

12/10/2019

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

The Wisconsin Natural Resources Board adopts an order to **repeal** NR 538.18 (2) (a) 4. and 538 Appendix I; to **amend** NR 538.01, 538.02 (Note), 538.04 (1) and (3), 538.05, 538.18 (1) (intro.), (a), and (2) (b) 1., and 538.22 (1) and (4); to **repeal and recreate** NR 538.03, 538.06, 538.08, 538.10, 538.12, 538.14, 538.16, 538.18 (2) (a) 1. and (b) 3., 538.20 (1), 538.22 (2), and (3); and to **create** NR 538.04 (7) and (Note), 538.09, 538.18 (1) (a) (Note), 538.24, and 538 Appendix relating to the beneficial use of industrial byproducts and affecting small business.

WA-11-15

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted:

Section 289.05(4), Wis. Stats.

2. Statutory Authority:

Section 289.05(4), Wis. Stats., establishes the authority for promulgation of the proposed rule revisions.

3. Explanation of Agency Authority:

Section 289.05(4), Wis. Stats., requires that the department promulgate, by rule, standards for the reuse of foundry sand and other high-volume industrial waste. This resulted in the promulgation of ch. NR 538, Wis. Adm. Code, Beneficial Use of Industrial Byproducts, on August 1, 1997. Under the statute, the department is required to design the rules to allow and encourage, to the maximum extent possible consistent with the protection of public health and the environment, the beneficial reuse of high-volume industrial waste, to preserve resources, conserve energy and reduce or eliminate the need to dispose of high-volume industrial waste in landfills. In developing rules under this subsection, the department is required to review methods of reusing high-volume industrial waste that are approved by other states and incorporate those methods to the extent that the department determines is advisable. In developing rules, the department must also consider the analysis and methodology used by the U.S. Environmental Protection Agency (EPA) in determining the impacts on groundwater from various methods of reusing high-volume industrial wastes. These statutory provisions support the department's proposed changes to ch. NR 538, Wis. Adm. Code, which will update regulatory standards, simplify the rule to encourage beneficial use, and revise the standards to incorporate new research and uses.

4. Related Statutes or Rules:

Chapter NR 538, Wis. Adm. Code, for the Beneficial Use of Industrial Byproducts with an effective date of December 1997 and January 2006.

Section 289.43(7), Wis. Stats., for the Exemption from Licensing, Recycling of High-Volume Industrial Waste. This section authorizes the department to exempt a specific solid waste facility or specified types of facilities to allow recycling of any high-volume industrial waste.

Subsections 227.21(2)(b) and 291.05, Wis. Stats., for the incorporation by reference testing, monitoring and other technical standards established by the federal government and technical societies and organizations, to which reference is made in ch. NR 538 Wis. Adm. Code. Some materials that are incorporated by reference in the references listed below are hereby incorporated by reference and made a

part of ch. NR 538 Wis. Adm. Code. References include:

- (1) SW-846 test methods incorporated by reference in s. NR 538.06(3)(a).
- (2) ASTM D3987-12, "Test Method for Shake Extraction of Solid Wastes with Water" incorporated by reference in s. NR 538.06(3)(c).
- (3) ASTM C618-15, "Specification for Coal Fly Ash and Raw or Calcined Natural Pozzolan for Use in Concrete" incorporated by reference in s. NR 538.10(3)(f).
- (4) ACI 229R-13, "Controlled Low Strength Materials" incorporated by reference in s. NR 538.10(3)(g).

5. Plain Language Analysis:

The Beneficial Use Program originated in 1997, when chapter NR 538, Wis. Adm. Code, was first adopted. This code laid out a streamlined process whereby certain industrial byproduct such as coal combustion byproducts, foundry sand, lime-kiln dust, paper mill sludge and other high-volume industrial wastes with similar characteristics could be beneficially used in a variety of approved applications. The process was designed to be mostly self-implementing, with byproduct generators responsible for characterization of their material and annual reporting of materials used. For some projects, the rule provided for department review to evaluate the potential for impacts to human health or the environment.

The program has been generally successful, but the code needs updating to address new environmental standards, laws and changes in manufacturing and air pollution control processes, while continuing to encourage the beneficial use of waste materials that might otherwise be landfilled. To accomplish this, the department is proposing the following changes to ch. NR 538, Wis. Adm. Code:

(A) Update standards.

(1) The current chapter NR 538 Appendix I consists of Tables 1 through 4, each with a list of concentrations of elements and compounds that are compared to the test results of a water leach test and a totals analysis for each byproduct material to assign them to a reuse category of 1 through 5. Each category corresponds to a list of accepted reuse activities. The Appendix I standards were based on s. NR 140.10, Wis. Adm. Code, groundwater quality standards for the water leach test results, and ch. NR 720, Wis. Adm. Code, soil clean-up standards for the totals analysis results, as they existed in 1997 when ch. NR 538, Wis. Adm. Code, was promulgated. To update and simplify these tables and standards, the department proposes repealing Appendix I in its entirety and replacing it with an Appendix that includes the following changes:

a. Appendix Table 1, to establish water leach testing standards based on the current ground water quality enforcement standard (ES) exceedance values in ch. NR 140, Wis. Adm. Code. Table 1, Column 1A is based on the ES value and Table 1, Column 1B is based on five times the ES value. The required parameters for testing are based on published studies of each byproduct material or existing water leach performance data.

b. Appendix Table 2, to establish bulk testing standards based on Wisconsin Department of Health Services (DHS) modelling of potential ingestion and inhalation exposures from specific approved uses that are not covered or encapsulated.

c. Appendix Table 3, to establish bulk testing standards for the use of flue gas desulfurization (FGD) gypsum as an agricultural soil amendment based on standards established by the U.S. Department of Agriculture in Natural Resource Conservation Service (NRCS) Conservation Practice Code 333 or Wisconsin-specific background threshold values in accordance with s. NR 720, Wis. Adm. Code, for

certain elements.

d. Appendix Table 4, to establish eligible uses for byproduct materials that meet the standards thresholds in Appendix Tables 1-3.

(B) Simplify rule requirements.

(1) Section NR 538.08, Wis. Adm. Code, establishes criteria for assigning a byproduct material to one of five categories based on testing results in comparison to the standards in the Appendix I Tables 1 through 4. Each category of byproduct material is then allowed certain specified uses under s. NR 538.10, Wis. Adm. Code. The department proposes simplifying this requirement by eliminating the category designations and instead directly assigning eligible uses to each byproduct material based on test results and the revised Appendix Table 1-4 standards. To accomplish this, the following sections will be modified:

a. Section NR 538.08, Wis. Adm. Code, will be repealed and recreated to describe the standards by which each byproduct material will be assigned acceptable eligible uses.

b. Section NR 538.06, Wis. Adm. Code, will be repealed and recreated to describe the testing and reporting necessary in an initial certification or recharacterization submittal from a generator to obtain a concurrence from the department regarding the eligible uses for each byproduct material.

(C) Update eligible uses.

(1) Section NR 538.10, Wis. Adm. Code, lists all the eligible beneficial uses for industrial byproducts and establishes standards for their use. The department proposes repealing and replacing section NR 538.10, Wis. Adm. Code, to delete some previously approved uses and add some new uses that have been developed since the original promulgation of the rule. New, revised and deleted permitted beneficial uses under s. NR 538.10, Wis. Adm. Code, include the following:

(a) Section NR 538.10(1), Wis. Adm. Code, is created to allow for uses that are fully contained in a disposal facility, encapsulated and bound in a matrix, burned for fuel or converted into a product. There are few conditions placed on these eligible uses.

(b) Section NR 538.10(2) and s. NR 538.12, Wis. Adm. Code, are created to allow for the limited use of byproducts as geotechnical fill material. Eligible uses include subgrade fill beneath non-residential buildings, subgrade fill beneath roadways and paved lots, fill material in berms or parking areas to be covered with two feet of soil cover or gravel, foundry sand to be used as fill beneath livestock buildings, transportation facility embankments, and geotechnical fill to restore nonmetallic mine sites to a stable and safe condition.

(c) Section NR 538.10(3), Wis. Adm. Code, is created to allow for byproducts to be used in a variety of construction uses including as subgrade fill beneath a roadway, base aggregates as a gravel substitute, as utility trench backfill under paved roadways, as fill material in underground tank abandonments, as slabjacking material, as in-situ soil or pavement stabilization, as controlled low-strength flowable fill, and bonded surface course. Fully encapsulated transportation embankments, decorative stone and bridge abutments were deleted as eligible construction uses due to their limited future application potential.

(d) Section NR 538.10(4), Wis. Adm. Code, is created to allow for certain beneficial uses that are

unconfined by a soil or pavement cover and are not encapsulated within a matrix. These uses include unbonded surface course on roadways, parking lots or trails as a substitute for gravel, winter weather road abrasives, and manufactured soil blends made from spent foundry sand.

(e) Section NR 538.10(5), Wis. Adm. Code, is created to allow for the use of flue gas desulfurization (FGD) gypsum and lime-bearing industrial byproducts as agricultural soil or plant additives provided the generator obtains licenses from the Department of Agriculture, Trade and Consumer Protection (DATCP).

(D) Long-term management of geotechnical fills.

(1) Section NR 538.14, Wis. Adm. Code, is modified to require that geotechnical fills greater than 5000 cubic yards obtain a concurrence from the department and submit detailed locational information so the fill sites and the byproduct used can be documented in a database.

(2) Section NR 538.22, Wis. Adm. Code, is modified so property owner notifications are required for all geotechnical fill projects and copies are submitted to the department to be recorded and kept on file.

(3) Section NR 538.24, Wis. Adm. Code, is created to regulate the excavation of existing geotechnical fill material. This will allow for excavation and reuse of existing, documented geotechnical fills without the need to conduct an investigation and obtain approval from the department's Remediation and Redevelopment Program.

(E) Appendix I.

(1) Section NR 538, Appendix I is repealed and replaced with section NR 538, Appendix. The revised Appendix contains new standards based on the groundwater quality standards in s. NR 140, Wis. Adm. Code, use-specific exposure modeling from DHS and Natural Resource Conservation Service (NRCS) standards for soil amendment application. Categories (1-5) have been eliminated to simplify the standards. Testing parameters are based on constituents of concern in published U.S. EPA reports and historic detects in the department's beneficial use database files.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:

The department is proposing changes in ch. NR 538, Wis. Adm. Code, under existing state statutory authority in s. 289.05(4), Stats. The proposed changes are not prompted by any changes in federal regulation of solid waste. Some associated federal rules that apply to the beneficial use of industrial byproducts include:

40 CFR 257.2, which defines materials that are regulated as solid waste. The federal definition of "solid waste" is almost identical to the state definition in s. 289.01(33), Stats. with the exception that state rules exempt iron and steel process slag under certain conditions while the federal rule does not allow for an exemption of iron or steel process slag from the definition of solid waste.

40 CFR 257.53 defines the beneficial use of coal combustion residuals (CCRs), which are considered "industrial byproducts" under the proposed revisions to ch. NR 538, Wis. Adm. Code, by describing four "legitimacy criteria" that must be met before CCR material may be considered beneficially used and not disposed. The first three legitimacy criteria were incorporated into proposed s. NR 538.03(9), Wis. Adm. Code, which defines use of the industrial byproducts in a "productive manner." The fourth criteria contained volume limitations that the department determined were not appropriate for inclusion in the

proposed rule revision, although the rules do include standards to prevent releases from beneficial use projects that may exceed regulatory standards.

7. Comparison with Similar Rules in Adjacent States (Illinois, Michigan, Minnesota and Iowa):

There is no federal rule regulating the beneficial use of all industrial byproducts. State regulations vary considerably. The state of Wisconsin was one of the first in the nation to promulgate rules on the beneficial use of industrial byproducts in 1997, and many states have rules that are loosely based on the ch. NR 538, Wis. Adm. Code, regulatory format.

The State of Michigan regulates the beneficial use of various industrial waste materials under Part 115 Rule (statute) through authority granted to the Michigan Department of Environmental Quality (MDEQ). Acceptable beneficial uses are listed under Section 11502(8) of the rule, which divides the uses into five separate categories. Specifications for testing and criteria for use are explained in other sections of Rule 115. Acceptable beneficial uses include bonding into cement or asphalt, construction fill under roadways, land application, waste treatment at landfills, soil blending, and flue gas scrubbing reagent. Uses must be demonstrated to be protective of groundwater and surface water quality as well as human health and the environment.

The State of Minnesota regulates the beneficial use of certain industrial waste byproducts through Minn. Rule Ch. 7035.2860 by establishing a process under which waste generators can apply to the Minnesota Pollution Control Agency (MPCA) for a case-specific beneficial use determination (CSBUD) or make use of a list of standing beneficial uses (SBUD) that do not require prior MPCA approval. The list of SBUD uses includes reclaimed glass as aggregate, coal fly ash as an ingredient in cement, recycled concrete as an aggregate, tire chips as aggregate, shingles in asphalt mixes, lime-bearing wastes as an agricultural soil amendment, and foundry sand in cement mixes. Foundry sand can be used in a variety of uses including construction and geotechnical fill under a CSBUD specifically for foundry material. The permitted uses are listed in the appendix and fills must meet certain chemical standards and locational criteria such as being placed five feet above the seasonal groundwater table, not in contact with surface water, covered, and placed in thicknesses not to exceed four feet unless used as building sub-base or as approved by the MPCA. Uses not included in the SBUD list or the foundry CSBUD must be physically and chemically characterized in accordance with 7035.2861 which specifies that the analysis methods used for characterization must be consistent with the management option or beneficial use being proposed. Subpart 7 also requires annual reporting to the county in which the byproduct is generated.

The State of Illinois regulates the beneficial use of certain industrial byproducts in accordance with Section 22.54 of the Illinois Environmental Protection Act (415 ILCS 5/22.54) by requiring the generator or applicant to submit a formal Request for a Beneficial Use Determination for review by the Illinois Environmental Protection Agency (IEPA). All determinations are case-specific and based on the properties of the byproduct and site-specific conditions. All applications must justify that the byproduct materials are being legitimately beneficially used. However, coal combustion byproducts are exempted under subsection (4)(f) provided they qualify for a list of pre-approved beneficial uses under 415 ILCS 5/3.135. Steel and foundry wastes that are classified as "beneficially usable" by Board rules (35 Ill. Code 817) are also exempt per subsection (4)(h). Steel and foundry wastes that are used for land reclamation purposes are not exempt from this provision and must obtain an individual beneficial use determination. In accordance with 35 Ill. Adm. Code 817, steel and foundry wastes must be tested using water leach test method ASTM D3987, with the results compared to water quality standards specified in 35 Ill. Adm. Code 620. Based on the water leach test results, the steel and foundry wastes are then designated as either beneficially usable, potentially usable or low risk.

The State of Iowa regulates industrial byproducts through Beneficial Use Determinations issued under ch.

108 of the Iowa Adm. Code (IAC 567 ch. 108). This Code also covers use of byproducts as alternate daily cover at landfill disposal sites. Similar to WI requirements, s. 108.04, IAC lists a variety of byproducts and specified eligible uses for each byproduct material that do not require prior approval by the IDNR but are considered universally approved beneficial use determinations. Byproducts used as fill material must meet the conditions in s. 108.6(1) IAC which includes water leach testing and a total metals analysis that is compared to water quality and state-wide soil standards. It also requires submission of a solid by-product management plan to the IDNR by all recipients of a beneficial use determination which must be updated and reported annually under s. 108.7 IAC. One section of the Code, 108.5, IAC, includes a provision for obtaining a beneficial use determination from the IDNR for byproduct materials or uses not specified in the Code.

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

The proposed ch. NR 538, Wis. Adm. Code, rule revisions rely on byproduct-specific analytical data to demonstrate the suitability of the byproduct material to be beneficially used while minimizing potential environmental impacts. Accepted uses are determined from established ASTM standards and Wisconsin Department of Transportation standard practices. Restrictions on those uses to protect public health and the environment are based on studies, existing quality standards in the administrative code, and good engineering practices. Specific examples include the following:

(A) Section 538.06, Wis. Adm. Code, requires the industrial byproduct generator to analyze the byproduct material for leachability through ASTM-D3987 and for bulk analytical through methods in EPA Method SW-846 for an initial certification determination to assign appropriate eligible uses.

(B) Section NR 538, Wis. Adm. Code, Appendix Table 1, lists the water leaching test parameters required for the Initial Characterization and Recharacterization of each industrial byproduct material. The parameters listed are based on listed constituents of concern from U.S. EPA studies of foundry sand and coal combustion residuals as well as historic characterization data collected by the department since implementation of the beneficial use program in 1997. Foundry sand parameters originated from Phase II Constituents of Concern per EPA Risk Assessment 530-R-14-003 (groundwater and ecological). Coal ash parameters were derived from Appendix III and IV, 40 CFR 257 (CCR Rule) and Constituents of Concern for groundwater and surface water per EPA 530-R-14-001.

(C) Section NR 538, Wis. Adm. Code, Appendix Table 2, lists the bulk analyses parameters and standards required for Initial Certification and Recharacterization based on standards developed by DHS-specific potential human exposure modelling results for unconfined uses.

(D) Section NR 538, Wis. Adm. Code, Appendix Table 3, lists the parameters and standards for the use of flue gas desulfurization gypsum as a soil amendment that are derived from NRCS Conservation Practice Standard Code 333, June 2015 and Wisconsin-specific soil background concentrations in ch. NR 720, Wis. Adm. Code.

(E) Section NR 538.10, Wis. Adm. Code, which is proposed to be repealed and replaced, contains numerous references to construction standards to define when a use is considered beneficial in notes. Standards include:

(1) NRCS Code 313 for animal waste storage facilities and NRCS Code 629 for animal feed storage facility construction.

(2) ASTM D7765-18a for use of foundry sand used for structural fill.

- (3) ASTM E2277-14 for use of coal ash in structural fills.
- (4) ASTM C618-15 for use of coal fly ash in concrete.
- (5) ACI 229R-13 for use of coal fly ash as a controlled low-strength material (flowable fill).
- (6) Wisconsin Department of Transportation Section 301 for aggregate use standards.

(F) Section 538.12(2), Wis. Adm. Code, proposes using a three or five-foot separation distance to the groundwater table for all geotechnical fill sites based on studies conducted by the University of Wisconsin-Madison Dept. of Civil and Environmental Engineering, Geo Engineering Reports No. 02-14 dated December 18, 2002 and No. 05-21 dated December 27, 2005.

(G) Section NR 538.12(3), Wis. Adm. Code, proposes to set a 100-foot setback from any geotechnical fill projects and private or public water supply wells based on a groundwater contaminant transport model developed for the department by Dr. Michael Cardiff of the University of Wisconsin-Madison in 2018.

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

Cost estimates from industry sources, fee tables for analyses from the State Laboratory of Hygiene, and information from the department beneficial use files.

10. Effect on Small Business (initial regulatory flexibility analysis):

None. Participation in this program is voluntary.

11. Agency Contact Person:

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

Hearings were held on July 25 and July 29, 2019. Written comments were accepted at the public hearings, by regular mail, fax and email. The deadline for submitting public comments was August 5, 2019.

The consent of the Attorney General was received on November 5, 2019 for the incorporation by reference of SW-846 test methods; ASTM D3987-12, “Test Method for Shake Extraction of Solid Wastes with Water”; ASTM C618-15, “Specification for Coal Fly Ash and Raw or Calcined Natural Pozzolan for Use in Concrete”; and ACI 229R-13, “Controlled Low Strength Materials.”

SECTION 1. NR 538.01 is amended to read:

NR 538.01 **Purpose.** The purpose of this chapter is to allow and encourage, to the maximum extent possible, ~~consistent with the protection of public health and the environment and good engineering practices,~~ the beneficial use of industrial byproducts in a nuisance-free

manner that is protective of public health and the environment and in accordance with good engineering practices. The department encourages the beneficial use of industrial byproducts ~~in order~~ to preserve resources, conserve energy, and reduce or eliminate the need to dispose of industrial byproducts in landfills. This chapter is adopted under ss. 289.05, 289.06, 289.43 (4), (7) and (8), and 227.11, Stats.

SECTION 2: NR 538.02 (Note) is amended to read:

NR 538.02 **Note:** The landspreading of wastewater treatment sludges is regulated under chs. NR 206 and 214. The landspreading of solid wastes is regulated under ch. NR 518. ~~Other~~ Additional state and local laws and codes, ~~however~~, may apply to the beneficial use of industrial byproducts regulated under this chapter.

SECTION 3: NR 538.03 is repealed and recreated to read:

NR 538.03 **Definitions.** In this chapter, the following definitions as well as the definitions in ch. 289, Stats., and s. NR 500.03 are applicable:

(1) "Base aggregates" means specified or selected material of designated thickness placed on a subgrade to support a pavement or other structure.

(2) "Beneficial use" means the utilization of an industrial byproduct in a productive manner.

(3) "Encapsulated use" means a use in which the measurable leaching, emissions or decomposition characteristics of the industrial byproduct are substantially eliminated by binding them into a solid matrix.

(4) "Excess quantities" means the use of industrial byproducts in volumes that are greater than necessary for the specific project purpose.

(5) "Flue gas desulfurization material" or "FGD" means the material recovered from air pollution control systems that capture sulfur dioxide emissions from energy recovery facilities. "Flue gas desulfurization material" includes flue gas desulfurization gypsum produced as a byproduct of a lime or limestone-based reagent wet air pollution control scrubbing process that includes a forced oxidation system resulting in commercial grade calcium sulfate compound. "Flue gas desulfurization material" also includes flue gas desulfurization byproduct material

generated in a dry or semi-dry air quality control system, provided the system includes separate coal combustion fly ash capture by means of an electrostatic precipitator or baghouse filter.

(6) "Foundry sand" means spent silica-based molding and core sand resulting from metal casting processes, including dry baghouse and wet collector sand fines collected at the foundry during the metal casting process.

(6m) "Generator" means any person whose act or process produces an industrial byproduct as identified, listed, or determined by the department under sub. (8).

(7) "Impervious surface" means a barrier layer designed to prevent percolation or contain liquids that have come into contact with the byproduct consisting of either a minimum 3 inches thick of asphalt or concrete, a minimum 2 foot thick clay layer constructed in accordance with s. NR 504.06 (2) (a) and (f), a geomembrane layer constructed in accordance with s. NR 504.07 (5), or other impervious surface designs approved in writing by the department.

(8) (a) "Industrial byproduct" means, subject to par. (b), papermill sludge; combustion ash including coal combustion residuals such as fly ash, bottom ash, boiler slag, and material captured in flue gas desulfurization systems; ferrous, steel and aluminum foundry sand; aluminum slag; byproducts from the production of lime including lime kiln dust; or non-hazardous solid waste with similar characteristics as determined by the department.

(b) "Industrial byproduct" includes only materials that have been generated as a byproduct of an industrial process and possess consistent physical and chemical properties.

(c) "Industrial byproduct" does not include any of the following:

1. Post-consumer waste or the byproducts of combusting or processing post-consumer waste.
2. Ash from solid waste incinerators.
3. Slag generated by the production or processing of iron or steel that is managed as an item of value in a controlled manner and not discarded.
4. Material that was previously disposed or landfilled.

Note: Materials excluded from the definition of industrial byproducts may be beneficially reused if approved in writing by the department under s. NR 500.08 (5) (a) and s. 289.43, Stats., except iron or steel foundry slag which is exempted under ss. 289.01(33) and 287.29 Stats.

(9) "Lime kiln dust" means the material recovered from air pollution control systems that capture emissions from lime kilns.

(10) "Productive manner" means the use of an industrial byproduct that meets all of the following criteria:

(a) Provides a functional benefit.

(b) Substitutes for the use of a virgin material that must be otherwise obtained.

(c) Meets relevant product specifications, regulatory standards or design standards when available, and, when such standards are not available, is not used in excess quantities.

(11) "Representative sample" means any sample of industrial byproduct material collected for analysis that reliably exhibits the average properties of the byproduct production stream.

(12) "Residential area" means properties that are in an area zoned as residential, are in an area planned for residential zoning under a master plan approved or adopted by a local municipal authority, or in an area within 100 feet of a human residence.

(12m) "Select foundry sand" means foundry sand as defined under sub. (6) that is comprised of either spent green molding sand, resin bonded molding sand, or core sand with primary components consisting of combinations of silica sand, bentonite clay, and carbonaceous additives such as bituminous coal, gilsonite, and cellulose. Select foundry sand may include nominal quantities of spent molding aides such as riser sleeves and ceramic filters but may not include uncured chemically bonded sands or debris beyond trace quantities. Select foundry sand must also have been determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B to meet this definition.

(13) "Soil or plant additive" means a substance, intended for application to seeds, soil, or plants, that is designed for use or claimed to have value in promoting or sustaining plant growth, improving crop yield or quality, promoting or sustaining the fertility of the soil, or favorably modifying the structural, physical, or biological properties of the soil for agronomic or horticultural purposes and used in accordance with subch. III of ch. ATCP 40 or ch. ATCP 41.

(14) "Subgrade" means the uppermost soil bearing surface upon which base aggregates are placed.

(15) "Subgrade fill" means the layer or layers of industrial byproduct material placed to achieve a subgrade.

(16) "Topsoil" has the meaning given in s. NR 500.03 (236).

SECTION 4. NR 538.04 (1), and (3) are amended to read:

NR 538.04 (1) A significant adverse impact on ~~wetlands~~ wetland water quality standards as provided under ch. NR 103.

(3) A detrimental effect on any surface water quality standard as provided in s. NR 102.03 (7).

SECTION 5. NR 538.04 (7) and (Note) are created to read:

NR 538.04 (7) A discharge of pollutants carried by storm water exceeding any applicable permit requirements or standards under ch. NR 216.

Note: The emissions of particulates and volatile organic compounds are regulated under s. NR 415.03 and chs. NR 419 to 424.

SECTION 6. NR 538.05 is amended to read:

NR 538.05 **Solid waste rules exemption.** (1) GENERAL. Persons who generate, use, transport, or store industrial byproducts that are characterized and beneficially used in compliance with this chapter are exempt from licensing under s. 289.31, Stats., and the regulatory requirements in chs. NR 500 to ~~538-528~~.

(2) EXISTING EXEMPTIONS. This chapter does not abrogate, rescind or terminate an approval or grant of exemption ~~in effect on January 1, 1998~~ that was issued under s. 289.43 (7) or (8), Stats. Nothing in this subsection limits the authority of the department to modify, terminate or rescind any approval or grant of exemption as provided by law.

SECTION 7. NR 538.06 is repealed and recreated to read:

NR 538.06 **Industrial byproduct characterization.** (1) GENERAL. (a) Industrial byproducts that are beneficially used under this chapter shall be characterized, as specified in this section, to determine their eligible uses under s. NR 538.10. A generator, or the generator's designee, shall report the results of this characterization to the department as specified in s. NR 538.14 (1). The department shall reply with a written concurrence within 10 business days provided the applicant meets the applicable criteria of this chapter. The department has the

option of concurring with the characterization, requesting additional information or analysis, determining that a case-specific approval under s. NR 538.09 is required, or issuing a non-concurrence decision. If the department does not respond to a notification within 10 business days, the notification is deemed complete and concurrence is considered granted. The department may approve eligible uses for industrial byproducts that do not meet the listed characterization criteria on a case-specific basis in accordance with s. NR 538.09.

For those materials not explicitly listed in, and which are subject to the requirements of the “Other” materials column of ch. NR 538 Appendix Tables 1 and 2, the department may do any of the following:

1. Exempt the requirement to analyze for certain parameters on a material-specific basis.
2. Require analysis for additional parameters on a material-specific basis in order to demonstrate compliance with performance standards identified at s. NR 538.04.
3. Require the applicant submit a testing program plan which the department must approve in writing prior to commencement of characterization.

(2) INITIAL CHARACTERIZATION. A representative sample of each industrial byproduct shall be properly characterized prior to beneficial use to determine its eligible uses under s. NR 538.10. Samples shall be obtained at the point of accumulation nearest to where the byproduct is generated. A case-specific approval under s. NR 538.09 may be required by the department if the byproduct is subject to any deliberate post-accumulation processing, excluding mechanical size reduction or sorting and the application of water to improve handling or as dust suppression.

(3) CHARACTERIZATION METHODS. (a) *General*. The limits of detection used in the characterization shall be at or below the concentrations listed in ch. NR 538 Appendix, Tables 1 to 3 for each parameter. When a limit of detection at or below a standard is not achievable, the method that will achieve the lowest detection limit shall be used. All material sampling, total elemental analyses, and analyses of elutriate from leach testing shall be performed using EPA SW-846 methods, unless alternate methods are otherwise approved by the department in writing. The generator shall report the limit of detection and the limit of quantitation with the sample results. If a substance is detected below the limit of quantitation, the detected value with the appropriate qualifier shall be reported.

(b) *Hazardous waste determination.* All industrial byproducts that are to be beneficially used under this chapter shall first be determined not to be a hazardous waste as defined under s. NR 660.10 (52) using a method specified under ch. NR 662.011. The generator shall provide supporting documentation of the waste determination along with the initial certification submitted to the department as specified in sub. (1).

Note: Supporting documentation may include representative sampling and analysis, safety data sheets, published information, process flow diagrams, profiles developed from the prior handling of industrial byproducts, or supported process knowledge.

(c) *Water leach test.* All industrial byproducts, except byproducts to be used as a soil or plant additive in accordance with s. NR 538.10 (5), shall be analyzed using ASTM D3987-12 water leach test as specified in ch. NR 538 Appendix, Table 1.

(d) *Bulk analysis.* All industrial byproducts, except byproducts to be used as a soil or plant additive in accordance with s. NR 538.10 (5), shall be analyzed using a bulk analysis for the parameters in ch. NR 538 Appendix, Table 2, unless another analytical method is approved by the department in writing.

(e) *Flue gas desulfurization analysis.* All flue gas desulfurization materials to be marketed and used as soil or plant additives in accordance with s. NR 538.10 (5) shall be analyzed using a total elemental analysis for the parameters in ch. NR 538 Appendix, Table 3, unless another analytical method or parameters are approved by the department in writing.

(f) *Select foundry sand.* Generators may request that the department designate their foundry industrial byproducts as select foundry sand with their initial certification notification under sub. (1) (a) or recharacterization under sub. (5) provided they submit supporting documentation to the department demonstrating that the foundry byproducts meet the definition under s. NR 538.03 (12m) and have been determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B. Supporting documentation shall include evidence of segregation which may include process flow diagrams, written material handling and segregation procedures, or byproduct management summaries. If the department determines that the foundry byproduct meets the definition, the department shall reply with a written concurrence of the designation within 10 business days provided the applicant meets the applicable criteria of this chapter. If the department does not respond to a

notification within 10 business days, the notification is deemed complete and concurrence is considered granted.

(4) MIXING OF INDUSTRIAL BYPRODUCTS. If separate industrial byproducts will be mixed together, each of the byproducts must be individually eligible for the specific intended final use of the resulting mixture unless otherwise approved by the department in writing under s. NR 538.09.

Note: Copies of EPA SW-846 test methods are available directly from the U.S. environmental protection agency at <https://www.epa.gov/hw-sw846>. Copies of the test methods are available for inspection at the offices of the department of natural resources and the legislative reference bureau. See also the definition for SW-846 at NR 500.03(231) Wis. Admin. Code.

Note: ASTM D3987-12 is the American society for testing and materials "Test Method for Shake Extraction of Solid Wastes with Water." Copies of the ASTM standard may be obtained from ASTM International at <https://www.astm.org/Standards/D3987.htm>. Copies of the standard are available for inspection at the offices of the department of natural resources and the legislative reference bureau.

(5) RECHARACTERIZATION. (a) Industrial byproducts that are beneficially used under this chapter shall be recharacterized after the initial characterization in accordance with this section, unless the department approves, in writing, an alternative recharacterization method.

(b) Industrial byproducts shall be recharacterized as follows:

1. A representative sample of each industrial byproduct shall be recharacterized whenever there is a change in the process that produces the industrial byproduct that could potentially result in a change in the eligible uses of the industrial byproduct.

2. A representative sample of each industrial byproduct shall be recharacterized in accordance with ch. NR 538 Appendix, Tables 1 and 2, at a minimum of once every 4 years from the date of the initial certification or the last recharacterization, except that recharacterization is not required under this subsection for any industrial byproduct of which less than 1000 cubic yards were beneficially used or stored for beneficial use in any calendar year during the previous 4-year period.

(c) The generator shall submit documentation of any recharacterization test results required under this section to the department in accordance with s. NR 538.14 (2). The

department shall reply with a written concurrence within 10 business days, provided the submittal meets the applicable criteria of this chapter. If the department does not respond to a notification within 10 business days, the notification is deemed complete and concurrence with the recharacterization is considered granted.

(6) INITIAL APPLICABILITY. A generator that submitted an initial certification prior to January 1, 2021 may submit a recharacterization and a hazardous waste determination under s. NR 538.06(3)b to the department within 4 years of the date the last recharacterization or initial certification was submitted to the department prior to January 1, 2021, provided there has been no change in the process that produces the industrial byproduct in accordance with s. NR 538.06 (5) (b) 1.

SECTION 8. NR 538.08 is repealed and recreated to read:

NR 538.08 **Determination of eligible uses.** Acceptable beneficial uses for industrial byproducts that have been determined not to be a hazardous waste as defined in s. NR 660.10 (52) and tested in accordance with s. NR 538.06 shall be determined as follows:

(1) CONTAINED OR CONVERTED USES. All industrial byproducts, including select foundry sand, are eligible for contained or converted uses in accordance with provisions of s. NR 538.10 (1).

(2) GEOTECHNICAL FILL. Industrial byproducts, including select foundry sand, that have been determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B, are eligible for use as geotechnical fill in accordance with the provisions of ss. NR 538.10 (2) and 538.12, except nonmetallic mine reclamation uses under s. NR 538.12 (2) (e), which must be designated by the department as a select foundry sand under s. NR 538.06 (3) (f) or determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column A.

(3) CONSTRUCTION USES. Industrial byproducts, including select foundry sand, that have been determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B, are eligible for construction uses in accordance with the provisions of s. NR 538.10 (3).

(4) UNCONFINED USES. Industrial byproducts, including select foundry sand, that have been determined to contain less than the concentration specified for the parameters listed in

ch. NR 538 Appendix, Table 1, Column B and Table 2 are eligible for unconfined uses in accordance with the provisions of s. NR 538.10 (4).

(5) SOIL OR PLANT ADDITIVES. Flue gas desulfurization materials that have been determined to contain less than the concentration specified for the parameters listed in ch. NR 538 Appendix, Table 3, are eligible for use as soil and plant additives in accordance with the provisions of s. NR 538.10 (5). Industrial byproducts intended for use as agricultural liming additives that have been determined to contain less than the concentrations specified in Table 3 of s. NR 204.07 (5) (c) are eligible for use as soil or plant additives in accordance with the provisions of s. NR 538.10 (5).

(6) CRITERIA AND PROCESS FOR USING ELIGIBILITY STANDARDS. (a) If a standard for a parameter listed in ch. NR 538 Appendix is above the limit of detection and the limit of quantitation, the standard shall be considered exceeded if the parameter is reported at or above the standard.

(b) If a standard for a parameter listed in ch. NR 538 Appendix is between the limit of detection and the limit of quantitation, inclusive, the standard shall be considered exceeded if the parameter is reported at or above the limit of quantitation.

(c) The following applies when a standard for a parameter listed in ch. NR 538 Appendix is below the lowest achievable limit of detection:

1. If a parameter is not detected in a sample, the standard shall be considered to have been met.

2. If a parameter is reported at or above the limit of detection but below the limit of quantitation, a confirmation analysis shall be conducted. The standard shall be considered exceeded if the presence of that parameter has been confirmed by the use of an appropriate analytical method as determined by the department.

3. If a parameter is reported at or above the limit of quantitation, the standard shall be considered exceeded.

SECTION 9. NR 538.09 is created to read:

NR 538.09 **Case specific approvals.** The department may review the characterization results for an industrial byproduct not defined in s. NR 538.03 (8) in response to a request from the generator and may, on a case-specific basis, approve a beneficial use or uses for that material

or conditionally approve a beneficial use that does not meet the beneficial uses or standards specified in this chapter. The department may require additional information prior to a case-specific approval. Any exemption or approval granted under this section shall be in accordance with the applicable requirements of s. 289.43 (4), (7) and (8), Stats. If the department determines that the industrial byproduct material falls under the s. NR 538.03(8)(b) or (c) exclusions or the proposed use does not meet the definition of a beneficial use under s. NR 538.03(2), approval for use or disposal must be obtained through the applicable provisions under ss. NR 500-528.

SECTION 10. NR 538.10 is repealed and recreated to read:

NR 538.10 **Eligible beneficial uses.** All uses of industrial byproducts shall meet all applicable structural and physical specifications and generally accepted engineering practices for the use. Under this chapter, the eligible beneficial uses of industrial byproducts that may be exempt from licensing under s. 289.31, Stats., and the regulatory requirements under chs. NR 500 to 528 include any of the following:

(1) **CONTAINED OR CONVERTED USES.** Uses that are fully contained within a licensed, engineered disposal facility, are encapsulated within a matrix material, are burned for fuel, or are converted into a product, including any of the following:

(a) Encapsulated uses. Products that may meet these criteria include cement, lightweight aggregate, structural or ornamental concrete or ceramic materials, portland cement concrete pavement, asphaltic concrete pavement, slurry seals, roofing materials, plastics, paint, fiberglass, mineral wool, wallboard, plaster and other products approved in writing by the department.

(b) Agents for physical or chemical stabilization, solidification or other treatment of solid waste that is to be disposed of at a licensed, engineered disposal facility or utilized in some other final use approved in writing by the department.

(c) Supplemental material used for fuel or to assist air pollution control during the process of combustion for energy production.

(d) Daily cover or internal structures at licensed, approved landfills having a liner and leachate collection system. The industrial byproducts used for this purpose may not contain free liquids. The industrial byproducts beneficially used at landfills for alternate daily cover in accordance with s. NR 506.055 may contain no more than 15% silt and clay sized materials as determined by their P200 content and may not be placed in layers greater than 6 inches thick.

Any uses under this paragraph shall be subject to the conditions of the plan of operation and any other applicable solid waste approvals associated with the landfill.

(2) GEOTECHNICAL FILL. Geotechnical fill material meeting the project criteria and uses specified in this subsection and s. NR 538.12 where applicable. If more than 5,000 cubic yards are to be used in an individual project, prior written notification in accordance with s. NR 538.14 (5) and concurrence by the department under s. NR 538.14 (6) are required unless the specific concurrence requirements in par. (b) or (f) apply. Industrial byproducts shall be used in accordance with best management practices. The criteria and uses under this subsection are as follows:

(a) *Subgrade fill for the construction of commercial, industrial or non-residential institutional buildings.* Industrial byproducts used as subgrade fill for the construction of commercial, industrial, or non-residential institutional buildings shall have placement of the concrete floor or frostwalls completed as soon as practical after placement of the fill material in accordance with s. NR 538.12 (4). Any area where industrial byproducts are not directly beneath the building shall be sloped to prevent ponding of water, covered with 2 feet of native soil including a minimum of 4 inches of topsoil, and seeded or otherwise covered as approved by the department in writing. Cover shall be placed over fill material as soon as practical after byproduct placement. Final vegetated slopes may not be steeper than a 3:1 horizontal to vertical incline. The use of industrial byproducts as subgrade fill in the construction of residential buildings is prohibited.

(b) *Subgrade fill for the construction of portland cement concrete or asphaltic concrete paved infrastructure.* Industrial byproducts used for subgrade fill for the construction of portland cement or asphaltic concrete paved infrastructure including parking lots, access roads, and private roadways shall have placement of the pavement completed as soon as practical after placement of the fill material. Any area where industrial byproducts are not directly beneath the pavement structure shall be sloped to prevent ponding of water, covered with 2 feet of native soil including a minimum of 4 inches of topsoil, and seeded as soon after byproduct placement as is practical or otherwise covered as approved by the department in writing. Prior written notification in accordance with s. NR 538.14 (5) and written concurrence by the department under s. NR 538.14 (6) are required for fills that do not meet the criteria in this subsection. The use of industrial byproducts as paved lot fill is prohibited in residential areas.

(c) *Geotechnical fill material with a soil or gravel cover.* Industrial byproducts beneficially used as geotechnical fill with a soil or gravel cover for sight, sound, safety and structural berms, public recreation trails, construction of sporting venues, limited use parking areas, access lanes, utility trenches not covered by a paved surface in accordance with sub. (3) (c), or other beneficial uses demonstrated to be acceptable by the department shall be sloped to prevent ponding of water, covered with 2 feet of native soils, including a minimum of 4 inches of topsoil or other cover approved by the department in writing, and seeded as soon as practical after placement of the industrial byproducts. Final vegetated slopes may not be steeper than a 3:1 horizontal to vertical incline. Gravel or other granular material may be substituted for topsoil if necessary for the specified use, provided the total fill cover is at least 2 feet. The beneficial use of industrial byproducts as geotechnical fill with a soil or gravel cover is prohibited in residential areas.

(d) *Use of foundry sand at livestock operations.* Foundry sand may be beneficially used at livestock operations for any of the following:

1. Liner material in an impoundment or structure used for the storage of livestock manure, livestock feed, or process wastewater. The impoundment or structure shall be designed and constructed in accordance with applicable natural resources conservation service standards and local ordinances, and in accordance with plans and specifications approved under chs. NR 213 and 243, if applicable.

2. Geotechnical fill beneath an area where livestock will be housed or confined. Any areas of foundry sand fill that will be washed or mechanically scraped shall be paved with an asphalt or concrete surface, or a 2 feet thick protective soil layer, over the industrial byproduct. The livestock housing or confinement area design and construction shall be in accordance with applicable natural resources conservation service standards and local ordinances, and in accordance with plans and specifications approved under ch. NR 243, if applicable to any portion of the project.

Note: Under ch. NR 243 Natural Resources Conservation Service (NRCS) conservation practice standard Code 313, dated December 2005 applies to waste storage facilities. Under ch. ATCP 50, NRCS conservation practice standard Code 629 dated January 2014 applies to feed storage runoff control facilities. Copies of these and other conservation practice codes can be obtained online from the NRCS Field Office Technical Guide,

www.nrcs.usda.gov/wps/portal/nrcs/site/wi/home. Copies are also available at the Wisconsin NRCS state office or the Wisconsin Land and Water Conservation Association office.

(e) *Transportation facility embankments.* Industrial byproducts used as geotechnical fill for transportation facility embankments such as linear roadway sound and sight barrier berm embankments, airport embankments, and roadway bridge or overpass embankments constructed under the authority of the Wisconsin department of transportation or a municipality shall meet the criteria in this paragraph. Any area where industrial byproduct is used as an embankment and not covered by pavement or road shoulder material, shall be sloped to prevent ponding of water, covered with 2 feet of native soils including a minimum of 4 inches of topsoil, or other cover approved by the department in writing, and seeded with an approved Wisconsin department of transportation seed mix as soon as practical after placement of the industrial byproducts. Final vegetated slopes may not be steeper than a 3:1 horizontal to vertical incline.

(f) *Geotechnical fill material used in the reclamation of nonmetallic mining sites.* Industrial byproducts that have been designated by the department as select foundry sand under s. NR 538.06 (3) (f) or that do not exceed the concentrations specified in ch. NR 538 Appendix, Table 1, Column A may be beneficially used as geotechnical fill material in the reclamation of nonmetallic mining sites. Prior written notification in accordance with s. NR 538.14 (5) and concurrence by the department under s. NR 538.14 (6) are required for all nonmetallic mine reclamation projects. Reclamation of a nonmetallic mine within an area of Silurian bedrock as defined under s. NR 151.015 (17) shall be approved as a case-specific approval in accordance with s. NR 538.09. Additional requirements for the use of industrial byproducts for reclamation of nonmetallic mining sites include the following:

1. The use of industrial byproducts at a nonmetallic mining site with a reclamation permit issued under ch. NR 135 shall be in accordance with the approved reclamation plan required under s. NR 135.19. If the reclamation plan does not specify the use of industrial byproducts as fill material, the plan shall be modified in accordance with s. NR 135.24 to reflect the use of these byproducts. The reclamation plan or modification shall be approved by the regulatory authority under s. NR 135.03(20) in accordance with s. NR 135 before applying for concurrence by the department.

2. A mine reclamation project at a mine site that does not have an approved reclamation plan issued under ch. NR 135 shall be subject to a case-specific approval in accordance with s.

NR 538.09. The applicant shall submit a reclamation plan that meets the applicable criteria under s. NR 135.19(1) to (4) to the department as part of the case-specific approval request.

3. Eligible uses for industrial byproducts as part of the reclamation of a nonmetallic mine site under this section include construction of safety berms, buttressing of unstable side slopes to provide for a revegetated surface, placement of no more than 2 feet of manufactured soils under sub. (4) (c) or other appropriate byproducts to establish a rooting zone layer, or the use of byproducts or byproduct blends as a topsoil substitute material as defined under s. NR 135.03 (24).

4. Any area where industrial byproducts are beneficially used as geotechnical fill in a nonmetallic mine site that are to be revegetated as part of the mine reclamation plan shall be sloped to prevent ponding of water, covered with 2 feet of native soils including a minimum of 4 inches of topsoil or other cover approved by the department in writing, and seeded in accordance with the reclamation plan as soon as practical after placement of the industrial byproducts. Final vegetated slopes may not be steeper than a 3:1 horizontal to vertical incline.

5. For all nonmetallic mine reclamation project sites industrial byproducts, including select foundry sand, used as geotechnical fill may not be placed within 5 feet of the groundwater table at the time the byproduct material is placed.

6. The beneficial use of industrial byproducts as geotechnical fill in the reclamation of nonmetallic mines is prohibited in residential areas or areas where residential construction is planned as a post-reclamation land use.

Note: Federal rules restrict the use of coal combustion residuals as fill in sand and gravel pits and quarries under ss. 40 CFR 257.50-107, subpart D.

Note: Best management practices under this paragraph may include ASTM D7765-18a when foundry sand is used for structural fill or embankments, ASTM E2277-14 for the use of coal ash in structural fills, Wisconsin department of transportation specifications for highway and structure construction, or other established engineering construction standards and practices appropriate for the project.

(3) CONSTRUCTION USES. Construction uses in accordance with the project criteria and uses specified in this subsection. Industrial byproducts used in this subsection may not be placed within areas of permanent standing water or areas that need to be dewatered prior to placement due to groundwater infiltration. Construction uses include any of the following:

(a) *Subgrade fill for the construction of a paved federal, state, or municipal roadway.*

Industrial byproducts placed as part of construction of a paved federal, state or municipal roadway may not extend beyond the subgrade shoulder point and the depth of the fill may not exceed 4 feet, except for incidental sections of the fill. Any area where industrial byproducts are not directly beneath the pavement structure shall be sloped to prevent ponding of water, covered with base course or native soil, including topsoil, and seeded as soon as practical after placement of the industrial byproduct. Placement of the pavement structure shall be completed as soon as practical after placement of the fill material. For fills greater than 4 feet in depth, the design shall adhere to the criteria specified in sub. (2) (e). The use of industrial byproducts as paved roadway subgrade fill is prohibited in residential areas, unless used in a roadway designed with a rural type cross-section without curbs and gutters.

(b) *Base aggregates for the construction of commercial, industrial and non-residential institutional building slabs and paved infrastructure.* Industrial byproducts used as base aggregates for the construction of commercial, industrial, and non-residential institutional building slabs and paved infrastructure including parking lots, access roads, and federal, state and municipal roadways shall meet the project specified physical properties of the Wisconsin department of transportation Section 301 standard specifications for base aggregates unless otherwise approved by the department in writing. The use of industrial byproducts as base aggregates under this subsection is prohibited in residential areas, unless used in a roadway designed with a rural type cross-section without curbs and gutters.

(c) *Utility trench backfill.* Industrial byproducts used to backfill a utility trench constructed for the placement of a sanitary or storm sewer, a non-potable water line, a gas main, or telecommunications, electrical or other utility lines shall be covered by a paved roadway, parking lot or other portland cement concrete or asphaltic concrete paved structure and may not extend more than 4 feet beyond the pavement structure. Any area where industrial byproducts are not directly beneath the pavement structure shall be sloped to prevent ponding of water, topsoiled, and seeded as soon as practical after placement of the industrial byproduct.

(d) *Abandonment of tanks, vaults, or tunnels.* Industrial byproducts may be beneficially used for the abandonment of tanks, vaults or tunnels that will completely contain the industrial byproduct. This use does not include the placement of an industrial byproduct in a location

where environmental pollution has been identified unless it is specified in a plan approval by the department.

(e) *Slabjacking material.* Industrial byproducts used as a component in a slabjacking material in combination with portland cement, lime, or bentonite shall be placed beneath portland cement concrete paved structures to raise areas that have settled. The slabjacking material shall be placed directly from an enclosed transport vehicle. Projects using more than 2 cubic yards of industrial byproduct as a slabjacking material are prohibited in residential areas.

(f) *Soil and pavement stabilization.* Coal combustion fly ash used as soil and pavement base stabilization for structural improvements shall be used in accordance with ASTM C618-15 or the Wisconsin department of transportation specifications for highway and structure construction, or other good engineering practices acceptable to the department. The use of industrial byproducts as soil and pavement base stabilization is allowed in residential areas for those beneficial uses specified in par. (a) if approved by the local unit of government with jurisdiction over the roadway.

Note: ASTM C618-15 is the American society for testing and materials "Specification for Coal Fly Ash and Raw or Calcined Natural Pozzolan for Use in Concrete." Copies of this test procedure can be obtained from ASTM International at <https://www.astm.org/Standards/C618.htm>. Copies of the standard are also available for inspection at the offices of the department of natural resources and the legislative reference bureau.

(g) *Controlled low strength material.* Industrial byproducts incorporated into controlled low strength material for structural improvements, commonly referred to as flowable fill, shall be used in accordance with ACI 229R-13, the Wisconsin department of transportation specifications for highway and structure construction, or other good engineering practices acceptable to the department.

Note: ACI 229R-13 is the American Concrete Institute report "Controlled Low Strength Materials." Copies of this report can be obtained at <https://www.concrete.org>. Copies of this report are also available for inspection at the offices of the department of natural resources and the legislative reference bureau.

(h) *Bonded surface course material.* Industrial byproducts used as a bonded surface course such as seal coats and chip seals in paved federal, state or municipal roadways,

commercial and private roadway or parking surfaces, driveways, airport runways, and trails shall conform to the Wisconsin department of transportation standard specifications for highway and structure construction applicable to asphaltic pavements, including limitations on the percentage of material passing the P200 sieve and application rates. Within 48 hours of application of the industrial byproduct, the surface shall be rolled to thoroughly embed these materials into the asphaltic mastic and, within one week of application, the surface shall be swept to remove any loose excess material.

(4) UNCONFINED USES. Unconfined uses that are not contained, encapsulated, or covered by either 2 feet of soil or an impervious surface and meet the project criteria and uses specified in this subsection. Unconfined uses include any of the following:

(a) *Unbonded surface course material.* Industrial byproducts used as an unbonded surface course shall conform to the requirements of Wisconsin department of transportation standard specifications for highway and structure construction applicable to base materials and may be placed at a cumulative thickness of 6 inches or less and in areas separated by at least a 25-foot vegetated buffer to a navigable surface water. This includes the use of industrial byproducts as a surface course material in unpaved driveways, road shoulders, farm lanes, parking areas, and recreation or exercise trails. The use of industrial byproducts as unbonded surface course is prohibited in residential areas.

(b) *Winter weather road abrasive on roadways with a rural cross-section.* Winter road abrasives using industrial byproducts, wholly or as part of a mixture of abrasives and de-icing compounds, shall meet Wisconsin department of transportation gradation and application rate recommendations for winter highway maintenance contained in the state highway maintenance manual. The use of industrial byproducts as winter road abrasives is restricted to use on roadways designed with a rural type cross-section with only incidental sections of curbs and gutters.

(c) *Manufactured soil blends.* Manufactured soil blends with the mineral component derived from spent silica-based foundry sand from iron, steel, and aluminum foundries shall be comprised of no more than 50 percent spent foundry sand by weight and intended for use as a commercial or consumer product. Soil blends that incorporate industrial byproducts other than foundry sand or solid waste material shall be approved under the case-specific provisions specified in s. NR 538.09.

Note: Bulk land application of spent foundry sand on agricultural fields is regulated under ch. NR 518.

(5) SOIL OR PLANT ADDITIVES DERIVED FROM FLUE GAS DESULFURIZATION OR LIME-BEARING INDUSTRIAL BYPRODUCTS. Flue gas desulfurization or lime-bearing industrial byproducts used as soil or plant additives shall be managed, applied and licensed in accordance with subchapter II of ch. ATCP 40 or ch. ATCP 41. Prior to use, initial certification, and concurrence by the department in accordance with s. NR 538.06 is required. In addition to the certification information, the applicant shall demonstrate, as part of the required written notification, all of the following:

(a) The industrial byproduct, as demonstrated through research projects approved under s. NR 518.04 (2) or previously published research, has value as a soil or plant additive and will not result in detrimental effects to the soil or vegetation at the rates and mixtures proposed. If the additive is part of a mixture, the physical and chemical nature of the other materials in the mixture and the relative percentages of each material shall be described in the submittal.

(b) The industrial byproduct or byproduct mixture will not be applied at rates such that excessive accumulation of hazardous substances occurs in soil or vegetation, or cause a detrimental effect on surface water quality, or cause a detrimental effect on groundwater quality that would result in an exceedance of the groundwater quality standards specified in s. NR 140.

(c) The industrial byproduct or byproduct mixture will be applied in accordance with accepted agricultural practices.

(d) Industrial byproducts that are intended for use as agricultural liming materials, as defined under s. 94.66 (1) (am), Stats., meet the requirements of ch. ATCP 41 and do not contain contaminant concentrations exceeding the values listed in Table 3 of s. NR 204.07 (5) (c).

(e) Flue gas desulfurization material intended for use as an agricultural soil amendment does not contain contaminant concentrations exceeding the values listed in ch. NR 538 Appendix, Table 3, and will not be applied in volumes exceeding the maximum recommended application rates as determined by the Wisconsin department of agriculture, trade and consumer protection.

Note: USDA Code 333 is the guidance document “Amending Soil Properties with Gypsum Products,” published as Natural Resources Conservation Service Conservation Practices Standard Code 333 (333-CPS-1), June 2015, and is available through the U. S. department of

agriculture website:

[https://efotg.sc.gov.usda.gov/references/public/OH/Amending_Soil_Properties_with_Gypsum_Products_Standard_\(333\).pdf](https://efotg.sc.gov.usda.gov/references/public/OH/Amending_Soil_Properties_with_Gypsum_Products_Standard_(333).pdf).

Note: Copies of Wisconsin department of transportation specifications for highway and structure construction and the state highway maintenance manual are available for inspection at the offices of the department of transportation, department of natural resources and the legislative reference bureau.

Note: Under s. 30.2022, Stats., highway and bridge projects affecting the waters of the state that are carried out under the direction and supervision of the department of transportation are exempt from department permit or approval requirements if accomplished in accordance with interdepartmental liaison procedures established by the department of natural resources and the department of transportation.

SECTION 11. NR 538.12 is repealed and recreated to read:

NR 538.12 Additional criteria for the beneficial use of industrial byproducts as geotechnical fill.

(1) All geotechnical fill uses shall comply with the performance standards under s. NR 538.04 and the applicable criteria in this section.

(2) Industrial byproducts that are utilized for any of the uses under s. NR 538.10 (2) shall be placed in accordance with all of the following:

(a) Industrial byproducts may not be placed within areas of permanent standing water or areas that need to be dewatered prior to placement due to groundwater infiltration.

(b) For those beneficial uses listed in s. NR 538.10 (2) that use industrial byproducts designated by the department as select foundry sand under s. NR 538.06 (3) (f) or that do not exceed the concentrations specified in ch. NR 538 Appendix, Table 1, Column A, there shall be a minimum separation distance of 3 feet between the industrial byproduct and the groundwater table at the time of placement, except geotechnical fill used for nonmetallic mine reclamation projects under s. NR 538.10 (2) (f) which shall maintain a minimum separation distance as determined by s. NR 538.10 (2) (f) 5.

(c) For those beneficial uses listed in s. NR 538.10 (2) that use industrial byproducts, excluding select foundry sand, that exceed the concentrations specified in ch. NR 538 Appendix,

Table 1, Column A, but are less than the concentrations specified in ch. NR 538 Appendix, Table 1, Column B, there shall be a minimum separation distance of 5 feet between the industrial byproducts and the groundwater table at the time the material is placed.

(d) Industrial byproducts may not be placed within an area that meets the definition of a floodplain under s. NR 116.03 (16) or below the ordinary high-water mark within any navigable waters as defined under s. NR 115.03 (6) without prior written approval from the department.

(e) Industrial byproducts used as geotechnical fill as part of the reclamation of nonmetallic mine sites in accordance with s. NR 538.10(2)(f) may not exceed the concentrations in s. NR 538 Appendix, Table 1, Column A unless designated by the department as select foundry sand under s. NR 538.06 (3) (f).

(3) Industrial byproducts that are used for the beneficial uses listed in s. NR 538.10 (2) and exceed 5000 cubic yards may not be placed closer than 100 feet from a private or public water well. Prior written notification to the department in accordance with s. NR 538.14 (5) and concurrence by the department under s. NR 538.14 (6) is required for separation distances less than 100 feet. Concurrence by the department shall be based on site specific conditions such as well construction and ground water flow direction.

(4) Beneficial use projects utilizing fill materials under s. NR 538.10 (2) shall be completed, including the placement of final cover, within 12 months of first accepting industrial byproduct material. This period may be extended to no more than 16 months provided the site is adequately secured from public access by means of exclusion fencing and signage or other equally effective means as approved by the department in writing. If the beneficial use project requires more than 12 months to complete, or 16 months to complete if the site is adequately secured, the project shall be planned in phases with each phase of filling completed and interim or final cover placed prior to initiation of filling the next phase. Prior to use of an alternate cover, the generator, or the generator's designee, shall provide a written request to the department. A written approval by the department may be granted based upon site-specific conditions and good engineering practices.

(5) Confining surfaces and soil cover in beneficial use projects utilizing fill materials under s. NR 538.10 (2) shall be maintained as designed. Fill materials exposed by erosion, excavation, or weathering shall be covered in accordance with the original design, or as approved by the department, as soon as practical. Requests for modification of the final cover

shall be made in accordance with s. NR 538.14 (7) and excavation of fill material shall be performed in accordance with s. NR 538.24.

(6) Beneficial use projects proposing utilization of 100,000 cubic yards or more of geotechnical fill materials under s. NR 538.10 (2) shall require a request to the department by the generator, or the generator's designee, for a case-specific approval in accordance with s. NR 538.09.

(7) All vegetated soil covers over geotechnical fill materials under s. NR 538.10 (2) shall utilize topsoil in sufficient quantities and of sufficient quality to support a vegetative cover that prevents erosion.

(8) All geotechnical fill projects under s. NR 538.10 (2) shall be conducted in a manner to minimize windblown dust, odor, tracking, and spillage of the industrial byproduct and not to cause nuisance conditions.

SECTION 12. NR 538.14 is repealed and recreated to read:

NR 538.14 **Reporting.** (1) INITIAL CERTIFICATION. Prior to beneficial use of industrial byproducts under this chapter, or the establishment of a non-exempt storage facility, each generator, non-exempt storage facility operator, or the generator's designee, shall submit an initial certification form to the department. An initial certification form shall be submitted prior to beneficial use in accordance with this chapter for any industrial byproduct not previously approved for eligible uses, for any industrial byproduct for which the generation process has changed, or for the establishment of a storage facility for industrial byproducts. The initial certification form shall include all of the following information:

- (a) The name and address of the generator or storage facility operator.
- (b) The name, address, and telephone number of the designated generator or storage facility operator contact.
- (c) A description of each industrial byproduct intended for beneficial use or storage that clearly identifies the process that generated the material and an estimate of the volume that may be made available for beneficial use on an annual basis.
- (d) Initial byproduct characterization results as required under s. NR 538.06 (1) to (3), including a listing of the eligible uses of each industrial byproduct to be beneficially used or stored for beneficial use in accordance with s. NR 538.10 and ch. NR 538 Appendix, Tables 1 to

3. Documentation, including test results supporting the eligible use determinations, shall be included. Non-exempt storage facilities under s. NR 538.16 (1) (c) shall provide the name and address of the generators of the industrial byproducts to be stored unless the storage facility is located at the same address as the industrial byproduct generating facility.

(e) Authorization for Wisconsin department of natural resources staff to conduct inspections of the facilities generating industrial byproducts being beneficially used under this chapter or storage facilities for those industrial byproducts and collect samples to verify compliance with this chapter.

(f) Certification by each generator, or the generator's designee, and each storage facility operator, or the operator's designee, that the information on the form is true and accurate, and that the performance standards of s. NR 538.04 will be met.

Note: Copies of the initial certification form may be obtained from the department of natural resources, bureau of waste management, 101 South Webster Street, Natural Resources Building, P.O. Box 7921, Madison, Wisconsin 53707-7921.

(2) RECHARACTERIZATION. Each generator of industrial byproducts that have been beneficially used under this chapter, operator of a non-exempt storage facility for industrial byproducts as required under s. NR 538.16 (1) (c), or the designee of the generator or operator, shall submit recertification information used to determine the eligible use of each industrial byproduct, electronically or on a form supplied by the department, every 4 years or after a process change in accordance with s. NR 538.06 (5). The recertification form shall be submitted to the department no later than 60 days following the receipt of the analytical testing results which indicate a potential reassignment of the eligible uses for any industrial byproduct. Analytical testing results that confirm the eligible uses assigned during the initial certification or the previous recharacterization may be submitted with the annual certification under (3). The recertification form shall include all of the following information:

(a) The name and address of the generator or storage facility operator.

(b) The name, address, and telephone number of the designated generator or storage facility operator contact.

(c) A description of each industrial byproduct intended for beneficial use or storage that clearly identifies the process and location of the generating facility.

(d) Documentation, including analytical testing results, supporting the eligible use classifications as specified under s. NR 538.06 (8).

(e) Certification by the generator, or the generator's designee, or the storage facility operator, or the operator's designee, that the information on the form is true and accurate.

(3) ANNUAL CERTIFICATION. Each generator of industrial byproducts that have been beneficially used under this chapter, operator of a non-exempt storage facility for industrial byproducts as required under s. NR 538.16 (1) (c), or the generator's or operator's designee, shall submit an annual certification, electronically or on a form supplied by the department, that documents the amount of material beneficially used for each eligible use in the previous calendar year and confirms the proper use of each industrial byproduct. The certification form shall be submitted no later than April 1 of the year following the reporting period. The annual certification form shall include all of the following information:

(a) The name and address of the generator or storage facility operator.

(b) The name, address, and telephone number of the designated generator or storage facility operator contact.

(c) A description of each industrial byproduct intended for beneficial use or storage that clearly identifies the process and location of the generating facility.

(d) The volume of each industrial byproduct that was beneficially used during the reporting period, identified by types of beneficial uses under s. NR 538.10. If the industrial byproduct was given or sold to an entity other than the generator for subsequent use or distribution, the name and address of the recipient shall be listed along with the volume the recipient received and the intended beneficial uses.

(e) For non-exempt storage facilities, the volume of each industrial byproduct that was in storage as of December 31 of the reporting year.

(f) Documentation, including test results, supporting any required recharacterization as specified in s. NR 538.06 (5). A non-exempt storage facility under s. NR 538.16 (1) (c) shall provide the name and address of the generators of the industrial byproducts to be stored unless the storage facility is located at the industrial byproduct generating facility.

(g) A summary of the performance, problems, and maintenance associated with any storage facilities in accordance with s. NR 538.16 (1) (c).

(h) Certification by the generator, or the generator's designee, or storage facility operator, or the operator's designee, that the information on the form is true and accurate, and that the performance standards of s. NR 538.04 have been met.

Note: Copies of the annual certification form may be obtained from the department of natural resources, bureau of waste management, 101 South Webster Street, Natural Resources Building, P.O. Box 7921, Madison, Wisconsin 53707-7921.

(4) EXEMPTION. Subsection (2) does not apply if the volume of the generator's industrial byproducts beneficially used, or stored for future use, during the reporting period was less than 1000 cubic yards.

(5) NOTIFICATION. Each generator, or a person designated by the generator such as a broker, shall submit written notification to the department prior to initiating a project when required under ss. NR 538.10 (2) and NR 538.12. All of the following information shall be included in the notification:

(a) The name, address, and phone number of the contact for the project.

(b) The location of the project and a site description, including a topographic or orthophoto map, township and range to the quarter section, and land use information. In addition, the applicant shall submit geographic information system locational information based on no fewer than 6 geographically informative points that define the limits of industrial byproduct placement. These points shall be collected using the North American Datum, NAD83 (1991). For each point, the longitude and latitude shall be referenced to the 5th decimal degree. The date, method, and tools used to collect locational information for each point shall also be included. Other methods of geolocation that provide similar or better accuracy are also acceptable, subject to approval by the department.

(c) The approximate volume of industrial byproduct anticipated to be used in the project.

(d) The anticipated start and end dates for the project and the timing of any phasing.

(e) Identification of the types and generators of the industrial byproducts to be used and the eligible uses of these materials.

(f) Information demonstrating that the proposed project will meet the performance standards and beneficial use specifications of this chapter.

(g) For those beneficial uses listed in s. NR 538.10 (2) that exceed 5000 cubic yards, the method and the data used to determine the groundwater separation distance.

(h) A copy of the property owner notification form required under s. NR 538.22.

(i) For those beneficial uses subject to the public notification requirement under s. NR 538.18, proof that a public notice was placed in the local newspaper in accordance with s. NR 538.18 (1) (a).

Note: Proof of a public notice may include a copy of the notice clipped from the newspaper along with the date it was published or any other notification verifying that an order for the public notice was placed with the newspaper and the expected date of publication.

(6) CONCURRENCE. For proposed projects that require submission of a written notification, the department shall reply with a written concurrence within 10 business days provided the applicant meets the applicable criteria of this chapter. If the department determines that the proposal does not demonstrate that the project will meet the applicable criteria, the department shall provide a written notice of non-concurrence within 10 business days, noting any deficiencies and allowing the applicant an opportunity to correct them or provide additional information. If the department does not respond to the notification within 10 business days, concurrence is considered granted.

(7) MODIFICATIONS. Any generator, or the generator's designee, that wishes to modify a project for which the department granted concurrence under sub. (6) shall notify the department in writing describing the nature of the modification requested. In determining if a modification is required, the applicant shall consider if the proposed modification alters the original project footprint, substantially increases the volume of the byproduct material, or has the potential to affect any of the performance standards under s. NR 538.04. The department shall review the modification request and notify the applicant in writing if submission of a revised notification under sub. (5) is required. If the department does not respond to the notification within 10 business days, the modification is deemed complete and concurrence is considered granted.

(8) RECORD KEEPING. The generator, or the generator's designee, shall maintain records of where industrial byproducts have been utilized under this chapter for one or more of the beneficial uses described under s. NR 538.10 (2). These records shall be maintained and be accessible to department staff upon request for 5 years after the use of the industrial byproduct.

SECTION 13. NR 538.16 is repealed and recreated to read:

NR 538.16 Storage and transportation requirements.

(1) STORAGE. (a) Storage of industrial byproducts for beneficial use shall meet the performance standards specified in s. NR 538.04. Storage facilities shall also satisfy all of the following:

1. The storage facility shall meet all of the following design and operational criteria:

a. Areas intended for the storage of industrial byproducts that have been determined to contain greater than the concentrations specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B shall incorporate an impervious surface pad and be surrounded by curbs or berms to control surface water run-on and run-off. Alternately, if a low permeability clay surface is used, it shall include a protective material cover of, at a minimum, one foot of gravel or an equivalent material over the clay. Areas intended for the storage of byproducts that have been determined to contain less than the concentrations specified for the parameters listed in ch. NR 538 Appendix, Table 1, Column B shall construct a surface pad beneath the storage pile consisting of either an impervious surface, compacted soil, or an aggregate surface with a minimum one-foot thickness or an equally effective design as approved by the department in writing.

b. Storage facilities shall be operated and maintained to minimize dust, off-site tracking, and storm water runoff. The storage area shall be clearly delineated and lined on 3 sides with curbs, blocks or berms designed to prevent spillage and contain the byproduct to the designated storage area. A setback shall be maintained between the stored material and the entrance to the storage area to prevent spillage of material and to reduce off-site tracking.

2. The operator of the storage facility shall provide the department an annual certification in accordance with s. NR 538.14, including a summary of the storage facility performance, problems, and maintenance in the annual certification under s. NR 538.14 (3) (g) and an affirmation that the impervious or low permeability surface pad, if required, still meets the design criteria specified in subd. 1. a.

3. Upon closure of an industrial byproduct storage facility, the storage operator shall remove all visible residues from the storage area.

(b) All of the following industrial byproduct storage facilities are exempt from the requirements of this subsection:

1. Facilities for the storage of industrial byproducts contained within enclosed structures such as buildings, silos, or roll-off boxes.

2. Facilities for the storage of industrial byproducts within a lined area at a licensed engineered landfill. Storage of industrial byproducts at a licensed engineered landfill shall be subject to the conditions of the plan of operation and any other applicable solid waste approvals associated with the landfill.

3. Municipal maintenance and storage facilities that stockpile no more than 300 cubic yards of industrial byproduct material at any given time. The stored material shall be contained by perimeter berms or curbs. These facilities shall be operated and maintained to minimize dust, minimize off-site tracking, and manage storm water runoff.

4. Facilities for the temporary off-site storage or staging of industrial byproducts to be used beneficially in accordance with s. NR 538.10. These temporary facilities shall be operated and maintained to minimize dust, off-site tracking, and storm water runoff, and limit public access. Industrial byproducts may not remain in temporary off-site storage or staging areas for more than 16 months after the date of their placement. These facilities shall provide to the department written notice of the storage location, the date on which the storage of materials began, and the total volume stored.

5. Facilities for which the department issues an exemption on a case specific basis in accordance with s. NR 538.09.

Note: The discharge of stormwater is regulated under ch. NR 216.

(2) TRANSPORTATION. A vehicle or container used to transport industrial byproducts intended for beneficial use shall meet all of the following criteria:

(a) The vehicle or container shall be designed and built to be durable and leak-proof and maintained to prevent nuisance conditions from occurring.

(b) The vehicle or container shall be loaded and hauled in such a manner that the contents do not fall, spill, or leak, including the use of covers as necessary. Any spilled industrial byproduct shall be properly recovered.

Note: Storage and transportation of industrial byproduct in accordance with this chapter are exempt from the storage and transportation requirements of ch. NR 502 as specified in ss. NR 502.05 (3) (i) and 502.06 (2) (k).

SECTION 14. NR 538.18 (1) (intro.) and (a) are amended to read:

NR 538.18 (1) NOTIFICATION. (intro.) Except as provided in sub. (2), no person may initiate a beneficial use project where the volume of the industrial byproduct to be used is greater than 30,000 cubic yards, or construct or operate a permanent or temporary storage facility with a design capacity greater than 30,000 cubic yards, prior to the person giving notice to the affected public and providing for adequate public participation. Unless other forms of public notification and involvement are approved by the department in writing, the notice and public participation process provided by the person intending to initiate a beneficial use project or storage facility shall include, at a minimum, all of the following:

(a) Placing a public notice in the local newspaper at least 30 business days prior to initiating an industrial byproduct beneficial use project or storage facility, specifying the nature of the beneficial use project or storage facility, including the type and amount of the material to be used or stored, how and where the material will be used, the time frame of the project or storage facility operation, that the person intending to initiate the beneficial use project or storage facility may hold a public informational meeting either electively or if requested, and a contact person for the public to request a meeting.

SECTION 15. NR 538.18 (1) (a) (Note) is created to read:

NR 538.18 (1) (a) **Note:** The public informational meeting is not considered an informational hearing under s. 289.26, Stats., even if department staff elect to participate.

SECTION 16. NR 538.18 (2) (a) 1. is repealed and recreated to read:

NR 538.18 (2) (a) 1. Beneficial uses described under s. NR 538.10 (1), (3), (4), and (5).

SECTION 17. NR 538.18 (2) (a) 4. is repealed.

SECTION 18. NR 538.18 (2) (b) 1. is amended to read:

NR 538.18 (2) (b) 1. Storage facilities ~~that are~~ located on the property where the industrial byproducts are generated.

Section 18m. NR 538.18 (2) (b) 3. Is repealed and recreated to read:

NR 538.18 (2) (b) 3. Municipal maintenance and storage facilities under s. NR 538.16 (1) (b) 3.

SECTION 19. NR 538.20 (1) is repealed and recreated to read:

NR 538.20 The department may require environmental monitoring for beneficial use projects subject to this chapter that do not meet the beneficial uses described in s. NR 538.10 or are subject to a case-specific approval under s. NR 538.09.

SECTION 20. NR 538.22 (1) is amended to read:

NR 538.22 (1) Written notice shall be provided to ~~the all~~ owners of property on which any volume of industrial byproducts are is utilized under this chapter for one or more of the beneficial uses described under s. NR 538.10 ~~(5) to (9)(2)~~. This notice shall be provided to the owner of property and the department prior to its use. The generator ~~of the industrial byproduct~~, or a person designated by the generator, shall provide the notice in accordance with this section, unless the department approves an alternative notice procedure. This notice shall be on a form provided by the department or in a format approved by the department in writing. Any property owner receiving this notice shall retain this information and provide this information to the next purchaser of the property. ~~Category 1 industrial byproducts are exempt from the requirements of this section. Category 2 industrial byproducts are exempt from the requirements listed in this section for beneficial use projects of less than 2500 cubic yards provided that the owner of the property is informed in writing that industrial byproducts are being utilized.~~

SECTION 21. NR 538.22 (2) and (3) are repealed and recreated to read:

NR 538.22 (2) A property owner notification shall include all of the following information:

(a) The type, volume, and generator of the industrial byproduct used as geotechnical fill on the property.

(b) The location of the project and a site description, including a topographic or orthophoto map, township and range to the quarter section, or geographic information system locational information that defines the location of industrial byproduct placement.

(c) Affirmation that the generator, or the generator's designee, has discussed the contents of this notice with the property owner and has provided them with a copy.

(3) A copy of the property owner notification form shall be submitted to the department prior to placement of any industrial byproduct material. A copy of the notification may be submitted by mail or electronically as directed by the department.

Note: Copies of this form may be obtained electronically or from the department of natural resources, bureau of waste management, 101 South Webster Street, Natural Resources Building, P.O. Box 7921, Madison, Wisconsin 53707-7921.

SECTION 22. NR 538.22 (4) is amended to read:

(4) ~~LARGE SIZED BENEFICIAL USE PROJECTS.~~ For projects that utilize more than 10,000 cubic yards of industrial byproducts, the notification shall include an affidavit recorded with the register of deeds, within 60 business days ~~of~~ after completing the placement of the industrial byproduct, indicating that industrial byproducts were used on the property, and an indication where the information required ~~in subs. under sub. (1) and (2),~~ may be obtained.

SECTION 23. NR 538.24 is created to read:

NR 538.24 **Excavation of existing geotechnical fill.** (1) GENERAL. An owner of property where industrial byproducts had previously been used as geotechnical fill in accordance with the provisions of this chapter, or the owner's designee, may petition the department for approval to excavate and re-use or dispose of the industrial byproduct material provided they meet the provisions of this section.

(2) REUSE. Except as provided in sub. (5), the property owner, or the owner's designee, shall submit a written notification to the department for re-use of the existing geotechnical fill. The department shall review and respond to the notification in accordance with s. NR 538.14 (6). The notification shall contain all of the following information:

(a) Name, address, and contact information for the property owner and the owner's representative or consultant.

(b) Information demonstrating that the existing geotechnical fill had been placed as a beneficial use project in accordance with this chapter. This information may include a copy of the concurrence letter from the department, a copy of the owner notification notice required

under s. NR 538.22, location on a database maintained by the department for locating beneficial use projects, or other proof as accepted by the department.

(c) Location of the existing geotechnical fill material and the proposed extent of the excavation and relocation of the material.

(d) The proposed reuse, including a demonstration that it will meet the applicable standards specified in ss. NR 538.04 and 538.10.

(3) DISPOSAL. If any excavated geotechnical fill material will be disposed rather than reused, the property owner or the owner's designee shall provide to the department in writing the information required under sub. (2) (a) to (c), the name of the disposal facility, and the volume of disposed material within 60 days after completion of the project.

(4) OFFSITE REUSE. If the excavated material is to be beneficially used on a property other than the original fill site, the property owner of the re-use site shall be notified in accordance with s. NR 538.22. A public notice shall also be issued in accordance with ch. NR 538.18 for excavated material re-use projects with a design capacity greater than 30,000 cubic yards.

(5) EXEMPTIONS. Minor excavations of 1000 cubic yards or less of geotechnical fill material that had previously been approved under the provisions of ch. NR 538 shall be exempt from the requirements of sub. (2), provided the excavated fill material is either reused in accordance with s. NR 538.04 and an eligible beneficial use per s. NR 538.10 or disposed in a landfill. Any remaining fill material shall be covered with a confining surface or soil cover in accordance with an eligible use under s. NR 538.10 (2) (a) to (f).

SECTION 24. NR 538 Appendix I is repealed.

SECTION 25. NR 538 Appendix is created to read:

Chapter NR 538 Appendix

Table 1
Initial Certification and Recertification
Water Leach Test
ASTM D3987-12

Numerical Standard (mg/L)		Parameter	Foundry System Sand	Coal Ash	FGD Gypsum	Other
A ¹	B ²					
0.006	0.03	Antimony	X	X	X	X
0.01	0.05	Arsenic	X	X	X	X
2	10	Barium		X		X
0.004	0.02	Beryllium	X	X		X
2	10	Boron		X	X	X
0.005	0.025	Cadmium	X	X		X
250	1250	Chloride		X		X
0.1	0.5	Chromium, Total	X	X		X
0.04	0.2	Cobalt	X	X		X
1.3	6.5	Copper	X			X
4	20	Fluoride		X	X	X
0.015	0.075	Lead	X	X		X
0.3	1.5	Manganese			X	X
0.002	0.01	Mercury		X	X	X
0.04	0.2	Molybdenum		X		X
0.1	0.5	Nickel	X			X
10	50	Nitrite + Nitrate (as N)				X
2	10	Phenol	X			X
0.05	0.25	Selenium		X	X	X
250	1250	Sulfate		X		X
0.002	0.01	Thallium		X	X	X
0.375	0.75	Vanadium				X
25	125	Zinc				X

Notes:

1 - Column A –Industrial byproducts that have concentrations below these standards may be used as geotechnical fill no less than 3 feet from the water table at the time of placement in accordance with s. NR 538.12 (2) (b), or no less than 5 feet from the water table when used for nonmetallic mine reclamation under s. NR 538.10 (2) (f). Standards are based on the enforcement exceedance values in s. NR 140.10 or recommended standard updates from the Wisconsin department of health services.

2 - Column B –Industrial byproducts that have concentrations above Column A but below Column B may be used as geotechnical fill no less than 5 feet from the water table at the time of placement in accordance with s. NR 538.12 (2) (c). Standards are based on 5 times the enforcement exceedance values in s. NR 140.10.

Table 2
Initial Certification and Recertification
Bulk Analysis

Numerical Standard (mg/kg)	Parameter	Foundry System Sand	Coal Ash	FGD Gypsum	Other
97.3	Antimony	X	X	X	X
8	Arsenic	X	X	X	X
8600	Barium		X		X
122	Beryllium	X	X	X	X
43600	Boron		X		X
104	Cadmium	X	X		X
1.9	Chromium, Hexavalent	X	X	X	X
35.2	Cobalt	X			X
52	Lead	X	X		X
13.7	Mercury		X	X	X
1220	Molybdenum		X		X
264	Nickel	X			X
1210	Selenium		X	X	X
2.4	Thallium		X	X	X
773	Vanadium		X		X
73000	Zinc				X
19.9	Benz(a)anthracene	X			X
2.0	Benzo(a)pyrene	X			X
20	Benzo(b)fluoranthene	X			X
200	Benzo(k)fluoranthene	X			X
2000	Chrysene	X			X
2	Dibenzo(ah)anthracene	X			X
20	Indeno(123-cd)pyrene	X			X
75.8	1-methyl naphthalene	X			X
628	2-methylnaphthalene	X			X
25.1	Naphthalene	X			X
4710	Pyrene	X			X

Notes:

Standards are based on Wisconsin department of health services potential ingestion and inhalation exposure modelling results.

Table 3
 FGD Byproduct for Soil or Plant Additive Standards
 Total Elemental Analysis

Parameter	Numerical Standard (mg/kg)
Antimony	1.5
Arsenic	13.1
Barium	1000
Beryllium	2.5
Boron	200
Cadmium	1.0
Chromium (Total)	100
Copper	95
Lead	52
Manganese	2937
Mercury	3.13
Molybdenum	10
Nickel	100
Selenium	50
Thallium	1.0
Vanadium	136
Zinc	150

Notes:

Values are derived from the NRCS Conservation Practice Standard Code 333, “*Amending Soil Properties With Gypsum Products*”, June, 2015, screening values or s. NR 720 Background Threshold Values for lead, manganese and zinc which have background values exceeding the NRCS screening values. Mercury values are based on the s. NR 720 Direct Contact Remedial Concentration Limits (RCLs).

Table 4

Beneficial Use Methods		Must contain less than the concentration specified for the parameters in the following Appendix Tables:		
NR 538.10		1 ^{3,4}	2	3
(1)	Contained or Converted Uses (a) Encapsulated uses (b) Waste stabilization or solidification (c) Supplemental fuels (d) Daily cover	---	---	---
(2)	Geotechnical Fill (a) Building sub-base (b) Paved lot sub-base (c) Soil/gravel cover (d) Feed and manure storage structures (e) Transportation embankments (f) Non-metallic mine reclamation ²	X	---	---
(3)	Construction Uses (a) Paved roadway base course (b) Base aggregates (c) Utility trench backfill (d) Tank, vault or tunnel abandonment (e) Slabjacking material (f) Soil and pavement base stabilization for structural improvements (g) Flowable fill for structural improvements (h) Bonded surface course	X	---	---
(4)	Unconfined uses (a) Unbonded Surface Course (b) Winter road abrasives (c) Manufactured soil	X	X	---
(5)	Soil or Plant Additives (a) Flue gas desulphurization material (b) Agricultural liming agents ¹	---	---	X

Notes:

1 – Byproducts intended for use as agricultural liming agents must contain concentrations less than the values listed in s. NR 204.07 (5) (c).

2 – Byproducts intended for use as part of a nonmetallic mine reclamation project must either be designated as “select foundry sand” by the department under s. 538.06(3)(f) or contain concentrations less than the values listed in Appendix, Table 1, Column A.

3 – Table 1 contains numeric standards under Column A and Column B. The standards under Column B determine the eligible uses under s. NR 538.08 and the standards under Column A determine the separation to groundwater for geotechnical fill uses under s. NR 538.10(2).

4 - Select foundry sand must contain less than the concentration specified for the parameters in Table 1, Column B as required under s. NR 538.03(12m).

SECTION 26. EFFECTIVE DATE. This rule takes effect on the first day of the sixth month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (b), Stats.

SECTION 27. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 10, 2019.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

Preston D. Cole, Secretary

(SEAL)