

## **REPORT TO LEGISLATURE**

### **Chapters NR 151, 153 and 155, Wis. Adm. Code**

#### **NR 151 - Runoff Management; NR 153 - Targeted Runoff Management Grant Program; and NR 155 - Urban Nonpoint Source Water Pollution Abatement and Storm Water Management Grant Program**

#### **Board Order No. WT-14-08 CR 09-112**

### **Basis and Purpose of the Proposed Rules**

Several actions triggered the proposal to revise these rules which have been in effect since 2002. A resolution passed by the Natural Resources Board on May 22, 2002 directed the department to incorporate an agricultural buffer performance standard into administrative code. Another action is an increased effort by the federal government and the state to address the problem of state waters that have been declared impaired, primarily due to polluted runoff. A third action was the promulgation in 2007 of revisions to ch. NR 243, Animal Feeding Operations, which necessitates changes to ch. NR 151 to make the rules consistent with each other. A fourth action was the passage by the state legislature in October 2007 authorizing the department, under s. 281.65 (4e), Wis. Stats., to fund runoff Notices Of Discharge (NODs) issued to non-permitted livestock facilities outside of the Targeted Runoff Management (TRM) grant process. Revisions to ch. NR 153 are needed to codify the NOD funding process. A fifth action was the transfer of responsibilities relating to commercial building site storm water erosion control from the Department of Commerce to the department in 2009 Wisconsin Act 28. A sixth action was the promulgation by US EPA of effluent limit guidelines for construction sites that must be incorporated into state rules and permits.

Other actions and events that occurred since the rules were first promulgated include the availability of research results showing that some performance standards may not be providing the level of protection originally intended; improved data sets for use in models and improved methods of calculating phosphorus and sediment delivery to receiving waters; and the emergence of data generated by municipalities that caused concern about meeting future performance standards for developed urban areas. Implementation of the performance standards since 2002 has demonstrated that portions of the runoff administrative rules need language changes to clarify intent.

### **Summary of the rules**

The following provisions, changes and requirements are implemented through the proposed rules:

#### **1. Chapter NR 151, Runoff Management**

The rule adds new and modifies existing performance standards that address runoff pollution from both agricultural and non-agricultural sources, including transportation facilities. The new performance standards include:

- a setback from waterbodies in agricultural fields within which no tillage would be allowed for the purpose of maintaining stream bank integrity and avoiding soil deposits into state waters;
- a limit on the amount of phosphorus that may run off croplands as measured by a phosphorus index;

- a prohibition against significant discharge of process wastewater including milk house waste and feed storage leachate.
- a standard that requires crop and livestock producers to reduce discharges if necessary to meet a load allocation specified in an approved Total Maximum Daily Load (TMDL). The department would be required to codify requirements more stringent than state standards and prohibitions by promulgating rules for targeted performance standards under s. NR 151.004. Best management practices, conservation practices and performance standards required in the TMDL area would be those specified in ch. ATCP 50.

Modifications are made to the agricultural performance standards addressing cropland soil erosion control, pasture management, nutrient management and manure storage.

- The rule modifies the sheet, rill and wind erosion standard by extending it to pastures starting July 1, 2012.
- The rule clarifies that bare soil areas around supplemental feeding areas in pastures and cattle travel lanes within pastures are permissible provided that such areas are not significant pollution sources. Significant sources may be regulated as feedlots.
- The rule clarifies that the nutrient management standard does not apply to applications of industrial waste, municipal sludge or septage regulated under other department programs provided the material is not commingled with manure prior to application. The rule also includes a note to explain how the application of these materials will affect farm nutrient management planning.
- Manure storage standards for existing and new facilities are modified to include margin of safety requirements.

The rule also changes the non-agricultural performance standards that address construction site erosion control, post-construction storm water management and developed urban areas:

- The rule modifies the construction site performance standard to apply prescriptive standards to construction sites of less than one acre to accommodate the transfer of ch. COMM 60 to the department effective January 1, 2010; to incorporate non-numeric effluent limits promulgated by US EPA effective February 1, 2010; and to revise the sediment reduction standard from an 80% reduction to a maximum discharge of 5 tons/acre/year. The revised sediment reduction standard has a two year delayed implementation to allow for revisions to the erosion model to better measure compliance.
- The rule revises the post-construction storm water performance standards by removing the exemption from the total suspended solids performance standards of redevelopment sites with no increase in exposed parking areas or roads; adding the 1-year, 24-hour design storm for the peak flow control performance standard and a mid-level infiltration performance standard for sites with moderate impervious area to pervious area development; and revising the definition of a highly susceptible wetland that requires a 75 feet protective area standard.
- The principle change made by the rule to the developed urban area performance standard is the description of a process that permitted municipalities can use if they cannot meet the total suspended solids reduction of 40% by 2013. The process identifies the storm water management plan submittal, the department review process and allowance for up to 10 more years to comply with the standard as long as the plan is followed.

- A change in the definition of minor reconstruction of a highway removes the conversion of a rural cross section of highway to an urban cross section from the definition. This development will be required to achieve a 40% TSS reduction.

The agricultural implementation and enforcement sections are modified to clarify cost-share eligibility and to better align with the department's stepped enforcement procedures. Some definitions are added and other definitions that are no longer used are deleted.

## **2. Chapter NR 153, Targeted Runoff Management (TRM) and Notice of Discharge (NOD) Grant Programs**

This existing rule contains policies and procedures for administering TRM grants to reduce both agricultural and urban nonpoint source pollution. Grants 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. Projects are selected through a competitive scoring system and generally take two to three years to complete.

The revisions create four project categories for the TRM grant program instead of one category in the existing rule. The categories include large-scale/TMDL implementation, large-scale/non-TMDL control, small-scale/TMDL implementation and small-scale/non-TMDL control projects. The rule will help the state make progress in meeting its obligation to address impaired waters in areas with TMDLs while allowing some continued effort to protect and improve other types of water resources including outstanding and exceptional resource waters and less severely degraded surface and ground waters.

To implement recent statutory changes to the grant program, the rule creates a mechanism outside the competitive TRM process to fund NODs issued under ch. NR 243. Other provisions allow the department more flexibility in allocating grant funds. Portions of ch. NR 153 are repealed and recreated to: accommodate the newly created categories; eliminate or add definitions; clarify and expand restrictions on cost sharing; require the establishment of a local ch. NR 151 implementation program as a grant condition; and allow for additional safeguards in the application documents so that projects do not negatively impact historic sites, cultural resources, endangered resources or create problem interactions with hazardous sites.

## **3. Chapter NR 155, Urban Nonpoint Source Water Pollution Abatement and Storm Water Management Grant Program.**

This existing rule contains policy and procedures for administering the urban nonpoint source and storm water management grant program authorized under s. 281.66, Stats. 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. 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 ch. 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. Projects are selected through a competitive scoring system and generally take one to two years to complete.

The revisions to ch. NR 155 increase the department's management oversight and accountability of grants while at the same time increase flexibility in how the grants are used. The revisions limit the amount of money a grantee may receive in a given grant year to 20% of the available funds. This limit is enough to allow a single grantee to win 2 or 3 grant awards while preventing a handful of successful applicants to garner all of the available funding. The amended rule will require department approval of all professional services contracts instead of just those over \$10,000. The reason for this is that even small planning contracts can lead to recommendations for expensive best management practices that the department may end up funding. It will also expose early on in the grants process any differences of opinion between the department and grantees over the eligibility of project costs. The amended rule provides the department greater flexibility in awarding funds, including granting of a partial award to a project that is too low on the ranking list to be offered full funding. Grantees that accept a partial award remain obligated to fulfill the project as described in the application. Flexibility to award partial grants will result in a greater chance that the project will proceed and benefit water quality, as opposed to denying a partial grant award to an otherwise willing community. In addition, the revised rule allows the department to deny a new grant award if the applicant is delinquent in completing a previously issued grant.

This discretion is needed as communities sign grant awards in successive years and sometimes get behind in completing projects. This provision will serve as an incentive for communities to not over-commit themselves and will help maximize use of funds to install practices instead of waiting in the queue. The revised rule requires the applicant to address potentially negative environmental impacts of projects in the application process. This helps facilitate the process of making grant awards as soon as scoring is completed and results in fewer projects that must be discontinued due to unforeseen circumstances.

The rule also allows the use of local assistance grants to pay for work done by competent in-house staff, rather than hiring an outside consultant, thus increasing local government's flexibility to control costs. The rule adds requirements that: hired consultants be competent in storm water management; all outstanding grants be completed on schedule prior to a new grant award; a final report be submitted; and provisions that the department may deny a grant to an otherwise eligible project if there is a potential impact on hazardous sites in addition to historic sites, cultural resources or endangered resources. Other parts of ch. NR 155 are repealed and recreated to define terms, clarify concepts, merge similar sections, and give the department greater flexibility in awarding funds.

### **Summary of Public Comments**

The department received written comments from 850 individuals and organizations. For the proposed agricultural revisions, there were 700 who submitted comments: 275 in support, 400 in opposition and 25 neutral/questions. For the proposed non-agricultural revisions, there were 100 who submitted comments, with a mix of support and opposition. There were also 52 general comments: 45 in support and 7 against.

Support for the rules came from lake and river associations, environmental groups, conservation groups and individuals who want strong rules limiting phosphorus inputs to lakes and streams. Lake shore property owners and small businesses that rely on tourism were concerned about excessive, unsightly blue green algae growth in the lakes that adversely affects the health of animals and humans. They cited agriculture as the largest contributor of the phosphorus discharges that cause algae growth. Opposition to the agricultural provisions of the rules came from farmers, including cranberry growers, farm organizations, agricultural consultants, researchers and co-ops. Municipalities, municipal groups, and

wastewater treatment utilities generally were in support of the agricultural provisions, but had some concerns about the non-agricultural provisions. County land conservation departments commented on the time, costs, and other barriers to implementation of the proposed revisions.

Testimony and comments received at the public hearings and during the comment period identified 8 agricultural issues and 4 non-agricultural issues that were of most significant concern. Agricultural issues of interest were: 1) lack of defining what constitutes “significant discharge”; 2) establishing a 20 foot tillage setback; 3) basing agricultural nutrient management on water quality criteria rather than agronomic criteria; 4) requiring that all cropland achieve an average phosphorus index of 6 or less; 5) setting the maximum allowable phosphorus index at 10; 6) establishing an accounting period over which the average phosphorus index would be calculated; 7) defining “pasture”; and 8) requiring agricultural producer participation in achievement of total maximum daily loads. The non-agricultural issues of greatest interest included: 1) revising the construction performance standard and removing the exemption for sites less than an acre; 2) removing the option to construct wet ponds in water courses for purposes of storm water treatment; 3) removing the exemption for road reconstruction along with the requirement that such reconstruction must achieve a higher total suspended solids reduction; and 4) changing the definition of “to the maximum extent practicable” or “MEP” for the developed urban area performance standard.

Germane comments and the department’s response to public comments are in Attachment 1 of this document.

## **Modifications Made**

Specific modifications to the rule that incorporate responses to public comments are below.

### **1. Chapter NR 151, Runoff Management**

#### **a. NR 151, Subchapter I—General Provisions**

**Modification to Regional Treatment Exclusion Section — NR 151.003** Identifies under what circumstances a best management practice (BMP) such as a detention pond could be located in a waterway or wetland and still get credit toward meeting the performance standards in subchs. III and IV. The proposed rule revisions eliminated all credit for BMPs in navigable waters. Due to public comment, this section was modified to no longer allow credit for construction of BMPs in just perennial, navigable waters. BMPs in all remaining waters can receive credit towards meeting the performance standards of subchs. III and IV, provided they can meet the requirements of all applicable permits, including waterway and wetland permits for construction on the bed or bank of a stream and water quality certification for fill in a wetland. Projects already underway prior to the effective date of the rule will be grandfathered in.

**New Performance Standard for Total Maximum Daily Loads (TMDLs) — NR 151.005** This section was modified to require that performance standards necessary to meet the load allocation of a TMDL shall be promulgated under s. NR 151.004 if more stringent than statewide standards. This section was also revised to clarify that crop and livestock producers shall use the practices and technical standards in ATCP 50 to meet load allocations in an approved TMDL.

**Applicability of Maximum Extent Practicable (MEP) — NR 151.006** The proposed rule revisions indicated a different level of performance, rather than a lower level of performance, was MEP. Modifications to this section identify factors that must be taken into account by persons subject to

non-agricultural performance standards when asserting that a performance standard is not achievable and that a lower level of performance is appropriate.

#### **b. NR 151, Subchapter II—Agricultural Performance Standards and Prohibitions**

**New and Modified Definitions — NR 151.015** The definitions for “feedlot” and “pasture” were modified to account for bare soil areas such as those due to cattle access lanes and supplemental feeding areas. Where these bare areas are significant pollution sources, they are considered part of a feedlot. Where insignificant, they can be considered part of a pasture.

**Modification to the Sheet, Rill and Wind Erosion Performance Standard — NR 151.02** The applicability date of this standard as it applies to pastures was revised to July 1, 2012.

**New Tillage Setback Performance Standard — NR 151.03** The rule was modified to clarify where the standard applies with respect to surface waters and grassed waterways. The performance standard was modified to incorporate broad goals for stream bank and water quality protection. The tillage setback zone was changed to 5 feet with an increase to 20 feet if required to meet the standard. A minimum level of required vegetative cover was added to requirements for the tillage setback area.

**New Phosphorus Index Performance Standard — NR 151.04** The annual PI cap was increased to 12. A required, version-dated method for calculating the PI is added to the rule with an allowance for alternative methods if approved by the department. The accounting period is clarified as starting when a nutrient management plan is completed, and a combination of planned and historic data may be used. The applicability date of the PI standard as it applies to pastures was revised to July 1, 2012.

**New Process Wastewater Handling Performance Standard — NR 151.055** The rule was modified to include criteria that must be considered in making a determination on the significance of a discharge.

**Modifications to the Nutrient Management Performance Standard — NR 151.07** The proposed rule revisions to this standard were rescinded. Language was added to clarify that other wastes regulated by the department under chs. 113, 204 and 214 are not governed by this standard provided the material is not co-mingled with manure prior to application.

#### **c. NR 151, Subchapter III—Non-Agricultural Performance Standards**

**Modifications to the Construction Site Performance Standard — NR 151.105 and NR 151.11** The proposed rule revisions removed the one acre threshold for meeting the performance standards requiring all sites to meet the numeric performance standard. In response to public comment, a new section, NR 151.105, was included that sets non-numeric performance standards for construction sites of less than one acre or any other site that would not be required to get a permit under ch. NR 216. These performance standards are the same standards imposed on small commercial construction sites through ch. COMM 60. The proposal under ch. NR 151.11 changes the current standard from 80 percent sediment reduction to a maximum allowable soil loss rate of 5 tons per acre per year. Compliance with this standard would be determined based on modeling results. In response to public comments, this performance will have a 2 year delayed implementation to allow time to beta test and train consultants on the model. In addition, the proposal includes the non-numeric performance standards recently promulgated by US EPA under its effluent limit guidelines for construction sites, effective February 2010.

**Modifications to Total Suspended Solids (TSS) Performance Standard for Redevelopment — NR 151.12 (5) (a) 2** The proposed rule revisions removed the exemption and then imposed a 50% TSS reduction on a redevelopment site. In response to public comments, this section of the rule was modified to: 1) remove the current exemption from meeting all performance standards in cases where there is no increase in the footprint of parking lots or roads when they are reconstructed; and 2) for non-exempt sites, require a 40 percent reduction in TSS on proposed parking areas and internal roads instead of the current 40 percent TSS reduction for the whole site.

**Modifications to the Developed Urban Area Performance Standard — NR 151.13** Modifications to this section include explaining what constitutes a cost-effectiveness analysis as it applies to this performance standard and removing the maximum extent practicable definition that included a financial cap for permitted municipalities on an annual basis.

**d. NR 151, Subchapter IV—Transportation Performance Standards**

The modifications to the performance standards of subch. IV include removing the conversion of a rural cross-section to an urban cross-section from the definition of minor reconstruction of a highway and modifying the swale treatment section. The proposed rule revisions indicated the swale treatment must be consistent with a technical standard, but didn't specify which standard. The modified rules reference compliance with a specific technical standard for swales.

**2. Chapter NR 153, Targeted Runoff Management and Notice of Discharge Grant Programs**

A screening criterion for TRM projects was added requiring that the proposed project be consistent with the county land and water resource management plan.

**Appearances at the Public Hearing**

The department conducted 7 public hearings in 2010 on the proposed rule revisions: Appleton, Jan. 25; Eau Claire, Jan. 28; Waukesha, Feb. 2; Madison, Feb. 10; Wausau, Feb. 11, Platteville, Feb. 25 and Ashland, March 8. Over 900 people attended the hearings, 685 filed appearance slips and 141 testified. A complete list of appearances at the public hearings is in Attachment 2. Of those people who filed an appearance slip, 106 were in support, 406 in opposition and 173 as interest may appear. The attendance and testimony breakdown is shown in the table below.

|                    | Attendance     | Support    |           | Opposition |           | As Interest May Appear |           | Total      |            |
|--------------------|----------------|------------|-----------|------------|-----------|------------------------|-----------|------------|------------|
|                    |                | Registered | Testified | Registered | Testified | Registered             | Testified | Registered | Testified  |
| <b>Appleton</b>    | 142            | 22         | 14        | 31         | 7         | 16                     | 4         | <b>69</b>  | <b>25</b>  |
| <b>Eau Claire</b>  | 135            | 19         | 6         | 60         | 5         | 31                     | 8         | <b>110</b> | <b>19</b>  |
| <b>Waukesha</b>    | 124            | 11         | 4         | 18         | 8         | 21                     | 6         | <b>50</b>  | <b>18</b>  |
| <b>Madison</b>     | 132            | 23         | 10        | 53         | 8         | 31                     | 4         | <b>107</b> | <b>22</b>  |
| <b>Wausau</b>      | 225            | 15         | 7         | 151        | 8         | 44                     | 9         | <b>210</b> | <b>24</b>  |
| <b>Platteville</b> | >100           | 6          | 4         | 85         | 12        | 9                      | 5         | <b>100</b> | <b>21</b>  |
| <b>Ashland</b>     | 64             | 10         | 3         | 8          | 3         | 21                     | 6         | <b>39</b>  | <b>12</b>  |
| <b>Totals</b>      | <b>&gt;922</b> | <b>106</b> | <b>48</b> | <b>406</b> | <b>51</b> | <b>173</b>             | <b>42</b> | <b>685</b> | <b>141</b> |

## Changes to the Rule Analysis and Fiscal Estimate

Minor modifications were made to the fiscal estimate to reflect rule revisions as a result of public comments. The fiscal effect remains the same.

## Response to Legislative Council 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.

- Section 2j: It appears that the note following s. NR 153.14 (8) would be more appropriately placed in the “Purposes” section of the rule, s. NR 153.10.

**Response:** The statements in the note are not appropriate for s. NR 153.10 as suggested by the Clearinghouse, because s. NR 153.10 is the purpose statement for the entire grant program, which includes NODs as well as the TRM projects in question. However, the note is related to the text in s. NR 153.14 (8) so it was not moved.

- Section 5b: In s. NR 151.002 . . . . sub. (14r), “regulatory authority” should be more specific. . . .

**Response:** The term “regulatory authority” is retained as a generic term because the implementation of the requirements is performed by local units of government through ordinances and/or state agencies through administrative rules.

- Section 5h: In s. NR 151.05 (2) (a), the requirements apply to “new or substantially altered manure storage facilities” and in sub. (2) (am), other requirements are created for “storage facilities that are constructed or significantly altered on or after the effective date of this rule”. The department should review all of the subsections of s. NR 151.05 to clarify what requirements apply to new or substantially altered manure storage facilities and the dates on which those requirements apply or will apply.

**Response:** All parts of s. NR 151.05 were examined and no changes are needed to clarify what must be done and when. The one point of confusion has been cost share requirements for closures under s. NR 151.05(3). This has been addressed elsewhere in the rule package.

- Section 5k: In s. NR 151.126, the term “fueling and vehicle maintenance areas” should be defined. In addition, the material in the note is substantive and should be moved to the text of the rule.

**Response:** The term “fueling and vehicle maintenance areas” does not need to be defined because the performance standard is clear that this refers to petroleum product in runoff. This performance standard will only apply during construction of a fueling and vehicle maintenance area such as a gas station. The fueling and vehicle maintenance areas of the project are identified on the plan. The note is not substantive since it only offers some options to meeting the performance standard.

- Section 5v: In s. NR 153.22 . . . . sub. (9), it is unclear what a “practice operation and maintenance period” is.

**Response:** "Operation and maintenance period" is already defined under s. NR 153.12 (19), so no additional explanation is required. The sentence was reworded for clarity.

**Final Regulatory Flexibility Analysis**

The effects of the proposed rule changes on small businesses are addressed in detail in the attached Final Regulatory Flexibility Analysis, Attachment 3 of this document.

Attachment 1 – Summary of Public Comments and Department Responses

Attachment 2 – List of Attendees at Public Hearings

Attachment 3 – Final Regulatory Flexibility Analysis