

02-081
(10)

ROGER BRESKE

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MEMORANDUM

September 10, 2002

TO: Senate Committee on Insurance, Tourism and Transportation

FR: Senator Roger Breske, Chair

RE: Proposed Clearinghouse Rules 02-069 and 02-081

Clearinghouse Rules 02-069 and 02-081 were recently referred to the Senate Committee on Insurance, Tourism and Transportation. For your reference, I have attached the analyses by the Office of the Commissioner of Insurance and the Department of Transportation. If you would like to request a hearing on this proposed rule, please contact Beth in my office before **Friday, September 27th, 2002.**

Proposed Clearinghouse Rule 02-069

Relating to revising requirements for defined network plans, preferred provider plans and limited service health organization plans to comply with recent changes in state laws.

Proposed Clearinghouse Rule 02-081

Relating to construction site erosion control and storm water management procedures for department actions.

Clearinghouse Rule 02-081

Analysis by the Department of Transportation

Currently, statutes require the Department of Transportation ("DOT") to establish standards for the control of soil erosion related to highway and bridge construction that is paid with state or federal funds. The statutes also exempt transportation facility projects directed and supervised by DOT (including highway, airport, harbor, and railroad projects) from numerous environmental prohibitions, and from permit or approval requirements administered by the department of natural resources ("DNR"), if DOT coordinates the exempted project with DNR through interdepartmental cooperation.

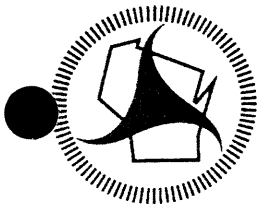
This revised chapter Trans 401 is an integral part of a series of administrative rules and interdepartmental cooperation coordinated with DNR to strengthen Wisconsin's nonpoint source water pollution abatement programs and related water regulations. The changes to Trans 401 are intended to protect the environment from nonpoint source water pollution originating from transportation facility construction and operation at least as effectively as the nonpoint source water pollution abatement programs and related water regulations proposed by DNR (principally proposed NR 151). This coordination of rules is intended to provide equal protection to the environment by prescribing similar practices for transportation projects undertaken by the state under regulation of this Trans 401 and for transportation projects undertaken by local units of government under regulation of proposed NR 151.

This rule revises construction site erosion control and storm water management for transportation facility projects directed and supervised by DOT. The rule also creates new 'post-construction' performance standards for storm water management. More specifically, the rule (which applies only to projects directed and supervised by DOT) does all of the following:

1. Standardizes the use of devices and practices to control erosion and stormwater runoff ("best management practices" or "BMPs"). The rule accepts BMPs as tested and proven effective when applied to specified site conditions. The standards are the same as those required under proposed NR 151, and may be amended only jointly with DNR. Exceptions to the standards require site-specific justification.
2. Maintains the existing scheme of erosion control plans and erosion control implementation plans. DOT prepares an erosion control plan for the project site as part of a project's design. The prime contractor supplements that plan with an erosion control implementation plan ("ECIP"), which reflects borrow sites, material disposal sites and construction methods chosen by the prime contractor. DOT reviews and approves the prime contractor's ECIP in consultation with DNR. The prime contractor implements the ECIP during construction, and DOT routinely inspects the project sites to verify the BMPs' effectiveness at protecting the environment. The prime contractor must take corrective action ordered by DOT and must amend an ECIP if the BMPs are ineffective.
3. Standardizes site inspections, site inspection reporting, and corrective action orders. The rule makes the site inspection process integral to preventing environmental harm by predicated liability for discharges of pollution upon the site inspections and corrective action orders. The rule formalizes communications between DOT and the prime contractor, and resolves minor inconsistencies between DOT's standard contract specifications and Trans 401. The rule details the process of ordering corrective action found during site inspections to be necessary, and the process of responding to such orders.
4. Clarifies liability for environmental harm caused by discharges of pollution from transportation facility projects. The rule specifies that the prime contractor is liable only if the prime contractor has failed to perform as required in the contract documents and if the failure was a substantial contributing factor in causing, failing to prevent, or worsening the discharge. Whenever the prime contractor has fully performed as required, or where any failure to perform was not a substantial contributing factor, DOT will pay as a project expense all costs associated with the discharge.
5. Creates post-construction standards for stormwater management similar to those in proposed NR 151. These post-construction provisions include requirements to do all of the following: avoid building transportation facilities near surface waters and to provide vegetated buffer areas where such building is unavoidable; reduce peak stormwater discharge rates from transportation facilities, and the total suspended solids carried in such runoff; encourage infiltration of runoff from transportation facilities into groundwater; reduce the amount of petroleum carried within runoff from fueling and vehicle maintenance areas; and encourage the use of vegetated swales (a low tract of land adjacent to a transportation facility) for the conveyance runoff and the removal of pollutants from runoff.
6. Establishes deadlines and standards for reducing the total suspended solids in runoff from transportation facilities located in developed urban areas. The rule requires DOT to educate DOT staff and other maintenance officials regarding nutrient, pesticide, salt and other deicing material and vehicle maintenance management activities in order to prevent runoff pollution of waters of the state.
7. Addresses utility facility projects undertaken within transportation rights-of-way. The rule harmonizes Trans 401 with DOT's utility accommodation policy and with the DOT-DNR interdepartmental liaison agreement.

Fiscal Effect

The Department estimates that there will be an annual fiscal impact on state liabilities of between \$4.4 and \$6.5 million. The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands. See the attached Fiscal Estimate and Fiscal Estimate Worksheet for a more detailed summary.



Wisconsin Department of Transportation

www.dot.state.wi.us

Scott McCallum
Governor

Thomas E. Carlsen, P.E.
Acting Secretary

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The Honorable DuWayne Johnsrud
Chairman, Assembly Committee on Natural Resources
323 North, State Capitol
Madison, WI 53702

October 9, 2002

OCT 10 2002

The Honorable Senator Roger Breske
Chairman, Senate Transportation Committee
Room 18 South, State Capitol
Madison, Wisconsin 53702

**RE: Proposed Administrative Rule
Chapter Trans 401
Clearinghouse Rule No. 02-081**

Gentlemen:

The Wisconsin Department of Transportation is submitting a germane amendment to **Section 51** of Clearinghouse Rule 02-081, relating to construction site erosion control and storm water management procedures for department actions.

As submitted, **Section 51** of Clearinghouse Rule 02-081, creating Trans 401.08(1)(ar), authorizes the Department of Transportation to hold a pre-construction conference within 14 days after the contractor submits an erosion control implementation plan ("ECIP") to the Department of Natural Resources for review, if the Department of Transportation provides written notice to the Department of Natural Resources that it intends to hold the pre-construction conference within that time.

Clearinghouse Rule 02-081, Section 51, should be amended to allow the Department of Natural Resources 14 days to review and comment on the ECIP, and to require the Department of Transportation to convene a follow-up meeting within 7 days after receiving those comments to consider those comments with the prime contractor, the Department of Natural Resources and any other affected parties. This amendment is intended to ensure that under any circumstances the Department of Natural Resources has at least 14 days to review the contractor's ECIP, and has an opportunity to comment meaningfully on the ECIP, while avoiding the increased costs and project delays caused by postponing a pre-construction conference.

Accordingly, pursuant to § 227.19(4)(b)3, Stats., the Department proposes the germane modification to this proposed rule as shown on the attached page. Please replace **Section 51** on pp. 28 and 29 originally submitted with the attached replacement page.

The Senate Transportation Committee review period expires November 4, 2002, and the Assembly Committee review period expires October 25, 2002, unless otherwise waived.

Thank you for your consideration of this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul E. Nilsen". The signature is fluid and cursive, with the first name "Paul" being the most prominent part.

Paul E. Nilsen

Assistant General Counsel

Attachment

cc: Senator Judy Robson
Representative Glenn Grothman
Gary Poulson
Gary Whited
Carol Cutshall
Dan Scudder

“SECTION 51. Trans 401.08(1)(am) and (ar) are created to read:

Trans 401.08(1)(am) The prime contractor shall select best management practices from the matrix published under s. Trans 401.07(1m)(a) when preparing an ECIP. The prime contractor may not employ best management practices that are not specified in the matrix unless the department of transportation has specifically approved that use in writing.

(ar)1. The department of transportation may not hold a pre-construction conference until at least 14 days after the prime contractor delivered or mailed the ECIP to the department of natural resources, unless either of the following occurs before the pre-construction conference is held:

a. The district director of the department of transportation has notified the regional director of the department of natural resources in writing that the department of transportation intends to hold the pre-construction conference.

b. The department of natural resources consents to the pre-construction conference.

2. If the department of transportation holds a pre-construction conference within 14 days after the prime contractor delivered or mailed the ECIP to the department of natural resources, the department of natural resources shall have 14 days after the prime contractor delivered or mailed the ECIP to the department of natural resources to review the ECIP and deliver written comments to the department of transportation and to the prime contractor. At the earliest practicable time, but not more than 7 days after receiving such written comments, the department of transportation shall hold a conference with the prime contractor, the department of natural resources and any other affected parties to consider the department of natural resources' comments.”

(end)

The Honorable DuWayne Johnsrud
Chairman, Assembly Committee on Natural Resources
323 North, State Capitol
Madison, WI 53702

October 15, 2002

The Honorable Senator Roger Breske
Chairman, Senate Transportation Committee
Room 18 South, State Capitol
Madison, Wisconsin 53702

**RE: Proposed Administrative Rule
Chapter Trans 401
Clearinghouse Rule No. 02-081**

Gentlemen:

The Wisconsin Department of Transportation is submitting its second germane amendment to **Section 6** of Clearinghouse Rule 02-081, relating to construction site erosion control and storm water management procedures for department actions.

As submitted, **Section 6** of Clearinghouse Rule 02-081, creating Trans 401.03(2)(c), makes the revisions to Trans 401 inapplicable to actions taken under bids first advertised before the effective date of the rule. The anticipated effective date of Trans 401 is January 1, 2003. To restate in the positive, **Section 6** as submitted makes the revisions to Trans 401 first apply to bids that are first advertised after January 1, 2003. The purpose of this initial applicability is to provide clear notice to bidders as to whether the project on which they bid is regulated by existing Trans 401, or by revised Trans 401. The Department of Transportation ordinarily lets a large number of projects for bid in January and likely will do so in January 2003. These January lets are first advertised in December. Because revised Trans 401 does not apply to bids first advertised before January 1, 2003, **Section 6** as drafted will make changes to Trans 401 inapplicable to all projects let in January 2003. The Department of Transportation believes having projects undertaken during a single construction season under two sets of rules may hinder the smooth implementation of the revisions to Trans 401.

Clearinghouse Rule 02-081, **Section 6**, s. Trans 401.03(2)(c), should be amended to make the revisions to Trans 401 apply to projects whose bids are first advertised after December 1, 2002. This change will make projects let in January 2003

and thereafter subject to Trans 401. The Department of Transportation believes that the scheduled training of its staff, of contractors, and of relevant Department of Natural Resources personnel will ensure that every person working with Trans 401 has adequate notice of the projects and bids that are subject to the revised Trans 401.

Accordingly, pursuant to § 227.19(4)(b)3, Stats., the Department proposes the germane modification to this proposed rule as shown in the shaded portion on the attached page. Please replace page 6 originally submitted with the attached replacement page.

The Senate Transportation Committee review period expires November 4, 2002, and the Assembly Committee review period expires October 25, 2002. Submittal of this second germane amendment will not extend the review period for either committee.

Thank you for your consideration of this proposal.

Sincerely,

Paul E. Nilsen
Assistant General Counsel

Attachment

cc: Senator Judy Robson
Representative Glenn Grothman
Gary Poulson
Gary Whited
Carol Cutshall
Dan Scudder
Pat Stevens, WTBA

SECTION 4. Trans 401.03(1)(c) is created to read:

Trans 401.03(1)(c) Construction or reconstruction of a highway designated under s. 86.32, Stats., as a connecting highway, or any improvement, as defined in s. 86.31(1)(b), Stats., of a connecting highway.

SECTION 5. Trans 401.03(2) is amended to read:

Trans 401.03(2)(intro.) ~~With the exception of the use of erosion control and storm water management measures as required under s. Trans 401.06(1)~~ Notwithstanding sub. (1), this chapter does not apply to an any of the following:

(a) An action administered directed and supervised by the department that is considered routine maintenance or that addresses an emergency, ~~nor does it apply to an.~~ Routine maintenance activities shall employ best management practices described in s. Trans 401.06(1), but no other provisions of this chapter apply to routine maintenance.

(b) An action not administered directed and supervised by the department that involves the installation of a driveway by a person for residential use or agricultural use, as defined in s. 91.01(1), Stats.

SECTION 6. Trans 401.03(2)(c) and (3) are created to read:

Trans 401.03(2)(c) An action taken under a bid first advertised before December 1, 2002, or, for projects for which no bid is advertised, taken under a contract signed before the effective date of this chapter....[revisor inserts date].

NOTE: This rule first applies to projects let on or after January 14, 2003.

(3) Notwithstanding sub. (1), post-construction performance standards under s. Trans 401.106 do not apply to any of the following:

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Sen.Breske@legis.state.wi.us

October 3, 2002

Thomas Carlsen, Acting Secretary
Department of Transportation
4802 Sheboygan Avenue
HAND DELIVERED

RE: Clearinghouse Rule 02-081
*Relating to: construction site erosion control and storm water management procedures
for department actions.*

Dear Acting Secretary Carlsen:

At the request of the members of the Senate Committee on Insurance, Tourism and Transportation and pursuant to §227.19(4)(a) and (b) Wis. Stats., I write to extend the Committee's review of this proposed rule. I will be in contact with your office to schedule a meeting to discuss possible modifications to this rule.

Thank you for your assistance. As always, please feel free to give me a call should you have any questions or concerns regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger".

ROGER BRESKE, CHAIR
Senate Committee on Insurance, Tourism
and Transportation

RB/ekp

cc: Joyce Kiel, Legislative Council
Donald Schneider, Senate Chief Clerk
Members, Senate Committee on Insurance, Tourism and Transportation