our proposal, there are a number of places where TMDLs are not mentioned but this is covered because of the definition of water quality based effluent limitation.
4. **Page 4, lines 15 and 18:** Clarification that the DOA's determination is made on a statewide basis.
5. **Page 5, line 6:** Revise review period to be every 10 years consistent with recent EPA proposed rule making.
6. **Page 5, line 17; Page 6, line 4:** The draft language refers to "each report" but there should be only one report with multiple sections. Recommend the deletion of "each".
7. **Page 6, lines 9-13:** Revise the language to reflect that the DNR not DOA should be determining the appropriate effluent limitations. Recommend the following revision:
 2. If the department of administration decides under subd. 1. that the determination remains accurate, decide whether it is appropriate to apply more stringent effluent limitations than those in sub. (5) or (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, ~~decide what those more stringent effluent limitations are~~ direct the department of natural resources to determine the more stringent effluent limitations.
8. **Page 7 lines 14 to 18.** Revise the language to make it clear that if the permittee makes an application and agrees to abide by the statutory conditions that the department shall approve the variance. Recommend changing the language as follows:
 2. The department shall approve an application under par. (a) for a point source that is not a minor source if the permittee ~~includes in its application an analysis that demonstrates that through optimizing the operation of the point source to control the discharge of phosphorus, the permittee~~ agrees to will comply with the requirements of ~~the variance that are applicable to the point source~~ sub (6).

9. **Page 10, line 3:** 0.5 milligrams per liter should read 0.4 milligrams per liter.

10. **Pages 10 – 13:** In our last version we attempted to add an alternative to the payments to counties by adding the term “or project if approved by the department.” The draft legislation includes “other entities” can receive payments but then does not identify what these other entities are, the requirements for how they are organized or how DNR determines they are appropriate entities to receive the money. Recommend deleting the term “other entities” in these sections including: Page 10 line 13, Page 11 lines 8, 13, Page 12 lines 1, 6, 8, 9, 12, 15, 20, and 23. There is sufficient flexibility provided by the options on page 10 lines 13-24.

11. **Page 12, lines 1-11:** Add reference to DATCP criteria so that the section would read:

(b) 1. A county shall use payments received under this subsection to provide cost sharing under ss. 92.14(6) and 281.16 (3) (e) or (4) for projects to reduce the amount of phosphorus entering the waters of the state or for staff to implement projects to reduce the amount of phosphorus entering the waters of the state from nonpoint sources.

2. A county shall use at least 60 percent of the amounts received under this subsection to provide cost sharing under ss. 92.14(6) and 281.16 (3) (e) or (4). If, during a year, a county uses payments received under this subsection to fill one or more full-time equivalent positions, the county shall use at least 75 percent of the payments received under this subsection in the next year to provide cost sharing under ss. 92.14(6) and 281.16 (3) (e) or (4).

12. **Page 12, line 14:** Add department of agriculture, trade and consumer protection to the list of departments receiving the report.

13. **Page 12, lines 22-23; Page 13, lines 1-2:** If the DNR determines that a County should not receive payments or County opts out from receiving payments, there should be some direction from the DNR on where the payments should be sent. Recommend the following revision:

4. The department shall evaluate reports submitted under subd. 3. If the department determines that a county or other entity 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 make future payments to a different county or entity. The department shall identify a different county to which the payments will be made.

5. A county shall notify the department if it chooses not to participate in the program under this subsection. In the event a county chooses not to participate, the department shall identify a different county to which payments will be made.

14. Page 13: Add a section to clarify what happens when a basin is in multiple counties. Recommend the following:

6. In basins that consist of multiple counties, the department of natural resources shall direct which county shall receive payments from the permittee.

15. Add revision to 283.63(1)(am) to reference new section.

(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 ss. 283.15 or 283.16. ...

11/29/2013 Phone conversation with Marney Hoefler regarding their response to LRB-3079/P10

Their points on embedded notes:

(re: notes on page 4, after line 2, and page 6, after line 16)
#1's 7 and 10: I had questions about the timing. She will review issue and provide more information.

✓ # 8. (re: note on page 4, after line 10) I didn't understand why they wanted to eliminate some language. We discussed and I agreed to try to make the language more clearly reflect EPA's policy - both current costs and projected cost of complying with phosphorus WQBE's.

#11. (re: 2nd question in note following page 9, line 15) I asked whether "as a monthly average" should be added. She will check.

Their additional revisions:

✓ #2. (re: page 2, line 18) I indicated that I don't understand the proposed language. Marney agreed that the language in the draft is clearer.

#5. (re: page 5, line 6) I pointed out that in the materials accompanying the proposed rule, EPA states "Variances are WQS... As WQS, variances are subject to §131.20(a) and thus must be reviewed on a triennial basis." ^{78 FR 171 (9/4/13) page 54532} Marney indicated that they are trying to minimize workload for DOA+DMR given that they feel it is unlikely that new technology will be available soon. They will take another look at this. ^{the proposed rule provides for a maximum variance of 10 days but}

#7 (page 6, lines 9-13) Marney will review this in connection with #1's 7 & 10 above, concerning deadlines which agency does what.

8. (re: pages 7, lines 14-18) I asked why eliminated the language "the variance that are applicable to the point source." She will check.

#11. (re: page 12, lines 1-11) I explained that 281.16(3)(e) and (4) limit the application of the performance standards, etc., unless cost sharing is available under s. 92.14 or 281.65 or from any other sources. The money paid to counties under this proposal would not come from NATCP under s. 92.14 or from DNR under s. 281.65. It would come from "any other source," so it doesn't make sense to refer to s. 92.14. If they want some of the restrictions in s. 92.14(6) to apply, for example, the draft will need to be changed in some other way. She will look into this.

RT

- 3079/P1

10/31/13 Meeting with Massey Hofer -

1. She brought attachments to explain how the timing should work for the determinations and reviews.
2. Regarding their points under response to my drafter's note: Instead, they want the process to be like the process in s. 283.15, specifically sub. (2)(am), (4)(b), (8) + (9). This is only applicable to the request for the variance for a particular source.
(relating to page 5 line 6)
3. Regarding their instruction # 5 under "Additional suggested revisions and comments," they want 10 year review of variance. Feel that LRB's position is unclear. If EIA objects, it can be changed.
- ✓ 4. Regarding their instruction number 8 (relating to page 7, line 14-18), they feel the language they propose to eliminate on last line of their instruction is unnecessary.
- ✓ 5. Regarding their instruction number 11 (relating to page 12, lines 1-11), they now agree that change need not be made.

RUT

reid, 10/31/13

Process Timeline for Phosphorus Legislation

1. Initial Determination by Department of Administration (sub.2)

a. **Current language:**

Effective Date of Legislation

↓ (60 Days)

DOA determines whether attaining the water quality standard for phosphorus through compliance with WQBEL is not feasible because it would cause substantial and widespread adverse social and economic impacts on statewide basis. DOA publishes determination in the administrative register.

↓ (30 Days)

Determination provided for public comment for at least 30 days.

b. **Proposed change:**

Effective Date of Legislation

↓ (60 Days)

DOA makes preliminary determination whether attaining the water quality standard for phosphorus through compliance with WQBEL is not feasible because it would cause substantial and widespread adverse social and economic impacts on statewide basis. DOA publishes notice through electronic notification system established by DOA (i.e. govdelivery) that preliminary determination is available for public comment.

↓ (30 Days)

Preliminary determination provided for public comment for at least 30 days.

↓ (30 Days)

DOA incorporates public comments into determination and finalizes determination. DOA publishes notice of availability of final determination in the administrative register.

revid. 10/31/13

2. Review of Findings and Requirements for Variance (sub. 3)

a. **Current language:**

September 1, 2016 (and every 3 years after) DNR submits a report to DOA regarding any changes in technology available for controlling phosphorus discharges from point sources and regarding the effluent limitations for phosphorus that are reasonably achievable.

↓ (90 Days)

DOA reviews DNR's report and decide whether the determination that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations is not feasible remains accurate and if accurate whether it is appropriate to apply more stringent effluent limitations based upon the availability and cost effectiveness of technology for compliance.

↓ (30 Days)

DOA provides public notice of its decisions and shall provide the opportunity for public comment on the decisions for at least 30 days. (Unclear whether this is within the 90 days the DOA has to review or if this is separate)

b. **Proposed change:**

August 1, 2016 (and every 3 years after) DNR submits a report to DOA regarding any changes in technology available for controlling phosphorus discharges from point sources and regarding the effluent limitations for phosphorus that are reasonably achievable.

↓ (60 Days)

DOA reviews DNR's report and makes a preliminary decision whether the determination that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations is not feasible remains accurate and if accurate whether it is appropriate to apply more stringent effluent limitations based upon the availability and cost effectiveness of technology for compliance. DOA provides public notice through electronic notification system established by DOA (i.e. govdelivery) of its preliminary decisions and shall provide the opportunity for public comment on the preliminary decisions for at least 30 days.

↓ (30 Days)

Preliminary decisions provided for public comment for at least 30 days.

↓ (30 Days)

DOA incorporates public comments into decisions and finalizes decisions. DOA publishes notice of availability of final determination in the administrative register.



State of Wisconsin
2013 - 2014 LEGISLATURE

Wed, 11/6, if possible



LRB-3079/P~~A~~ 2

RCT:cjs:jf

RMV

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Note

Gen Cat

1 AN ACT *to create* 283.13 (7) and 283.16 of the statutes; **relating to:** phosphorus
2 discharges to the waters of the state and a statewide variance from the water
3 quality standard for phosphorus for certain dischargers.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

4 **SECTION 1.** 283.13 (7) of the statutes is created to read:
5 283.13 (7) COMPLIANCE WITH THE WATER QUALITY STANDARD FOR PHOSPHORUS. (a)
6 In this subsection, “adaptive management option” means an approach to achieving
7 compliance with a water quality standard adopted under s. 281.15 under which a
8 permittee implements a plan to achieve the water quality standard through
9 verifiable reductions in the amount of water pollution from point sources and

1 nonpoint sources, as defined in s. 281.16 (1) (e), in a watershed and uses monitoring
2 data ^{and modeling} and other ^{appropriate} information to adjust the plan if needed to achieve compliance.

Inset 2-1

3 (b) If the department authorizes a permittee to use an adaptive management
4 option to achieve compliance with the water quality standard for phosphorus, the
5 department may specify a date under sub. (5) that provides 5 permit terms for the
6 permittee to comply with its water quality based effluent limitation for phosphorus.

7 SECTION 2. 283.16 of the statutes is created to read:

8 **283.16 Statewide variance for phosphorus.** (1) DEFINITIONS. In this
9 section:

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

****NOTE: The federal term for the 8-digit hydrologic unit is "subbasin." Do you
want the draft to use the term "subbasin"?

12 (b) "Category" means a class or category of point sources specified by the
13 department under s. 283.13 (1).

****NOTE: The list is in NR 220.02, Wis. Adm. Code. The categories in the rule differ
somewhat from the federal categories. Is this approach acceptable?

14 (c) "Conventional control technology" means optimal use of a technology for
15 controlling phosphorus discharges that is appropriate for a point source and that is
16 ^{most commonly used} ~~in use~~ at point sources in the same category in the majority of states adjoining this
17 state.

****NOTE: Might there be more than one technology that would satisfy this
definition for a particular point source? If so, I assume that the technologies might not
be equally effective at removing phosphorus. Would a permittee be allowed to select any
of these technologies to use as the basis for setting an interim limit under sub. (6)? Should
it be "the optimal use of the most effective technology for controlling phosphorus
discharges ..." or something like that?

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

****NOTE: Please note that "permit" is a defined term for ch. 283

1 (e) "Major facility upgrade" means construction or installation, including
2 installation of a filtration system, for which the permittee must acquire a substantial
3 amount of property or for which the permittee must the develop an extensive
4 financing plan and obtain financing.

****NOTE: Please consider whether this definition is sufficiently clear to ensure that
it will have the effect that is wanted where the term is used in the draft (sub. (5) (b)).

5 (f) "Minor source" means a point source with a discharge from a lagoon
6 treatment work ^{Insert 3-6} or with a discharge of less than 100,000 gallons per day.

****NOTE: I used "treatment work" because it is a defined term for ch. 283. It might
be helpful to define "lagoon treatment work" or "lagoon system." NR 217.19 (1) (a), Wis.
Adm. Code, refers to a system "that consists primarily of a stabilization pond system or
a lagoon system." Perhaps the draft should include the "consists primarily of"
requirement. Should this also mention stabilization pond systems?

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

8 (h) "Target value" means the number of pounds of phosphorus that would be
9 discharged from a point source during a year if the average concentration of
10 phosphorus in the effluent discharged by the point source during the year was 0.2
11 milligrams per liter.

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

16 (2) INITIAL DETERMINATION CONCERNING THE WATER QUALITY STANDARD FOR
17 PHOSPHORUS. (a) No later than the 60th day after the effective date of this paragraph
18 [LRB inserts date], the department of administration shall determine whether
19 attaining the water quality standard for phosphorus, adopted under s. 281.15,
20 through compliance with water quality based effluent limitations is not feasible

1 because it would cause substantial and widespread adverse social and economic
2 impacts on a statewide basis.

****NOTE: Does federal law require notice and opportunity for public comment for this initial determination?

3 (b) The department of administration shall include all of the following in its
4 determination under par. (a):

5 1. A calculation of the statewide cost of compliance with water quality based
6 effluent limitations for phosphorus.

7 2. A calculation of the statewide per household cost for water pollution control
8 by publicly owned treatment works ^{Insert 4-8.} after complying with water quality based
9 effluent limitations for phosphorus and a calculation of the percentage of median
10 household income the per household cost represents.

****NOTE: The request seemed to be referring only to the additional costs that would be incurred because of WQBEL's for phosphorus, but my impression is that EPA looks at what the total costs of sewage treatment would be after the technology for complying with the WQBEL is installed.

11 3. A calculation of the statewide cost for minor sources to comply with water
12 quality based effluent limitations for phosphorus.

13 4. A determination of whether the cost of compliance with water quality based
14 effluent limitations for phosphorus would cause substantial adverse social and
15 economic impacts on a statewide basis.

16 5. A determination of whether the cost of compliance with water quality based
17 effluent limitations for phosphorus would cause widespread adverse social and
18 economic impacts on a statewide basis.

INSERT
4-18

Final

19 (e) The department of administration shall send a notice that describes its

20 determination under par. (a) and the information under par. (b) to the legislative

21 reference bureau for publication in the administrative register.

1 ^f (d) If the department of administration determines under par. (a) that
2 attaining the water quality standard for phosphorus through compliance with water
3 quality based effluent limitations is not feasible, the determination remains in effect
4 until the department of administration finds under sub. (3) (c) 1. that the
5 determination is no longer accurate.

6 (3) REVIEW OF FINDINGS AND REQUIREMENTS OF VARIANCE. (a) Every ¹⁰3 years,
7 beginning in ²⁰²³2016, if a determination under sub. (2) (a) that attaining the water
8 quality standard for phosphorus through compliance with water quality based
9 effluent limitations is not feasible is in effect, the department of natural resources
10 shall submit a report, no later than September 1, to the department of
11 administration regarding any changes in the technology available for controlling
12 phosphorus discharges from point sources and regarding the effluent limitations for
13 phosphorus that are reasonably achievable. The department of natural resources
14 shall consult with permittees that would be subject to water quality based effluent
15 limitations for phosphorus and other interested parties in preparing the report.

****NOTE: The variance for sources other than minor sources will terminate (after applying for 4 permit terms), so at some point this determination should only apply to minor sources. The draft does not yet reflect that. Does federal law or EPA practice affect whether "reasonably achievable" is a standard that is acceptable here?

16 (b) The department of natural resources shall include all of the following in
17 ^eeach ^areport under par. (a):

18 1. A determination of whether technology is reasonably available for point
19 sources to comply with effluent limitations for phosphorus that are more stringent
20 than those in sub. (5) or (6) (a).

21 2. A determination of whether technology is reasonably available for any
22 category of point sources to comply with effluent limitations for phosphorus that are
23 more stringent than those in sub. (5) or (6) (a).

3. A determination of whether any technology that is available for compliance with effluent limitations for phosphorus that are more stringent than those in sub. (5) or (6) (a) is cost effective.

(c) The department of administration shall review ^{of a} each report under par. (a) and within 3 months of receiving the report do all of the following:

1. Decide whether the determination that attaining the water quality standard for phosphorus through compliance with water quality based effluent limitations is not feasible remains accurate.

2. If the department ^{of administration} decides under subd. 1. that the determination remains accurate, decide whether it is appropriate to apply more stringent effluent limitations than those in sub. (5) or (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, decide what ^{specify} those more stringent effluent limitations are ^{preliminary} Insert 6-13

(d) The department of administration shall provide public notice of its ^{preliminary} decisions under par. (c) ^{Insert 6-15} and shall provide the opportunity for public comment on the decisions for at least 30 days following the public notice.

****NOTE: Should this require preliminary decisions before notice and comment and then final decisions? In other words, should there be an opportunity for the public comments to have an effect on DOA's decisions? Or is the intent that the public be given the opportunity to comment on the issues (rather than on DOA's decisions) and that the comment period take place within the 3 months that DOA is given to make its decisions?

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

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

Insert 6-16

x

1 quality based effluent limitations is not feasible is in effect, a permittee may apply
2 for the variance under this section for an existing source in any of the following ways:

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

Insert
7-4-3

3 ~~2~~ *Insert 7-4-A*
By requesting a modification of the permit. x

Insert
7-4-B

4 ~~3~~ If the department issued a permit to the permittee before the effective date x

6 of this subdivision [LRB inserts date], that includes a water quality based effluent
7 limitation for phosphorus and that requires the permittee to submit to the
8 department options for complying with the water quality based effluent limitation,
9 by submitting a request for the variance as a compliance option.

Insert
7-9

10 ~~1~~ 1. The department shall approve an application under par. (a) for a minor x

11

source, except that for a minor source with a discharge from a lagoon treatment work, *Insert 2-11*

12 the department may only approve the application before the end of the useful life of

13

the lagoon *or treatment work* that exists on the effective date of this subdivision [LRB inserts date].

****NOTE: Might a lagoon treatment work have more than one lagoon?/

14 2. The department shall approve an application under par. (a) for a point source

15

that is not a minor source if the permittee includes in its application an analysis that

16

demonstrates that through optimizing the operation of the point source to control the

17

discharge of phosphorus, the permittee will comply with the requirements of the

18

variance that are applicable to the point source. *agrees to under sub. (6)*

19 3. The department shall approve the request of a permittee for an effluent

20 limitation under sub. (6) (a) 2., 3., or 4. based on conventional control technology if

21 the permittee demonstrates that it cannot reasonably achieve the numeric limit in

22 sub. (6) (a) 2., 3., or 4. and provides sufficient information for the department to

23 determine the concentration of phosphorus that can be achieved by the use of

24 conventional control technology.

****NOTE: Is this consistent with the intent of the proposal?

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

Insert
8-32

(5) VARIANCE PROVISIONS FOR MINOR SOURCES. Except as provided in sub. (7), the
4 department shall include all of the following in the permit for a minor source for
5 which the department approves the variance under this section:

6 (a) In the first permit for which the department approves the variance, an
7 initial effluent limitation for phosphorus that is equal to the performance of the
8 minor source on the effective date of this paragraph ... [LRB inserts date].

****NOTE: I think that the draft should be more specific about what is meant by "the
performance of the facility on the effective date."

9 (b) In the first permit for which the department approves the variance, a
10 requirement to implement, before the end of the term of that permit, a plan to
11 optimize the operation of the minor source to limit the amount of phosphorus
12 discharged to the extent possible without a major facility upgrade.

13 (c) In the second permit for which the department approves the variance, a
14 requirement to achieve, by the end of the term of that permit, compliance with an
15 effluent limitation for phosphorus equal to the concentration of phosphorus achieved
16 by optimizing the operation of the minor source as provided in the plan under par.

17 (b), calculated as a monthly average.

****NOTE: I think that the language should be more specific about what "by the end
of the term of that permit" means. Something like "to achieve, by the last month of the
term of that permit," might work, if that is what is intended.

18 (d) In the third and each subsequent permit for which the department approves
19 the variance, a requirement to maintain compliance with the effluent limitation for
20 phosphorus described in par. (c).

1 (6) VARIANCE PROVISIONS FOR OTHER DISCHARGERS. (a) Except as provided in sub.
2 (7), the department shall include all of the following in the permit for a point source,
3 other than a minor source, for which the department approves the variance under
4 this section:

5 1. In the first permit for which the department approves the variance, a
6 requirement to achieve, by the end of the term of that permit, compliance with an
7 effluent limitation for phosphorus equal to the greater of 0.8 milligrams per liter as
8 a ~~6-month~~ ^{monthly} average or a concentration as a ~~6-month~~ ^{monthly} average that is 20 percent lower
9 than the average concentration of phosphorus in the source's effluent for the past 5
10 years.

****NOTE: Is this what is intended? Might there be an existing source that would not have operated for 5 years when the effluent limitation must be established?

11 2. In the 2nd permit for which the department approves the variance, a
12 requirement to achieve, by the end of the term of that permit, compliance with an
13 effluent limitation for phosphorus equal to the greater of 0.6 milligrams per liter as
14 a ~~6-month~~ ^{monthly} average or the concentration of phosphorus that can be achieved by the
15 use of conventional control technology, ^{as a monthly average}

****NOTE: Might a limit based on conventional control technology be higher than a limit under subd. 1. based on the source's past performance? If so, might there be a problem with getting EPA approval of a waiver that allows a source to discharge a higher concentration of phosphorus than allowed in the earlier permit term?
Should "as a 6-month average" also be included for a limit based on conventional control technology?

16 3. In the 3rd permit for which the department includes the variance, a
17 requirement to achieve, by the end of the term of that permit, compliance with an
18 effluent limitation for phosphorus equal to the greater of 0.5 milligrams per liter as
19 a ~~6-month~~ ^{monthly} average or the concentration of phosphorus that can be achieved by the
20 use of conventional control technology, ^{as a monthly average}

1 4. In the 4th permit for which the department includes the variance, a
2 requirement to achieve, by the end of the term of that permit, compliance with an
3 effluent limitation for phosphorus equal to the greater of 0.5^{0.4} milligrams per liter as
4 a ~~6-month~~^{3-monthly} average or the concentration of phosphorus that can be achieved by the
5 use of conventional control technology^{as a monthly average} and a compliance schedule that requires the
6 permittee to achieve compliance with the water quality based effluent limitation for
7 phosphorus not more than 5 years after the end of the term of that permit.

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

13 1. Making payments to a county or other entity as provided in sub. (8).

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

****NOTE: Is this intended to be limited to reductions from nonpoint sources?

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

1 (7) MORE STRINGENT EFFLUENT LIMITATIONS. If the department of administration
2 determines under sub. (3) (c) 2. that it is appropriate to apply more stringent effluent
3 limitations than those in sub. (5) or (6) (a) to all point sources or to a category of point
4 sources, the department of natural resources shall include the more stringent
5 effluent limitations specified under sub. (3) (c) 2. in permits reissued, modified, or
6 revoked and reissued after that determination for all point sources or for the category
7 of point sources to which the more stringent effluent limitations apply.

8 (8) PAYMENTS TO COUNTIES OR OTHER ENTITIES. (a) 1. A permittee that chooses
9 to make payments for phosphorus reduction under sub. (6) (b) 1. shall make the
10 payments to a county that is participating in the program under this subsection and
11 that has territory within the basin in which the point source is located or, with the
12 approval of the department, to another county participating in the program or to
13 another entity. ^{Insert 11-13} The permittee shall make a payment by March 1 of each calendar
14 year in the amount equal to the per pound amount under subd. 2. times the number
15 of pounds by which the amount of phosphorus discharged by the point source during
16 the previous year exceeded the point source's target value.

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

****NOTE: I assumed that the per pound payment should not be adjusted in 2014. Please let me know if this should be changed.

1 (b) 1. A county or other entity shall use payments received under this
 2 subsection to provide cost sharing under s. 281.16 (3) (e) or (4) for projects to reduce
 3 the amount of phosphorus entering the waters of the state or for staff to implement
 4 projects to reduce the amount of phosphorus entering the waters of the state from
 5 nonpoint sources.

6 2. A county or other entity shall use at least 60 percent of the amounts received
 7 under this subsection to provide cost sharing under s. 281.16 (3) (e) or (4). If, during
 8 a year, a county or other entity uses payments received under this subsection to fill
 9 one or more full-time equivalent positions, the county or other entity shall use at
 10 least 75 percent of the payments received under this subsection in the next year to
 11 provide cost sharing under s. 281.16 (3) (e) or (4).

12 3. ^{Insert 12-12} A county or other entity ^{receives} receiving payments under this subsection ^{the county} shall
 13 submit an annual report to the department of natural resources, the department of
 14 administration, ^{Insert 12-14} and ^{to} each permittee from which it received payments during the
 15 previous year. In the annual report, the county or other entity shall describe the
 16 projects for which it provided cost sharing, quantify the associated phosphorus
 17 reductions achieved using accepted modeling technology, and identify any staff
 18 funded with the payments.

****NOTE: There should probably be a deadline for submitting the annual report.

19 4. The department shall evaluate reports submitted under subd. 3. If the
 20 department determines that a county or other entity is not using the payments to
 21 effectively reduce the amount of phosphorus entering the waters of the state from
 22 nonpoint sources, the department may require permittees who made the payments
 23 to make future payments to a different county or entity. ^{Insert 12-23}

1 5. A county shall notify the department if it chooses not to participate in the
2 program under this subsection.

3

(END)

Insert 13-2

Note

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P2ins
RCT:.....

1

2

Insert 2-1

3

no 11

basin or other area specified by the department

4

Insert 3-6

5

no 11

that consists primarily of a stabilization pond system or a lagoon system

6

Insert 4-8

7

no 11

, including the projected costs of compliance

8

Insert 4-18

9

(c) The department of administration shall make a preliminary determination

10

under par. (a) no later than the 60th day after the effective date of this paragraph

11

[LRB inserts date]. The department of administration shall provide public notice,

12

through an electronic notification system that it establishes or selects, of its

13

preliminary determination and shall provide the opportunity for public comment on

14

the preliminary determination for at least 30 days following the public notice.

15

(d) The department of administration shall consider any public comments in

16

making its final determination under par. (a) and shall make the final determination

17

no later than the 30th day after the end of the public comment period. ✓

18

Insert 6-13

19

no 11

based on the report of the department of natural resources under par. (a)

20

Insert 6-15

21

no 11

no later than the 60th day after receiving the report under par. (a)

22

23

1 **Insert 6-16**

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

5 **Insert 7-3**

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

9 **Insert 7-4-A**

10 ^{not} If the department issued a permit to the permittee before the effective date of
11 this subdivision [LRB inserts date], that includes a water quality based effluent
12 limitation for phosphorus,

13 **Insert 7-4-B**

 ****NOTE: Should there be a time limit for requesting the modification (given the
time limit in subd. 2., which is based on s. 283.15 (2) (am) 1.?

14 **Insert 7-9**

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

1 continue in effect until the last day for seeking review of the department's final
2 decision or a later date fixed by order of the reviewing court.

***NOTE: This is based on s. 281.15 (2) (am) 2. Perhaps the last sentence is not needed or perhaps it should be modified to better fit this context.

3 **Insert 7-11**

4 (w/9)

that consists primarily of a stabilization pond system or a lagoon system

5 **Insert 8-2**

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

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

12 **Insert 11-13**

13 (w/9)

If more than one county that participates in the program under this ^{sub}section has
14 territory within the basin in which the point source is located, the permittee shall
15 make the payments to the county specified by the department.

16 **Insert 12-12**

17 (w/9)

No later than May 1 of the year following a year in which

18 **Insert 12-14**

19 (w/9)

the department of agriculture, trade and consumer protection,

20 **Insert 12-23**

21 (w/9)

specified by the department

22 **Insert 13-2**

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



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

History: 1973 c. 74; 1979 c. 110, 221; 1985 a. 182 s. 57; 1987 a. 27, 60; 1995 a. 227 s. 875; Stats. 1995 s. 283.63; 2011 a. 167.

11 **SECTION 2.** 283.63 (4) of the statutes is amended to read:



12 283.63 (4) Subsections (1) and (2) do not apply to the modification of a permit
13 which implements a decision under s. 283.15 or 283.16 or the denial of a request for
14 a variance under s. 283.15 or 283.16. A proceeding under subs. (1) and (2) shall not
15 be delayed pending completion of the review of a variance request under s. 283.15
16 or 283.16.

History: 1973 c. 74; 1979 c. 110, 221; 1985 a. 182 s. 57; 1987 a. 27, 60; 1995 a. 227 s. 875; Stats. 1995 s. 283.63; 2011 a. 167.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P2dn

RCT./:....

gjs

— date —

This is a redraft of the proposal creating a statewide variance from the numeric water quality standard for phosphorus. There are many changes from the first version, so it should be reviewed carefully.

One of the instructions was to use certain provisions in s. 283.15 for the process under this proposal. It did not quite work to simply use cross-references, so I modified language from those provisions to work with the rest of proposed s. 283.16.

As requested, this redraft changes the period for review of the variance from three years to ten years, based (as I understand it) on the Environmental Protection Agency's proposed regulation on variances from water quality standards, published in the Federal Register on September 4, 2013. The proposed regulation states that variances must have an expiration date that is as short as possible and that may not exceed 10 years. The introductory materials in the Federal Register state that establishing an expiration date will ensure that the conditions of a variance will be reevaluated and subject to a public review on a regular basis. The same materials state that, as water quality standards, variances must be reviewed on a triennial basis.

These positions by EPA may seem to be inconsistent. However, as I understand it, EPA has provided in the past that three-year review of variances would be required, even though it might require review during the term of a variance. For example, the EPA Great Lakes Water Quality Implementation Procedures, in 40 CFR 132, Appendix F, state that variances may last up to five years and that a state must review and **modify** variances, as necessary, as part of the state's triennial review of water quality standards. It seems unlikely to me that EPA would approve a statewide variance that provides for review only every 10 years.

Please contact me with questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3079/P2dn
RCT:cjs:jm

November 5, 2013

This is a redraft of the proposal creating a statewide variance from the numeric water quality standard for phosphorus. There are many changes from the first version, so it should be reviewed carefully.

One of the instructions was to use certain provisions in s. 283.15 for the process under this proposal. It did not quite work to simply use cross-references, so I modified language from those provisions to work with the rest of proposed s. 283.16.

As requested, this redraft changes the period for review of the variance from three years to ten years, based (as I understand it) on the Environmental Protection Agency's proposed regulation on variances from water quality standards, published in the Federal Register on September 4, 2013. The proposed regulation states that variances must have an expiration date that is as short as possible and that may not exceed 10 years. The introductory materials in the Federal Register state that establishing an expiration date will ensure that the conditions of a variance will be reevaluated and subject to a public review on a regular basis. The same materials state that, as water quality standards, variances must be reviewed on a triennial basis.

These positions by EPA may seem to be inconsistent. However, as I understand it, EPA has provided in the past that three-year review of variances would be required, even though it might require review during the term of a variance. For example, the EPA Great Lakes Water Quality Initiative Implementation Procedures, in 40 CFR 132, Appendix F, state that variances may last up to five years and that a state must review and **modify** variances, as necessary, as part of the state's triennial review of water quality standards. It seems unlikely to me that EPA would approve a statewide variance that provides for review only every 10 years.

Please contact me with questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov

Tradewell, Becky

From: Henkel, Matt
Sent: Monday, December 30, 2013 1:20 PM
To: Tradewell, Becky
Subject: LRB-3079 Phosphorus

Becky, I'm sending over some changes to the draft of LRB-3079. I just wanted to give you a heads up that they're on their way and to let me know if you have any questions.

Hope you had a great Christmas!

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174