

Wisconsin Department of Agriculture,
Trade and Consumer Protection

Initial Regulatory Flexibility Analysis

Rule Subject: Soil and Water Conservation
Adm. Code Reference: ATCP 50
Rules Clearinghouse #: Not yet assigned
Department Docket#: 11-R-01

Rule Description

General

This proposed rule will modify the soil and water resource management (SWRM) program under ch. ATCP 50, primarily for the purpose of incorporating the changes in ch. NR 151 adopted by the Department of Natural Resources (DNR) in 2011.¹ Specifically, the changes of most significance for this analysis center on the agricultural conservation standards and practices in subchapters I and II of ATCP 50, requirements for farmland preservation conservation compliance in subchapter III and the technical and other standards for practices cost-shared with state funds in Subchapter VIII. Farmers and others may benefit from other rule changes intended to improve program implementation, such as cost-sharing modifications for non-farm conservation practices and clarification of the process for certifying engineering practitioners.

Small Businesses Affected

The moderate impacts of this rule will mostly affect farmers, a great majority of whom qualify as “small businesses.” It is important to note that this rule does not impose new runoff control standards on farmers beyond those required by the 2011 changes to NR 151 (2011 DNR standards), and, in fact, this rule takes certain steps to minimize impacts by defining implementation steps. Most farmers will be insulated from some of the costs of implementation because of the state’s cost-share requirement and the limited availability of state funding to provide cost-sharing. For farmers receiving farmland preservation program (FFP) tax credits, this rule provides farmers the flexibility to minimize financial impacts of compliance, including the option of discontinuing collection of a tax credit as a last recourse to avoid compliance responsibilities.

Rule changes will also affect businesses other than farmers including nutrient management planners, soil testing laboratories, farm supply organizations, agricultural engineering practitioners, and contractors installing farm conservation practices. The

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

rule will impact these businesses to a much smaller degree, and with primarily positive impacts.

To reach its conclusion regarding impacts on farmers and non-farmers, the department first defines its responsibility to assess impacts in relation to DNR's responsibilities. To place its analysis in context, the department reviewed the cost estimates prepared by DNR as part of its adoption of the 2011 agricultural performance standards. This review includes a discussion regarding DNR's primary justification asserting the limited impacts of the 2011 DNR standards; namely, the cost-share requirement imposed by state law.

The analysis then turns to the impacts directly related to this rule, which focuses on implementation of the 2011 DNR standards. The department separately analyses the impacts on farmers and non-farmers, and each of these analyses considers the direct costs and benefits of this rule; reporting, bookkeeping and other procedures; and professional skills required. Key aspects of this rule that are designed to minimize impacts of the 2011 DNR standards on farmers are also included in this analysis. The department also considered the requirements of the farmland preservation program, as modified by this proposed rule, in assessing the impacts. After performing this expanded analysis of costs and impacts, the department finds no reason to modify DNR's conclusion regarding the impacts of the 2011 DNR standards, and ultimately the department concludes that this rule will create no more than a moderate impact on farmers and other businesses.

DNR Impact Analysis

When DNR adopted the new and modified state runoff standards for farms as the lead agency responsible for setting performance standards, it analyzed the costs of the new and modified standards as part of its fiscal and business analyses, received public comment, and then summarized its conclusions in its final rulemaking documents.

DNR's 2011 rule revision expanded the runoff standards for farms, and was a minor adjustment in comparison to the 2002 rule that created the new state agricultural performance standards. The 2011 DNR standards defined the framework for the department's limited rulemaking, relegating the department to clarification of the practices and cost-sharing needed to comply with the new ch. NR 151 requirements.

DNR's 2011 rule order added the following new and modified performance standards to address polluted runoff from farms:

- A setback area between cropland and waterbodies within which tillage is prohibited for the purpose of maintaining streambank integrity and avoiding soil deposits into state waters.
- A new annual and rotational limit on the amount of phosphorus that may run off cropland and pasture, as measured by a phosphorus index.
- Extension of the sheet, rill and wind erosion standard to pastures starting July 1, 2012.
- A prohibition against significant discharge of process wastewater from milk houses, feedlots, and other similar sources.

- A requirement that crop and livestock producers reduce discharges if necessary to meet a load allocation specified in an approved Total Maximum Daily Load (TMDL) by implementing targeted performance standards specified for the TMDL area using best management practices and farm conservation practices in ch. ATCP 50.
- Manure storage standards for existing and new facilities are modified to include margin of safety requirements, and redefine responsibilities for closure.

In its 2011 rulemaking order (p. 10), DNR reached the following conclusion regarding impacts on small businesses: “the overall effect on small businesses may be increased time, labor and money spent on BMPs or planning tools, but there will not be a significant economic impact on small business.” This conclusion applies to most farms which are considered small businesses. Also, the small business focus is a reliable measure of impacts on all farms because many of our state’s largest livestock operations must already meet process wastewater and nutrient management requirements as part of their WPDES permits, including pastures. Confirming this interpretation of overall impacts, DNR’s revised Fiscal Estimate, which specifically addressed all private sector impacts and concluded that: “The department [DNR] does not believe that the rule revisions will have a significant fiscal impact on the private sector.”

Regarding increased time, labor and money, DNR’s rule making order (pp. 9-10) states that: “the rules will not result in additional reporting or significant increases in record-keeping requirements for small businesses. Rather than mandate specific design standards, the rules either establish new performance standards or revise existing performance standards.”

To support its assessment of the financial impacts of the 2011 DNR standards, DNR’s rule making order (pp. 9-10) provides the following:

“Agricultural producers who are in compliance with the existing nutrient management performance standard may already be in compliance with the new phosphorus index and tillage setback performance standards. A phosphorus reduction strategy is included in NRCS nutrient management technical standard 590 (Sept. 5, 2005). A phosphorus index of 6 or less is specified in the PI strategy in Criteria C, 2 of the technical standard. The concept of streambank integrity, as proposed through a tillage setback performance standard, is an assumption of the phosphorus index calculation, which estimates phosphorus delivery to the stream via overland flow, but not from bank erosion or other means that soil, manure or fertilizer might enter the stream from farming operations.”

DNR’s revised Fiscal Estimate (p. 4) also discusses provisions of the new standards designed to “limit the financial impact of the new standards on the private sector” and provides these examples:

“In the agricultural portion of NR 151, the Phosphorus Index (PI) performance standard requires that the average PI calculated over an 8-year period shall not exceed 6, and also requires that the PI shall not exceed 12 in any year. Allowing use of planning information until records can be established will greatly reduce the effort required to document the PI accounting period. 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. A PI cap of 12 provides considerable leeway to manage crops using conventional methods, although in some cases additional cropping management measures will still be needed such as where corn silage is grown on steeper slopes or where vegetable crops are grown in areas where excessive phosphorus has accumulated in soils. The standard tillage setback requirement is 5 feet, which will not significantly reduce the amount of land available for cropping. The rule contains provisions that allow some bare areas within pastures for cattle travel lanes and supplemental feeding areas. This will allow standard pasturing management, although if such bare areas become significant pollution sources then they will be subject to additional management requirements.”

DNR evaluated specific costs in reaching its conclusions about the new and modified performance standards. For example, the revised Fiscal Estimate (p. 2) provides a detailed calculation in relation to implementation of the new process wastewater performance standard. Based on a \$13.3 million estimate for the cost of full implementation, DNR determined that the state would need \$9,312,500 for landowner cost-sharing, with landowners responsible for paying about \$4.0 million if 70 percent cost-sharing were provided.

Cost-Share Requirement Limits Impact

The state cost-share requirement was critical to DNR’s determination regarding the limited economic impact of the 2011 DNR standards. In support of its position, DNR in the final rule making order (p. 10) explains:

“Compliance requirements for agricultural producers vary depending on the type of operation and the performance standard, but the revisions to the rules will not change the existing compliance requirements for agricultural operations. Under state law, compliance with the performance standards is not required for existing nonpoint agricultural facilities and practices unless cost sharing is made available for eligible costs. A less stringent compliance schedule is not included for agricultural producers because compliance is contingent on cost sharing and in many cases, it can take years for a county or the state to provide cost share money to a producer.”

The following facts bear out DNR's position about the relationship between funding and implementation of the 2011 DNR standards on Wisconsin's 78,000 farms (2011 Wisconsin Ag Statistics). Based on state cost-sharing provided in the 10 years from 2003-2012, the state is likely to provide no more than \$10-\$13 million annually to cost-share practices in the future, and it is likely that funding may even decline further.² Between \$8 to \$10 million annually will likely be in the form of bond revenue funds that can be used to pay for hard practices such as those to control discharges of process wastewater or stabilize streambanks to protect their integrity. Only \$2 to \$3 million will likely be available each year to cost-share nutrient management plans for pastures and soil erosion control practices needed to meet the phosphorus index (PI) performance standard.

In addition to possible reductions in funding based on budget considerations, other factors will limit the amount of state funds available to cost-share the 2011 DNR standards. In the foreseeable future, much, if not all, of state funds are likely to be spent on cost-sharing practices to comply with the original performance standards and prohibitions adopted in 2002. At the time of their adoption in 2002, the department and DNR estimated that \$373-\$573 million were necessary to fully implement the original performance standards over ten years. In its first ten years of implementation of the designed nonpoint program, DNR and DATCP provided \$100 million in cost-share funding. Less certain in terms of future trends, but no less important, is that there may be reduced state support for county conservation staff if recent budget cuts become the norm. County conservation staff are the only public sector professionals authorized to distribute state cost-share funding from the department and DNR. Reduced staff support translates into fewer county staff in the field and diminished capacity to provide technical services and to deliver cost-share dollars.

DATCP Impact Analysis

Under the state framework for managing farm runoff, the department is responsible for implementation of performance standards promulgated by DNR. In the case of the 2011 DNR standards, DNR rule changes went beyond setting performance standards³, further circumscribing the department's rule making options and confining the impacts arising out of this proposed rule. In the end, the key focus of ch. ATCP 50 rule revisions involves clarifying the implementation of the new standards for pastures and a tillage setback, and the implications of the new standards for farmer participants in FPP. As

² If recent history is any indicator, the state is less likely to increase spending and incur debt. In 2012, for example, the department and DNR each year provided counties about \$10.8 million in cost-share funding, a reduction of nearly \$8.0 million from the amount provided in 2002 when there were fewer performance standards.

³ For example, DNR established the definition of pasture, and assumed responsibility for approving an alternative method for calculating the phosphorous index. Nor can the department address DNR's rule change to eliminate the cost-share requirement for closing manure storage facilities that do not meet s. NR 151.05 (3) and "were either constructed on or after Oct. 1, 2002, or were constructed prior to Oct. 1, 2002 and subject through Oct. 1, 2002 to the operation and maintenance provisions of a cost share agreement."

noted in the “Accommodation for Small Business”, this rule in fact employs measures to minimize those impacts generally, and specifically in regard to the FPP participants.

Farmers

Implications for Recipients of Farmland Preservation Program (FPP) Tax Credits

The impacts from this rule on farmers participating in the FPP arise from the changes related to FPP implementation. In the case of the 15,023 farmers who collected \$18.9 million in farmland preservation tax credits (based on 2012 payments for tax year 2011 claims, <http://www.revenue.wi.gov/ra/FarmPres2012payments.pdf>), they may be required to comply with new and modified standards without cost-sharing. Identifying impacts with precision is complicated by a number of factors including the changes in program participants over time, the compliance status of new participants, and the range of options to achieve compliance.

The department’s proposed rule revision has taken several steps to limit impacts on this group by providing time for program participants to comply with the new and modified performance standards, and allowing participants to claim a tax credit on the basis of performance schedules. In addition, the proposed rule has sought to ease the transition to the standards for farmers with pastures by first focusing application of nutrient management plans to pastures in high risk locations. Also, farmers may receive cost-sharing to install conservation practices necessary to maintain their eligibility for tax credits. Last, but not least, farmers who do feel the compliance burdens are too great may decide to stop collecting a tax credit rather than implement the new standards.

Notwithstanding these accommodations, there is a fiscal impact on FPP farmer participants. To comply with the phosphorus index requirement, FPP participants have alternatives short of installing soil erosion control practices to reduce discharges. In the quote from the DNR fiscal estimate (pp. 4-5 above), several options are discussed. However, some participants may need to install conservation practices to reduce erosion on cropland. By 2020, when the phase-in for pastures is completed, all farmers will need to develop nutrient management plans for pastures. In the end, the department estimates that FPP participants may need to spend \$5 to \$7 million to develop nutrient management plans for their pastures once the requirement is fully phased in. To meet the process wastewater standard, this rule gives producers options to reduce discharges below the significant threshold without installing the most expensive practices required when state or federal cost-sharing is provided. However, to access cost-sharing, some farmers may select higher-cost options which require that they install practices that must fully meet NRCS technical standards and specifications. The department estimates that the costs for meeting the process wastewater standard will range from \$2 to \$4 million.

Recordkeeping and New Skills Required

In considering impacts, the department must evaluate additional reporting or record-keeping requirements imposed on farmers, particularly with respect to nutrient

management planning. Consistent with DNR's assessment, the department believes these impacts will not be significant. Among the chief reasons for this conclusion, the department assumes that these obligations will not arise in most cases unless farmers are provided cost-sharing. For those farmers who must comply with nutrient management requirements related to the new pasture standard or the phosphorus index, they will need to:

- Manage soil test and other data to prepare nutrient management plans.
- Understand and keep records of soil types, soil tests, crop nutrient requirements (including University of Wisconsin recommendations), nutrient applications, nutrient contents of manure, nutrient application scheduling and other matters related to nutrient management. Most farmers have knowledge in some or all of these areas, but some farmers may need to update or expand their knowledge.

The increased requirements for nutrient management planning are slight in comparison with the responsibilities imposed on farmers in 2002 when the nutrient management standards were first adopted, or in comparison to 2005 when the standard was modified to include the phosphorus component. As noted in the DNR Revised Fiscal Estimate (p. 4), "allowing use of planning information until records can be established will greatly reduce the effort required to document the PI accounting period."

Farmers claiming FPP tax credits already must keep records to document compliance with the DNR performance standards adopted in 2002. For FPP participants, additional recordkeeping created by this rule should be minimal. For example, since farmers already must keep records related to nutrient management plans, farmers should be able to readily incorporate requirements relating to pasture and PI into their systems.

By its nature, the business of farming requires that farmers be skilled at managing changes that are driven by the need to incorporate new technologies, respond to growing conditions or modify production methods. In changing bedding systems for livestock, for example, a farmer must work through a challenging series of steps to deploy new equipment and change management practices, and may use adaptive management techniques to overcome challenges. The skills and experience gained in these settings help farmers manage newly installed conservation practices such as feed storage runoff control systems. Nonetheless, there is a learning curve that farmers must negotiate. In the case of nutrient management, farmers may need to build their skills with computers to take advantage of tools that facilitate tracking of the PI on cropland and pastures.

Whether the challenge involves recordkeeping or new skills, the demands of this rule should be viewed in the larger context of the many programs in which farmers participate. Farmers need to make changes to meet other program requirements including state and local permitting and federal cost-share programs. For example, expanding livestock operations must at a certain point control discharges of process wastewater as condition of a required permit. Many programs, from county manure storage permits to FPP, require that farmers have nutrient management plans for their cropland. For farmers in these programs, it is a small step to add pastures to these required nutrient management

plans.

Overall Impact on Farmers

This impact analysis focuses primarily on the costs associated with compliance by participants who claim FPP tax credits. In evaluating the net impact on FPP participants, the department weighed the potential costs against offsetting considerations such as DNR and department rule provisions intended to minimize implementation costs, the option of withdrawing from the program, access to cost-share funds, and the availability of tax credits to offset costs. In its final analysis, the department estimates an impact of \$8 to \$12 million to implement the 2011 DNR standards based on FPP cross-compliance.

The department believes that recordkeeping and other increased responsibilities are offset by a number of factors including DNR and department rule provisions that minimize burdens, and the following potential benefits from implementation of the 2011 DNR standards:

- Promotion of more efficient use of nutrients and possible cost-savings on fertilizer through nutrient management planning.
- The implementation of conservation practices that provide protection against environmental and other liability created by runoff events or groundwater contamination.
- The protection of water quality, particularly for drinking water wells, through conservation practices.
- Improved availability of the department cost-sharing as a result of cutting red tape and adding new efficiencies in managing grant funds.
- Improved focus of limited cost-share funds on support for farmer compliance with conservation practices by excluding the use of cost-sharing on land owned by state and local governments, and (limiting or encouraging reduced) cost-sharing for practices not required to achieve compliance with state runoff performance standards, and by clarifying that economic hardship is not available to non-farm landowners.
- Provision of a wider range of engineering services from conservation engineers to farmers and others as a result of the simplification of the process for updating their certification.

Non-Farm Businesses

This rule has the following impacts on non-farm businesses, a considerable number of which qualify as “small businesses.”

Nutrient Management Planners and Crop Consultants

This rule will marginally increase the demand for professional nutrient management planners to help implement the phosphorus index and to develop nutrient management plans for pastures. Nutrient management planners who prepare plans for others must be

qualified to do so, and these qualifications will equip them to develop plans for pastures. Nutrient management planners must know how to prepare nutrient management plans. They must understand and follow record keeping requirements related to soil types, soil tests, crop nutrient requirements (including University of Wisconsin recommendations), nutrient applications, nutrient contents of manure, nutrient application scheduling and other matters related to nutrient management. Planners holding certain professional credentials are presumed to be qualified. Professionals with the knowledge and skill to use SNAP-Plus, a computer program critical to calculating the phosphorus index, are in a special position to capture business.

Farm Supply and Farm Service Organizations

This rule will marginally increase the demand for entities that provide services to farmers. Farm supply and farm service organizations may provide nutrient management planning services, crop consulting, fertilizer sales, conservation compliance and other services. They may also sponsor the department-approved training courses for farmers who wish to develop their own nutrient management plans.

This rule will not necessarily increase demand for manure hauling services. Nutrient management planning on pastures will not trigger demand for this service.

This rule is not likely to have a measurable impact on the sales of agricultural fertilizers, since it will not likely to create an increase in sales to those farmers who must manage nutrients more carefully. Persons selling agricultural bulk fertilizer to farmers must record the name and address of the nutrient management planner (if any) who prepared the farmer's nutrient management plan. This rule does not prohibit the sale of fertilizer to a farmer who lacks a nutrient management plan.

Soil Testing Laboratories

This rule will slightly increase demand for soil testing. Nutrient management plans must be based on soil tests conducted by certified laboratories. The department certifies soil testing laboratories and may audit laboratories to ensure accurate testing.

Construction Contractors

This rule will slightly expand the demand for construction of farm practices by contractors, particularly in the area of process wastewater management. This rule does not substantially alter construction standards for new or modified performance standards, nor does it impose any new contractor reporting or recordkeeping requirements. This rule may affect construction demand and the distribution of projects across the state. Certain changes such as limitations on cost-sharing for non-farm projects may reduce certain business opportunities. This may not affect large contractors who can make adjustments to handle changes in demand, but smaller, less flexible operations may be negatively affected.

Conservation Engineering Practitioners

This rule may increase demand for agricultural (conservation) engineers and engineering practitioners. Certain conservation practices must be designed by licensed engineers or certified engineering practitioners, to ensure safety and effective performance. Engineering costs are eligible for cost-sharing under this rule.

Under this rule, as under prior rules, conservation engineering practitioners must be certified by the department. This rule simplifies current certification requirements and procedures.

Recordkeeping and New Skills Required for Non-Farm Businesses

This rule does not directly trigger changes in reporting, bookkeeping or other procedures for non-farm businesses.

Business professionals will need to enhance their skills to help farmers implement the 2011 DNR standards; however, these professionals will likely take these actions for reasons other than this rule. Engineers and nutrient management planners must keep pace with the latest technical standards to meet the needs of customers and protect themselves from liability. Certain professionals such as engineers and certified crop advisors are required to update their skills to retain their registration or certification.

Reporting, Bookkeeping and other Procedures

To the extent that this rule requires reporting, bookkeeping or other procedures, the department's analysis is included in the prior sections covering impacts on farmers and non-farm businesses.

Professional Skills Required

To the extent that this rule requires changes in professional skills, the department's analysis is included in the prior sections covering impacts on farmers and non-farm businesses.

Accommodation for Small Business

Both DNR and the department have taken steps to identify compliance and reporting effects of these rule changes. In its final rule draft, DNR considered: (1) the existing performance standards and prohibitions in ch. NR 151, (2) the requirements of NRCS technical standard 590 needed to meet the nutrient management performance standard, (3) assumptions contained in the Wisconsin phosphorus index, and (4) feedback from members of advisory committees that included small business owners and organizations. The department worked extensively with farm representatives and others to minimize adverse effects of this proposed rule on small business. The department took the

following actions: (1) worked with DNR to determine the scope of the department rule revision, (2) conducted listening sessions that included farm and conservation groups, (3) held numerous public hearings throughout the state, (4) prepared simplified information materials, and (5) reviewed the rule to identify opportunities to accommodate small businesses.

While DNR's 2011 rule revision established the core requirements, most of which the department could not alter, the department's proposed rule provides accommodations to small businesses. These accommodations minimize the impact on farms and other businesses, both small and large. In general, this rule:

- Clarifies the process for annual review of nutrient management plans to ensure that plans are updated when needed.
- Allows farmers to identify practices to meet new performance standards such as the process wastewater standard, particularly if the discharge can be reduced to below the level of "significant".
- Seeks voluntary compliance with the rule changes to the maximum extent feasible, consistent with the department's past approach.
- Incorporates NRCS standards for feed storage, manure storage and waste transfer that recognize less costly approaches to manage smaller systems.
- Eases the transition for farmers with pastures by limiting the initial application of nutrient management plans to pastures in high risk locations.
- Improves availability of department cost-sharing by cutting red tape and adding new efficiencies in managing grant funds.
- Minimizes the removal of cropland from production necessary to comply with tillage setback within NR151, through precise interpretation of the tillage setback requirements.
- Enables conservation engineers to provide a wider range of engineering services to farmers and others by simplifying the process for updating their certifications.

In connection with the farmland preservation program, this rule:

- Provides a phase-in for 2011 DNR standards for farmers who must meet the conservation compliance requirements to receive a farmland preservation tax credit.
- Creates a range of options for a farmer, from a performance schedule to voluntary exit from the program, which will enable farmers to make choices about how to meet the added compliance responsibilities.

Conclusion

This rule will have no more than a moderate impact on farmers, including “small businesses.” The limited scope of the rule changes, combined with the cost-share mandate, account for the reduced impact. Other businesses may slightly benefit from these rule changes.

Dated this _____ day of _____, 2013.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
John Petty, Administrator
Division of Agricultural Resource Management