

DATE: December 7, 2001

FILE REF: 3200

TO: Natural Resources Board

FROM: Darrell Bazzell

SUBJECT: Background Memo on Proposed Revisions to Chapter NR 216, Proposed Creation of Chapters NR 151, 152, 153, 154 and 155, and Repeal and Recreation of Chapter NR 120 and Chapter NR 243 to Redesign the Department's Nonpoint Source Pollution Control Program and Related Regulatory Programs.

### 1. Why These Rules are Being Proposed

The department is proposing to create or modify a series of inter-related administrative rules in response to 1997 Wisconsin Act 27 and 1999 Wisconsin Act 9. These legislative actions require changes to the department's nonpoint source water pollution abatement program and to the department of agriculture, trade and consumer protection's (DATCP) soil and water resources management program. Many of these changes were recommended in 1994 in reports from the Legislative Audit Bureau and from the Animal Waste Advisory Committee (AWAC). Most of the statutory changes in Acts 27 and 9 pertaining to the redesign of the nonpoint source program modified Chapter 281, Wisconsin Statutes.

The Environmental Protection Agency identified urban and rural sources of polluted runoff to be a leading cause of surface and groundwater quality problems in Wisconsin. The Wisconsin Legislature and the Governor, recognizing the impacts that nonpoint source pollution pose to the state's water resources, passed Act 27 which requires the department to do the following:

- develop non-agricultural nonpoint source performance standards designed to meet water quality standards,
- in consultation with DATCP, develop agricultural nonpoint source performance standards and prohibitions designed to meet water quality standards, including, at a minimum, the four manure management prohibitions specified in statute,
- specify a process for development and dissemination of technical standards to implement the non-agricultural performance standards,
- administer cost-sharing funds provided for compliance,
- specify criteria to determine availability of cost-sharing for compliance by an agricultural facility, and
- jointly, with DATCP, specify procedures for review and approval of proposed local livestock regulations that exceed the performance standards and prohibitions.

Act 27 also directs DATCP, in consultation with DNR, to prescribe conservation practices and specify a process for development and dissemination of technical standards to implement the agricultural performance standards. At a minimum, the conservation practices and technical standards must cover animal waste management, nutrients applied to the soil and cropland sediment delivery. The statute provides that performance standards and prohibitions for existing agricultural facilities and practices are not enforceable unless at least 70 percent cost sharing (90 percent for economic hardship cases) is made available.

Act 9, the 1999-2001 biennial budget, provided funding and other provisions that facilitate the redesign of the nonpoint source programs. The legislation:

- created a new urban nonpoint source grant program,
- provided funding for targeted, competitive nonpoint source projects,
- provided base level funding to counties for staff and cost-sharing,
- transferred funding to DATCP for local assistance grants to priority watershed and priority lake projects,
- created a unified grant submission and interagency clearinghouse between DNR and DATCP, and
- further clarified the content and role of county Land and Water Resource Management Plans.

Events and actions that shaped the development of the performance standards and other program changes that form the core of these administrative rules included listening sessions in 1998 and 1999, workgroup efforts between affected agencies and feedback from a diverse advisory committee. The department conducted public hearings on the rules in March 2000, identified key issues raised at the hearings, and created four work groups of diverse interests to address these issues.

Most of the changes recommended by the workgroups were incorporated into a subsequent version of the rules that went out for public hearings and comment in March 2001. In that version the agricultural performance standards were changed to include three buffer strip options for addressing soil loss from riparian areas and/or limiting contaminated runoff from agricultural fields to surface waters. A fourth option for relatively flat fields was added upon the recommendation of the Natural Resources Board. Other changes recommended by the NRB included offering three versions of the sheet, rill and wind erosion performance standard ranging from local selection of tools and/or models to statewide use of one tool or model (final version to be selected after public hearings), a phased-in schedule for nutrient management planning and an increase in the time period for cost sharing nutrient management from 3 to 6 years. New and expanding operations were redefined for cost-share eligibility based on the practices on the land rather than ownership and the cut-off date for determinations were tied to the effective date of the rules. Water Quality Management Areas (WQMAs) were redefined to add greater groundwater protection, and properly designed livestock and equipment stream crossings were added as an exemption to the cattle access restriction. The agricultural implementation and enforcement sections were strengthened to identify DNR and local government roles and responsibilities, specify procedures regarding cost-share eligibility and compliance, and achieve better integration of state and local resource management efforts through the grant program in proposed chapter NR 153.

Changes to the non-agricultural performance standards in the March 2001 version of the rules include a shift in the erosion control performance standard from 80 percent control of sediment to maximum extent practicable with a goal of 80 percent reduction, further clarification of when and where the infiltration performance standard is to be met, expansion of the buffer standard to reflect differing water resources, and the inclusion of a performance standard on nutrient and pest management for large, non-municipal pervious areas. The transportation subchapter was refined to address unique features of transportation facilities. The section on responsible party was greatly expanded and a clarification was made that rural roads with swale drainage of a certain type are deemed to meet the performance standards.

Modifications to the rules following the March 2001 hearings are highlighted in the Summary of Rules.

## **2. Summary of the Rules**

### **Chapter NR 120**

Existing Chapter NR 120 is the rule under which the department currently administers the Nonpoint Source Water Pollution Abatement Program. The chapter specifies the process to select, plan and

implement priority watershed and priority lake projects to reduce nonpoint source pollution in both urban and rural areas. The rule also includes a mandatory component in which critical sites of nonpoint source pollution must be addressed, and the procedures to administer the grants for cost-sharing best management practices and for technical and other assistance.

Chapter NR 120 as recreated contains changes in three main areas including scope of the chapter, cost-share administration and critical sites administration. There are three main changes in the scope of the rule. The process for selecting priority watershed and lake projects has been eliminated entirely, pursuant to s. 281.65(3m), Stats. Provisions dealing with rural local assistance grants have been deleted and moved to chapter ATCP 50 for administration by DATCP. Changes in cost-share administration include an increase in the duration of priority watershed projects, changes in cost-share rates for several best management practices, modified criteria for determining economic hardship and restrictions on cost-share reimbursements to rural grantees that exceed the expenditure amounts established by the department. Changes in critical sites administration include added flexibility in the notification schedule and an explicit requirement that grantees cover all critical sites needs provided that adequate cost sharing is made available by the department.

### **Chapter NR 151**

This is a new proposed chapter that establishes runoff pollution performance standards for non-agricultural practices, pursuant to s. 281.16 (2), including transportation, and performance standards and prohibitions for agricultural facilities and practices, pursuant to s. 281.16 (3). These standards and prohibitions, which are listed on pp. 6-7 of the Environmental Assessment, are intended to be the minimum necessary to achieve water quality standards. The chapter establishes implementation and enforcement procedures for the agricultural performance standards and prohibitions and specifies a process for the development and dissemination of department technical standards to implement the non-agricultural performance standards. In some areas of the state, where the performance standards may not achieve the desired water quality, the chapter proposes a process to establish, by rule, targeted performance standards. Pursuant to s. 92.15, Stats., the code also includes requirements for department review of local livestock operation ordinances that exceed state performance standards and prohibitions for agricultural sources of pollution.

Changes were made to NR 151 in response to the public testimony and written comments received from the public hearings in the spring of 2000 and 2001. In subch. II, Agricultural Performance Standards, Key definitions, such as "adequate sod cover" and "sites susceptible to groundwater contamination" were clarified. The sheet, rill and wind erosion performance standard was revised to only specify the requirement to achieve the tolerable soil loss value for croplands. It includes a note recognizing formulas to estimate T as referenced in ATCP 50 (RUSLE II for sheet and rill erosion). The department removed water quality corridors and concentrated flow channels as required performance standards. In addressing public comments, DATCP and DNR could not agree on a cost-effective approach to implementing these practices as performance standards. The department remains committed to both of these measures as effective means to control nonpoint source pollution. As a result, the department continues to allow cost-sharing for them under its grant programs as non-mandatory best management practices.

In the nutrient management performance standard, clarifying language has been added stating that the nutrient management performance standard does not apply to manure directly deposited by grazing or pastured animals. Also, the technical standard reference has been deleted and the performance standard is better targeted at water quality protection. Organization of the agricultural implementation and enforcement sections was simplified and variance provisions combined in a new section. While

procedures for addressing cropland activities and livestock operations remain as separate sections, language was added to clarify the roles of DNR and governmental units and state the department's intent to develop an inter-governmental agreement(s) to address important items that are not appropriate to include in an administrative rule. The standard compliance period for existing facilities is restated to be from 60 days to 3 years with the potential for a fourth year if approved by DNR when cost sharing is required and 60 days to 2 years when cost sharing is not required. A 90-day deadline for DNR review of ordinances and variances was added and changes were made to expand the scope of review consistent with a statement from the Attorney General's office.

In subch. III, Non-Agricultural Performance Standards, the infiltration performance standard for non-agricultural facilities has been modified to include a cap on the amount of land dedicated to infiltration as well as a reduction in the level of control for non-residential development. For large pervious areas (over 5 acres), the requirement to develop an integrated pest management plan was deleted and the fertilizer application requirement was modified to include a nutrient application schedule that uses appropriate soil tests rather than based solely on soil test results. The reference point for urban buffers along rivers and streams has been clarified.

In subch. IV, Transportation Facility Performance Standards, the post-construction performance standard was modified for transportation facilities that have less than 2,500 Average Daily Travel (ADT). For those transportation facilities, grassed swales are adequate for post-construction management of storm water discharges to any water of the state. Additional storm water management practices still may be required for discharges to Outstanding or Exceptional Resource Waters or 303(d) listed waters for heavier volume roads and highways.

The non-agricultural technical standards subchapter (V) NR 151 now specifies that DNR will develop an erosion control matrix in conjunction with DOT and other affected stakeholders. This matrix would designate acceptable practices that may be used to meet the transportation erosion control performance standards of NR 151.

### **Chapter NR 152**

This new chapter is intended to secure voluntary uniformity of regulations that affect municipalities. It contains, as appendices, model ordinances for both storm water management and for construction erosion control sites exclusive of building construction in accordance with s. 281.33, Stats. The performance standards included in the ordinances are taken from NR 151. This statute also requires the department to distribute copies of the model ordinances upon request. Adoption of the ordinances on the part of local units of government is voluntary. However, the ordinances may assist communities that wish to meet anticipated requirements of "qualifying local programs" expected to be created in Wisconsin's equivalent of the U.S. Environmental Protection Agency's Phase II storm water rules. As a result of the public comments, reference to transportation and agricultural facilities and practices were removed from the ordinances. In addition, the ordinances were modified so that there would be greater uniformity in organization and format, where possible. Changes to the non-agricultural performance standards were also reflected in the ordinances.

### **Chapter NR 153**

Chapter NR 153 contains policy and procedures for administering the targeted runoff management grant program authorized under s. 281.65 (4c), Stats. The department may make grants under this program to governmental units and state agencies, including itself, for the purpose of reducing both agricultural and urban nonpoint source pollution. Grants to a governmental unit may be used to cost share the installation

of best management practices as well as to support a variety of local administrative and planning functions. A governmental unit may use grant funding to control pollution sources on land it owns or operates, but most frequently the grant funds will be forwarded to private landowners and operators in accordance with a cost-share agreement. If a state agency's project is located within a priority watershed or priority lake area, the department can award a targeted runoff management grant directly to the agency. If the agency's project is located outside of a priority watershed or priority lake area, the agency cannot apply directly to the department for a grant, but can receive cost-share funds through a local governmental unit that would submit an application on its behalf.

As required by statute, the department will select projects for funding by using the competitive scoring system set forth in the rule. The DNR will score and select projects annually with advice from the Wisconsin Land and Water Conservation Board. The scoring system considers fiscal accountability, cost effectiveness, water quality, extent of pollutant control, project evaluation and monitoring, likelihood of success and regulatory storm water management requirements for the City of Racine. Projects can be up to 3 years in duration unless the department grants an extension, limited to one year. Projects will be consistent with county land and water resources management plans prepared under chapter ATCP 50 and department priorities established on a geographic basis. Projects are not limited to implementation of state nonpoint source performance standards contained in chapter NR 151, but it is expected that many projects will focus on compliance with these standards. Projects may be located anywhere in the state, including areas within and outside of existing priority watershed and priority lake projects.

The department may not use funding from this program to make grants for managing point source discharges of storm water regulated under chapter 283, Stats. This includes point source discharges of storm water regulated under chapter NR 216. A statutory exception is made for the City of Racine, which can apply for grants under either chapters NR 153 or NR 155 to meet regulatory requirements imposed under chapter NR 216. Other local governments that seek funding to conduct activities required under chapter NR 216 may apply for funding under proposed chapter NR 155.

The department currently administers priority watershed and priority lake projects under chapter NR 120. These projects will be gradually phased out and the funding sources re-directed to projects selected under chapter NR 153. After this transition occurs, chapter NR 153 will be the primary vehicle by which the department focuses limited financial and technical resources into areas where control of urban and rural nonpoint pollution sources is a high priority. Projects conducted under chapter NR 153 will be shorter in duration, smaller in cost and scope and distributed more widely across the state than priority watershed or priority lake projects.

Changes affecting cost share and grant eligibility, application process and grant administration have been made to the rule based on public comments. Cost sharing and grant eligibility changes include a provision that the department and DATCP can jointly fund the state share of a management practice provided that full funding is not allocated for the practice in the joint allocation plan. The cost of design work is eligible for reimbursement even if initiated prior to signing a runoff management grant, as long as the best management practice is structural and as long as the practice is actually installed. Design work may not be covered by a local assistance grant, however. It may only be covered if included as part of the construction grants. Interim practices may be used to address urban as well as rural pollution sources. Local market wage will be used as a cost control criterion for in-kind services. The maximum cost-share rate for easements is set at 70%. Applicability of easements is expanded to include urban best management practices.

Changes to the application process include making the grant applications due April 15, adding provisions to assure that navigable waters, wetlands, cultural resources, endangered resources and threatened resources are adequately protected and assigning an appropriate multiplier to projects that are not clearly urban or rural in nature. Grants administration changes include the department providing DATCP with grants information for incorporation into the joint allocation plan, DNR review of cost-share agreements if any BMP exceeds \$50,000 in cost or the entire agreement exceeds \$100,000, an open records law provision for local grants and a section on project evaluation.

#### **Chapter NR 154**

Proposed ch. NR 154 contains best management practices, technical standards and cost-share conditions applicable to cost sharing under chs. NR 153 and NR 155. The 2001 hearing draft contained department technical standards and cost-share criteria for both agricultural and non-agricultural facilities. Extensive efforts had been made between DNR and DATCP to make this rule consistent with ATCP 50, but a number of inconsistencies remained. The department received many comments concerning the discrepancies between the two rules. As DATCP was given the statutory authority and responsibility to establish technical standards designed to meet the NR 151 performance standards for agricultural facilities, the department decided to cross-reference the agricultural technical standards in ATCP 50 wherever possible. As a result of the different missions between the two agencies, there were some continuing differences, especially regarding cost-share conditions. This was resolved by creating exceptions for certain technical standards. NR 154 contains 40 technical standards. Of these, 27 are cross-referenced to ATCP 50 with no exceptions, 10 are cross-referenced to ATCP 50 with exceptions and 3 non-agricultural standards were retained.

#### **Chapter NR 155**

Proposed chapter NR 155 contains policy and procedures for administering the urban nonpoint source and storm water management grant program authorized under s. 281.66, Stats. Provisions of this rule were previously included in proposed NR 153. The department may make grants under this program to governmental units for practices to control both point and nonpoint sources of storm water runoff from existing urban areas, and to fund storm water management plans for developing urban areas and areas of urban redevelopment. Urban areas include commercial land use, industrial land use (excluding non-municipal industrial areas regulated under ch. NR 216) or areas with a population density of at least 1,000 persons per square mile. In order to receive a grant, the governmental unit with jurisdiction over the project area must assure adequate implementation of a comprehensive storm water management program.

The goal of this grant program is to achieve water quality standards, minimize flooding, protect groundwater, coordinate urban nonpoint source management activities with the municipal storm water discharge permit program and implement the non-agricultural nonpoint source performance standards under chapter NR 151. Grants to a governmental unit may be used to cost share the installation of best management practices as well as to support a variety of local administrative and planning functions. The department may also make grants to the board of regents of the University of Wisconsin System to control urban storm water runoff from campuses in selected locations.

As required by statute, the department will select projects for funding by using the competitive scoring system set forth in the rule. The scoring system considers fiscal accountability, cost effectiveness, water quality, extent of pollutant control, project evaluation and monitoring, likelihood of success and regulatory storm water management requirements for the City of Racine. Projects will be consistent with department priorities established on a watershed or other geographic basis. Projects can be up to 2 years in duration unless the department grants an extension, limited to one year. The department will use the

grant policies and procedures in chapter NR 155, with some modifications, to fulfill its remaining grant obligations to urban grantees in the priority watershed program.

Changes affecting cost share and grant eligibility, application process and grant administration have been made to the rule based on public comment. Cost sharing and grant eligibility changes include a provision making the cost of design work eligible for reimbursement even if initiated prior to signing a runoff management grant for structural best management practices that are actually installed. Interim practices may be used to address urban as well as rural pollution sources. Local market wage will be used as a cost control criterion for in-kind services. The maximum cost-share rate for easements is set at 50%. Applicability of easements is expanded to include urban best management practices. The grant application and grant writing processes include provisions to assure that navigable waters, wetlands, cultural resources, endangered resources and threatened resources are adequately protected. The same grant administration changes as outlined in the summary of NR 153 apply to NR 155.

### **Chapter NR 216**

This chapter establishes criteria and procedures for issuance of storm water discharge permits to certain construction sites, industrial facilities, and municipalities, as required by s. 283.33, Stats., to limit the discharge of pollutants carried by storm water runoff into waters of the state. Chapter NR 216 is primarily being revised to incorporate non-agricultural performance standards in proposed NR 151, subchapters III and IV. As revised, components of construction and municipal storm water discharge permits including storm water management programs, pollutant loading assessments, storm water pollution prevention plans, construction erosion control plans, and storm water management plans will need to meet the non-agricultural performance standards. Additional changes to this chapter are also being proposed to clarify the existing requirements of this chapter.

### **Chapter NR 243**

This proposed chapter is intended to implement design standards and accepted manure management practices for concentrated animal feeding operations (with 1,000 animal units or more). It also establishes the criteria under which the department may issue a notice of discharge (NOD) or a permit to animal feeding operations with less than 1,000 animal units that discharge pollutants to waters of the state.

Changes have been made to ch. NR 243 to include standard permit conditions and procedures, update applicable technical standards, and provide consistency with federal regulations affecting Concentrated Animal Feeding Operations. These changes include modifying the animal unit equivalency numbers for beef cattle and requiring animal feeding operations that meet the definition of a point source to apply for a WPDES permit. In addition, changes have been made to requirements for animal feeding operations with less than 1,000 animal units to be consistent with s. NR 151.095, Wis. Adm. Code regarding implementation of statewide performance standards and prohibitions for livestock operations.

## **3. How this Proposal Affects Existing Policy**

Existing policy addresses water quality degradation caused by both urban and rural polluted runoff through three separate programs. The Nonpoint Source Water Pollution Abatement Program, codified in chapter NR 120, is a nonpoint source control program while the Animal Waste Management Program, codified in chapter NR 243, and the Storm Water Management Program, codified in chapter NR 216, are considered point source control programs. This proposal narrows the gap between the programs by establishing performance standards applicable to sources of polluted runoff under all three programs.

Another major policy shift is the movement away from addressing nonpoint sources of pollution within a primarily voluntary cost-share program in selected watersheds. Currently the Nonpoint Source Water Pollution Abatement Program targets cost-share and technical assistance grants to local units of government in priority watersheds and priority lakes. A total of 86 priority watersheds and lakes have been selected since that program started in 1978 and 62 of those are currently being implemented. The proposed rules would eliminate the process of selecting priority watershed and lake projects. Existing projects would remain in effect until they are completed, but no new large-scale projects would be selected. Smaller, targeted projects would be selected on a competitive basis to complement the larger watershed projects with implementation occurring on a much smaller time frame than the priority watershed projects. The intent is to focus scarce financial resources toward areas of greatest need, such as impaired waterbodies listed on the 303(d) list required under the Clean Water Act, source water protection areas or waters designated as Exceptional or Outstanding Resource.

Administration of funding is another change to existing policy. Chapter NR 120, as re-created, focuses on administering rural cost-share grants for nonpoint source controls in existing priority watershed projects. Pursuant to Act 9, administration of rural local assistance grants have been moved from the department to DATCP who will administer these grants under chapter ATCP 50. The department will continue to administer local assistance grants for urban municipalities in priority watershed projects under newly created chapters NR 153 and NR 155. Funding for this program is linked to funding for priority watershed projects administered under chapter NR 120. As priority watershed projects are completed, funding resources will be shifted to targeted runoff management projects. Compared to priority watershed projects administered under chapter NR 120, the targeted runoff management projects conducted under chapter NR 153 will be shorter in duration, lower in cost, smaller in scope and more widely spread across the state. Based on statutory changes in Act 9, administration of the funding program for NR 243 NODs has been transferred from DATCP to the department.

#### 4. Hearing Synopsis

The department conducted 12 public hearings on the proposed runoff management rules between March 12 and 22, 2001 (note: previously, in March 2000, a total of 22 hearings were conducted). About 650 people attended the hearings and 151 of those in attendance presented oral testimony. The attendance and testimony breakdown is shown in the table below.

ATTENDANCE	Richland. Center	Eau Claire	Fitchburg	Wausau	Green Bay	Waukesha	TOTAL
Afternoon	96	62	80	75	90	90	493
Evening	38	17	49	3	16	30	153
<b>Total Count</b>	<b>134</b>	<b>79</b>	<b>129</b>	<b>78</b>	<b>106</b>	<b>120</b>	<b>646</b>
<b>App. Slips</b>	<b>80</b>	<b>32</b>	<b>99</b>	<b>60</b>	<b>72</b>	<b>86</b>	<b>429</b>
<b>Testimony</b>	<b>23</b>	<b>24</b>	<b>34</b>	<b>17</b>	<b>21</b>	<b>32</b>	<b>151</b>

DNR also received 1280 written comments during the comment period that ended April 20, 2001, including 192 personalized letters from individuals, organizations, businesses and agencies. The comments and department responses organized into general and specific comments for each rule are attached to this memo. Comments from small businesses along with the department responses are also included in the attached Final Regulatory Flexibility Analysis.

The department received 628 postcards, 198 letters and a resolution from Izaak Walton League all stating that the rules are not strong enough. They state that there needs to be increased monitoring, compliance, and enforcement of the new standards; increased funding to ensure full and quick implementation; vegetation along rivers and streams in urban and rural areas to control erosion; assurance that farms implement manure, fertilizer, and pesticide management plans as soon as the rules become effective; implementation of standards to restrict livestock access to rivers, lakes, and wetlands; implementation of standards to control storm water runoff in developments; and requirements that all state agencies and local governments abide by the standards.

The department also received 262 postcards originating from the WI Corn Growers Assn. expressing concern that the proposed rules will cost Wisconsin farmers substantially more than farmers in other states and limit their ability to produce agricultural commodities and manage their land. They don't believe the rules are based on sound science in real world conditions and they object to recommendations like soil test results and the resulting recommendations being converted to regulations. They state that research shows that most Wisconsin cropland is being farmed responsibly and does not need the costs and restriction these rules will impose. They say the rules will be an excessive cost on all residents of the state by imposing unnecessary and expensive regulation on all Wisconsin farmers.

The most frequently heard comments focused on costs. There was general acknowledgement that it will cost a lot of money to successfully implement the rules and there was support from most interest groups for increased and sustained funding for cost-sharing, local implementation and enforcement staff, education, monitoring and evaluation. Several producers and agri-business groups commented that 70 percent cost-sharing was not enough and suggested rates anywhere from 75 to 100 percent. Some commented that cost sharing should cover additional expenses like labor, equipment and land in addition to best management practices. Several farmers commented that both new and existing facilities should receive cost sharing and that there should be no distinction between small and large operations. While some objected to the costs to producers and taxpayers, others noted that we either pay for prevention up front or clean-up costs which are often much higher.

A common theme was the acknowledgement that DNR had listened to previous comments, convened appropriate workgroups and made substantial changes based on the comments. People noted that this version was much improved from the previous rules package but there were still some areas that needed attention. Those specific areas are addressed in the Comment and Response attachment.

Several people urged DNR to let other states take the lead on implementing federal legislation and learn from their mistakes. Many argued for a phase-in of the rules over time. Several others stated that Wisconsin needs to continue progressive environmental protection and that clean water is important to Wisconsin's economy. Many point out that these rules are long overdue and DNR should not delay implementation any longer.

Other general comments focused on the rules themselves. Some said the rules needed to be more flexible while others argued for uniformity. Several counties supported the rules. However, the vast majority of counties that commented, along with the Wisconsin Land and Water Conservation Association and the Wisconsin Land Conservation Employees Association, went on record as opposing the rules. They stated that while they generally supported the performance standards, they objected to the way they are written and felt the rules ignored the original intent of the program redesign. Many felt the rules were too complicated, that the rules needed to be tied to county Land and Water Resources Management plans, and that the implementation and enforcement process as stated in the rules was inadequate.

Proposed NR 151 generated the most comments. There were many comments on the agricultural performance standards, particularly the water quality corridor, nutrient management and sheet, rill and wind erosion standards. The key concerns were that farmers will be required to take too much land out of production and they should be compensated for their loss, maintenance will be difficult, more flexibility/uniformity is needed, unintended consequences will result, and certain operations or structures should be exempt from the performance standards.

The implementation and enforcement procedures for both cropland and livestock performance standards also received many comments, mostly from counties and some county associations. The key concerns were increased workload and a need for more staff, no strong ties between the rules and the county land and water resource management plans, local government roles and responsibilities need to be clarified, there needs to be a more defined implementation strategy, confusion and opposition to the definitions of new and existing operations

For the non-agricultural portion of NR 151, including the transportation subchapter, the majority of comments were on the infiltration, buffer and fertilizer application performance standards. Many commented that the infiltration performance standard required too much land to be set aside encouraging sprawl, the costs were too high, it increased the risk of groundwater contamination, devices have a high failure rate and there needs to be technical standards for implementation. There were comments both in support and opposition to the proposed buffer widths and opposition to a note recommending native plants over turf grasses for buffer areas. Comments on the fertilizer and pesticide performance standard were centered around the requirement for soil tests and integrated pest management plans. There was both support for and questions about the goal of 80 percent sediment load reduction. Broader concerns expressed in the comments were the costs and additional responsibilities borne by local governments who must implement the rules without the requirement of cost sharing from the state, and inequities between permitted and non-permitted municipalities.

Additional comments specifically addressed at the transportation performance standards included the need for technical standards, a desire to continue the workgroup, and both support and opposition to WisDOT being required to meet the performance standards.

Most of the comments on NR 120 were suggestions for language clarifications and consistencies with other rules. There were also comments both for and against maintenance of practices beyond the grant period, recommendations to tie cost-sharing and inspections to county, basin and other approved plans, support for lake protection measures and recommendations for shoreland protection measures. Many comments focused on the changes to the grant process and changes to cost share eligibility and procedures.

For proposed NR 152, there were comments on both sides of the issue of uniform model ordinances, with some arguing for more local options and control. Counties and some county associations requested a delay or that the model ordinances be developed outside the administrative rule process. They also recommended a third model ordinance that combines erosion control and storm water management into a single ordinance and permit process. The transportation builders association commented that transportation projects should be exempt from the proposed ordinances. Some planning and engineering agencies commented that the peak discharge and infiltration requirements were not protective enough while others commented that they were too restrictive.

Comments on proposed NR 153 and NR 155 were mainly about the process and procedures, the limitations of and workload associated with competitive grants, and a desire to focus these grants on protection rather than reduction of nonpoint source pollution. Previously mentioned comments regarding the importance of sustained funding and ties to county land and water resource management plans were also made about these rules.

For proposed NR 154, there were several comments that the rule should be either be eliminated or made more consistent with ATCP 50, that the economic hardship provisions be eliminated or redefined, that certain cost-share conditions be changed, that the laboratory analysis requirement be modified and that the shoreland habitat restoration provisions be expanded.

For NR 216, there was objection to the use of this rule to implement the non-agricultural performance standards in NR 151 leaving leave many small communities out of the enforcement process and that NR 216 should allow for watershed approaches. There was support for expansion of the Tier 3 category to include certain facilities that pre-treat discharge. Some counties and county associations would like an expansion of the fee exclusion to include all local ordinances regardless of the date.

The bulk of the comments on NR 243, which originated from EPA and several environmental groups, requested changes to make the rule as stringent as federal regulations. Other people commented that there needs to be thorough planning for large operations with compliance requirements subject to public comment, considerations of proper siting for large operations, a need for incentives for local implementation of notices of discharge, considerations for over-wintering of cattle and more recognition of local governments and ordinances.

Following the public hearings, the department met with several agencies, trade associations and other organizations to discuss issues raised during the public comment period. The department continued discussions with the Transportation Stakeholders Group that had been meeting prior to the hearings to work on ongoing issues related to the performance standards. Non-DNR members of this group include WisDOT, Wisconsin County Highway Association, Wisconsin Transportation Builders Association. The department also met with DATCP, Wisconsin Land and Water Conservation Association, Wisconsin Association of Land Conservation Employees, Dane County Land Conservation Department, Grant County Land Conservation Department and Wisconsin Counties Association to discuss implementation and enforcement issues raised during the comment period.

### **Legislative Rules Clearinghouse Report**

With the exception of comments discussed below, the comments included in the Clearinghouse Report to the department have either been incorporated into the proposed rules or are no longer applicable because subsequent revisions removed or significantly altered the rule. In the text below, the current code section being discussed is followed by a reference in brackets to the original Clearinghouse Report.

#### **Rule 00-027 (NR 151)**

##### **Adequacy of References to Related Statutes, Rules and Forms**

The citation to s. 281.16, Stats., should contain the notation “as affected by 1999 Wisconsin Act 9”.

***Response: This is no longer needed since the statutes have been officially updated since the review was originally done.***

h. Section NR 151.015(16) [NR 151.002 (49)] would be easier to comprehend if the information contained in that subsection were broken down into paragraphs. In addition, how is it to be determined whether a site is “susceptible to groundwater contamination or has the potential to be a direct conduit for contamination to reach groundwater”?

**Response:** *Wording was changed in the revised rule, but not changed to paragraph form because there are a number of specific conditions that need to be clearly broken out.*

#### **Form, Style and Placement in Administrative Code**

The requirements set forth in s. NR 151.08 should be rewritten in the following form: “No person may . . . .” [See s. 1.01 (2), Manual.] **Response:** *The wording used in the rule is from state statutes.*

#### **Clarity, Grammar, Punctuation and Use of Plain Language**

l. Section 151.09 (3) (c) 2. In [s. NR 151.09 (1) (b) 2.], the first sentence includes the phrase “corrective measures . . . do not involve eligible costs.” Does the inclusion of this phrase make redundant the additional phrase “regardless of the availability of cost-sharing”? **Response:** *This is not redundant. The point that compliance is required without cost sharing if eligible costs are not involved can be covered either by modifying s. NR 151.09 (3) (c) (1) a. or by creating a separate clause, such as was done under s. NR 151.09 (3) (c) 2. We chose to add a separate clause to emphasize this point.*

q. In [s. NR 151.11(2)], it is unclear which person other than a landowner is a person “with control of a construction site”. **Response:** *This can include any number of people responsible for activity at the site. The language allows the department to enforce against any person culpable for the performance standards not being met.*

r. In [s. NR 151.11(3)(a)], there is a reference to a “Soil erosion and sediment control plan” – Who reviews, where is it submitted, etc. **Response:** *Since this is covered in NR 216, it was not repeated in NR 151. NR 216 is the implementation code for NR 151.*

s. In [s. NR 151.11(3)(a)], how is the “annual average sediment load” to be determined? **Response:** *This will be determined through the use of a model or desktop calculation using the universal soil loss equation. The technical standard developed under NR 151(V) will define this.*

v. Under [s. NR 151.11(5)], must the responsible party receive approval from the department to cease to maintain best management practices (BMPs) when final stabilization has been achieved? **Response:** *The responsible party must submit a Notice of Termination (NOT) to the department in accordance with NR 216 requirements. NR 216 is the implementation code for NR 151, subch. III.*

ae. What is meant by the statement in the [note following s. NR 151.13(1)(d)] that the general population “has secondary responsibility” in complying with municipal ordinances and other requests? **Response:** *The local unit of government has the enforcement capability identified in their ordinance if the general public fails to comply. This statement is intended only to put the general public on notice that they also bear responsibility for the success of this clean up effort.*

ah. In the [note after s. NR 151.15(1)(a)2], use “its” instead of “their”. **Response:** *“Their” is the correct use with the plural form (municipalities).*

#### **Rule 00-026 (NR 152)**

#### **Form, Style and Placement in Administrative Code**

g.(5). Section 152 Appendix A s.07(2) In [s. NR 152 Appendix A s.07(2)] ... does not indicate who is required to design, install, apply and maintain best management practices. **Response: We believe that the previous section, s.07 (1), clearly indicates this applies to the responsible party.**

h(7). Section 152 Appendix B s.07(2) In [s. NR 152 Appendix B s.07(2)] Paragraphs (a) and (b) should be combined. **Response: We have kept them separate to be consistent with the format of NR 15, which this references.**

### **Rule 00-025 (NR 153)**

#### **Clarity, Grammar, Punctuation and Use of Plain Language**

(note: in response to a Legislative Clearinghouse comment, the rule addressing the grant programs was separated into two rules under one order number—NR 153 and NR 155)

f. Section 153.22 (9) and Section 155.22(9). [Section NR 153.005 (9)] provides that if a change of ownership occurs during a cost-share agreement, a new landowner must fulfill all conditions of the cost-share agreement. How will this be enforced? **Response: Creating an obligation with the current landowner via a signed cost-share agreement, and then recording the agreement with the register of deeds will enforce this. Provisions requiring the cost-share agreement to be signed and recorded are included in the rule.**

h. Section 153.25 (3) (g) and Section 155.25(3)(g). [In s. NR 153.007 (3) (g)], what is meant by “the interest of the state of Wisconsin”? This provision should more precisely indicate what should be recorded with the deed to protect the state’s interest in the property. **Response: This section of the administrative code deals solely with property acquisitions. The recording requirement in (3)(g) specifically calls for the deed covering the property acquisition to be recorded. Any property interest of the state of Wisconsin will be reflected in the recorded deed.**

j. Section 153.32 (3) (b) and Section 155.32(3)(b). In [s. NR 153.013 (1) (a)], is the suspension of state liability prospective only? In par. (b) (3), the word “sent” should be replaced by the word “send.” **Response: Yes, the liability is prospective only according to the process set forth in the rule. The word “sent” will be retained because it would be grammatically incorrect to use the word “send.”**

o. Section 153.19 (3) (a) and Section 155.19(3). [Section NR 153.34 (1) (c)] provides in part that DNR may establish a minimum of points that must be earned in any given category in order to receive funding. The minimum point totals should be included in the text of the rule. **Response: Detailed point assignments have not been included in any part of the scoring system. Consequently, it would not make sense to include point values for this portion of the scoring process.**

### **Rule 00-034 (NR 243)**

#### **Statutory Authority**

Section NR 243.25 (2) (a)1 [Section NR 243.23(2)(a)] indicates that corrective action needs to be taken if cost-sharing is available. However, it also provides that if cost-sharing was available previously, corrective actions must still be taken regardless of the current availability of cost-sharing. Section 281.16 (4), Stats., seems to indicate that cost-sharing being available is a necessary precondition for existing operations to have to come into compliance without regard to whether it was formerly available. Does s. 281.16 (4) authorize the department to consider previously available cost-sharing? **Response: Previous offers of cost sharing will be considered as long as they meet the criteria for making cost sharing available under NR 151.095.**

## **Form, Style and Placement in Administrative Code**

a. The rule incorporates a number of standards by reference. The analysis of the rule should indicate that consent to incorporation has been given by the Attorney General and the Revisor of Statutes. [s. 2.08 (1), Manual.] **Response:** *The department intends to seek permission to incorporate standards by reference after the Natural Resources Board approves final adoption of the rules.*

## **Clarity, Grammar, Punctuation and Use of Plain Language**

k. In several places in the rule, a report or other information is required to be submitted to the department. The rule provides that the report, or other information, must contain "at a minimum" certain specific information. For example, see [s. NR 243.12 (2) (c) and (d)]. Is it necessary to use the phrase "at a minimum"? Does the department expect that additional information will or should be provided? If the department does expect other information to be provided, that information should be specified in the rule.

If not, simply state the minimum requirement and eliminate the phrase "at a minimum." **Response:** *There may be instances where additional information will need to be submitted based on unique water quality concerns at a given site or in a given area. Because it is not possible to determine ahead of time what these conditions will be, the language has been retained to allow the department the ability to account for variability in water quality concerns and site conditions.*

x. How does one go about getting "approval" under s. NR 243.15(4) [NR 243.14(4)]? **Response:** *Procedures for obtaining approvals of designed structures, such as a permanent spray irrigation system, are outlined in NR 243.15 (1) (see also NR 243.12(2)(a) and NR 243.4 and NR 243.5).*

ad. Also, it seems upon close reading of NR 243.24(4)(b) [s. NR 243.23(3)], that if the county agency or DATCP do not want to review the proposed corrective measures and if the department does not ask for them to be submitted, no agency has to review the corrective measures. Is this the intent? **Response:** *Yes.*

## **5. Environmental Assessment**

The proposed rule chapters would have a beneficial effect on the quality of the waters of the state. These effects are discussed in detail in the attached draft Environmental Assessment.

## **6. Final Regulatory Flexibility Analysis**

Proposed rules NR 151, NR 216 and NR 243 will have a significant economic impact on a substantial number of small businesses. These impacts are discussed in the attached Final Regulatory Flexibility Analysis.