

Report From Agency

REPORT TO LEGISLATURE

NR 150, Wis. Adm. Code
Relating to the department's environmental analysis and review
procedures under the Wisconsin Environmental Policy Act.

Board Order Number: OE 21-14
Clearinghouse Rule Number: 15-037

BASIS AND PURPOSE OF THE PROPOSED RULE

WEPA and ch. NR 150 are cornerstone laws for the agency that date back to the early 1970's. Chapter NR 150 was substantially revised and went into effect April 1, 2014. Following the initial implementation of the April, 2014 rule, an emergency rule (Board Order OE-10-14(E)) was approved by the Natural Resources Board in August (effective August 31, 2014) for two purposes: 1) to clarify the procedures for review and analysis of new administrative rules in order to ensure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and 2) for additional housekeeping changes to ensure that the intent of the April 2014 ch. NR 150 rewrite is being met - all in a manner consistent with past WEPA compliance approaches that have been upheld by courts.

The August emergency rule was to expire on January 28, 2015. Two 60-day extensions were granted by JCRAR that extended the August emergency rule to an expiration date of May 27, 2015.

A new emergency rule (Board Order OE-20-14(E)) was adopted May 27, 2015 to broaden the scope and add additional clarification and different rule language not contained in the expiring August 2014 emergency rule, while a new permanent rule is promulgated. This companion new permanent rule (Board Order OE-21-14) similarly broadens the scope and adds the additional clarification and different rule language contained in the current emergency rule.

The May, 2015 emergency rule and this proposed permanent rule clarify that emergency rules are "minor actions," requiring no additional environmental analysis, and that the process for developing permanent rules is an "~~integrated~~ ~~equivalent~~ analysis action." The rules also clarify: applicable definitions related to those rules and actions; procedures for WEPA compliance determinations and publication requirements; and strategic analysis requirements.

The proposed new emergency and permanent rules expand the list of "minor actions," and expand and amend the list of "~~equivalent~~ ~~integrated~~ analysis actions" for which a detailed environmental analysis and public disclosure are part of program review.

~~Office of Energy and Environmental Analysis and Sustainability (OEEAS)~~ staff have obtained the input of an internal team of staff from several Department programs. ~~OEEAS~~ has also involved a broad range of potentially interested and affected external parties. ~~No controversies have emerged.~~ There will be no impact on small business.

The fundamental department policy regarding WEPA, as currently embodied in ch. NR 150, will not change. The rule recreation will result in a number of procedural changes and a new emphasis

on how the department applies the Wisconsin Environmental Policy Act, especially to its policy development actions.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

The Department conducted one public hearing on the new permanent rule on June 2, 2015 in Madison. Two people attended and no one provided oral testimony for the record. As part of the hearing public notification process, public review was also sought statewide via news releases and publicity on the Department's website.

The Department received one comment letter during the May 13 to June 10, 2015 comment period. The comments covered many of the same topics addressed during the original (April, 2012) rule revision process and were addressed in a 24-page response to comments document dated August 28, 2013. ~~A comment that has been addressed in previous proceedings, but continued through this process is about the determination that certain department actions include "equivalent analysis" and therefore an additional environmental review document and additional public comment process on that document is not needed to ensure compliance with WEPA. Since this concern remains, the department prepared a detailed explanation of the rationale for listing certain actions as "equivalent analysis actions."~~

Department staff prepared responses to all public comments during the current process and made a few changes to the rule based on the comments received (see next section and Attachment 1 for the comment/response summary, which includes a brief description of these changes).

Comments in the comment/response document are summarized under general topics. Topics include one or more general comments and comment responses. Some topics also include specific comments in italic type and Department responses that are related to the topic but that differ from the general comments.

MODIFICATIONS MADE TO THE PROPOSED RULE AS A RESULT OF PUBLIC COMMENT OR TESTIMONY RECEIVED

Some of the comments received resulted in changes being made to the proposed code and rule package. Changes made are indicated in the responses to comments. See the Attachment 1 for details on the changes made.

On August 12, 2015, the Natural Resources Board approved the rule contingent upon the inclusion of a note that clarifies that CAFO permit decisions are "integrated analysis actions," while some plans and specifications reviews involved in the CAFO review process are "minor actions" under this rule. A note was added to s. NR 150.20 (1m).

PERSONS APPEARING OR REGISTERING AT PUBLIC HEARINGS

At the Madison hearing, two people attended and none presented oral comments nor delivered any written comments. Attendees registered as follows:

In support:	None
In opposition:	None
As interest may appear:	Barbara J. Arnold (no affiliation) Adam Voskuil (no affiliation)

CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE

No changes were made to the Fiscal Estimate for this rule.

RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

Nearly all the changes recommended in the Clearinghouse report dated May 21, 2015 were incorporated into the rule. In a few instances, changes made to the rule package made the remainder of the changes no longer relevant.

FINAL REGULATORY FLEXIBILITY ANALYSIS

This rule describes the environmental analysis review procedures to be implemented by the Department. This is not a regulatory program and the department does not expect any impact on small businesses. As a result it is unnecessary to conduct a regulatory flexibility analysis.

NR 150 Revision
Comments and Responses
Natural Resources Board Order No. OE-21-14

July 20, 2015

This document presents a summary of public comments received on the proposed revision of Chapter NR 150, Wisconsin Administrative Code, and the Department's responses.

PROCESS SUMMARY

The draft rule was made available for public review through the economic impact analysis review process (from March 23 to April 7, 2015) and the Board/department's rule review process (from May 13 until June 10, 2015). No comments were received during the economic analysis process. One written comment was received during the rule comment period. The department held one public hearing on the draft proposed code on June 2, 2015, in Madison. Two persons attended the hearing and no person spoke on the record.

WRITTEN COMMENT SUMMARY

The Department had also received resolutions from Eau Claire, La Crosse, and Wood Counties dated between January and March 2015, raising concerns about the August 2014 emergency rule. The department responded to those comments in the background memo that accompanied the green sheet for the request for adoption of an emergency rule at the Board's May 2015 meeting. Those responses are repeated below.

The one comment letter received during the proposed permanent rule comment period was from Midwest Environmental Advocates (MEA). A response to those comments begins on page 3 of this memorandum.

Response to Comments from Eau Claire, La Crosse, and Wood Counties:

Comment:

Under the new rule, CAFOs "are now considered a minor action that will not require an environmental analysis"

DNR Response:

CAFOs are not considered minor actions. NR 150 and WEPA impose informational and procedural requirements on the DNR, but are not regulatory. Environmental analyses under NR 150 identify potential environmental effects of proposed actions and alternatives, but does not (and cannot) require permit conditions or directly affect decisions.

CAFOs cannot operate until they've received a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. WPDES permits for new sites are considered integrated (formerly equivalent) analysis actions under NR 150. This is not changed by the proposed permanent rule. Categorizing CAFO WPDES permit issuance as integrated analysis actions acknowledges that the permit issuance/reissuance process itself involves an appropriate level of environmental analysis and public disclosure and does not require the creation of an additional analysis document with an additional review process.

It is true that there are a number of **approvals associated with issuance** of a WPDES permit which are identified as minor actions. Those actions were also considered to be minor under the April 2014 version of NR 150. The environmental analysis required as part of the WPDES permit process encompasses and includes those other approvals.

Comment:

The new rule "...limits the public involvement" in the review process for CAFOs

DNR Response:

The emergency rule and this proposed permanent rule do not limit public involvement. For the WPDES process, the public has opportunities for comment on draft permits and for legal challenges to the permit. The rule does not change anything about the regulatory processes for CAFOs or for any other DNR action.

Comment:

The rule "... reduces the Natural Resources Board oversight of the DNR's environmental review process"

DNR Response:

The emergency rule and this proposed permanent rule do not reduce the Natural Resources Board oversight of the DNR's environmental review process. The role of the NRB is established by statute, and as it relates specifically to Strategic Analysis, the NRB already has authority to require a strategic analysis regardless of any provision in the new ch. NR 150. The April 2014 version of the permanent rule did not create any new oversight for the board, and the inclusion of the NRB relating to Strategic Analysis is superfluous and confusing. Editing to the rule has been proposed to eliminate this potentially confusing language.

Response to Comments in MEA letter dated June 10, 2015

Highlighted below are the specific comments in the MEA letter and offer the following responses keyed to the numbered comments in the attachment. Below are the department responses to specific matters raised by MEA.

1. Concerns about the environmental analysis of dams: The comment misreads the term “facility development.” The term was intended to mean facility development on department properties, which could include small dams or water control structures associated with wildlife areas. Based on this comment, the term “facility development” has been eliminated and replaced with a term “department facility” in NR 150.03.

The comment also raises concerns on the various dam related actions listed in the code as minor actions. Below is a detailed analysis of each subsection in 150.20(1m) related to dams.

(sc)Temporary drawdowns of dams under s. 31.02, Stats.

Temporary drawdowns involve the operation of a dam to temporarily allow water to pass through the dam and drain any impoundment behind the dam. Temporary drawdowns of dams may be conducted for any variety of reasons. Often these temporary drawdowns facilitate inspection by the dam owner. By statute an owner of the dam is required to conduct an inspection to ensure that the dam is structurally sound to protect life, health, and safety. These drawdowns occur for a very short period of time to allow the Department, the dam owner, or the owners agent to view aspects of the dam that would be inaccessible during operation. In some circumstances temporary drawdowns could also be allowed where an entity is completing some other environmental project, such as dredging, aquatic plant management, or fish management. These environmental projects involve their own analysis of environmental impacts and would include any assessment of the impacts from a temporary drawdown. Regardless, a temporary drawdowns associated with an environmental project are still for typically shorter periods of time to allow for the completion of a project and do not modify the overall operation of a dam. Drawdowns of dams did not require environmental analysis under the pre-2014 version of ch. NR 150.

(sg)Reconstruction and repairs of dams under s. 31.12, 31.18, or 31.185, Stats.

Owners of a dam are required to inspect and maintain a dam to protect life, health and safety. Under s. 31.19, Stats., the Department may order a dam owner to repair or reconstruct a dam if pursuant to an inspection the Department finds that a dam is unsafe. Repairs may be anything from removal of vegetation along a spillway, repairing gates or reducing seepage. Reconstruction means rebuilding all or parts of the dam.

Some of the dams in the state of Wisconsin have been in place since before the turn of the century and many of the existing dams in Wisconsin have been in place for decades. The environmental impacts of an existing dam occurred when the dam was constructed. By statute owners of a dam are required to maintain and repair dams to protect the public. Reconstruction and repair includes repairing or rebuilding the dam to hold the same water level as the original dam. Consequently, repairing or reconstructing a dam would not result in any long term impacts to the existing environment. Reconstruction may have some short term impacts that are due to the potential need to temporarily draw down an impoundment during construction. Efforts to increase the size of the dam or the impoundment or changes in the operation of the dam are regulated under different statutory authority in ch. 31. Some dam reconstruction actions required environmental analysis under the pre-2014 version of ch. NR 150.

(sl)Transfer of dam ownership under s. 31.14, Stats.

Transfers of ownership merely establish ownership and responsibility for constructing, maintaining, repairing, and operating a dam from one entity to another. Transfers of ownership do not result in any changes to a dam or its operation. It is a process to establish and document ownership and financial responsibility for construction, operation, repair and maintenance of a dam for a minimum of 10 years. A municipally-owned dam may not be transferred to a private individual or foreign corporation according to s. 31.21, Stats. Real estate laws require that the transfer of any parcel of land containing a dam (large or small, on navigable or non-navigable waterways) must obtain approval from the Department. Dam ownership transfers did not require environmental analysis under the pre-2014 version of ch. NR 150.

(sp) Dam inspections under s. 31.19, Stats.

By statute an owner of a dam, or the owner's agent, is required to conduct an inspection to ensure that the dam is structurally sound to protect life, health, and safety. The Department may also conduct inspections. The inspection itself does not result in any environmental impacts, except perhaps the short term impacts that may result if a temporary drawdown is necessary. A temporary drawdown may be necessary to inspect areas that would be inaccessible during operation. Inspections verify that a dam is structural sound and does not pose a risk to life, health or safety. An inspection in and of itself does not cause environmental impact. Dam inspections were not listed under the pre-2014 version of ch. NR 150 and did not require environmental analysis.

(st) Plan approvals for dams under 31.33, Stats., and approvals of emergency action plans, inspection plans, operation and maintenance plans, dam failure analysis plans, or stability analysis plans under ch. NR 333.

The Department is required to approve emergency action plans, inspection plans, operation and maintenance plans, dam failure analysis plans, and stability analysis plans under ch. NR 333. These plans ensure that the dam is constructed, operated and maintained to protect life, health and safety.

For new dams, the Department typically requires the submission of these plans and approval of these plans concurrently with an applicant's request to construct under s. 31.05, Wis. Stats. However, these plans may be modified over time or these plans may be submitted by an owner of an older existing dam, to bring the dam into compliance with ch. NR 333, even though no physical alternations to the dam may occur. The department reviews these plans to verify compliance with ch. NR 333 and sound engineering principals. Staff review of these plans ensures that the dam is constructed, operated and maintained in a manner that protects life, health and safety. These actions were not listed under the pre-2014 version of ch. NR 150.

2. Status of actions involving dams: The proposed clarifying additions to the minor action list were included in the May 2015 emergency rule. In the past, some actions involving dams were considered Type III or Type IV under the pre-2014 version of NR 150, where no environmental analysis was required. Some cases were listed as Type II actions in the pre-2014 code, requiring an Environmental Assessment process. In the future, there may be proposals involving dams where the department will opt to use its discretion to conduct an EIS under 150.20(4)(b).

3. Status of the emergency rule process: This comment raises concerns about the emergency rule process used to get to this permanent rule proposal. Any future additions or subtractions to the rule would require a new administrative rules process.

4. Justification for considering some actions as Minor Actions: The department will prepare program guidance to identify which actions are considered routine and small scale, subject to the department's public review process for all program guidance.

5. Amendments to the list of Minor Actions: The comment raises concerns about proposed amendments to the minor action list. As has been explained, the 2014 rule used a “catch-all” and intended for program guidance to clarify what actions were minor. The emergency rules and proposed permanent rule provide greater clarity within the rule, adding in many actions that were not addressed in the pre-2014 rule. Any future additions or subtractions to the rule would require a new administrative rules process.

6. Elimination of Environmental Assessments (EAs): Since 2010, the department has prepared on average 35 EAs per year, most of which received zero public comments. The proposed rule is about how the environmental analysis occurs, requiring that environmental analysis be conducted as part of the review process, but the documentation will not be a separate process from the action.

7. Clarification of actions formerly listed as “Type II”: The terminology “Type II” was eliminated by the 2014 rule, as such there are no actions “currently listed as Type II”.

8. Status of CAFO reviews: See answers regarding the handling of WPDES for CAFOs above on pages 1-2 of this memorandum. Per statute, only WPDES permits for “new sources” are required to comply with s. 1.11, Stats. The department uses a detailed analysis form to address a broad range of potential impacts to the human environment and that analysis documentation is included as part of the review process.

9. Environmental analysis as distinct from permit review authority: The comment mixes concerns about legal authority and requirements for permit issuance with matters to consider as part of the environmental analysis. NR 150 is about providing information, not about the regulatory decision. Any analysis conducted as part of the action review is part of the reviewable record for the action.

10. Clarification regarding high-capacity well reviews: The rule clarifies complicated statutory language regarding WEPA and high capacity wells. In fact, some well permit actions have required an EIS since 2014. Others are considered integrated (formerly “equivalent”) analysis actions. In the future, there may be proposals involving large farms, where the department will opt to use its discretion to conduct an EIS under 150.20(4) (b).

11. Clarification regarding the concept of Integrated analysis action or equivalent analysis action: This comment has been addressed in previous proceedings. MEA is concerned about the provision in the rule that recognizes that the normal procedures for certain department actions include environmental analysis and public disclosure and therefore a separate environmental analysis document and additional public comment process on that document are not needed to ensure compliance with WEPA. There has been much confusion with the public and internal staff over the term “equivalent analysis action.” As such the term has been changed to “integrated analysis action” and the

definition section and introduction to section NR150 (2) (a) have been revised in the final rule to add more clarity. In addition, the department prepared a 28-page detailed explanation of the rationale for listing certain actions as “minor actions,” “integrated analysis actions,” and “prior compliance actions.” That document was attached to the green sheet for Natural Resources Board review of the proposed permanent rule.

12. Clarification regarding the use of emergency rules: Comment #C is a comment about the use of an emergency rule process, and is not directly related to the actual verbiage found in this proposed rule. The rationale for using an emergency rule process was explained at all stages of this rule process to the Board and to the legislative committee (JCRAR). Public comments on the emergency rule process were considered by those bodies in advance of a decision to approve the emergency rules.