



**WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS**

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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State of Wisconsin
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Board Order Number: WT-14-08

Clearinghouse Number: CR09-112

Subject of Rules: Runoff Management – NR 151; Targeted Runoff Management and Notice of Discharge Grant Program – NR 153; Urban Nonpoint Source Water Pollution Abatement and Storm Water Management Grant Program – NR 155.

Date of Transmittal: July 6, 2010

Send a copy of any correspondence or notices pertaining to the rule to:

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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
Appleton	142	22	14	31	7	16	4	69	25
Eau Claire	135	19	6	60	5	31	8	110	19
Waukesha	124	11	4	18	8	21	6	50	18
Madison	132	23	10	53	8	31	4	107	22
Wausau	225	15	7	151	8	44	9	210	24
Platteville	>100	6	4	85	12	9	5	100	21
Ashland	64	10	3	8	3	21	6	39	12
Totals	>922	106	48	406	51	173	42	685	141

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 153.22sub. (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

Attachment 1

Summary of Public Comments and Department Responses Revisions to NR 151, 153 and 155 – WT-14-08

The department received a total of 1,535 written and oral comments from organizations and individuals.

Support was registered for the TMDL, phosphorus index and tillage setback performance standards as ways of controlling phosphorus in runoff that is causing excessive algae growth in lakes and rivers. While some supported a PI of 6, many said the number should be 4. Many supporters of the tillage setback concept wanted the width to be wider than 20 feet—many suggested 35 feet—while some wanted a true buffer instead of a tillage setback. Municipalities, wastewater treatment utilities, and environmental groups commented that the TMDL performance standard gives DNR the regulatory authority it needs to control nonpoint sources so that the cleanup burden does not fall entirely to point sources that have already reduced discharges to very low levels.

Opposition to the agricultural provisions of the rules came from farmers, including cranberry growers, farm organizations, agricultural consultants, researchers and co-ops. While most acknowledged that a PI of 6 was acceptable to most farmers, they objected to the PI being an enforceable performance standard rather than a management option. Many said that the accounting period should go forward instead of relying on past records. There was opposition to an annual cap of 10 as too restrictive. Many in the agricultural community objected to the inclusion of pastures in the sheet, rill and wind erosion control performance standard

The agricultural community opposed the tillage setback as a one-size-fits-all approach that could take land out of production and limit the type of crops that can be grown. Many commented that the TMDL performance standard would be too restrictive on farmers and that it does not provide enough information about what farmers are supposed to do and who it applies to. There were many comments that there was no oversight or opportunities for public input in the standard and that the targeted performance standard rulemaking process should be used instead. There were also many comments against the modifications to the nutrient management performance standard that says plans should be written to limit discharge of nutrients to state waters instead of managing for crop needs and soil concentrations. County land conservation departments and organizations commented on the time, costs, and other barriers to implement the proposed revisions.

Municipalities and municipal groups opposed the changes to the regional treatment section of ch. NR 151, the minor parking lot and road reconstruction revisions, and the inclusion of a definition of maximum extent practicable for the developed urban area standard. Municipalities and municipal groups as well as consultants supported giving the permitted municipalities more time to meet the developed urban area performance standard and advocated for not proposing a change in the construction site performance standard until a modeling tool is available. Builders and builder organizations objected to the removal of the one acre threshold for construction site erosion control and the change in the infiltration performance standard. The construction and transportation industries also opposed many provisions of the construction erosion control performance standard and the revisions to the minor parking lots and roads as well as the removal of a separate subchapter for transportation. Environmental groups supported tougher standards in general and proposed additional standards for construction sites. They recognized the difficulty municipalities would have with meeting the developed urban area performance standard, and they also supported giving the permitted municipalities more time.

The major issues that emerged from the comments and the department's responses are listed below. In addition, the department made minor clarifying edits based on comments, which are not listed here.

Phosphorus Index Performance Standard

1. PI of 6 as a performance standard

- The PI should be a BMP tool and not a performance standard.
- Support for PI, but 6 should be maximum, 4 would be better. PI should be 4.
- PI should be 8.
- Cannot implement. Drop PI standard. Keep 590 options—more flexible and less confusing.
- DNR has no authority to put PI in rule.
- PI is not meant to be a quantitative measure of delivery; only potential & relative.
- PI is a rotation planning tool just like RUSLE 2 is for soil loss, not a single year planning tool as is being proposed.
- PI based on limited research—no data correlating PI and the amount of phosphorus that reaches surface waters.
- PI as a performance standard means that DATCP cannot designate other technical standards and conservation practices that could be used to meet a phosphorus performance standard.

Response: As proposed, the PI language is not calculated for a single year but rather over a maximum 8-year accounting period. The PI is still being implemented as a planning tool to evaluate the potential for delivery; the target specified in ch. NR 151 is the same as NRCS 590 (PI equal to 6). With the PI as a performance standard, DATCP still has the authority to develop the BMPs needed to meet the performance standard. The PI has significant research in support of what is delivered to the edge of field and that is how the phosphorus index is being used in ch. NR 151. The PI standard is neither a BMP nor an assessment methodology. The PI is an indicator of phosphorus delivery. It is no different in concept that the sheet, rill and wind erosion standard (s. NR 151.02) which requires that soil loss be equal to or less than "T". The rule requires that SNAP-Plus software developed and maintained by the University of Wisconsin be used to calculate the PI unless an alternate method is approved by the department. The note directs the reader to available modeling tools commonly used in Wisconsin.

2. Accounting period of current year plus past 7 years.

- Support the concept of 8 years, but go forward instead of backwards. Farmers may not have adequate records or previous calculations of PI. Will waste time and increase costs to create past records.
- Should be combination of years forward (5-6) and years back (2-3).
- Going back 7 years is inconsistent with ATCP 50 requirements. Make accounting period same as 590.
- Accounting period should start with rule promulgation.
- Accounting period is too long.

Response: The proposed language in ch. NR 151 has been modified to allow for a transition period in which planning data can be used in lieu of historical records. Once a sufficient historical record has been established, the accounting period will consist of the current planning years and the previous 7 years. The accounting period is consistent with NRCS 590 which specifies a rotational period not to exceed 8 years.

3. Annual PI cap of 10

- Cap of 10 is not achievable.

- Delete cap. It is not needed.
- Previous nutrient management plans were allowed a choice of using P balance or PI; under P balance, fields can have a PI > 10 on annual basis and still meet standards; concern that in those instances the annual cap of 10 would not be achievable in the short term.
- May require dramatic management changes, possibly including new equipment (e.g. no-till planter), on just a few acres—hard to justify.
- Will take time for all fields to meet this—need flexibility.

Response: The annual PI cap has been changed from 10 to 12. The cap is needed to address acute runoff events and help ensure that a PI of 6 can be accomplished over the accounting period. A PI of 12 will only represent a significant change for fields that have little or no existing conservation.

4. Use of models

- Don't require modeling, allow farmers to use common sense.
- Need option for Amish who don't use computers.
- Farmers do not have skills to use SNAP Plus—will have to hire someone.
- Allow for alternative methods to SNAP Plus—may not be available in future.
- Programming changes are needed before SNAP Plus can give annual number.
- Develop matrix to target use of PI so do not have to model every field.

Response: SNAP-Plus is of the same complexity as RUSLE2 which is required for soil loss calculations. RUSLE2 is a computer model. Farmer's common sense and site specific knowledge can be used in accurately characterizing site conditions and in the selection of BMPs.

5. Applicability

- Use PI only in TMDL areas.
- Do not apply PI to pastures as it does not work well there.
- PI does not cover all crops. Need different option for some crops (e.g., cranberries). Challenge for vegetable and poultry producers.
- Create transition period to phase in PI.
- Create examples of what this means to farmer.
- Create variance to PI for extreme weather years.
- Clarify that PI does not estimate P from bank erosion
- Exempt soils that are high in P from the PI standard.

Response: The PI is calculated using an average annual climate dataset so a variance is not needed for extreme weather conditions. Most crops are in the SNAP-Plus database and additional crops are being added to address deficiencies. Proposed language is written to allow for other methods to calculate the PI for cranberries and other situations in which SNAP-Plus is not effective.

6. Miscellaneous

- Delete direct application language: it is in 590 already.
- Biosolids crediting hard to do; best way to measure impact is through soil testing.
- Retain soil test method.
- PI will allow unacceptable increases in soil P in some areas.
- Do not require soil test every 4 years unless needed for given rotation.
- Clarify how tile lines are affected.
- Need code language to allow for winter kill that causes change in rotation.
- Extend winter grazing period to September 1.

- Winter grazing areas should only be December - March; pasture most of year.
- Restate as a unit area loading requirement (e.g. 6#/ac/y).

Response: SNAP-Plus provides an evaluation of relative loads under different management options. However, the current data is not sufficient to estimate the pounds per acre being delivered.

Tillage Setback of 20 feet

1. Setback as performance standard

- Standard is in public interest and generally includes marginal land.
- It is a taking; compensate farmers for this land.
- Adopt a real buffer standard in lieu of tillage setback.
- Contradicts scientific findings of the Wisconsin Buffer Initiative.
- Setback is not needed.

Response: The tillage setback is to prevent direct deposition of sediment from tillage operations into surface waters and maintain bank integrity from damage through tillage operations. The tillage setback has been modified to 5 feet with a provision for increase to 20 feet if needed. It is not a buffer standard. The standard is supported by recommendations in the WBI.

2. Width of setback

- Support for 20 ft.; support 20 ft. as minimum.
- Expand setback to 35 feet or more.
- Allow setback less than 20 feet with approved BMPs.
- Allow variable setback determinations based on need.
- It's not practical—will be overkill for some fields, too little for others.
- 20 feet is too big for stated objective. Reduce to 5 feet.
- Adopt standard of performance (goal or maintaining streambank integrity); do not specify number.
- The 20 foot setback will revert to shrubs, weeds or lead to chemical use.
- Not practical to harvest a 20 ft. strip; takes too much land.
- Not based on sound science.

Response: The standard tillage setback has been changed from 20 feet to 5 feet to better match the intent of the standard. The tillage setback consists of a narrative standard with a 5 foot minimum to aid in implementation. Flexibility has also been added allowing an increase up to 20 feet in the required setback width if needed to maintain stream bank integrity and protect water quality.

3. Applicability; restrictions and allowances

- Prohibit all manure spreading/nutrient application in setback area.
- Require biomass removal from buffer (setback) area.
- Apply setback to intermittent streams too.
- Prohibit grazing in setback area.
- Prohibit mowing or harvesting in setback area.
- Define self-sustaining vegetative cover.
- Define which waters this applies to and point from which you measure.
- Make sure setback applies to ravines, gullies and headwater streams.
- Apply setback to all channels.
- Exempt ch. NR 243 CAFOs from this standard; already have other controls.
- Exempt or modify for cranberry operations—beds are physically separated from water channels.

- Allow tillage to re-establish vegetation.
- Replace setback with prescribed cover requirement in the WQMA.
- Will negatively impact CRP and CREP programs; affect use value.
- USGS maps are not accurate enough to determine where setback should apply.
- Clarify if counties can adopt different setbacks (e.g. drainage districts).
- Clarify how this applies to drainage ditches. Could mean loss of significant area and money.
- Clarify how tile lines are affected.
- DNR needs to increase support and assistance on removing box elders/willow trees and establishing grasses on the stream banks to stabilize banks and reduce erosion. Several studies show that the majority of soil loss comes from areas within the stream and not from the agricultural fields

Response: The setback applies to perennial and intermittent streams. Self-sustaining vegetation has been defined. The tillage setback can be part of a CRP or CREP "buffer". Grazing is already covered in existing prohibitions that require maintenance of stream beds and vegetation.

TMDL Performance Standard

1. Equity between agricultural nonpoint sources and municipal point sources

- Municipalities spent a lot of money to reduce phosphorus to low levels. It is more cost effective to control agricultural nonpoint sources, which is about 80% of nutrient pollution.
- Goals need to look at economic factors like cost/lb. of P removal and hold all parties accountable.
- This standard gives DNR the regulatory authority it needs to provide reasonable assurances that nonpoint sources will be controlled. Without that, EPA requires that all reductions be assigned to point sources.
- Whole watersheds should be addressed. Consider pollutant trading; add trade brokering rules.
- Spreading TMDL over a watershed does not recognize those farmers that are doing the correct job.
- Farmers could be faced with restrictive controls that create an economic burden and puts farmers at a national and global competitive disadvantage.
- Local advisory committees should have balance of agricultural and point source representation. Diverse committee could be created in ch. NR 151 or NR 121.
- Good way for community to work together in a watershed.
- Puts dairy farmers at national and global disadvantage.

Response: Chapter NR 151 provides performance standards and does not lay out the make-up of TMDL implementation teams. DNR acknowledges that successful implementation will require both point source and agricultural representation. Development of TMDLs is a federal requirement and nonpoint pollution is also being addressed in neighboring states.

2. Regulatory authority

- The standard creates regulatory uncertainty and does not provide adequate notice for agricultural operations regarding how they can manage their farms and fields to meet the standard at the federal level. Farmers would have no recourse except to litigate.
- The performance standard is unconstitutional because it incorporates prospective federal legislation, a federal TMDL, by reference.
- DNR does not have authority to identify BMPs for TMDL areas.

Response: The Department acknowledges that the proposed TMDL performance standard does not dictate specific practices or measures that must be implemented to meet the TMDL performance standard. The best management practices, conservation practices and technical standards required to

achieve agricultural load reductions in TMDL areas are those specified in ch. ATCP 50. The rule is modified to require that targeted performance standards be developed under s. NR 151.004 to implement the required load reductions.

3. Public input into process

- This standard short circuits the administrative rule process without local or legislative oversight.
- No opportunity for public input in process.
- TMDL process is open and transparent with ample opportunity for involvement from stakeholders.
- Use the existing targeted performance standard process.
- Landowners need to be included in rule formation.

Response: The rule is modified to require that targeted performance standards be developed under s. NR 151.004 to implement the required load reductions. Furthermore, a TMDL itself does not have to be promulgated as a rule because the TMDL is already based on a rule—a promulgated state water quality standard. The Department does agree with the comments that the TMDL process is open and transparent with ample opportunity for involvement from stakeholders and landowners

4. Implementation

- Implementation plans must focus on cost-effectiveness and be flexible.
- The provisions on an implementation strategy are premature and should be removed from the rule.
- How will TSS criteria be implemented once TMDLs are developed?

Response: This rule does not address the requirements of implementation plans; however, costs can be a factor in development of a TMDL when allocating reductions between different sources. Chapter NR 151 does not contain implementation provisions beyond providing a linkage between TMDLs and the performance standards or beyond the existing notice and implementation procedures in ss. NR 151.09 and 151.095. Chapter NR 151 does not create TSS criteria.

5. Uncertainty about requirements

- Producers, including cranberry growers and their bankers need regulatory certainty. This standard does not give farmers enough information about what standards apply to their farms and makes planning difficult for farmers who sell their crops 2-3 years out.
- DNR could go from farm to farm to require a lower PI that could eliminate the cropping of fields during some years, drastically change crop rotations, limit the application of manure and alter other BMPs
- Include more of the TMDL process in the rule.

Response: Currently, federally mandated TMDLs specify a load allocation for agriculture and other nonpoint sources. To meet water quality standards, a lower PI may be needed that could reduce phosphorus applications or implementation of management practices on specific fields that pose a high delivery risk or have high soil test P values. Targeted performance standards will be used to require more stringent controls in TMDL areas.

6. Miscellaneous

- Address atmospheric deposition (e.g. mercury).
- Add ability to create more stringent controls for groundwater.
- Apply the flexibility related to the financial cap to both the existing MS4 TSS criteria and the TMDL criterion.

- Modify the rule to include actual monitoring in the areas being regulated. At a minimum, require that TMDL samples be taken at multiple stream points not just at the mouth as is the usual current practice.
- Complexity of program will take enormous amounts of staff time and dollars.
- Are computer models reliable up to the 95% efficacy standard set by the EPA?

Response: TMDLs are only established for surface waters. TMDLs have a built in cap through the use attainability analysis. TMDLs require water quality monitoring to remove a waterbody from the impaired water list. TMDL development often requires the use of models and EPA has guidelines on how to address the variability in the modeling process.

Process Wastewater Handling Performance Standard

1. Performance standard

- Basic support.
- Do not adopt standard until have better BMPs for small farms.
- This standard is not needed; farmers know what to do.
- Needs to be done on a site-by-site basis, not statewide standard.

Response: Process wastewater discharges, especially milk house waste and feed storage leachate, are high strength and can have serious impacts on waters of the state. Although some farmers are adequately managing these discharges, many are not. There is a national technical standard available that addresses process wastewater discharges from livestock operations. It is USDA-NRCS Technical Standard 629 (Wastewater). Other NRCS Technical Standards may also be useful. Like all technical standards, these will be updated as better technology becomes available. The technical standard gives options, with the specific solution for each site identified jointly between the farmer and a conservation specialist.

2. Significant discharge

- Define what constitutes a significant discharge.
- Give examples of significant discharges in a note.
- Define significant; require controls only for select operations.

Response: A section has been added to the rule that lists factors to be considered in making a determination of significance. When a site is deemed significant based on evaluation of these factors, controls will be required in accordance with provisions of ch. NR 151.

3. Applicability; Requirements

- Don't require holding tanks for all bunker silos—would be cost prohibitive for many farmers.
- Prohibit all wastewater discharges.
- Small farms without proper storage cannot implement this standard. Poor options.
- Management style (especially harvest moisture of silages) and distances to waters of the state are some of the items that need to be considered if a collection system should be installed.

Response: Not all bunker silos will need controls (see *Significant discharge* above). NRCS Technical Standard 629 contains some options for managing wastewater. The Wisconsin Department of Agriculture, Trade and Consumer Protection is responsible under s. 281.16,

Stats., to develop and disseminate technical standards for implementing agricultural performance standards and prohibitions. It is not practical or necessary to prohibit all process wastewater discharges.

Pastures in Sheet, Rill and Wind Erosion Control Performance Standard

- Concern with vegetative cover requirement especially with winter feeding—defined as feedlot if cover removed, and could then be subject to s. NR 151.06, clean water diversions performance standard.
- Under adverse weather condition like drought, wet conditions, areas of winter kill cattle may need to be temporarily fed on a portion of the pasture which results in areas with little or no vegetative cover.
- No need for all pastures to be included. Erosion is not permanent—pasture plants grow back quickly.
- Change definition of pasture to allow cattle access lanes and supplemental feed.
- Do not apply soil loss standard to pastures.
- Better distinguish between pastures and feedlots.
- Extend winter grazing period to September 1.
- Winter grazing areas should only be December - March; pasture most of year.
- Clarify if pasture standards apply to grazed woodlots.

Response: Soil and phosphorus losses from pasture areas can impact waters of the state. The USDA-NRCS is modifying RUSLE2 to better quantify pasture soil losses. The effective date for requiring erosion control for pastures is delayed under the rule until July 1, 2012, to give USDA sufficient time to complete these modifications. The rule is modified to allow limited bare soil areas in pastures, such as cattle travel lanes and supplemental feeding areas. If these bare areas are not environmental hazards, they may be allowed as part of the normal pasturing operation. If bare soil areas within pastures, such as supplemental feeding areas, become significant pollution sources they will be regulated as feedlots. The dates that define winter grazing are not being changed; they are consistent with ch. ATCP 51. This standard does not apply to grazed woodlots.

Modifications to Nutrient Management Performance Standard

1. Modification in General

- General support.
- Oppose. Change is not needed; would alter crop rotations, reduce yields/profitability.
- Implement current rules; DATCP estimates less than 20% of cropland has NMPs-get all producers using NPM before going to more regulations; NMPs need to be in place at least 10 years.
- No scientific basis for proposed revisions. Violate the agreed upon Standards Oversight Council process for development of agricultural best management practices.

Response: The proposed changes to this standard are largely being removed from the final rule because they overlap the Phosphorus Index Standard and create confusion as to the applicability of NRCS 590 (Nutrient Management) for all cropped fields. The retention of current s. NR 151.07 makes for more seamless integration of these two nutrient management standards and retains NRCS 590 where it is adequate to protect water resources.

2. Change from soil test to reduction of nutrients to state waters

- Oppose requiring nutrient plans to minimize nutrient discharge to state waters instead of the current standard calculated primarily on crop needs.
- New nutrient management approach will negatively affect yields.
- Wording change is unrealistic. Purpose of 590 is to meet nutrient needs of crop while minimizing loss of nutrients to surface and ground water.
- Unworkable, fundamental change to farming practices, lacks balance. How can crops be grown or nutrients applied under this proposal?
- New NM standard is undefined, unachievable and a new direction from NRCS 590.
- Provision needs to be modified to ensure that crop rotations are not significantly altered and acceptable yields are produced.
- Who is going to rewrite all of these plans? How much will that cost? Unsure if there are crop consultants qualified to write a NMP based on “minimization of loss”.

Response: These provisions have been removed. NRCS 590, which is an agronomic standard with additional provisions to protect water quality, will remain the primary means to implement s. NR 151.07. The Phosphorus Index Performance Standard (s. NR 151.04) will work in concert with the nutrient management requirements of s. NR 151.07 to effectively regulate nutrient pollution of state waters.

3. Regulation of industrial waste and other byproducts for land application

- DNR needs to consider regulating the applications of livestock manure and industrial waste and byproducts under the same requirements (phosphorus application rates) if they cannot be regulated under the same rule.
- DNR needs to address other land applications (e.g. municipal sludge).
- The March 2004 policy guidance from Bureau regarding application of this section to municipal biosolids, industrial wastewater & sludge and septage should be followed.
- Does this mean that any industrial material land applied to sites identified in a nutrient management plan be able to receive land application rates based on P only or shall it be limited by ch. NR 214 limits, such a hydraulic, winter/summer rates, N rates, etc? Which prevails—nutrient management plan or ch. NR 214?
- Even when fields/sites are continuously used for industrial wastes with no other fertilizers land applied, crop producers should be liable, not contract hauler.

Response: The rule has been revised to clarify how this rule affects applications to cropland of septage, municipal bio-solids and organic industrial wastes. Applications of these materials are regulated under other DNR regulations. These other regulations are primarily nitrogen based and include setbacks and other management practices to protect state waters. DNR is initiating rule-making under the WPDES permit program and the septage hauling program to consider adding phosphorus-based criteria to these regulations. As in the existing s. NR 151.07, if a cropped field receives only applications of these materials, the applications are regulated only under ch. NR 113, 204, or 214. Any fields that receive commercial fertilizer or manure, including those which have received septage, municipal bio-solids or industrial wastes, must also comply with s. NR 151.07. This means that the landowner will be required to manage these fields in accordance with a NRCS 590 nutrient management plan

and the Phosphorus Index, and will have to account for all nutrient applications (including commercial fertilizer, manure, septage, bio-solids, and industrial waste) in doing so.

4. Nutrient management plan, 590, and phosphorus index

- Relationship between nutrient management and PI is very confusing: which one dominates?
- What governs septage, biosolids, and industrial applications? The nutrient management plan or the PI?
- Unacceptable refocusing of NRCS 590; duplicates PI.
- Add standard per NRCS 590 to prohibit manure applications in the water quality management area (WQMA).
- What affect will this have on compliance with 590?
- What if more nutrients are needed for the crop? How are crop needs taken into account?
- Are there enough crop consultants to assist farmers with these requirements? This major shift will require modifications to 590; does not provide needed flexibility for specialty crop producers.
- Concerned that NRCS has not been fully engaged in development of this provision. The proposal might exceed 590. DNR may be straying from widely accepted approaches to nutrient management.

Response: These comments are covered by the responses above.

5. Pastured animals

- Remove exemption in s. NR 151.07 (2) for manure directly deposited by pasturing or grazing animals on fields dedicated to pasturing or grazing. Recent studies show that winter pastures can be significant contributor of nutrient runoff to surface water.
- Address concentrated pastures in whole farm nutrient management plan.

Response: The exemption clause should have been removed. It has now been deleted.

6. Miscellaneous

- Snap Plus (PI) calculations are not understood enough to support trading idea.
- All producers should be required to manage manure to CAFO standards.
- Clarify how tile lines are affected.
- Why is modeling the only way for producers to meet the requirements. These models cannot accurately predict loss from an individual farm or field. Let producers use monitoring data.
- Using PI as a predictor of phosphorus loss to a stream is wrong. Changing a PI from 6 to 3 does not mean a 50% reduction in phosphorus loss.

Response: These comments were made in response to the proposal to change the nutrient management standard to a nutrient loading standard. This change is no longer being proposed.

Modifications to Manure Storage Facility Performance Standard

- Support Margin of Safety additions to s. NR 151.05 (4).
- Remove reference to NRCS Technical Standards in s. NR 151.05.(4). Not accurate.
- Cost share compost units, not liquid storage which causes environmental harm.
- Clarify cost share requirements: new, existing, expansions, cross-compliance.
- Keep cost share requirement for all closures.

Response: The reference to the NRCS technical standard in the note has been removed. The most commonly accepted structural facilities for managing manure are storage units, not composting facilities. The Wisconsin Department of Agriculture, Trade and Consumer Protection is responsible under s. 281.16, Stats., to develop and disseminate technical standards for implementing agricultural performance standards and prohibitions. The type of information requested to explain cost share requirements is not appropriate for a rule, but can be included in fact sheets and guidance. It is not reasonable to require state tax payers to cost share closure costs for recently constructed storage facilities. For newer facilities, many of which have been cost shared to begin with, proper closure is expected as routine maintenance and the cost should be borne by the landowner.

Miscellaneous Agricultural Issues

- Adopt a gully erosion standard to augment 590.
- Eliminate cost share requirements.
- Adopt maximum extent practicable (MEP) concept for agriculture.
- Change direct runoff definition to require use of scientifically acceptable methods.
- Expand 10-year history requirement defining "new" to pastures.
- Retain appeals language in notice requirements. It's fair and cost-effective.
- Remove cost share requirements for lands and facilities owned/operated by state.
- Exempt rotational grazing/pasture systems from definition of facility.
- Base needs on water quality impact.

Response: DNR will not develop a gully erosion standard at this time since it was not included in the rule-making order. DNR does not have the authority to eliminate cost sharing requirements; these are imposed under s. 281.16, Stats. It is not practical to develop maximum extent practical provisions for agriculture. Agriculture already has cost share requirements covering 70% to 90% of the cost. Consideration of this provision was also not part of the rule-making order. The definition of direct runoff based on prediction was part of the existing rule and is not being changed. Conservation staff use a combination of models and observations to determine if runoff can be predicted to reach surface water. It is not appropriate to expand the history of cropping provision to pastures. DNR is also tightening up the cost share requirements for cropped fields coming out of CREP and CRP contracts such that the requirement will not apply to lands re-enrolled after October 1, 2002. These changes bolster the policy of requiring continued compliance with standards and prohibition, regardless of future cost sharing once the land has been brought into compliance with performance standards and prohibitions. The department is not changing its position on deleting the requirement to include notification of appeals processes in notices required under ch. NR 151. Farmers will still have appeals rights under ch. 227 for any action or decision of the department. In most cases, the county land conservation department will have already provided the farmer with a chance to challenge compliance determinations. The cost share requirements under s. 281.16, Stats., do not require that the state provide cost sharing to itself. This is basic statutory interpretation and nothing is required to this effect in the rule. Section 281.16, Stats., specifically includes pastures in the definition of livestock operation. The inclusion of pastures and pasture systems as components of livestock facility will be maintained in the rule. Performance standards and prohibitions are by their very nature designed to establish statewide land management requirements to achieve water quality standards. It was never intended that the requirement to meet these standards be re-

established for every farm in the state based on the condition of receiving waters. If it is clear that statewide standards are not adequate, the department can develop additional requirements under the provisions for targeted performance standards (s. NR 151.004).

Construction Erosion Control

1. Delete 1 acre threshold

- Reinststate 1 acre threshold.
- Get rid of plan requirement for < 1 acre.
- Keep 80% and assumed compliance w/BMPs - not 5 tons/acre/year and not RUSLE.
- Incorporate EPA's effluent limit guidelines.
- Don't incorporate EPA's effluent limit guidelines.
- Local municipalities don't have resources to enforce <1 acre sites.
- Allow regional treatment for construction site erosion control if they clean it out.
- Develop a technical std for < 1 acre sites instead of performance standard.
- Exempt maintenance (ditch cleaning) activities.
- Section NR 151.15 says the < 1 acre sites are implemented through ch. NR 216 which is not consistent with EPA.
- Don't impose stricter standards than Commerce.
- Make it clear that landfills are not affected.
- Forestry uses their own BMPs - don't change.

Response:

A separate section has been proposed for sites less than one acre and for any sites that would not need a permit under ch. NR 216. These sites will have prescriptive standards that are identical to the prescriptive performance standards commercial building sites and one- and two-family residential sites are currently required to meet under chs. COMM 60 and COMM 21. These sites will not be enforced under ch. NR 216 and local ordinances will have the option of administering this part of the rule. Two of EPA's effluent limit guidelines that involve timing of installing practices have been added for these smaller sites. The remainder of the EPA non-numeric effluent limit guidelines has been added to the one acre or more sites that are regulated under ch. NR216. These non-numeric performance standards went into effect in February, 2010. The numeric standards have a phased implementation and those will be handled through revisions to ch. NR 216.

2. Change from 80% to 5 tons/acre/year

- Make routine maintenance meet requirements of ch. TRANS 401.06 (1).
- Reference the Department of Transportation matrix.
- Use 7.5 tons/acre/year and soil types.
- Keep 80% and 5 tons/acre/year maximum (whichever is tougher at a site).
- Develop a matrix off RUSLE2.
- Don't go to 5 tons/acre/year standard until RUSLE2 is available.

Response:

The rule will propose continuing with the current 80% reduction of sediment for 2 years after the effective date of the rule. This will give the department time to beta test the RUSLE2 model and to train consultants and municipal officials on its use. Until then, compliance with the performance standard will continue to be measured by proper use of the existing technical standards for construction BMPs, including the Department of Transportation matrix. Chapter COMM 60 uses the

5 ton/acre/year and 7.5 tons/acre/year standard based on soil type. The use of RUSLE2 will negate the need to have two standards.

In-line Ponds Removed as Option

- Bring back in-line pond option.
- Put in language to govern ch. 30, Stats., decisions.
- Allow in-line ponds for new development.
- Allow in-line ponds for where the stream is a man-made conveyance or intended for storm water conveyance.
- Wording in section is very confusing - needs work.
- Section NR 151.003 (5) -- shouldn't this only apply to navigable waters and not waters of the state?
- Add that BMPs that meet this rule meet ch. NR 103 and ch. 30, Stats.
- Allow credit for ponds constructed between 2002 and rule promulgation.
- Allow DNR staff professional judgment on decision.

Response:

This section was confusing so it has been repealed and recreated to allow professional judgment to continue to determine whether a BMP should be constructed in a navigable waterway or wetland for all but perennial, navigable streams. The rule proposes only giving credit for BMPs in intermittent, navigable streams and wetlands where all applicable permits can be obtained. BMPs in non-navigable streams will continue to be allowed. Use of in-line BMPs had not been allowed for new development and the proposed rule will continue to not allow their use.

Definition of Minor Road Reconstruction and TSS Requirements for Road Reconstruction and Other Development

- Road reconstruction and minor road reconstruction standard is too hard to meet.
- Bring back no increase in exposed parking and roads as exempt.
- Go back to old 40% TSS for road reconstruction and redevelopment.
- Get rid of note about considering off-site drainage areas in calculations.
- Make minor road reconstruction exempt.
- Don't make permitted MS4s meet the redevelopment/road reconstruction standard.
- Infill between 1-5 acres should stay at 40% after 2012.
- Make sure development after 2004 can't redevelop at a lesser standard.
- Fix definition of minor road reconstruction for urban cross-section.
- Define parking area and roads.

Response:

There are 2 entities affected by this section: 1) redevelopment sites that are privately owned; and 2) parking areas and road reconstruction which are municipally owned. In both cases the public hearing draft proposed removing the exemptions that had allowed many of these sites to not have to meet any of the performance standards. These exemptions had been too broad. The proposed code will not have an exemption for redevelopment sites based on area of existing impervious as compared to proposed impervious area. In addition, the definition of minor road reconstruction has been modified so that conversion of rural cross sections to urban cross sections is no longer considered minor although the remainder of the definition is still intact and exempt. The TSS performance standard for redevelopment and road reconstruction was increased to a 50% TSS reduction in the public hearing draft. The proposed rule has returned to the current 40% TSS reduction standard for road reconstruction. For redevelopment, the standard has also returned to 40%; but the 40% standard must be met by treating the parking areas and roads, the dirtiest areas of any development. This change

allows a developer to direct runoff from roofs, landscape areas, and sidewalks either directly to the storm sewer system or using infiltration. Removing this "cleaner" runoff from the volume of water entering a BMP will allow the designer of the storm water management plan to reduce the size of the BMP and thereby reduce the cost. The rule has been revised to ensure that development that occurred under the current ch. NR 151 will maintain the treatment performance even during redevelopment of the site.

Developed Urban Area Standard and MEP

- Don't use Nationwide Urban Runoff Program (NURP) particle size distribution.
- Don't use cap or use different method, clarify what it covers.
- Better clarification of cost-effectiveness - inflection point.
- Allow communities paying into deep tunnel to get credit.
- Put in wording about combined sewer being counted.
- Support soft practice credit. Get technical standard for soft practices done in 2010.
- Recognize MS4s that have met the 40%.
- Allow credit for both street cleaning and catch basin sump cleaning on the same street.
- Get rid of the 40%.
- Get rid of separate MEP definition for developed urban area.
- Remove feasibility from MEP definition and expand BMP definition.
- Change HUC 8 to HUC 12 for meeting the 40% on a regional basis.
- Keep old language about not including industrial facilities.
- Include cap language in the plan portion.
- Want non-metallic mines to get credit or want quarries clearly out and no utility fees.
- DNR has too much authority in deciding MEP.

Response:

Some of the comments are related to limitations in the model or in technical standards and will be handled through guidance and not through rule language. The discomfort felt by permitted municipalities trying to meet the 40% TSS reduction standard for the developed urban area is partly due to the looming deadline of 2013 and also due to the new information on what meeting this standard will cost. The 40% TSS standard is a minimum standard that will likely be increased when TMDLs are done for a watershed. This rule is not proposing to reduce that performance standard. However, the proposed rule will include the option for a municipality that feels it cannot meet the deadline to prepare a storm water management plan that would identify the practices needed to meet the 40% standard but extend the time period, not to exceed 10 years. The department will review the plan, make recommendations, and then every 5 years the municipality and the department will revisit the plan to see if progress has been made. The public hearing draft included a definition of maximum extent practicable that included an annual cost cap of 37 cents per thousand dollars of equalized value of the municipality. This cap was proposed by the League of Wisconsin Municipalities. The public comments supported the concept of a cap, but no one supported the one proposed. The League requested that we remove the cap and instead include language in the requirements of the storm water management plan to address cost-effectiveness and affordability. The proposed rule includes such language. The rule was also modified to allow a regional approach (similar to a pollutant trading concept) for contiguous municipalities or municipalities in the same hydrologic unit or HUC. HUC 8 was too broad. It has been modified to a watershed size at HUC 10.

Modifications to Peak Flow Performance Standard

- Don't use Type II rainfall distribution in all parts of state, use critical duration not 24 hours.
- 1-year, 24-hour data is not in TR-55, DNR needs to provide.

- Use 2-year, 24-hour and reduce to 1-year, 24-hour.
- Type II overestimates which isn't conservative for pre-development calculation.

Response:

A Type II rainfall distribution is typical of the Midwest in general and appropriate for Wisconsin. That it overestimates is not a problem because the requirement is that the post-development peak flows match the pre-development peak flow which is a relative comparison that factors out over-estimation. The department may need to provide additional information in a technical standard or guidance on what constitutes a 1-year, 24-hour storm; although the total amount is currently available in a technical standard for wet pond construction. The decision to match the pre and post for two sets of storm events is believed to be more representative of bank full condition which this standard is intended to protect.

Modifications to Infiltration Performance Standard

- Give back 2-year, 24-hour option for calculating infiltration volume.
- Rewrite standard as a stay-on standard since other than infiltration meets it.
- All residential should stay at 1% of land disturbance instead of the proposed 2% for medium and high density development.
- Should be able to exempt land that infiltrates at a rate less than 0.6 inches per hour.
- Want credit for maintaining wetlands, green space, natural areas.
- Separation distances should be the same as s. COMM 82.365.
- Use impervious area instead of connected imperviousness.
- Development may increase impervious area to get lighter standard.

Response:

This performance standard was a new direction for BMP designers when introduced in the current rule in 2002. Since then, regulators and consultants have implemented this standard and unintended consequences have emerged. One was that designers were exempting land that infiltrated at a rate of less than 0.6 inches/hour. That had never been the intent so the revised rule clarifies that this is a limitation for siting an infiltration practice, not for creating a broad exemption. The standard has been rewritten to reflect the opportunity to infiltrate at development sites based on the ratio of pervious and impervious area. The caps have also been modified to reflect ability to infiltrate. The use of "connected imperviousness" rather than impervious area is that not all impervious area is connected to waters of the state and therefore should not be a concern. The proposed terminology is scientifically defensible. Where possible, this rule is consistent with other rules that govern infiltration practices.

Modifications to Protective Area Performance Standard

- Don't like increase in susceptible wetland standard.
- Like increase in wetland standard
- Ephemeral ponds are open to interpretation.
- Less susceptible wetlands too strictly interpreted.
- Include man-made wetlands in less susceptible areas.

Response:

The current rule identified highly susceptible wetlands as wetlands governed under ch. NR 103. As the rule was implemented, it became clear that use of ch. NR 103 was requiring a 75 foot protective area for lower quality wetlands simply because of their proximity to state trails or because an agency had mapped them. The intent was to recognize high quality wetlands and provide greater buffering to

maintain that quality. This change eliminates use of ch. NR 103 for highly susceptible wetlands and uses a listing of high quality wetlands. Information about these wetlands is on the department website and can be understood by a professional in the field. As part of a construction site storm water management plan, on-site wetlands will be delineated and their classification will be determined by the professional developing the plan.

Swale Treatment

- Go back to 1.5 feet per second until technical standard is ready.

Response:

There is currently a swale technical standard (Technical Standard 1005 – Vegetated Infiltration Swale) on the department website that can be used to design an infiltration swale. Road construction projects are exempt from infiltration so the concern is that this standard does not adequately address this rule revision. Technical Standard 1005 does include a pre-treatment section which is intended to address the TSS reduction of a swale. This pre-treatment section can be used until a TSS swale standard can be written. Use of the pre-treatment section is actually more flexible in responding to slopes and soils than the current 1.5 feet per second limitation in the current rule.

Grant Programs, NR 153 and NR 155

- Make TMDL and non-TMDL allocations equal.
- Support permit fee changes if staff time covered for Land Conservation Department reviews.
- Create stronger link with Land and Water Resource Management Plans.
- DNR and DATCP need to create and fund statewide implementation program.
- Define maximum watershed size for all project categories.
- Requirement to control all existing problems is staff intensive and costly—target significant problems.
- Get rid of the grant program.

Response: It is not appropriate to set budget allocations by rule. As the rule specifies, these will be included in annual joint allocation plans. The department has included language in the rule that creates a stronger tie to land and water resource management plans. The department has included a provision in the rule to provide local assistance funding to counties for supporting large scale TRM projects. This is in addition to staffing allocations provided by the DATCP. The amount of funding available for local staffing to implement the state's nonpoint programs is set by the legislature and governor through the biennial budgeting process. Maximum watershed size is not set for large-scale TMDL projects because the TMDL will define the extent of the affected drainage area. The rule was modified to allow flexibility, with department approval, in requiring cost share recipients to address existing problems that do not require cost sharing. The department is directed by state statute to operate a cost share program to address performance standards and prohibitions.

Fiscal Estimate

- Prepare a fiscal analysis for costs to farmers to calculate PI for each field. Most farmers will need to hire consultants.
- The fiscal estimate costs to municipalities to reduce TSS from 40-50% are very high and will be difficult for municipalities to achieve.

Response: The nutrient management planning has been a component of the ch. NR 151 agricultural performance standards since it was promulgated in 2002. The majority of ongoing nutrient management planning in Wisconsin is now conducted with SnapPlus

software. Notably, SnapPlus automatically generates a PI number. Additionally, in accordance with recent rule revisions, the need to calculate the PI is required only for those fields with elevated soil test phosphorus levels. Fields without elevated levels of phosphorus will not need to calculate the PI and may continue to use traditional, soil test-based nutrient management tools for these fields. Another rule revision provides other limits on financial impacts to farmers. Crop producers may use alternative methods to calculate the PI for situations where available tools are not adequate, which will help some producers such as cranberry farmers develop suitable methods to determine compliance. The department has modified the public hearing draft so that the current requirement for 40% municipal TSS control is maintained.

Other Fiscal and Policy Analyses

- Before rule is advanced to NRB for final adoption the agency should prepare a report to address the following items:
 1. Fiscal impact and analysis on the impact of the proposed rule on agriculture.
 2. If advanced as proposed, how the agency will implement TMDLs as a performance standard, including real examples of practices and associated costs to implement these practices in both a given TMDL area and on an individual farm.
 3. Rationale on why the agency does not want to use the targeted performance standard approach to implement TMDLs.
 4. A summary of the cross compliance components referred to by other state programs (such as WPDES permits for CAFOs, county manure storage permits cross compliance, state standards for livestock siting and the newly created working lands program) in order for participation.
 5. A summary of industrial and municipal sludge applications within the state, including acres, volume and rationale why it's done to a nitrogen standards and not to a P standard, and implications for a livestock producer if he/she has applied sludge to their fields.

Response: The department is not preparing the suggested report for several reasons. The department has included impacts on agriculture in the fiscal estimate and regulatory flexibility analysis. These documents present the best estimates currently available. The TMDL implementation planning process is the appropriate time to evaluate the cost-effectiveness of alternative agricultural pollution control strategies. Cross-compliance requirements for other state programs, including Working Lands Initiative and Livestock Siting administered by DATCP are specified in the state statutes and reflected in other administrative rules. These steps were conducted in accordance with accepted and long standing procedures for creating laws and administrative rules. There is no reason to delay this rules process to rehash the cross compliance issue. If cross-compliance requirements are deemed too onerous for farmers, then the state legislature can revisit the cross compliance requirements of these other programs. The croplands receiving septage, municipal bio-solids, and organic industrial wastes constitute a very small portion of cropland acres in the state. Based on the department's data bases, it is estimated that septage is applied to 1.57% of cropland, municipal biosolids is applied to 2.08% of cropland and industrial byproducts are applied to 11.33% of cropland. Together, these sources are applied to 14 – 15% of cropland. Since not every acre of cropland receives these applications each year, it is estimated that in any one year 4 – 5% of croplands receive these wastes. Consequently, delay of this rule for a report detailing this information is not warranted.

Attachment 2

Attendees at the Public Hearings

Seven public hearings regarding proposed rules revisions for NR 151, 153, and 155, were held in Appleton, Eau Claire, Waukesha, Madison, Wausau, Platteville and Ashland. The following is a list of attendees at the public hearings who filed appearance slips.

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Attachment 3

Final Regulatory Flexibility Analysis Revisions to NR 151, 153 and 155 – WT-14-08

Small businesses directly affected by the proposed agricultural revisions in ch. NR 151 are crop and livestock productions. The Wisconsin Agricultural Statistics Service estimates that in 2007 there were about 76,000 farms in Wisconsin (68,000 livestock operations). Most of these operations meet the definition of a small business. Other small businesses that would benefit from these rule revisions are restaurants, shops, marinas and similar businesses that rely on tourism and are adversely affected by degraded lake and river water quality caused by nonpoint source pollution.

Proposed revisions to the non-agricultural performance standards in ch. NR 151 will apply to any business involved with land-disturbing construction activity. As part of a new construction project, businesses must meet the performance standards both for the construction phase and the post-construction phase as identified in an erosion and sediment control plan and in a storm water management plan. Small businesses established after the effective date of the proposed rule that are required to obtain industrial storm water permits must also meet post-construction performance standards by designing and installing BMPs as part of their industrial storm water pollution prevention plan. Construction erosion control and post-construction storm water management are federal requirements for land disturbing construction sites of one acre or more. This rule proposes prescriptive measures for construction sites of less than one acre or sites not required to obtain permit coverage under the Clean Water Act. These sites are currently meeting similar performance standards as regulated by the Department of Commerce under ch. COMM 60 prior to its transfer to the department. Chapter COMM 60 requires an erosion control plan, but the proposed changes to ch. NR 151 will not require development of a plan, just implementation of appropriate BMPs. There will be no reporting requirement.

A. Methods for Reducing Impacts on Small Business

1. Less stringent compliance or reporting requirements.

Agricultural Operations

Agricultural livestock and crop producers are required to comply with the new performance standards and modifications to the performance standards contained in ch. NR 151, just as they are for the existing performance standards and manure management prohibitions. Producers who are in compliance with the existing nutrient management performance standard may already be in compliance with the proposed phosphorus index and tillage setback performance standards. The phosphorus index standard is included in nutrient management technical standard 590. The maintenance of streambank integrity, as proposed through a tillage setback standard, is an assumption of the phosphorus index calculation. In circumstances where the phosphorus index has been determined to be insufficient to achieve water quality standards in areas where a total maximum daily load (TMDL) has been approved, a phosphorus index lower than 6 may ultimately be required. The process wastewater performance standard may require producers to have higher levels of pollution control to be in compliance. The annual cap included in the phosphorus index performance standards may mean that some producers will need to modify their tillage practices to reduce the rate of cropland soil erosion.

For existing agricultural facilities and practices, compliance is only required if cost sharing is provided at 70% of the eligible costs, or up to 90% for cases of economic hardship. If actions needed to comply with

the rules only involve minor management changes that aren't eligible for cost sharing, then a producer must implement those practices to comply with the standards without cost sharing. New agricultural facilities and practices that are established after the effective date of the new and modified performance standards will need to comply, regardless of the availability of cost sharing. In other words, any new facilities or practices installed or constructed after the performance standards are in effect must be installed or implemented in compliance with the new standards.

The proposed code changes do not require crop producers and livestock operators with less than 1,000 animal units to report to the department. Counties that choose to implement the performance standards and prohibitions via ordinances may require some form of reporting. It is not possible to determine what type of reporting or the impact such reporting would have on these types of operations. In general, the purpose of relying on performance standards and prohibitions is more conducive to minimal reporting, allowing operations to rely on more visual, rather than technical, methods of determining compliance. Reporting required by counties would likely be minimal due to the large number of facilities that will need to meet the standards.

Non-agricultural Businesses

The compliance and reporting requirements for businesses involved with land-disturbing construction sites, including commercial sites, will not change except that a plan is no longer required for sites less than one acre. The rule revisions provide for a clarification of the performance standards when developing an erosion and sediment control plan or a storm water management plan, but do not require additional reporting. Small businesses have been meeting the current reporting and compliance requirements of the permit program. It is not anticipated that small businesses undertaking new construction, whether it be for commercial or industrial sites, will have a harder time meeting the reporting and compliance requirements than any other industry or commercial development.

2. Less stringent schedules or deadlines for compliance or reporting requirements.

Agricultural Operations

Existing livestock operations with fewer than 1,000 animal units and crop producers are only required to comply with the new and modified performance standards if cost sharing is provided. Implementation schedules and deadlines, consequently, are dependent on when cost-sharing dollars are available. The code sets up time frames for compliance once dollars are available. Counties, however, may have different time frames established although cost sharing is still required. Since compliance is contingent on cost-share availability and cost-share dollars will be limited each year, it may be years before the standards are fully implemented and less stringent time frames would only stretch compliance out further. New crop producers and livestock facilities with fewer than 1,000 animal units will need to comply with the new and modified performance standards from the date the rule becomes effective, regardless of the availability of cost sharing. It is more cost effective for new facilities to construct best management practices or otherwise comply with performance standards up front rather than correct problems later on.

Non-agricultural Businesses

The proposed revisions did not change the schedule for compliance and reporting. A Notice of Intent (NOI) is still required to be submitted 14 days prior to commencing construction. Once construction commences, the required plans must be followed. This rule refines the performance standards for the erosion and sediment control plan and storm water management plan and does not change the time schedule. New industrial permittees will continue to have requirements to submit a Storm Water Pollution Prevention Plan prior to construction of a new site. As part of their construction NOI, their storm water

management plan and best management practice implementation will have a clear set of performance standards to meet.

3. Consolidation or simplification of compliance or reporting requirements.

Agricultural Operations

Department compliance and reporting requirements for agricultural operations and facilities are not expected to change as a result of the proposed code changes. For crop producers and livestock operations with fewer than 1,000 animal units, the majority of compliance efforts will be handled through the counties. The counties can provide a convenient, accessible contact for operations and several counties have developed compliance checklists and/or tracking and reporting systems to consolidate and simplify compliance identification and verification. As for reporting, as mentioned above, the proposed rule revisions do not require additional reporting.

Non-Agricultural Businesses

For commercial development, the department will be assuming the responsibilities formerly held by the Department of Commerce to regulate storm water discharges from commercial building sites in a manner that meets ch. NR 151 requirements. The rule revisions simplify the construction erosion control requirements that Commerce formerly imposed.

4. Performance standards in lieu of design or operational standards.

For both agricultural and non-agricultural operations, the program requirements are already in the form of performance standards. Many of these promote self-assessments on behalf of the operation because they can be easily recognized and complied with via site management or low-cost improvements. However, meeting some of the performance standards may require technical assistance with designs, operational standards or written management plans.

5. Exemptions from any or all requirements of the rule.

Agricultural Operations

Crop producers and livestock operations with fewer than 1,000 animal units cannot be wholly exempted from applicable performance standards and prohibitions because: 1) the authorizing statute was specifically established to apply to these operations (i.e., nonpoint source agricultural operations); and 2) they are the sectors that need to give further consideration to the impacts of their operations on water quality. Conditional exemptions based on the availability of cost sharing do exist.

Non-agricultural Businesses

Small businesses that undertake construction are required to comply with the construction erosion control and storm water management requirements of ch. NR 151. Construction site erosion, whether it is from a small business or a large one is still potentially a major water quality problem and storm water discharges from these sites have been equally regulated with those of other businesses under ch. NR 216. A small business building and parking lot can have a greater impact than a large business depending on the amount of imperviousness, and its proximity to a water resource. If small business were to be exempt from meeting the performance standards, then the level of control and the attainment of water quality standards would be significantly diminished.

B. Issues raised by small business during the rule hearings, changes made in the proposed rule as a result of alternative suggested by small business and reasons for rejecting any alternatives suggested by small business.

Several owners of small businesses on lakes severely impacted by algae commented that their businesses were negatively impacted during the summer months because the smell and bad water quality kept tourists and seasonal home owners away. They commented that strong rules regulating phosphorus runoff were needed and many cited in particular the need for the TMDL and PI performance standards.

The department received the following comments from dairy farmers, vegetable, and cranberry growers:

- Comment. The **phosphorus index** should not be an enforceable performance standard but rather a management option, the accounting period should go forward instead of relying on past records, an annual cap of 10 is too restrictive, alternative methods to SNAP+ must be allowed, application of the standard to pastures should recognize limitations of the RUSLE 2 model for soil erosion and its resultant impact on the PI for pastures; the PI should not apply to applications of bio-solids regulated under other DNR permit programs.

Response. The phosphorus index standard is being retained because it is an effective way to target and manage phosphorus delivery from high priority agricultural fields. Many changes were made in the draft standard based on comments from farmers and haulers of waste. These are: the accounting period has been modified so that a transition period exists allowing a producer to use planning data until sufficient historic record has been created; the annual cap is increased to 12; alternative methods of calculating the PI are allowed if approved by the department; portions of the standard requiring calculation of the PI for pastures has a delayed effective date so that the NRCS can complete updates of the RUSLE 2 modules for pastures.

- Comment. The **tillage setback** performance standard is a one-size-fits-all approach that could take land out of production and limit the type of crops that can be grown.

Response. The tillage setback is being retained because it represents good stewardship and is consistent with assumptions of the phosphorus index. Several changes were made in response to farmers' comments. A purpose statement has been added; the standard setback is set at 5 feet with the possibility of increasing the setback up to 20 feet if justified; a clear description has been added for where the setback applies, including an exclusion for grassed waterways; and adequate vegetative cover is better defined.

- Comment. The **TMDL** performance standard is too restrictive on farmers, it does not provide enough information about what farmers were supposed to do and who it would apply to, there was no oversight or opportunities for public input and the targeted performance standard should be used instead.

Response. This TMDL standard is being retained and a provision has been added requiring the department to establish more stringent performance standards within TMDL areas by making rules under the existing targeted performance standard provisions of s. NR 151.004. A rule provision is added to clarify that the best management practices, conservation practices and technical standards to meet TMDL requirements are those specified in ch. ATCP 50. TMDLs are not self-implementing, so

ch. NR 151 is needed to provide the department with the authority to require agricultural controls needed to meet the TMDL.

- Comment. This revised **nutrient management** standard is very confusing and duplicates the phosphorus index; the nutrient management performance standard should not require that plans be written to limit discharge of nutrients to state waters instead of meeting crop needs. This change will limit yields. It is unclear how the standard affects haulers of septage, industrial waste, and municipal bio-solids.

Response. The proposed refocusing of the nutrient management standard has been dropped. The current version is retained with clarification of its applicability to applications of septage, industrial wastes, and municipal bio-solids.

- Comment. The inclusion of **pastures** in the sheet, rill and wind erosion control performance standard is not practical because the RUSLE 2 model over-predicts soil loss from these fields; the requirement for vegetative cover over 100% of a pasture is not practical because vegetation is not possible in cattle lanes or around supplemental feeding areas; the link between the definition of pasture and feedlot needs to be reframed so that minor bare areas in pastures are not automatically subject to feedlot regulations.

Response. Application of the sheet, rill and wind erosion standard to pastures is given a delayed effective date so that the NRCS can complete updates of the RUSLE 2 modules for pastures; the pasture definition has been amended to allow limited bare areas such as those that occur in cattle lanes and around supplemental feeding areas; the feedlot definition does not include bare areas in pastures such as those for cattle lanes and supplemental feeding areas provided such areas do not constitute significant sources of pollution to waters of the state.

- Comment. In the **process wastewater** handling performance standard, the term “significant discharge” is ambiguous.

Response. A list of factors that will be used to define whether or not a process wastewater discharge is significant is added to the rule.

The department also received the following comments from builders and other small businesses in the construction industry:

- Comment. There needs to be assurances that **TMDL allocations** are fair and that no entity should be required to do more than their fair share.

Response. This rule cannot create assurances for implementation of another program.

- Comment. The department should not incorporate into this rules package recent EPA rules related to **effluent limitation guidelines**.

Response. The EPA rules go into effect when the department reissues the construction site permit later this year. There is insufficient time to incorporate these standards into ch. NR 216 before the permit expires.

- Comment. Restore the **one-acre threshold** for the erosion control performance standard.

Response. The one-acre threshold has not been restored; but the performance standards for these small sites have been modified to allow use of appropriate BMPs for compliance and there is no requirement to run a model or develop a plan.

- Comment. Maintain the current exemption from storm water requirements for **redevelopment** of parking lots and roads when there is no increase in exposure.

Response. This exemption resulted in very few redevelopment projects designing storm water practices to reduce pollutants. These are opportunities to improve the water quality of our developed urban areas while the site is already torn up.

- Comment. Maintain the **one percent cap** on land used for infiltration.

Response. The cap has increased for medium and high density residential from 1% to 2%, but the goal has been reduced from 90% to 75%. This change in performance standard better reflects the ability to achieve the goal and not rely on the cap. Many sites will be able to meet the goal without reaching even the 1% cap.

- Comment. In the developed urban area standard, eliminate the requirement to reduce total suspended solids by **40 percent**.

Response. This standard is not directly placed on small businesses but on the municipality as a whole. To achieve water quality standards, we must reduce pollutants from the developed urban area.

- Comment. Eliminate the requirement to have an erosion control plan for construction sites of **less than one acre**.

Response. The erosion control plan requirement was dropped for the less than one acre construction sites and the performance standard is prescriptive to match what commercial buildings were subject to under ch. COMM 60.

C. Reports required by the rules that must be submitted by small business and an estimated cost of preparation.

Most small businesses regulated by these rules are not required to submit reports to the department.

D. Measures or investments that small business must take to comply with the rule and estimates of the associated cost.

Measures and investments to small businesses resulting from revisions to the rules, along with cost estimates are included in the Fiscal Estimate.

E. Additional cost to the state in administering or enforcing the rules that include any of the methods listed in A.

Any additional cost to the state has been included in the Fiscal Estimate for each rule.

F. Impacts on public health, safety and welfare caused by including in the rule any of the methods listed in I. A-E.

Implementation of these rules is expected to result in improved water quality with subsequent benefits to public health, safety and welfare.