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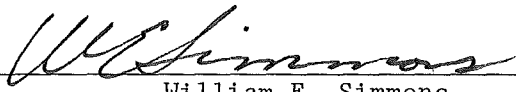
STATE OF WISCONSIN )  
 ) SS.  
DEPARTMENT OF AGRICULTURE, )  
TRADE & CONSUMER PROTECTION )

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, William E. Simmons, Assistant Administrator, Agricultural Resource Management Division, State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the official records of said Division, do hereby certify that the annexed order adopting rules relating to the regulatory program for the control of fertilizer or pesticide substances in groundwater, Chapter Ag 161, Wis. Adm. Code, was duly approved and adopted by the Department on August 20, 1985.

I further certify that said copy has been compared by me with the original on file in the Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the Department offices in the city of Madison, this 20th day of August, 1985.

  
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William E. Simmons  
Assistant Administrator  
Agricultural Resource Management Division

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ORDER  
OF THE  
STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION  
ADOPTING, AMENDING, OR REPEALING RULES

To create chapter Ag 161, relating to the department's regulatory program for the control of fertilizer or pesticide substances in groundwater.

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Analysis Prepared by the Department of Agriculture,  
Trade and Consumer Protection

PREFATORY NOTE:

The department of agriculture, trade and consumer protection ("department") is responsible for regulating the use of pesticides under ss. 94.67 through 94.71, Stats. The department is also responsible for regulating fertilizer and pesticide bulk storage practices under s. 94.645, Stats., created by 1983 Wisconsin Act 410 (effective May 11, 1984). These activities subject to department regulation may, under some circumstances, result in the presence of fertilizer or pesticide substances in groundwater. Groundwater contamination is sometimes caused by violations of existing rules or orders of the department. In other cases, contamination may conceivably result from normal bulk storage practices or normal pesticide use practices which, though they may be subject to the department's regulatory jurisdiction, are not currently prohibited.

Under 1983 Wisconsin Act 410, which created ch. 160, Stats., the department of natural resources ("DNR") will establish numerical standards, consisting of enforcement standards and preventive action limits, for certain fertilizer and pesticide substances in groundwater. DNR will also be sampling groundwater, to determine whether groundwater is contaminated. If a fertilizer or pesticide substance is found in groundwater, the department will attempt to determine whether the contamination has resulted from, or may be aggravated by an activity subject to department regulation. The department may then take appropriate regulatory or enforcement action, based on its authority under s. 94.645, Stats. or ss. 94.67 through 94.71, Stats.

If the contamination has resulted from a violation of an existing rule or order of the department, the department may seek appropriate enforcement action against the violator, even if the concentration does not exceed an enforcement standard or preventive action limit established by DNR. If the concentration

attains or exceeds an enforcement standard or preventive action limit, the department may implement a site-specific regulatory response to control the contamination, whether or not the contamination was caused by a violation of an existing rule or order.

Authority for a site-specific regulatory response must be based on the department's underlying regulatory authority under s. 94.645, Stats. or ss. 94.67 through 94.71, Stats. Chapter 160, Stats. makes no addition to the department's underlying authority; however, any site-specific regulatory response must conform to the requirements and limitations of ch. 160, Stats. Under ch. 160, Stats., the department is required to consider various facts and criteria in its implementation of site-specific regulatory responses.

Under ch. 160, Stats., the department must adopt preventive rules within its jurisdiction, designed to limit the presence of fertilizer or pesticide substance in groundwater. Department rules must also specify the range of site-specific responses which the department may implement for each substance, if the enforcement standard or preventive action limit for that substance is attained or exceeded at the point of standards application.

Chapter Ag 161, Wis. Adm. Code (Fertilizer or Pesticide Substances in Groundwater; Regulatory Program) establishes the basic elements of the department's regulatory program for the prevention and control of groundwater contamination, where the department finds that the contamination has resulted from or may be aggravated by activities subject to department regulation. The rule establishes basic operating procedures, and identifies the regulatory and enforcement options which are available to the department for the control of groundwater contamination. It also identifies basic criteria to be considered by the department in its choice of options. The rule will be supplemented, at a later date, by substance-specific rules designed to regulate individual substances in greater detail.

#### RULE ANALYSIS:

Chapter Ag 161, Wis. Adm. Code, establishes certain elements of the department's regulatory program for the prevention and control of groundwater contamination, where the department finds that groundwater contamination has resulted from or may be aggravated by activities subject to department regulation. The rule includes:

1. Standards for the collection, handling and analysis of official groundwater samples, to ensure the reliability of sample test results used by the department as a basis for regulatory or enforcement action.

2. The points of standards application at which concentrations of a fertilizer substance or pesticide substance in groundwater may be measured to determine whether an enforcement standard or preventive action limit has been attained or exceeded. These points of standards application are defined, pursuant to s. 160.21(2), Stats., for activities subject to department regulation.

3. The preliminary investigative steps to be taken by the department upon receipt of groundwater sample results which indicate the presence of a fertilizer substance or pesticide substance in Wisconsin groundwater.

4. The enforcement options which are available to the department if the department finds, upon investigation, that the presence of a fertilizer substance or pesticide substance in groundwater has resulted from a violation of an existing statute, rule or order administered by the department under s. 94.645, Stats. or ss. 94.67 through 94.71, Stats. Enforcement action may be taken against law violators, whether or not the groundwater contamination attains or exceeds an enforcement standard or preventive action limit.

5. The site-specific regulatory options which are available to the department under s. 94.645, Stats. or ss. 94.67 through 94.71, Stats. if, at a point of standards application, the concentration of a fertilizer or pesticide substance is found to attain or exceed an enforcement standard or preventive action limit.

6. General criteria to be considered by the department in its choice and application of site-specific regulatory responses, or in the adoption of rules which require nondiscretionary site-specific responses under specified conditions.

7. Requirements and limitations governing the prohibition of pesticide uses, whether by site-specific regulatory responses or by rule.

8. A commitment to adopt substance-specific rules, as appropriate under ss. 94.69, 160.19, and 160.21, Stats., for each pesticide substance for which an enforcement standard or preventive action limit is established by the department of natural resources Rules may include preventive measures designed to limit the presence of pesticide substances in groundwater statewide. Rules may also include requirements for the implementation of site-specific responses under specified conditions.

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1 Pursuant to authority vested in the state of Wisconsin  
2 department of agriculture, trade and consumer protection by  
3 ss. 93.07(1), 94.645 and 94.69, Stats., and ch. 160, Stats., the  
4 state of Wisconsin department of agriculture, trade and consumer  
5 protection hereby creates rules interpreting s. 94.645, Stats.,  
6 ss. 94.67 through 94.71, Stats., and ch. 160, Stats. as follows:

7 SECTION 1. Chapter Ag 161 is created to read:

8 Chapter Ag 161  
9

FERTILIZER OR PESTICIDE SUBSTANCES IN  
GROUNDWATER; REGULATORY PROGRAM

PREFATORY NOTE:

(1) The department of agriculture, trade and consumer protection has authority to regulate fertilizer and pesticide bulk storage under s. 94.645, Stats., and pesticide use under ss. 94.67 through 94.71, Stats. Activities subject to department regulation may, under some circumstances, result in the presence of fertilizer substances or pesticide substances in groundwater. Under ch. 160, Stats., the department of natural resources is required to establish numerical standards, consisting of enforcement standards and preventive action limits, for certain substances in groundwater. If a fertilizer substance or pesticide substance is found in groundwater, the department will consider whether the presence of the fertilizer substance or pesticide substance has resulted from, or may be aggravated by an activity subject to department regulation. If the presence of the fertilizer or pesticide substance has resulted from a violation of an existing statute, rule or order administered by the department, the department may seek appropriate enforcement action against the violator, whether or not the contamination exceeds an enforcement standard or preventive action limit adopted by the department of natural resources. If, at a point of standards application, the concentration of a fertilizer substance or pesticide substance in groundwater attains or exceeds an enforcement standard or preventive action limit, the department may take site-specific regulatory action to prevent further groundwater degradation or restore groundwater quality, whether or not the substance concentration has resulted from a violation of an existing statute, rule or order. Site-specific regulatory action will be consistent with ch. 160, Stats. and this chapter. The department will also adopt substance-specific rules, as appropriate under ss. 94.69, 160.19 and 160.21, Stats., for each pesticide substance for which an enforcement standard and preventive action limit are established by the department of natural resources. Rules may include preventive measures designed to minimize the presence of pesticide substances in groundwater statewide. Rules may also include requirements for the implementation of site-specific regulatory responses under specified conditions.

(2) This chapter establishes certain elements of the department's program for the prevention and control of groundwater contamination where it appears that groundwater contamination has resulted from or may be aggravated by activities subject to department regulation. This chapter includes:

1 (a) Standards for the collection, handling and  
2 analysis of official groundwater samples, to ensure the  
3 reliability of sample test results used by the depart-  
4 ment as a basis for regulatory or enforcement action.

5 (b) The points of standards application at which  
6 concentrations of a fertilizer substance or pesticide  
7 substance in groundwater may be measured to determine  
8 whether an enforcement standard or preventive action  
9 limit has been attained or exceeded. These points of  
10 standards application are defined, pursuant to  
11 s. 160.21(2), Stats., for activities subject to depart-  
12 ment regulation.

13 (c) The preliminary investigative steps to be  
14 taken by the department upon receipt of groundwater  
15 sample test results which indicate the presence of a  
16 fertilizer substance or pesticide substance in Wisconsin  
17 groundwater.

18 (d) The enforcement options which are available to  
19 the department if the department finds, upon investiga-  
20 tion, that the presence of a fertilizer substance or  
21 pesticide substance in groundwater has resulted from a  
22 violation of an existing statute, rule or order admin-  
23 istered by the department under s. 94.645, Stats. or  
24 ss. 94.67 through 94.71, Stats.

25 (e) The site-specific regulatory options which are  
26 available to the department under s. 94.645, Stats. or  
27 ss. 94.67 through 94.71, Stats. if, at a point of stand-  
ards application, the concentration of a fertilizer sub-  
stance or pesticide substance is found to attain or  
exceed an enforcement standard or preventive action  
limit.

(f) The general criteria to be considered by the  
department in its choice of a site-specific regulatory  
response, or in the adoption of rules which require non-  
discretionary site-specific responses under specified  
conditions.

(g) Requirements and limitations governing the  
prohibition of pesticide uses, whether by site-specific  
regulatory responses or by rule.

(h) A commitment to adopt substance-specific  
rules, as appropriate under ss. 94.69, 160.19 and  
160.21, Stats., for each pesticide substance for which  
an enforcement standard and preventive action limit are  
adopted by the department of natural resources. Rules  
may include preventive measures designed to minimize the  
presence of pesticide substances in groundwater state-  
wide. Rules may also include requirements for the  
implementation of site-specific regulatory responses  
under specified conditions.

(3) This chapter does not limit the department's  
rulemaking authority under ss. 94.645, 94.69, 160.19, or  
160.21, Stats. In the exercise of its rulemaking  
authority, the department may consider any information

1 which may be relevant to the rulemaking proceeding,  
2 whether or not the information is derived from Wisconsin  
3 groundwater samples. The finding of a fertilizer or  
4 pesticide substance in groundwater, at a level which  
5 equals or exceeds an enforcement standard or preventive  
6 action limit, is not a prerequisite to the exercise of  
7 the department's rulemaking authority under ss. 94.645,  
8 94.69, 160.19, or 160.21, Stats.

9 (4) This chapter does not limit the department in  
10 the exercise of any of its statutory authority, where  
11 the department determines that the exercise of its  
12 authority is necessary to comply with a statutory man-  
13 date, or to safeguard the public health, safety or  
14 welfare.

15 (5) General rules governing pesticide use and  
16 control are contained in ch. Ag 29, Wis. Adm. Code.  
17 Rules adopted under s. 94.645, Stats. to regulate ferti-  
18 lizer bulk storage are contained in ch. Ag 162, Wis.  
19 Adm. Code. Rules adopted under s. 94.645, Stats. to  
20 regulate pesticide bulk storage are contained in ch.  
21 Ag 163, Wis. Adm. Code.

22 Ag 161.01 DEFINITIONS. As used in this chapter:

23 (1) "Activity subject to department regulation" means:

24 (a) The bulk storage of fertilizer or pesticides, to the  
25 extent that the bulk storage is subject to possible regulation by  
26 the department under s. 94.645, Stats.

27 (b) Pesticide use, to the extent that the pesticide use is  
28 subject to possible regulation by the department under ss. 94.67  
29 through 94.71, Stats.

30 (2) "Department" means the state of Wisconsin department of  
31 agriculture, trade and consumer protection.

32 (3) "Enforcement standard" means a numerical value express-  
33 ing the concentration of a substance in groundwater which is  
34 adopted under ss. 160.07 and 160.09, Stats.

35 (4) "Fertilizer" means a fertilizer as defined in  
36 s. 94.64(1)(e), Stats., except that it does not include anhydrous  
37 ammonia.

1 (5) "Fertilizer substance" means either of the following for  
2 which an enforcement standard or preventive action limit has been  
3 adopted by the department of natural resources:

4 (a) A fertilizer; or

5 (b) A degradation product or metabolic product of fer-  
6 tilizer.

7 (6) "Groundwater" means any of the waters of the state, as  
8 defined in s. 144.01(19), Stats., occurring in a saturated sub-  
9 surface geological formation of rock or soil.

10 (7) "Official groundwater sample" means a groundwater sample  
11 from which an official groundwater test result is obtained.

12 (8) "Official groundwater test result" means a groundwater  
13 test result which is:

14 (a) Obtained by department analysis of a groundwater sample  
15 collected by the department or its agent; or

16 (b) Reported and certified to the department by the  
17 department of natural resources pursuant to s. Ag 161.02.

18 (9) "Nonpotable water supply" means an excavation or opening  
19 into the ground made by digging, boring, drilling, driving or  
20 other methods for the purpose of obtaining groundwater for a use  
21 other than human consumption or preparation of food products.

22 (10) "Pesticide" means a pesticide as defined in  
23 s. 94.67(25), Stats., or a pesticide active ingredient as defined  
24 in s. 94.67(1), Stats.

25 (11) "Pesticide substance" means any of the following  
26 for which an enforcement standard or preventive action limit has  
27 been adopted by the department of natural resources:



1 (a) A pesticide;

2 (b) An isomer of a pesticide; or

3 (c) A degradation product or metabolic product of a  
4 pesticide.

5 (12) "Pesticide use" means the mixing, use, application,  
6 handling, transport, storage or disposal of a pesticide.

7 (13) "Point of standards application" means a location at  
8 which the concentration of a substance in groundwater may be  
9 measured to determine whether a preventive action limit or  
10 enforcement standard has been attained or exceeded, as provided  
11 in s. 160.21(2)(b), Stats. and s. Ag 161.03.

12 (14) "Preventive action limit" means a numerical value  
13 expressing the concentration of a substance in groundwater which  
14 is adopted under s. 160.15, Stats.

15 (15) "Property boundary" means the boundary of a total con-  
16 tiguous parcel of land owned by a common owner, regardless of  
17 whether public or private roads run through the parcel.

18 (16) "Secretary" means the secretary of the department.

19 (17) "Site-specific response" means a localized regulatory  
20 response by the department to groundwater sample findings obtained  
21 at a point of standards application, as provided in s. Ag 161.07.

22 (18) "Special order" means an order of the department which  
23 is directed to an individually named or identified respondent.

24 (19) "Substance" means any solid, liquid, semisolid, dis-  
25 solved solid or gaseous material, naturally occurring or man-made  
26 chemical, parameter for measurement of water quality or biological  
27 organism which, in its original form, or as a metabolic or a

1 degradation or waste product, may decrease the quality of  
2 groundwater.

3 Ag 161.02 GROUNDWATER TEST RESULTS; USE BY DEPARTMENT.

4 (1) USE OF OFFICIAL GROUNDWATER TEST RESULTS. An official  
5 groundwater test result is presumed to be reliable for purposes of  
6 regulatory or enforcement action under this chapter whether or not  
7 the department collected or analyzed the official groundwater  
8 sample.

9 (2) USE OF UNOFFICIAL GROUNDWATER TEST RESULTS. A regulatory  
10 or enforcement action under this chapter may be based on a ground-  
11 water test result which is not an official groundwater test result  
12 only if the department determines that the unofficial groundwater  
13 test result is reliable for purposes of the regulatory or enforce-  
14 ment action.

15 NOTE: If an unofficial groundwater sample is not  
16 determined to be reliable for purposes of regulatory  
or enforcement action under this chapter, the depart-  
ment may nevertheless:

- 17 1. Refer the unofficial groundwater test result to  
18 the department of natural resources, with or  
19 without a recommendation for official sampling and  
testing.
- 20 2. Inform affected persons of the unofficial  
21 groundwater test result.
- 22 3. Refer the unofficial groundwater test result to  
23 state or local health authorities, and to county  
agricultural extension agents.
- 24 4. Initiate further investigation or research related  
to the unofficial groundwater sample result.

25 (3) MEMORANDUM OF UNDERSTANDING. Pursuant to  
26 ss. 160.21(2)(e) and 160.27, Stats., the department shall enter  
27 into a memorandum of understanding with the department of natural

1 resources to ensure the reliability of official groundwater test  
2 results used by the department for purposes of regulation and  
3 enforcement under this chapter. The memorandum of understanding  
4 shall govern the reporting and certification of official ground-  
5 water test results to the department by the department of natural  
6 resources. It shall also govern the collection, handling and  
7 analysis of official groundwater samples by the department of  
8 natural resources or its designated agents. The memorandum of  
9 understanding shall include:

10 (a) Standards for the collection of official groundwater  
11 samples, including standards related to:

- 12 1. Collection equipment and containers.
- 13 2. Collection procedures.
- 14 3. Collection records.

15 (b) Standards for the handling of official groundwater  
16 samples, including:

- 17 1. Temperature conditions under which samples are to be  
18 kept.
- 19 2. Time periods within which samples are to be analyzed.
- 20 3. Chain of custody requirements.

21 (c) Standards for the analysis of official groundwater  
22 samples, including:

- 23 1. Required quality assurance programs for laboratories  
24 engaged in the analysis of official groundwater samples under this  
25 chapter.
- 26 2. Control sample requirements.
- 27 3. Required analytical methods.

- 1 4. Required confirmation of analytical results.
- 2 5. Instrument calibration and maintenance requirements.
- 3 6. Required analytical worksheets and documentation.
- 4 7. Chain of custody requirements in the laboratory.
- 5 8. Requirements for the timely reporting of analytical
- 6 results.
- 7 9. Continuing sample custody requirements.
- 8 10. Access to laboratory records by the department and the
- 9 department of natural resources.

10 (d) Contract requirements applicable to designated agents  
11 engaged in the collection or analysis of official groundwater  
12 samples under this chapter.

13 (e) Reports and certifications required to accompany official  
14 groundwater samples and test results obtained by designated agents  
15 of the department of natural resources.

16 (f) Standards for the reporting and certification of official  
17 groundwater test results to the department by the department of  
18 natural resources.

19 (4) DEPARTMENT CONTRACTS WITH AGENTS DESIGNATED TO COLLECT OR  
20 ANALYZE OFFICIAL GROUNDWATER SAMPLES. Every person or entity  
21 designated to collect or analyze an official groundwater sample as  
22 the agent of the department, rather than as the agent of the  
23 department of natural resources, shall first enter into a written  
24 contract with the department. Contracts shall include specific  
25 standards for the collection, handling and analysis of official  
26 groundwater samples, to ensure the reliability of official  
27 groundwater test results used by the department for purposes of

1 regulation and enforcement under this chapter. Agents contracting  
2 directly with the department shall be held to the same require-  
3 ments which are applicable to agents designated by the department  
4 of natural resources pursuant to a memorandum of understanding  
5 under sub. (3).

6 Ag 161.03 POINTS OF STANDARDS APPLICATION. (1) To  
7 determine whether an enforcement standard or preventive action  
8 limit for a fertilizer substance or pesticide substance has been  
9 attained or exceeded, the concentration of the fertilizer sub-  
10 stance or pesticide substance shall be measured at a point of  
11 standards application. Except as otherwise provided in this  
12 section, points of standards application for fertilizer substances  
13 and pesticide substances include:

14 (a) A community water system covered under ch. NR 111.

15 (b) A private water supply, high capacity water system,  
16 school water system or public water system covered under  
17 ch. NR 112.

18 (c) A monitoring well or other groundwater sample source,  
19 regardless of whether the well or source is covered under par. (a)  
20 or (b), if the well or source is reasonably designed and of  
21 adequate depth to permit the collection of representative ground-  
22 water samples.

23 (2) Except with the consent of the property owner, neither  
24 a high capacity water system covered under NR 112, nor a well or  
25 source not covered under sub. (1)(a) or (b) may be considered a  
26 point of standards application for a fertilizer substance or pest-  
27 icide substance for purposes of a site-specific response under

1 s. Ag 161.07(5) if:

2 (a) The system, well or source is located within the  
3 property boundary of a parcel of land on which an activity subject  
4 to department regulation is conducted; and

5 (b) The activity subject to department regulation is a  
6 potential source of the fertilizer substance or pesticide sub-  
7 stance in groundwater; and

8 (c) The system, well or source is not used as a source of  
9 potable water. A system, well or source under this subsection  
10 shall be clearly posted to warn potential users that the system,  
11 well or source is not a potable water supply. The system, well or  
12 source shall be locked when not in use, to prevent any use of the  
13 system as a potable water supply.

14 (3) A private water supply system or high capacity water  
15 supply system covered under ch. NR 112 shall, upon request of the  
16 system owner, be excluded as a point of standards application for  
17 purposes of a site-specific response under s. Ag 161.07(5) if the  
18 system is located within the property boundary of a parcel of land  
19 on which an activity subject to department regulation is  
20 conducted, and if:

21 (a) Use of the system has been discontinued, and the dis-  
22 continued system is locked or otherwise secured to prevent any use  
23 of the system; or

24 (b) The system is used solely as a nonpotable water supply.  
25 A nonpotable water supply system under this paragraph shall be  
26 clearly posted to warn potential users that the system is not a  
27 potable water supply. The system shall also be locked or

1 otherwise secured when not in use, to prevent any use of the  
2 system as a potable water supply.

3 (4) A well or system shall be excluded as a point of stand-  
4 ards application if the department or the department of natural  
5 resources determines that groundwater samples collected from the  
6 well or system do not reliably reflect groundwater conditions,  
7 because of the design or construction of the well or system.

8 NOTE: Since groundwater monitoring is not usually  
9 required under existing rules for activities subject  
10 to department regulation, the points of standards  
application in s. Ag 161.03 are specified pursuant  
to s. 160.21(2)(b), Stats.

11 Ag 161.04 PRELIMINARY INVESTIGATION BASED ON GROUNDWATER

12 SAMPLE TEST RESULTS. (1) Upon receipt of groundwater test  
13 results indicating the presence of a fertilizer substance or pest-  
14 icide substance in groundwater, the department shall undertake a  
15 preliminary investigation to determine whether the presence of the  
16 fertilizer substance or pesticide substance may have resulted  
17 from, or may be affected by an activity subject to department reg-  
18 ulation. The department may investigate on the basis of unoffi-  
19 cial groundwater test results if the test results are sufficiently  
20 reliable to warrant investigation.

21 (2) If, upon preliminary investigation, the department finds  
22 that the presence of a fertilizer substance or pesticide substance  
23 in groundwater has resulted from, or may be affected by an  
24 activity subject to department regulation, the department shall  
25 investigate to determine:

26 (a) Whether the presence of the fertilizer substance or  
27 pesticide substance in groundwater has resulted from a violation

1 of an existing statute, rule or order administered by the depart-  
2 ment under s. 94.645, Stats. or ss. 94.67 through 94.71, Stats.

3 (b) Whether the concentration of the fertilizer substance or  
4 pesticide substance attains or exceeds an enforcement standard or  
5 preventive action limit.

6 NOTE: If an unofficial groundwater test result is not  
7 sufficiently reliable to warrant investigation, the  
department may nevertheless:

- 8 1. Refer the groundwater test results to the department  
9 of natural resources, with or without a recommendation  
for official sampling or other action.
- 10 2. Refer the groundwater test results to another regu-  
11 latory agency, with or without a recommendation for  
action.
- 12 3. Refer the groundwater test results to state or local  
13 health authorities, and to county agricultural extension  
agents.
- 14 4. Inform affected persons of the groundwater test  
15 results, and suggest voluntary measures to prevent,  
limit or reduce any substance concentrations which may  
16 exist in groundwater.
- 17 5. Initiate further investigation or research related to  
the groundwater test results.

18 Ag 161.05 VIOLATION OF EXISTING STATUTE OR RULE;

19 ENFORCEMENT OPTIONS. (1) FERTILIZER AND PESTICIDE BULK STORAGE;

20 VIOLATION OF EXISTING RULES. If, upon investigation under

21 s. Ag 161.04(2), the department finds that the concentration of a

22 fertilizer substance or pesticide substance in groundwater has

23 resulted from a violation of rules adopted by the department under

24 s. 94.645, Stats., the department may proceed against the violator

25 using any of the following enforcement options, even if the con-

26 centration does not exceed an enforcement standard or preventive

27 action limit:



1 (a) A court action to recover a civil forfeiture from the  
2 violator, as provided under s. 94.645(5), Stats.

3 (b) An administrative special order proceeding, as provided  
4 under s. 94.645(4)(a), Stats. Upon violation of a department  
5 special order issued under s. 94.645(4)(a), Stats., the department  
6 may seek an injunction under s. 94.645(4)(b), Stats., or a civil  
7 forfeiture under s. 94.645(5), Stats.

8 (c) A warning notice under s. 93.06(10), Stats.

9 NOTE: Rules adopted under s. 94.645, Stats. to regulate  
10 fertilizer bulk storage are contained in ch. Ag 162, Wis.  
11 Adm. Code. Rules adopted under s. 94.645, Stats. to  
12 regulate pesticide bulk storage are contained in ch. Ag 163,  
13 Wis. Adm. Code.

14 (2) PESTICIDE USE; VIOLATION OF EXISTING STATUTES OR RULES.

15 If, upon preliminary investigation under s. Ag 161.04(2), the  
16 department finds that the concentration of a pesticide substance  
17 in groundwater has resulted from a violation of any provision of  
18 ss. 94.67 through 94.71, Stats., or any rule adopted under  
19 s. 94.69, Stats., the department may proceed against the violator  
20 using any of the enforcement options set forth under s. 94.71,  
21 Stats., as appropriate, or may issue a warning notice to the  
22 violator under s. 93.06(10), Stats., as appropriate. The con-  
23 centration of a pesticide substance in groundwater need not attain  
24 or exceed an enforcement standard or preventive action limit in  
25 order for the department to take enforcement action under this  
26 subsection.

27 (3) This section does not limit the department's respon-  
sibility under ss. Ag 161.06 and Ag 161.07.

1           Ag 161.06 FERTILIZER OR PESTICIDE BULK STORAGE; GROUNDWATER  
2 CONTAMINATION EXCEEDING ENFORCEMENT STANDARD OR PREVENTIVE ACTION  
3 LIMIT; REGULATORY OPTIONS.

4           (1) RULEMAKING. If, upon investigation under  
5 s. Ag 161.04(2), the department finds that the concentration of a  
6 fertilizer substance or pesticide substance in groundwater attains  
7 or exceeds an enforcement standard or preventive action limit, and  
8 that the concentration has resulted from or may be affected by  
9 bulk fertilizer or bulk pesticide storage activities which are not  
10 currently regulated by the department, the department shall review  
11 its rules adopted under s. 94.645, Stats. to determine whether the  
12 rules should be amended pursuant to s. 160.19, Stats. Rule  
13 amendments, if any, shall be general in application, and may not  
14 be limited in their application to a single bulk fertilizer or  
15 bulk pesticide storage facility.

16           NOTE: Rules adopted under s. 94.645, Stats. to regulate  
17 fertilizer bulk storage are contained in ch. Ag 162, Wis.  
18 Adm. Code. Rules adopted under s. 94.645, Stats. to  
19 regulate pesticide bulk storage are contained in ch.  
20 Ag 163, Wis. Adm. Code.

21           (2) SPECIAL ORDERS; STATUTORY LIMITATIONS ON USE. The  
22 department may not regulate the storage of bulk fertilizer or bulk  
23 pesticides by special order under s. 94.645(4)(a), Stats., except  
24 to prohibit or correct a violation of existing rules under  
25 s. 94.645, Stats. This does not prevent the department from regu-  
26 lating the storage or other use of bulk pesticides by special  
27 order under s. 94.71(3)(c), Stats. and this chapter, whether or  
not the storage or use violates existing rules under s. 94.645,  
Stats.

1 NOTE: If groundwater contamination is related to  
2 fertilizer bulk storage, but the department is unable to  
3 respond by rule or special order, the department may  
4 refer the matter to the department of natural resources  
5 for possible site-specific action under ch. 144, Stats.

4 Ag 161.07 PESTICIDE USE; GROUNDWATER CONTAMINATION EXCEEDING  
5 ENFORCEMENT STANDARD OR PREVENTIVE ACTION LIMIT; SITE-SPECIFIC  
6 RESPONSE.

7 (1) SITE-SPECIFIC RESPONSE; GENERAL. If, upon investigation  
8 under s. Ag 161.04(2), the department finds that the concentration  
9 of a pesticide substance in groundwater attains or exceeds an  
10 enforcement standard or preventive action limit, and that the con-  
11 centration has resulted from or may be affected by a pesticide  
12 use, the department shall implement an appropriate site-specific  
13 response to regulate the pesticide use, pursuant to the applicable  
14 provisions of ss. 160.21(3), 160.23 and 160.25, Stats. and this  
15 section. A site-specific response may take any of the forms  
16 described under sub. (2). A site-specific response may be imple-  
17 mented to regulate a pesticide use, whether or not the pesticide  
18 use violates an existing statute or rule administered by the  
19 department. Except as otherwise provided under s. 160.23, Stats.  
20 or s. 160.25, Stats., the site-specific response shall be designed  
21 to minimize the concentration of the pesticide substance where  
22 technically and economically feasible and to restore and maintain  
23 compliance with the preventive action limit at the point of stand-  
24 ards application, and at other downgradient points to which the  
25 pesticide substance may migrate. A site-specific response may be  
26 implemented pursuant to substance-specific rules adopted under  
27 s. Ag 161.09.

1 (2) SITE-SPECIFIC RESPONSE; FORM OF REGULATORY ACTION.

2 (a) Special orders. 1. A site-specific response may include one  
3 or more special orders issued under s. 94.71(3)(c), Stats. The  
4 department may issue a special order to a respondent, whether or  
5 not the respondent has previously engaged in the use of the pesti-  
6 cide, if the department finds that the special order is necessary  
7 to achieve the objectives under sub. (1). The department may, by  
8 substance-specific rules under s. Ag 161.09, prescribe the scope  
9 and contents of special orders, and the conditions under which  
10 special orders are to be issued. Special orders may be issued on  
11 a summary basis, according to criteria set forth under  
12 s. 94.71(3)(c), Stats. and any substance-specific rules adopted  
13 under s. Ag 161.09. Summary special orders are subject to a right  
14 of hearing before the department upon request. Special orders  
15 required by rule may be signed by a department employe designated  
16 in the rule. All other special orders shall be signed by the  
17 secretary, or a person individually designated by the secretary.

18 2. A special order may include:

19 a. A prohibition against the use of a pesticide, subject to  
20 s. Ag 161.08.

21 b. Limitations on the purposes for which a pesticide may be  
22 used, including limitations on the crops or target pests for which  
23 a pesticide may be used.

24 c. Limitations on the rate at which a pesticide is applied.

25 d. Limitations on the time or frequency of pesticide use.

26 e. Limitations on the method of pesticide use.

27 f. Requirements for the training or certification of

1 pesticide applicators or other persons using a pesticide.

2 (b) Rules applicable to a specific locality. A site-  
3 specific response may include the adoption of rules whose  
4 geographic scope is limited to a specific locality if, in the  
5 department's judgment, the conditions in that locality justify the  
6 geographically limited rules. Within the designated locality,  
7 rules shall be general in their application, and may not be  
8 limited to a single pesticide user. Rules may be adopted on an  
9 emergency basis as necessary, pursuant to s. 227.027, Stats.  
10 Site-specific rules under this paragraph may supplement, or be  
11 incorporated into more general substance-specific rules under  
12 s. Ag 161.09. Site-specific rules may include any of the provi-  
13 sions set forth under s. Ag 161.09(2), as applicable.

14 (c) Denial, suspension or revocation of permits. If a  
15 permit is required by statute or rule for the use of a pesticide,  
16 a site-specific response may include the denial, suspension or  
17 revocation of pesticide use permits for the locality covered by  
18 the site-specific response. The department may, by substance-  
19 specific rules under s. Ag 161.09, prescribe the terms and condi-  
20 tions under which permits are to be denied, suspended or revoked.  
21 If the denial, suspension or revocation of a pesticide use permit  
22 is required by rule under certain conditions, the order denying,  
23 suspending or revoking the permit may be signed by a department  
24 employe designated in the rule. All other orders denying, sus-  
25 pending or revoking permits shall be signed by the secretary, or  
26 by a person individually designated by the secretary. Where  
27 necessary in an emergency, permits may be summarily suspended,

1 pursuant to s. 227.14, Stats. Circumstances constituting an emer-  
2 gency may be specified by rule. The denial, suspension or revoca-  
3 tion of a permit is subject to a right of hearing before the  
4 department upon request.

5 NOTE: In addition to any of the site-specific regulatory  
6 responses identified under this paragraph, the department  
7 may take other actions in response to a finding of pesti-  
8 cide contamination which attains or exceeds an enforcement  
9 standard or preventive action limit. The department may,  
10 for example:

- 11 1. Review its rules governing pesticide use, pursuant to  
12 s. 160.19, Stats. and s. Ag 161.09.
- 13 2. Disseminate information concerning the groundwater  
14 contamination, and notify affected persons.
- 15 3. Notify state or local health authorities and county  
16 agricultural extension agents of the groundwater  
17 contamination.
- 18 4. Initiate or recommend further investigation or research  
19 concerning the groundwater contamination.

20 (3) SITE-SPECIFIC RESPONSE; MAXIMUM GEOGRAPHIC SCOPE. A  
21 site-specific response required under this section does not  
22 include a regulatory action which extends beyond the groundwater  
23 recharge zone of the aquifer from which the groundwater sample was  
24 collected at the point of standards application. If the pesticide  
25 substance has migrated, or may migrate through more than one  
26 aquifer, a site-specific response may extend, at a maximum, to the  
27 boundary of the outermost recharge zone providing recharge to an  
28 affected aquifer. If the natural boundary of a groundwater  
29 recharge zone is not readily defineable, a site-specific response  
30 may extend, at a maximum, to the whole of every land parcel which,  
31 in the judgment of the department, may be wholly or partially  
32 located within the relevant groundwater recharge zone. All or a

1 portion of any land parcel may be exempted from a site-specific  
2 response upon proof that the parcel or portion is located outside  
3 the groundwater recharge zone to which the site-specific response  
4 is applicable. Within the maximum geographic limits specified  
5 under this section, the department may determine the geographic  
6 scope of the site-specific response, based on the objective of  
7 restoring and maintaining compliance with the preventive action  
8 limit and minimizing the concentration of the pesticide substance  
9 in groundwater where technically and economically feasible, at the  
10 point of standards application and other downgradient points to  
11 which the pesticide substance may migrate. For purposes of admin-  
12 istrative efficiency, the geographic scope of a site-specific  
13 response may be delineated according to a regular geometric  
14 pattern.

15 (4) SITE-SPECIFIC RESPONSES; FACTORS TO BE CONSIDERED.

16 (a) In the department's choice of a site-specific response,  
17 or in its adoption of substance-specific rules under s. Ag 161.09  
18 prescribing nondiscretionary site-specific responses, the depart-  
19 ment shall consider the general risks and benefits of the possible  
20 actions to the extent authorized by relevant law, and shall con-  
21 sider the following specific factors to the extent feasible:

22 1. The concentration of the pesticide substance in ground-  
23 water at the point of standards application, and any known changes  
24 in concentration.

25 2. The concentration of the pesticide substance at other  
26 points of standards application, if known, and any known changes  
27 in concentration.

1           3. The extent, age and reliability of groundwater sample  
2 data indicating the presence of the pesticide substance in  
3 groundwater.

4           4. The specific activities or practices from which the pes-  
5 ticide contamination originated, if known, and the locations at  
6 which the source activities or practices are conducted.

7           5. The previously demonstrated propensity, if any, for the  
8 pesticide substance to leach to groundwater as a result of normal  
9 use.

10          6. Environmental conditions which may reasonably affect the  
11 risk of groundwater contamination, including soil conditions,  
12 depth to groundwater, and subsurface geological conditions.  
13 Differences in local environmental conditions may not be used to  
14 justify a difference in site-specific responses between localities  
15 unless the differences in environmental conditions are reasonably  
16 known to affect the relative risk of groundwater contamination  
17 between localities.

18          7. Differences in local pesticide use practices which are  
19 reasonably known to affect the risk of groundwater contamination.

20          8. The environmental fate of the pesticide substance in soil  
21 and groundwater, to the extent known.

22          9. The direction and rate of groundwater movement within the  
23 affected groundwater recharge zone, if known.

24          10. The potential uses of the affected groundwater.

25          11. The extent and likelihood of human exposure to the pesti-  
26 cide substance in groundwater.

27          12. The alternative measures which are available to prevent



1 or control groundwater contamination, the relative cost and effec-  
2 tiveness of each alternative, and the risks associated with each  
3 alternative including the risk of adverse environmental effects.

4 (b) Except as otherwise required by law, the department is  
5 not required to make a written record of its consideration under  
6 this subsection. This subsection may not be construed to limit  
7 the department's responsibility under ss. 160.19 or 160.25, Stats.

8 (5) SITE-SPECIFIC RESPONSE; PROHIBITIONS AGAINST PESTICIDE  
9 USE. If a site-specific response under this section prohibits a  
10 pesticide use in the locality covered by the site-specific  
11 response, the prohibition shall comply with the applicable  
12 provisions of s. Ag 161.08.

13 Ag 161.08 PROHIBITIONS AGAINST PESTICIDE USE.

14 (1) SITE-SPECIFIC PROHIBITION IN RESPONSE TO GROUNDWATER CONTAMI-  
15 NATION WHICH EXCEEDS AN ENFORCEMENT STANDARD. If, at a point of  
16 standards application, the concentration of a pesticide substance  
17 in groundwater attains or exceeds an enforcement standard, and if  
18 the concentration has resulted from or may be affected by a pesti-  
19 cide use, the department shall, as a site-specific response under  
20 s. Ag 161.07, prohibit the pesticide use on a site-specific basis  
21 unless the department is shown, and determines to a reasonable  
22 certainty by the greater weight of the credible evidence, that an  
23 alternative response will achieve compliance with the enforcement  
24 standard. The scope and duration of the site-specific prohibition  
25 shall be reasonably designed to achieve and maintain compliance  
26 with the enforcement standard at the point of standards applica-  
27 tion, and at other downgradient points to which the pesticide

1 substance may migrate. A prohibition may remain in effect indefi-  
2 nitely unless the department is shown, and determines, that  
3 resumption of the pesticide use is not likely to cause a renewed  
4 or continued violation of the enforcement standard. The depart-  
5 ment's responsibility to initiate a site-specific prohibition  
6 under s. 160.25, Stats. and this subsection is not affected by  
7 sub. (2), or by contemporaneous findings that concentrations of  
8 the same pesticide substance at other points of standards appli-  
9 cation fall below the enforcement standard.

10 (2) SITE-SPECIFIC PROHIBITION IN RESPONSE TO GROUNDWATER  
11 CONTAMINATION WHICH EXCEEDS A PREVENTIVE ACTION LIMIT, BUT NOT AN  
12 ENFORCEMENT STANDARD. If, at a point of standards application,  
13 the concentration of a pesticide substance in groundwater attains  
14 or exceeds a preventive action limit but not an enforcement stand-  
15 ard, the department may not implement a site-specific response  
16 under s. Ag 161.07 prohibiting a pesticide use unless the  
17 department:

18 (a) Determines, pursuant to s. 160.23(4), Stats., that no  
19 less restrictive response would prevent the violation of an  
20 enforcement standard at the point of standards application.

21 (b) Establishes the basis for the geographic scope and  
22 duration of the prohibition; and

23 (c) Limits the scope and duration of the prohibition to that  
24 which is reasonably necessary to maintain compliance with the  
25 enforcement standard at the point of standards application.

26 (3) STATEWIDE OR REGIONAL PROHIBITION. The department may,  
27 by rule under s. Ag 161.09, prohibit a pesticide use on a statewide

1 or regional basis, as well as on a site-specific response basis, if  
2 the department does all of the following:

3 (a) Determines that groundwater contamination has occurred  
4 or is likely to occur on a statewide or regional basis as a result  
5 of the pesticide use.

6 (b) Determines that a statewide or regional prohibition is  
7 necessary to achieve or maintain compliance with an enforcement  
8 standard. In determining the need for a statewide or regional  
9 prohibition, the department shall consider:

10 1. The extent, age, reliability, and geographical distribu-  
11 tion of groundwater sample test data; and

12 2. The extent to which local conditions and circumstances can  
13 reliably be considered characteristic of a larger region, or of the  
14 state as a whole.

15 (c) Determines that compliance with the enforcement standard  
16 cannot reasonably be achieved and maintained by other, less  
17 restrictive measures.

18 (d) Establishes the basis for the scope and duration of the  
19 prohibition.

20 (e) Limits the scope and duration of the prohibition to that  
21 which is reasonably necessary to achieve and maintain compliance  
22 with the enforcement standard.

23 Ag 161.09 RULEMAKING TO CONTROL PESTICIDE CONTAMINATION OF  
24 GROUNDWATER; GENERAL. (1) SUBSTANCE-SPECIFIC RULES. If an  
25 enforcement standard and preventive action limit are adopted by the  
26 department of natural resources for any pesticide substance, the  
27 department shall review its existing rules and adopt new or amended

1 rules as necessary to comply with s. 160.19, Stats. The department  
2 may adopt rules on a substance-specific basis as appropriate, pur-  
3 suant to ss. 94.69, 160.19, and 160.21, Stats. Except as otherwise  
4 provided under ch. 160, Stats., the rules shall be designed, to the  
5 extent technically and economically feasible, to minimize the level  
6 of the pesticide substance in groundwater and maintain compliance  
7 with the preventive action limit for the pesticide substance state-  
8 wide. Rule provisions may apply on a statewide or localized basis,  
9 and on a temporary or permanent basis, as necessary to address  
10 varying state or local conditions.

11 (2) RULE PROVISIONS. Substance-specific rules under this  
12 section may include:

13 (a) Prohibitions against the use of a pesticide, subject to  
14 s. Ag 161.08.

15 (b) Limitations on the purposes for which a pesticide may be  
16 used, including limitations on the crops and target pests for which  
17 a pesticide may be used.

18 (c) Limitations on the rate at which a pesticide is applied.

19 (d) Limitations on the time or frequency of pesticide use.

20 (e) Limitations on the method of pesticide use.

21 (f) Reporting or permit requirements applicable to the use of  
22 a pesticide.

23 (g) Requirements for the training or certification of  
24 pesticide applicators or other persons using a pesticide.

25 (h) Required site-specific responses to be implemented by the  
26 department if an enforcement standard or preventive action limit  
27 for a pesticide substance is attained or exceeded at a point of

1 standards application. Rules may specify the form and scope of the  
2 site-specific responses, and the specific conditions under which  
3 the site-specific responses are to be implemented.

4 (3) SITE-SPECIFIC RESPONSES REQUIRED BY RULE. Site-specific  
5 responses required by rule under this section shall comply with  
6 s. Ag 161.07. Before adopting rules to require site-specific  
7 responses, the department shall consider the factors set forth  
8 under s. Ag 161.07(4), to the extent feasible. If, by rule, the  
9 department requires site-specific responses which will prohibit the  
10 use of a pesticide in affected localities, the rule shall comply  
11 with s. Ag 161.08.

12 (4) SCOPE OF RULEMAKING AUTHORITY; GENERAL. This section  
13 does not limit the department's rulemaking authority under  
14 ss. 94.69, 160.19 or 160.21, Stats. In the exercise of its rule-  
15 making authority, the department may consider any information which  
16 may be relevant to the rulemaking proceeding, whether or not the  
17 information is derived from Wisconsin groundwater samples. The  
18 finding of a pesticide substance in groundwater, at a level which  
19 equals or exceeds an enforcement standard or preventive action  
20 limit, is not a prerequisite to the exercise of the department's  
21 rulemaking authority under ss. 94.69, 160.19 or 160.21, Stats.

22 SECTION 2: The rules contained in this order shall take  
23 effect on the first day of the month following publication in the  
24 Wisconsin administrative register, as provided in s. 227.026(1)  
25 (intro.), Stats.

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Dated this 20 day of August, 1985.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By William E. Simmons  
William E. Simmons  
Assistant Administrator  
Agricultural Resource Management  
Division

JKM/T4/1/PID4  
8/19/85-27