Clearinghouse Rule 16-083

DATCP Docket No. 15-R-13 Proposed Hearing Draft
Clearinghouse Rule No. _____ September 20, 2016

PROPOSED ORDER
OF THE STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING RULES

The Wisconsin Department of Agriculture, Trade and Consumer Protection proposes the following permanent rule ***to repeal*** ATCP 50.04(3)(Note), 50.16(3)(b)1., 2. and (Note), 50.56(3)(b)1., 50.885(4)(a)2.(Note), 50.16(6)(a)(5)(Note), 50.50(2)(g)(Note); ***to amend*** ATCP 50.04(1), 50.04(3)(dm)1., 50.04(3)(e) and (Note), 50.04(3)(f), 50.04(3)(g), 50.10(title), 50.16(3)(a), 50.16(3)(a)2., 50.16(3)(a)(3)(Note), 50.16(3)(a)4. and (Note), 50.16(4)(a), 50.16(4)(b), 50.16(4)(c), 50.16(6)(b), 50.16 (6)(d), 50.32(7)(a), 50.40(3)(b)13., 50.42(2)(g), 50.46 (3)(title), 50.48(1)(a), 50.48(2)(a)2., 3., 4. and (Note), 50.48(6), 50.50(2)(d) and (Note), 50.50(8)(c), 50.54(2)(b), 50.56(2)(g), 50.62(3)(d), 50.62(5)(a)and (c), 50.705(5)(a)6., 50.77(4)(a)5., 50.78(3)(a) and (Note), 50.885(4)(a)2.; ***to repeal and recreate*** 50.50(8)(c)(Note); ***and to create*** 50.16(6)(c)3. and 4., 50.40(11)(b)4. and (Note), 50.46(3)(c)1., 2., 3., 4., 50.48(1)(a), 50.50(9), ***relating to*** soil and water resource management and affecting small business.

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

This rule modifies ch. ATCP 50, Wis. Admin. Code, related to Wisconsin's soil and water resource management (SWRM) program. The Department of Agriculture, Trade and Consumer Protection (the "Department") administers the SWRM program under ch. 92, Stats. The SWRM program is designed to conserve the state's soil and water resources, reduce soil erosion, prevent pollution runoff and enhance water quality.

Statutes Interpreted

Statutes interpreted: ss. 71.57 to 71.61, 71.613 (3), 91.80 and 91.82, ch. 92, and s. 281.16, Stats.

Statutory Authority

Statutory authority: ss. 91.82(3), 92.05 (3) (c) and (k), 92.14 (8), 92.15 (3) (b), 92.16, 92.18 (1), 93.07 (1), and 281.16 (3) (b) and (c).

Explanation of Agency Authority

The Department has responsibilities imposed by statute for implementing the state's nonpoint source pollution control program. Sec. 281.16, Stats., requires that the Department develop rules to implement department of natural resources (DNR) farm runoff standards, also known as the agricultural performance standards adopted in ch. NR 151, Wis. Adm. Code (NR 151). Chapter 92, Stats., establishes the framework for the Department to operate a statewide program that includes implementation of farm conservation practices such as nutrient management, approval of county land and water resource management plans, conservation compliance for the farmland preservation program, administration of soil and water resource management grants, oversight of manure storage and other local regulations covering livestock operations, provision of training and engineering practitioner certification, and standards for cost-sharing practices. Through ch. ATCP 50, Wis. Adm. Code (ATCP 50), the Department carries out these responsibilities. Among other things, ATCP 50 ensures that implementation of the farm runoff standards is contingent on cost share-requirements (see s. ATCP 50.08).

Related Statutes and Rules

As explained above, this rule is related to s. 281.16, Stats., and NR 151. Chapter 92, Stats., establishes the framework for the Department to operate a statewide soil and water resource management program. This rule also implements the soil and water conservation requirements in sub ch. V of ch. 91, Stats.

Plain Language Analysis

Background

This proposed rule will modify the Soil and Water Resource Management (SWRM) Program under ch. ATCP 50, primarily for the purpose of incorporating the changes to the United States Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) 2015 version of the 590 Nutrient Management Standard (2015-590 NM Standard) for the purposes of implementing ch. NR 151 adopted by the Department of Natural Resources (DNR) in 2011 (2011 DNR standards).[1]

[1] DNR's final rulemaking order of September 24, 2010, Administrative Rule Number WT-14-08, as well as revised fiscal estimate is available at https://health.wisconsin.gov/admrules/public/Rmo?nRmoId=1703

Rule Content

Among other things, this rule:

- Replaces the farm conservation practice standard for nutrient management (NM) and other standards for practices cost-shared in Subchapters II and VIII.

- Clarifies the requirements for farmland preservation conservation compliance consistent with the Department's voluntary approach in Subchapter III. Farmers may be required to comply with new and modified standards without receiving cost-sharing.

- Increases the associated NM cost-sharing rates from $7 to $10 per acre per year due to additional costs associated with soil tests and new spreading restrictions in Subchapter V.

- Requires annual NM plans developed according to s. ATCP 50.04(3) for local regulation in Subchapter VII. Farmers may be required to comply with new and modified standards without receiving cost-sharing.

- Clarifies that the alternative related to s. NR 151.04, the phosphorus index (PI), is a nutrient management plan developed in accordance with the nutrient management provisions in 50.04(3). Meaning, the 2005 and 2015-590 NM Standard provided the PI alternative with the soil test P management strategy.

- Enables the Department to simplify the process for cancelling a conservation engineer's certification if agreed to in writing.

- Clarifies a qualified NM planner must complete a NM checklist form representing the NM plan, and provide reasonable documentation to substantiate each checklist response if requested by the Department or its agent.

- Clarifies the standards for cost-sharing, specifically that a manure storage system's capacity is based on the farm's inability to comply with the NM plan. When the facility is emptied, the manure must be applied to non-frozen soil in compliance with a NM plan under s. ATCP 50.04(3).

- Identifies a conflict of interest prohibition for Department certified soil testing laboratories.

The following provides more detailed analysis by subchapter.

Soil and Water Conservation on Farms

Farm Conservation Practices, specifically nutrient management

To implement the 2011 DNR standards, this rule modifies the farm conservation practices as follows:

Nutrient Management and Phosphorus Index. This rule replaces the farm conservation practice standard for nutrient management (NM) and other standards for practices cost-shared in Subchapters II and VIII. The alternative related to s. NR 151.04, the phosphorus index (PI), is a nutrient management plan developed in accordance with the nutrient management provisions in 50.04(3). Meaning, the 2005 and 2015-590 NM Standard provided the PI alternative with the soil test P management strategy.

The Department calculates an additional $3/acre to comply with the 2015-590 NM Standard may be appropriate for those farms that have not yet developed a NM plan. The costs for soil testing and labor have increased, and additional restrictions have been added to the 2015-590 NM Standard that may require more land to apply manure compared to the 2005-590 NM Standard, and may increase the amount of time required to develop a NM plan that complies with the 2015-590 NM Standard. The potential need for more land to apply manure is due to the additional spreading restrictions listed below.

- Prohibiting nutrient applications within 50' of all direct conduits to groundwater where only grazing and a limited amount of corn starter fertilizer may be applied. This change was added to all direct conduits to groundwater, not just wells. However the 2015-590 NM Standard deletes a 200' incorporation requirement for non-winter nutrient applications, allowing farmers to use less erosive tillage practices.
- Prohibiting applications of manure within 100' of a non-community well which includes schools, restaurants, churches, and within 1000' of a community well unless the manure is treated to reduce pathogen content.
- Prohibiting winter nutrient applications within 300' of all direct conduits to groundwater, unless manure is directly deposited by gleaning or pasturing animals. This setback increased 100' from the 200' setback in the 2005-590 Standard.
- Prohibiting liquid manure application in February or March on DNR Well Compensation Areas, or on fields with Silurian dolomite bedrock within 5' of the surface.
- Limiting manure nitrogen (N) applications in late summer or fall using the lower application rate of either the current 2012 version of UW Pub. A2809 or 2015-590 NM Standard available N per acre rate for the situation on sites vulnerable to N leaching high permeability (P) soils, or rock (R) soils with < 20 inches to bedrock, or wet (W) soils with < 12 inches to apparent water table (PRW Soils). N rates of 90 or 120 lbs. N per acre have not changed. The rates depend on the crop, manure dry matter, and soil temperature.
- Limiting winter manure applications when frozen or snow-covered soils prevent effective incorporation. The NM plan must limit these applications when slopes are > 6% and if fields have concentrated flow areas using 2 practices listed in the winter application section of the 2015-590 NM Standard. These requirements do not apply to manure

deposited through winter gleaning or pastoring. Farmers will need more application acreage if they choose these practice options as either or both of the required practices for each field: Apply manure in intermittent strips on no more than 50% of field; Reduce manure application rate to 3,500 gal. or 30 lbs. P_2O_5, whichever is less; No manure application within 200 feet of all concentrated flow channels; Fall tillage is on the contour and slopes are lower than 6%.

- Prohibiting manure applications to areas locally delineated by the Land Conservation Committee as areas contributing runoff to direct conduits to groundwater, unless manure is substantially buried within 24 hours of application. This provision now requires incorporation to reduce the risk of runoff being intercepted by the conduit to groundwater in all seasons. Therefore, winter applications are prohibited, because the manure cannot be effectively incorporated if the ground is frozen. Farmers may need more application acreage if the field's soil loss will be too high with the required manure incorporation or if crops are no-tilled. A conservation plan, signed by the land operator and approved by the county Land Conservation Committee, will be needed for designating winter spreading restrictions other than those specifically listed in this standard.

Not all of the changes to the 2015-590 NM Standard will require more land or add costs:

- Nutrients cannot be applied within 8' around an irrigation well, making this prohibition consistent with NR 812 well code. The 2015-590 NM Standard clarifies that an irrigation well does not require a 50' nutrient prohibition and incorporation of manure within 200' of the well.
- New options are now available to control ephemeral erosion, including contours, reduced tillage, adjusting the crop rotation, or implementing other practices to control ephemeral erosion. Existing options include using contour strips, contour buffer strips, filter strips, > 30% crop residue after planting, and establishing fall cover crops.
- Late summer or fall commercial N fertilizer applications are limited on: areas within 1,000 feet of a community well; 5 feet or less over bedrock; sites vulnerable to N leaching high permeability (P) soils, or rock (R) soils with < 20 inches to bedrock, or wet (W) soils with < 12 inches to apparent water table; to rates needed for establishment of fall seeded crops or to meet UWEX Pub. A2809 with a blended fertilizer. The fall N rate was increased from 30 to 36 lbs. of N per acre to match common blended fertilizers if other nutrients are needed. The 2015-590 NM Standard is likely to decrease the amount of N fertilizer that can be applied in the fall; but, the applications can be made in the spring.
- An additional option for use on P soils, when commercial N is applied in the spring and summer has been added. These in-season applications must follow the UWEX Pub. A2809 crop N rate guidelines and apply one of the following strategies: a split or delayed N application to apply a majority of crop N requirement after crop establishment, use a nitrification inhibitor with ammonium forms of N, or use slow and controlled release fertilizers for a majority of the crop N requirement applied near the time of planting.
- More options for mechanical applications of manure or organic by-products in the winter in the surface water quality management area (SWQMA) within 1000' of lakes/ponds or

300' of rivers. A new option allows for no-till silage if nutrient applications are made within 7 days of planting. Nutrient applications in the spring, summer, and fall limit mechanical applications to 12,000 gals/acre of unincorporated liquid manure with 11% or less dry matter where subsurface drainage is present or within the SWQMA. This will be easier to implement with a single manure rate with more gallons per acre.

This rule continues to allow farmers to choose the best way to comply with this rule. A farmer may choose between conservation practices that are appropriate for the farm, as long as those practices achieve compliance. Farmers continue to have access to a range of resources such as the Department, UW-Extension, NRCS, and the county land and water conservation departments to secure technical assistance.

Cost Sharing Required

The Department has not changed the requirement for cost-sharing when a landowner is required to install conservation practices. Under state law, compliance with the performance standards is not required for existing nonpoint agricultural facilities and practices unless cost sharing is made available for eligible costs. This rule clarifies:

- The changes from the 2005-590 NM Standard to the 2015-590 NM Standard increases the associated cost-sharing rates from $7 to $10 per acre per year due to additional costs associated with soil tests and new spreading restrictions.

- The Farmland Preservation section requirements seeking voluntary compliance with the rule changes to the maximum extent feasible, consistent with the Department's past approach. Farmers who wish to continue to participate in this program may be required to comply with new and modified standards without receiving cost sharing.

- A NM plan, and subsequent annual submissions for local regulation means NM plans develop according to s. ATCP 50.04(3). Farmers may be required to comply with new and modified standards without receiving cost sharing.

- The standards for cost-sharing, specifically that a manure storage system's capacity is based on the farm's inability to comply with the NM plan. When the facility is emptied, the manure must be applied to non-frozen soil in compliance with a NM plan under s. ATCP 50.04(3).

<u>County Soil and Water Conservation Programs</u>

Farmland Preservation; Conservation Standards

The impacts from this rule on farmers participating in the farmland preservation program (FFP) arise from the changes related to FPP implementation. In the case of the 13,500 farmers who collected $18 million in farmland preservation tax credits (based on 2015 payments for tax year 2014 claims), they may be required to comply with new and modified standards without receiving cost-sharing. Identifying impacts with precision is complicated by a number of factors including the changes in program participants over time, the compliance status of new

participants, and the range of options to achieve compliance. The Department's proposed rule revision:

- Clarifies and limits impacts on this group by providing time for program participants to comply with the new performance standards, using performance schedules.

- Clarifies that certificates of compliance issued to farmers complying with standards can be modified if some land is sold. Certificates of compliance are rendered void if all the land is under new ownership or a county land conservation committee issues a notice of noncompliance if a landowner no longer complies. Conversely, a county land conservation committee can withdraw a notice of noncompliance if the landowner is again found in compliance with standards. Also, farmers may receive cost-sharing to install conservation practices necessary to maintain their eligibility for tax credits. Last, but not least, farmers who feel the compliance burdens are too great may decide to stop collecting a tax credit rather than implement standards.

- This rule ensures that a farmer's eligibility is in part based on meeting state conservation standards that mirror DNR performance standards and prohibitions. This rule clarifies that the alternative related to s. NR 151.04, the phosphorus index (PI), is a nutrient management plan developed in accordance with the nutrient management provisions in 50.04(3) and provides that in accordance with both, the 2005-590 NM Standard and 2015-590 NM Standard , the alternative to the PI is complying with the soil test P management strategy.

Grants for Conservation Practices

The Department's proposed rule revision clarifies that a cost share grant may not be used to bring a permittee into compliance with standards under Wisconsin Pollution Discharge Elimination System permit under chs. 281 and 283, Stats.

Soil and Water Professionals

Under s. 92.18, Stats., the Department is directed to establish, to the extent possible, requirements for certification in conformance with the federal engineering approval system. This rule includes a more flexible and responsive framework for certifying engineering practitioners that better matches the federal system, and ultimately ensures maximum capacity for design and installation of farm and other conservation practices. The Department's proposed rule revision enables the Department to simplify the process for cancelling a conservation engineer's certification if agreed to in writing. The rule also provides for a person with the appropriate level of NRCS job approval authority to certify in writing that the practice complies with this rule.

Nutrient Management Planners

This rule will marginally increase the demand for professional nutrient management planners to develop nutrient management plans. Nutrient management planners who prepare plans for others must be qualified to do so. They must understand and follow record keeping requirements related to soil types, soil tests, crop nutrient requirements including University of Wisconsin

recommendations, nutrient applications, nutrient contents of manure, nutrient application scheduling, and other matters related to nutrient management. Planners holding certain professional credentials are presumed to be qualified. Professionals with the knowledge and skill to use SnapPlus, a computer program critical to calculating the phosphorus index, are in a special position to capture new business. The rule also impacts planners requiring a qualified NM planner to complete a NM checklist form, provided by the Department, and provide reasonable documentation to substantiate each checklist response if requested by the Department or its agent. The Department's proposed rule revision:

- Clarifies the changes from the 2005-590 NM Standard to the 2015-590 NM Standard and increases the associated cost-sharing rates from $7 to $10 per acre per year due to additional costs associated with soil tests and new spreading restrictions.

- Clarifies that the alternative related to s. NR 151.04, the phosphorus index (PI), is a nutrient management plan developed in accordance with the nutrient management provisions in 50.04(3) and provides that in accordance with both, the 2005-590 NM Standard and 2015-590 NM Standard , the alternative to the PI is complying with the soil test P management strategy.

- Requires a qualified NM planner to complete a NM checklist form, provided by the Department, and provide reasonable documentation to substantiate each checklist response if requested by the Department or its agent.

County and Local Ordinances

In Wisconsin, the 590 Standard uses the current 2012 version of UW Pub. A2809 *Nutrient Application Guidelines for Field, Vegetable and Fruit Crops* to determine the crop's nutrient needs and includes other restrictions required of NM plans developed for: Department of Natural Resources (DNR) – Notice of Discharge or Wisconsin Pollution Discharge Elimination System permits for >1000 animal unit operations; Ordinances for manure storage or livestock siting; the Department cost share or Farmland Preservation; DNR cost share; USDA cost share; or voluntary reasons. The Department's proposed rule revision clarifies that a NM plan, and subsequent annual submissions for local regulation means NM plans developed according to s. ATCP 50.04(3). Farmers may be required to comply with new and modified standards without receiving cost-sharing.

Standards for Cost Shared Practices

In addition to updating technical standards incorporated into this subchapter, this rule:

- Clarifies the changes from the 2005-590 NM Standard to the 2015-590 NM Standard increases the associated cost-sharing rates from $7 to $10 per acre per year due to additional costs associated with soil tests and new spreading restrictions.

- Clarifies the standards for cost-sharing, specifically that a manure storage system's capacity is based on the farm's inability to comply with the NM plan. When the facility

is emptied, the manure must be applied to non-frozen soil in compliance with a NM plan under s. ATCP 50.04(3).

Standards Incorporated by Reference

Pursuant to s. 227.21, Stats., the Department has requested permission from the Attorney General to incorporate the following standards by reference in this rule:

- NRCS technical guide standards and related documentation.
- ASCE and other private sector-developed engineering practice standards.
- State agency (DNR, DOT) erosion control standards for construction sites and storm water management.
- UW-Extension publications including fertilizer recommendations, milking center waste water management, rotational grazing, and soil and manure testing.
- NRCS standards for determining soil erosion (RUSLE 2, WEPS).

Copies of these standards will be on file with the Department and the Legislative Reference Bureau. The Department has discontinued the practice of including key documents as appendices and will utilize its website to indicate where documents may be obtained.

Land and Water Conservation Board

The Land and Water Conservation Board has reviewed this rule as required by s. 92.04(3)(a), Stats.

Summary of, and Comparison with, Existing or Proposed Federal statutes and Regulations

NRCS has adopted standards for conservation practices cost shared by NRCS. Current Department rules incorporate many NRCS standards by reference. In most cases, the standards apply only to conservation practices cost shared with Department funds. But in some cases (such as nutrient management), Department rules incorporate the NRCS standards as mandatory pollution-control standards. Enforcement of these mandatory standards is generally contingent on cost-sharing (there are limited exceptions).

While NRCS sets national standards, standards vary, to some extent, between states. NRCS coordinates its Wisconsin standard-setting process with the Department, DNR, counties, and others. For purposes of Wisconsin's soil and water conservation program, the Department may incorporate NRCS standards as written or may modify the standards as appropriate.

NRCS certifies engineering practitioners who design, install, or approve conservation engineering practices cost-shared by NRCS. The Department certifies practitioners who perform similar functions under the Department's rules. The Department's proposed rule revision enables the

Department to simplify the process for cancelling a conservation engineer's certification if agreed to in writing. The rule also provides for a person with the appropriate level of NRCS job approval authority to certify in writing that the practice complies with this rule.

The U.S. Department of Agriculture administers a number of federal programs that offer voluntary conservation incentives to farmers. The Environmental Quality Incentives Program (EQIP) is a key program offering cost-sharing for conservation improvements, including nutrient management plans, manure storage improvements and other conservation practices. As a result of confidentiality requirements, federal cost-sharing provided to landowners through this and other NRCS cost share programs cannot be publicly disclosed. Without accurate historical data about past use of NRCS cost-sharing to implement state conservation standards, it is difficult to account for the role these funds may play in the future.

Comparison with Rule in Adjacent States

This comparison examines how surrounding states are addressing issues related to agricultural runoff and nutrient management planning and regulation and its relationship with farmland preservation activities. In general, the adjacent states do not use statewide performance standards specifically designed to address polluted runoff from agricultural sources. However, these states have various regulations and procedures in place to address many of the polluted runoff sources that this rule revision addresses. All four states use the NRCS 590 Nutrient Management Standard to steer their implementation of agricultural nutrient management, but none use it to the extent of Wisconsin's nonpoint program. All four states use the phosphorus index in some form but none use it in the same manner as NR 151 provides. For example, nutrient management strategies in Michigan are implemented as part of the state's Generally Accepted Agricultural and Management Practices (GAAMPs). Wisconsin's approach differs from the programs in adjacent states in that it has more detail in its state nutrient management standard and applies to more small and medium size farming operations than in other states. Also, in Wisconsin, pursuant to s. 281.16, Stats., cost-sharing must be made available to existing agricultural operations before the State may require compliance with the standards. Cost sharing is often tied to compliance responsibilities in adjacent states, but there are instances where farmers must meet standards other than the phosphorus index as part of regulatory programs.

Illinois

Using a different framework and programming, Illinois implements several standards similar to those adopted in Wisconsin. In addition to implementing a phosphorus index for large livestock operations, Illinois encourages voluntary participation in nutrient management for small and medium operations and only requires the use of the PI in areas draining to impaired waterbodies.

While Illinois has a statewide farmland preservation program in which landowners may restrict the use of their land to agricultural or related uses in exchange for tax credits, the program does not include conservation compliance requirements.

Iowa

Like Illinois, Iowa requires that manure management plans for livestock operations of 500 or more animal units be based on the phosphorus index. Iowa nutrient management planning includes a nitrogen leaching index and, like Wisconsin, includes restrictions on manure applications near surface water, groundwater conduits, and frozen soil. See Iowa's website at: http://www.iowadnr.gov/portals/idnr/uploads/afo/fs_desncriteria_medcafo.pdf

While Iowa operates a county-based statewide farmland preservation program in which landowners may restrict the use of their land to agricultural or related uses in exchange for tax credits, the program does not include conservation compliance requirements.

Michigan

Michigan relies on GAAMPs [see *Generally Accepted Agricultural and Management Practices for Manure Management and Utilization* (January 2012)] to support the Michigan Agriculture Environmental Assurance Program (MAEAP), which includes a compliance verification process that ensures nuisance protection to farmers under Michigan's Right to Farm law. GAAMPs covers standards similar to those in Wisconsin including standards for nutrient management. These standards are implemented as part of the state's right to farm law and its complaint investigation program. The state assesses problems identified through complaints, and farmers must take corrective action to earn nuisance protection under the right to farm law. Michigan uses a risk assessment formula to rank a field's risk for runoff and allows farms to use conservation practices to reduce the risk for those fields, thereby allowing farmers to apply manure in the winter.

While Michigan has a statewide farmland preservation program in which landowners may restrict the use of their land to agricultural or related uses in exchange for tax credits, the program does not include conservation compliance requirements

Minnesota

Minnesota requires a manure management plan for farms greater than 100 animal units if the farm requests a permit for one of several state programs. Like Wisconsin, the plans do not need to be submitted annually but need to be available upon request. Minnesota also utilizes setback from surface and groundwater features to reduce the risk of nonpoint contamination.

Under its feedlot program, Minnesota imposes mandatory requirements on about 25,000 registered feedlots. This program requires feedlot owners, ranging in size from small farms to large-scale commercial livestock operations, to "register with the MPCA, and meet the requirements for runoff discharge, manure application and storage, and processed wastewater."

While Minnesota has a statewide farmland preservation program in which landowners may restrict the use of their land to agricultural or related uses in exchange for tax credits, the program does not include conservation compliance requirements.

Summary of Factual Data and Analytical Methodologies

The Department participated in the Wisconsin USDA NRCS development of the 2015 version of the Wisconsin 590 Nutrient Management Standard with technical assistance from agronomists, farmers, UW scientists, and agency staff. In Wisconsin, the 590 Standard uses the current 2012 version of UW Pub. A2809 *Nutrient Application Guidelines for Field, Vegetable and Fruit Crops* to determine the crop's nutrient needs and includes other restrictions required of NM plans developed for: Department of Natural Resources (DNR) – Notice of Discharge or Wisconsin Pollution Discharge Elimination System permits for >1000 animal unit operations; Ordinances for manure storage or livestock siting; Department cost share or Farmland Preservation; DNR cost share; USDA cost share; or voluntary reasons. Currently about 2.9 million acres are implementing nutrient management plans, which leaves 6.27 million acres yet to have plans developed. The cost share rates of $7 per acre increased to $10 per acre due to the additional costs and spreading restrictions. With 6.27 million acres yet to have a NM plan, at $3 per acre, an additional $19 million estimate for the cost of full implementation or $1.9 million annually for the next ten years. If these landowners are offered 70% cost-sharing, they would be responsible for paying 30% of the $10 cost per acre or about $2.7 million annually.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

The Department worked with all federal and state agencies and stakeholders, including farmers, agronomists, and conservation staff to update the current federal standard, which resulted in the 2015-590 Nutrient Management Standard. Adopting the 2015-590 Standard was recommended based on the desire for one standard to apply to farms rather than varying federal and state standards. The changes from the 2005-590 to the 2015-590 were compared for cost of implementation.

Effects on Small Business

Most impacts of this rule will be on farmers, a great majority of whom qualify as "small businesses." The analysis of the impacts on farms takes into consideration the following factors:

- Most farmers will be insulated from some of the costs of implementation by the state's cost share requirement and the limited state funding available to provide cost-sharing.

- For farmers receiving farmland preservation tax credits, this rule provides farmers flexibility to minimize the financial impacts related to compliance (which range from $8 to $12 million state-wide), including a delay in the effective date for compliance with the 2011 DNR standards, the use of performance schedules, pursuit of cost-sharing for which they are eligible, use of a tax credit to offset some implementation costs, or if needed, withdrawal from the farmland preservation program to avoid unmanageable costs.

The proposed rule changes will have small, but positive impacts on businesses other than farmers. Those businesses include nutrient management planners, soil testing laboratories, farm

supply organizations, agricultural engineering practitioners, and contractors installing farm conservation practices. The *Initial Regulatory Flexibility Analysis*, which will be filed with this rule, provides a more complete analysis of this issue.

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Place Where Comments are to be Submitted and Deadline for Submission

Questions and comments related to this rule may be directed to:

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

CHAPTER ATCP 50
SOIL AND WATER RESOURCE MANAGEMENT PROGRAM

SECTION 1. ATCP 50.04 (1) is amended to read:

(1) NONPOINT SOURCE POLLUTION CONTROL. A landowner shall implement conservation practices that achieve compliance with DNR performance standards under ss. NR 151.02 to 151.08, in effect on May 1, 2014. A nutrient management plan developed in accordance with s. ATCP 50.04 (3) may be used to demonstrate compliance with s. NR 151.04.

SECTION 2. ATCP 50.04 (3) (Note) is repealed.

SECTION 3. ATCP 50.04 (3) (dm) (1) is amended to read:

1. Standard values specified in the current edition of *Nutrient Application Guidelines for Field, Vegetable and Fruit Crops*, UWEX publication A2809 ~~NRCS Wisconsin Conservation Planning Technical Note WI-1 (November, 2008), companion document to~~ referenced in the NRCS technical guide standard 590.

SECTION 4. ATCP 50.04 (3) (e) and (Note) are amended to read:

(e) The plan shall comply with the NRCS technical guide nutrient management standard 590 (~~September, 2005~~ December, 2015) except for sections IV. D., IV. E., and VI~~.~~., and shall also comply with the *Wisconsin Conservation Planning Technical Note WI-1* (~~November, 2008~~ February, 2016).

Note: The NRCS technical guide standard 590 (~~September, 2005~~ December 2015) and the companion document *Wisconsin Conservation Planning Technical Note WI-1* February, 2016 are on file with the department and the legislative reference bureau. Copies are available from a county land conservation department, a NRCS field office, the national NRCS website at: http://www.nrcs.usda.gov, the Wisconsin NRCS website at: www.wi.nrcs.usda.gov, or the department website at: https://datcp.wi.gov/Pages/Programs_Services/ATCP50.aspx. The NRCS technical guide standard 590 (December 2015) includes the options for the development of a P management strategy when manure or organic by-products are applied during the crop rotation using either the Phosphorus Index (PI) or Soil Test Phosphorus Management Strategy. A person may obtain a checklist to gather information for a nutrient management plan by visiting the department's website at: https://datcp.wi.gov/Pages/Programs_Services/ATCP50.aspx.

SECTION 5. ATCP 50.04 (3) (f) is amended to read:

The plan may not recommend nutrient applications that exceed the amounts required to achieve applicable crop fertility levels recommended by the University of Wisconsin-Extension in the ~~2006~~ 2012 edition of *Nutrient Application Guidelines for Field, Vegetable and Fruit Crops*, UWEX publication A2809, or in the latest subsequent edition of that publication if preferred by the landowner, unless the nutrient management planner can show that one or more of the following circumstances justifies the recommended application:

SECTION 6. ATCP 50.04 (3) (g) is amended to read:

(g) The plan shall be consistent with any nutrient management plan required under ch. NR 113, 204, or 214 if the landowner applies septage, municipal sludge, industrial waste, or industrial by-products to the land and in accordance with s. ATCP 65.22(6)(c). A landowner is not required to have a nutrient management plan under this subsection if the landowner applies primarily septage, municipal sludge, industrial waste, or industrial byproducts according to ch. NR 113, 204, or 214.

SECTION 7. ATCP 50.10 (title) is amended to read:

ATCP 50.10 County program; general.

SECTION 8. ATCP 50.16 (3) (a) is amended to read:

(a) A county land conservation committee may enter into a written performance schedule with a landowner to obtain compliance with new standards under s. ATCP 50.04 if all of the following apply:

SECTION 9. ATCP 50.16 (3) (a) (2) and is amended to read:

2. The landowner agrees in writing to ~~specific farm conservation practices needed to~~ achieve compliance with the standards required under sub. (1) according to a specific schedule for completing the work.

SECTION 10. ATCP 50.16 (3) (a) (3) (Note) is amended to read:

Note: While a performance schedule may ~~establish~~ extend a landowner's compliance under this section, a landowner may not meet other program requirements necessary to receive benefits such as farmland preservation tax credits. These other program requirements may include residency, minimum farm income, and continuity of claiming farmland preservation program tax credits.

SECTION 11. ATCP 50.16 (3) (a) (4) and (Note) are amended to read:

4. The land conservation committee approves the performance schedule, including the ~~proposed~~ required practices and the time allowed to achieve compliance. The land conservation committee may establish shorter periods to achieve compliance that the 5 year maximum

allowed under this subsection. A landowner is considered to be implementing their performance schedule if the landowner is making reasonable progress in installing the required practices and is taking other appropriate actions in the time frame identified by the land conservation committee in the performance schedule to achieve compliance.

Note: A county should exercise sound judgment ~~at critical junctures~~ in its monitoring of a farmer's conservation compliance, including its decision on the length of a performance schedule, and its decision on how and when to respond to changes in farmer compliance with applicable standards. The county may consider the following in exercising its discretion: extenuating circumstances, such as adverse weather conditions, that may affect a landowner's ability to comply; the nature and seriousness of the landowner's non-compliance; the degree to which the landowner has cooperated or taken actions to address concerns; the availability of technical or other assistance; and the consistency of treatment among farmers in the area. Before taking any compliance action, a county shall afford the landowner notice and reasonable opportunity to demonstrate compliance.

SECTION 12. ATCP 50.16 (3) (b) (1) and (2) and (note) are repealed.

SECTION 13. ATCP 50.16 (4) (a) is amended to read:

(a) The county land conservation committee shall issue a certificate of compliance to a landowner claiming tax credits under s. 71.613, Stats., if the landowner meets the soil and water conservation standards as required by s. 91.80, Stats., and this section. The certificate shall be issued on ~~a~~ the form ~~approved~~ provided by the department.

SECTION 14. ATCP 50.16 (4) (b) is amended to read:

(b) A certificate establishing a landowner's compliance with s. 91.80, Stats., and this section remains in effect and valid until the county land conservation committee issues a notice of noncompliance under sub. (6) or the ownership of the covered land is transferred.

SECTION 15. ATCP 50.16 (4) (c) is amended to read:

(c) A certificate of compliance may be amended or modified to reflect changes in ownership or a landowner's status.

SECTION 16. ATCP 50.16 (6) (a) (5) (Note) is repealed:

SECTION 17. ATCP 50.16 (6) (b) is amended to read:

(b) A county land conservation committee shall issue a notice of noncompliance under par. (a) on ~~a~~ the form provided by the department, making the landowner ineligible to claim farmland preservation tax credits beginning in the year the notice of noncompliance is issued until such time as the county land conservation committee withdraws the notice of noncompliance under sub (d). This notice shall disclose all of the following:

SECTION 18. ATCP 50.16 (6) (c) (3) and (4) are created to read:

3. The landowner(s).

4. The department.

SECTION 19. ATCP 50.16 (6) (d) is amended to read:

(d) A county land conservation committee may, at any time, withdraw a notice of noncompliance issued under par. (a). The committee shall issue a notice of withdrawal on ~~a~~ the form approved by the department. The committee shall give notice of the withdrawal to any agency under par. (c) that received a copy of the notice of noncompliance. When the county land conservation committee withdraws a notice of noncompliance it demonstrates the landowner has been found in compliance with this section.

SECTION 20. ATCP 50.32 (7) (a) is amended to read:

(a) To obtain a reimbursement payment under sub. (6) (a), a county land conservation committee shall file a reimbursement request on a form provided by the department. A county may file a reimbursement request on or after ~~July 1~~ November 1 for costs incurred before ~~July 1~~ November 1. A county may file a second reimbursement request for costs ~~incurred on or after July 1~~ not covered by the first request. A county may file no more than 2 reimbursement requests, and shall file all reimbursement requests by February 15 of the year following the grant year.

SECTION 21. ATCP 50.40 (3) (b) (13) is amended to read:

13. Bring a ~~landowner~~ permittee into compliance with standards required under ~~the~~ a ~~landowner's~~ WPDES permit under chs. 281 and 283, Stats.

SECTION 22. ATCP 50.40 (11) (b) (4) and (Note) are created to read:

4. A person with the appropriate level of NRCS job approval authority.

Note: See Note under sub. (1)(b).

SECTION 23. ATCP 50.42 (2) (g) is amended to read:

(g) For nutrient management ~~and pesticide management~~, $~~7~~10 per acre per year.

SECTION 24. ATCP 50.46 (3) (title) is amended to read:

(3) CONSERVATION ENGINEERING PRACTITIONER; INITIAL CERTIFICATION AND RECERTIFICATION.

SECTION 25. ATCP 50.46 (3) (C) and 1. through 4. are created to read:

(c) Certifications issued under this section are for a term of three years and automatically renew unless any of the following occur:

1. The practitioner is not employed by an entity with a supervisor who is authorized to sign the certification.
2. The practitioner fails to meet the education requirements.
3. The practitioner has failed to provide or update information required for certification under par. (b).
4. The practitioner wishes to rescind the signature on the certification or otherwise indicates an intent to surrender the certification.

SECTION 26. ATCP 50.48 (1) (a) is amended to read:

(a) Compliance with the NRCS technical guide standard 590.

SECTION 27. ATCP 50.48 (2) (a) 2., 3., 4., and (Note) are amended to read:

2. Recognized as a certified crop ~~advisor~~ adviser or professional agronomist by the American society of agronomy, Wisconsin certified crop ~~advisors~~ advisers board.

3. Registered as a soil scientist by the soil science society of America ~~or as a professional agronomist by the American society of agronomy~~.

4. The holder of other credentials that the department deems equivalent to those specified under subds. 1. To 3. A landowner is presumptively qualified to prepare a nutrient management plan for his or her farm, but not for others, if the landowner completes a department-approved training course that results in a nutrient management plan in compliance with s. ATCP 50.04 (3) and the course instructor approves the landowner's first annual plan. The landowner shall complete a department-approved training course at least once every 4 years to maintain his or her presumptive qualification. The course instructor is not required to hold credentials listed in sub. 1-3, however he or she must be knowledgeable and competent in accordance with ATCP 50.48 (1).

~~**Note:** The department may develop minimum standards for a department-approved training course for farmers who develop their own nutrient management plans.~~

SECTION 28. ATCP 50.48 (6) is amended to read:

(6) RECORDS. A qualified nutrient management planner shall keep copies of all nutrient management plans that the planner prepares or approves for funding under s. 281.65 or 281.66, Stats., or this chapter. The planner shall retain the records for at least 4 years, and shall make them available for inspection and copying by the department or its agent upon request. A qualified nutrient management planner under ATCP 50.48(3) shall complete the nutrient management checklist form provided by the department. The qualified nutrient management planner shall have reasonable documentation to substantiate each checklist response and provide it to the department or its agent upon request.

SECTION 29. ATCP 50.50 (2) (d) and (Note) are amended to read:

(d) The soil tests, test methods, and nitrogen estimation methods used by the laboratory. The laboratory shall be capable of performing the following tests according to methods prescribed by the University of Wisconsin-Extension in Nutrient Application Guidelines for Field, Vegetable, and Fruit Crops in Wisconsin, UWEX Publication A2809 (2012) or subsequent versions, and by the University of Wisconsin-Madison soil science department in *Wisconsin Procedures for Soil Testing, Plant Analysis and Feed & Forage Analysis, Soil Fertility Series* (~~March, 2012~~ October, 2013) or subsequent versions, and shall be capable of estimating nitrogen levels based on those tests:

1. Soil pH.
2. Buffer pH.
3. Phosphorus (P).
4. Potassium (K).
5. Organic matter (OM).

Note: Copies of the Nutrient Application Guidelines for Field, Vegetable, and Fruit Crops in Wisconsin. UWEX Publication A2809 (2012) and the Wisconsin Procedures for Soil Testing, Plant Analysis and Feed & Forage Analysis, Soil Fertility Series (~~March, 2012~~ October, 2013) are on file at the department and legislative reference bureau. To obtain a copy of the A2809, see s. ATCP 50.04 (3) (f) 4. (note). Copies of the Wisconsin Procedures publication are available at the University of Wisconsin website at: http://uwlab.soils.wisc.edu/lab-procedures.

SECTION 30. ATCP 50.50 (2) (g) (Note) is repealed:

Note: ~~A person may obtain a copy of the soil test laboratory certification form by visiting the department website at: http://datcp.wi.gov/ATCP50 or by calling (608)224-4622.~~

SECTION 31. ATCP 50.50 (8) (c) is amended to read:

(c) The laboratory is capable of estimating total and available nutrient levels based on the manure tests under par. (b) and the availability percentages shown in ~~Table~~ *Nutrient Application Guidelines for Field, Vegetable and Fruit Crops in Wisconsin*, UWEX publication A2809 (2012) ~~3 of part III of the Wisconsin conservation planning technical note WI-1~~

~~(September, 2007), a companion document to the NRCS technical guide nutrient management standard 590.~~

SECTION 32. ATCP 50.50 (8) (c) (Note) is repealed and recreated to read:

Note: To obtain a copy of A2809, see s. ATCP 50.04 (3) (f) 4. (Note).

SECTION 33. ATCP 50.50 (9) is created to read**:**

(9) CONFLICT OF INTEREST. For the purpose of complying with 50.04 (3) a privately owned laboratory certified under this section shall not perform soil test analysis on cropland managed or owned by a person managing or having a substantial financial interest in the laboratory.

SECTION 34. ATCP 50.54 (2) (b) is amended to read:

(b) Paragraph (a) does not apply to a nutrient management plan ~~required~~ under s. ATCP 50.04 (3) when being required by any of the following:

SECTION 35. ATCP 50.56 (2) (g) is amended to read:

(g) Provisions, if any, for monitoring the adequacy of manure storage systems, including the ~~adequacy of related nutrient management practices~~ annual submission of a nutrient management plan that complies with s. ATCP 50.04 (3).

SECTION 36. ATCP 50.56 (3) (b) (1) (Note) is repealed.

SECTION 37. ATCP 50.62 (3) (d) is amended to read:

(d) Any manure storage system costs related to an animal feeding operation if all of the manure from that operation could be applied to land according to the NRCS technical guide nutrient management standard 590 (~~September, 2005~~ December, 2015) without causing or aggravating nonattainment of water quality standards.

SECTION 38. ATCP 50.62 (5) (a) and (c) are amended to read:

(a) The system capacity is necessary based on the farm's inability to comply with the farm's nutrient management plan to store the manure produced by the animal feeding operation over a normal period of 30 to 365 days~~, as verified by a nutrient management plan or an operation and maintenance plan~~.

(c) If the manure storage facility is designed to be emptied annually or semi-annually, manure from the system must be applied to non-frozen soils in compliance with a nutrient management plan under s. ATCP 50.04 (3) ~~is incorporated into the soil within 3 days after it is applied to land.~~

SECTION 39. ATCP 50.705 (5) (a) (6) is amended to read:

6. NRCS technical guide nutrient management standard 590 (~~September, 2005~~ December, 2015).

SECTION 40. ATCP 50.77 (4) (a) (5) is amended to read:

5. NRCS technical guide nutrient management standard 590 (~~September, 2005~~ December, 2015).

SECTION 41. ATCP 50.78 (3) (a) and (Note) is amended to read:

(a) The nutrient management practice complies with NRCS technical guide nutrient management standard 590 (~~September, 2005~~ December, 2015).

Note: The NRCS technical guide nutrient management standard 590 ~~(September, 2005)~~ can be obtained by visiting the department website at: https://datcp.wi.gov/Pages/Programs_Services/ATCP50.aspx.

SECTION 42. ATCP 50.885 (4) (a) (2) is amended to read:

2. NRCS technical guide streambank and shoreline protection standard 580 (~~March,~~ ~~2015~~ August, 2013).

SECTION 43. ATCP 50.885 (4) (a) (2) (Note) is repealed.

~~**Note:** CR 16-012 erroneously replaced "August, 2013" with "March, 2015". There is not a March, 2015 standard 580. The current version is August, 2013. The date will be corrected in future rulemaking.~~

SECTION 44. EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided under s. 227.22 (2) (intro).

Dated this _____day of _____, 2017.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary