

DATCP Docket: 24-R-03

**THE DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ORDER TO ADOPT EMERGENCY RULE**

ORDER

The Wisconsin Department of Agriculture, Trade and Consumer Protection hereby adopts the following emergency rule *to create* ss. ATCP 52.08, 52.09, 52.10, 52.11, 52.12, 52.13, and 52.14, *relating to* creating a commercial nitrogen optimization pilot program.

The statement of scope for this rule, SS 043-24, was approved by Governor on April 25, 2024, published in the Register No. 821A2 on May 13, 2024, and approved by the Department of Agriculture, Trade and Consumer Protection Board on June 3, 2024. The emergency rule was approved by the Governor on October 3, 2024.

Exemption from Finding of Emergency

A finding of emergency is not required. 2021 Wisconsin Act 223 § 4(2) provides that the department shall, using the procedure under s. 227.24, Stats., promulgate rules to implement s. 92.14 (16), Stats. Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), Stats., the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

Analysis

This emergency rule implements the commercial nitrogen optimization pilot project program created under s. 92.14 (16), Stats. Under s. 92.14 (16), Stats., the department is authorized to award grants for commercial nitrogen optimization pilot projects conducted in collaboration with a University of Wisconsin System institution. Under s. 20.115(7) (qf), Stats., the legislature has appropriated \$1 million for this program in Fiscal Year 2024–2025.

Statutes Interpreted: s. 92.14 (16), Stats.

Statutory Authority: s. 92.14 (16), Stats.

Explanation of Agency Authority

Section 92.14 (16)(g), Stats., directs the department to promulgate rules to implement the commercial nitrogen optimization pilot program. This emergency rule is needed, on an interim basis, to implement the program, pending the adoption of permanent rules.

Related Statutes and Rules

There are no other related rules or statutes, other than those cited above.

Plain Language Analysis

The commercial nitrogen optimization pilot program is designed to encourage agricultural producers to develop innovative approaches to optimize the application of commercial nitrogen.

Section 92.14 (16), Stats., outlines the program:

- Project must span at least two growing seasons.
- Awarded producers will collaborate with a University of Wisconsin System (UWS) institution for project monitoring.
- The UWS institution shall monitor the grant project on-site, and no more than 20% of the grant award may be distributed to the UWS collaborator.
- Grant awards will not exceed \$50,000.
- Priority will be given to producers in different parts of the state and projects in areas that have different soil types or geologic characteristics.
- Priority will be given to innovative projects not currently funded through state or federal programs.
- Priority will be given to longer-term projects.

Grant Purposes

Under this emergency rule, the department may award grants for projects that focus on commercial nitrogen optimization through:

- Reduction of nitrates in groundwater and surface water.
- Collection of data to ascertain the balance of providing the appropriate amount of nitrogen to a crop at the right time while reducing nitrogen loss to the atmosphere, groundwater or surface water.
- Installation of conservation practices to assist with nitrogen optimization coupled with monitoring runoff and testing soils.
- Optimization of commercial nitrogen use through a variety of agronomic methods and techniques.

Use of Grant Funds

Under this emergency rule, grant funds may be used to reimburse expenses that are determined by the department to be a reasonable and necessary part of the grant project. Applicants will not be required to provide any match for grant resources. Eligible expenses include, but are not limited to:

- Personnel for coordinator role, including expense for salaries and wages, contract and consulting services, and travel.
- Incentive or stipend payments for landowners who participate in full-scale commercial nitrogen optimization field study.
- Water quality monitoring and soil testing in collaboration with a UWS institution.
- Agronomy services, including custom application and nutrient management planning.

- Equipment rental for project implementation.
- Equipment purchases needed for project implementation. Equipment purchases over \$2,500 must receive pre-approval from the department.

Grant funds may not reimburse any of the following expenses:

- Real estate purchases.
- Repayment of loans or mortgages.
- Rent or contract payments for time periods extending beyond the term of the grant contract.
- Equipment purchases that exceed \$2,500, without department pre-approval.
- Administrative or overhead costs that are not direct costs of the grant project.

Grant Proposals

Under this emergency rule, the department must issue at least one request for grant proposals in each state fiscal biennium (the department may issue more frequent requests, if it chooses to do so). The request for proposals must describe the required form and content of the grant proposal and must specify a deadline for submitting grant proposals. Applicants must submit grant proposals to the department in the manner prescribed within the department's request for proposals.

Grant Awards

Under this emergency rule, the department must evaluate grant proposals and issue its grant awards within 45 days after closing of the grant proposal deadline. The department must clearly identify each award recipient, the amount of the award, the purposes for which the award is given, and what is to be included in the annual and project reports. The department may consider the following criteria when evaluating grant proposals and making grant awards:

- Direct impact of the project on commercial nitrogen optimization.
- Location of the project - geography and geology - to assure awards are distributed across the state.
- The length of the project.
- The innovative approaches to nitrogen optimization being studied in the project.
- Whether the proposed project meets the standards prescribed in this emergency rule.
- The viability of the proposed project.
- The management and technical qualifications of the grant recipient.
- The ability of the UWS institution to collaborate with the grant recipient.
- The adequacy of the project plan and budget.
- Whether the grant proposal and budget adequately identify the nature of project expenses to be reimbursed under the proposed grant.

Grant Contracts

Under this emergency rule, the department must enter into a contract with a legal entity before distributing funds. The contract must spell out grant terms and conditions, including performance requirements, reporting requirements and payment terms. Grant recipients will be required to file an annual report with the department and a final project report.

Summary of, and Comparison with, Existing or

Proposed Federal Statutes and Regulations

Federal Programs

There are currently no similar federal programs.

If Held, Summary of Comments Received during Preliminary Comment Period and at Public Hearing on Statement of Scope

The Joint Committee for Review of Administrative Rules did not request a preliminary hearing on the scope, and the department chose not to hold a preliminary hearing on the scope.

Comparison with Rules in Adjacent States

Illinois

There is no state sponsored nitrogen optimization programming (adjacent or direct) in Illinois.

Iowa

Iowa does not have a formal commercial nitrogen optimization program; however, it does make nitrogen optimization tools and strategies available to its producers. These tools and strategies include the Corn Nitrogen Rate Calculator, which is a tool to estimate potential N-nitrate loss by estimating optimal nitrogen based on fertilizer and corn prices.

Michigan

There is no state sponsored nitrogen optimization programming (adjacent or direct) in Michigan.

Minnesota

Minnesota has different nitrogen optimization programs available to producers, including a farmer educational outreach program focused on how nitrogen behaves in the environment. The Minnesota Nitrogen Fertilizer Management Plans include groundwater nitrate testing and evaluation, targeting sensitive areas in the state. This program includes voluntary testing of private wells. Finally, the Minnesota Groundwater Protection rule, Department of Agriculture Rule 1573 – Groundwater Protection, minimizes potential sources of nitrate pollutions to the state's groundwater and protects drinking water by restricting application of nitrogen fertilizer in the fall and on frozen soils in areas vulnerable to contamination, and outlines steps to reduce the severity of the problem in areas where nitrate in public water supply wells is already elevated.

Summary of Factual Data and Analytical Methodologies

This is the third year this program is being administered via emergency rule. When legislation creating this program was first passed, the department worked with a variety of stakeholders to draft the emergency rule and estimate farmer demand. Feedback was collected from numerous stakeholders ranging from agribusiness organizations, conservation groups, county governments, university entities, the federal government, and other collaborators to develop standards for grant determinations contained in this emergency rule. No relevant comments were received in the public comment period over the past two years. This year the department is including the definition of “commercial fertilizer”.

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

The commercial nitrogen optimization pilot program is voluntary and thus imposes no costs on businesses. By providing grant funding up to \$50,000 to agricultural producers and collaborating UWS institutions, the nitrogen optimization pilot program will benefit farms, other agriculture businesses and agriculture communities. Grant recipients will directly benefit, while others will benefit indirectly from the increased knowledge producers gain regarding nitrogen optimization for crop production.

Fiscal Impact and Economic Impact Analysis

This emergency rule will have a fiscal impact on department operations. Under this emergency rule, the department must issue at least one request for grant proposals in each state fiscal biennium. Department staff must review grant applications, recommend grant awards, administer grants, and ensure compliance with applicable requirements. Department staff will also provide technical assistance to grant applicants and recipients, as appropriate.

With current resources, program administration will occupy at least 0.25 FTE staff in the department's Division of Agricultural Resource Management (this does not include legal, managerial, DATCP central accounting, or other indirect staff support). The cost for the 0.25 FTE staff will be at least \$30,000 per year, including salary, fringe benefits and support costs (there will be a smaller proportionate cost for the remainder of the current fiscal year). A complete Fiscal Estimate is attached.

Effect on Small Business

This emergency rule will have no adverse effect on small businesses. The commercial nitrogen optimization pilot project is voluntary and thus imposes no cost on businesses. Some small businesses may indirectly benefit as collaborators in the projects.

The Department's Regulatory Review Coordinator may be contacted by:

Email at Bradford.Steinel@wisconsin.gov

Telephone at (608) 224-5024

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Place Where Comments are to Be Submitted and Deadline for Submission:

Comments must be received on or before November 23, 2024, to be included in the record of rule-making proceedings. Submit comments:

By mail to:

Alex Elias
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Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911

By email to:

DATCPLandWater@wisconsin.gov

RULE TEXT

1 SECTION 1. ATCP 52.08, 52.09, 52.10, 52.11, 52.12, 52.13, and 52.14 are created to read:

2 **Subchapter I – Commercial Nitrogen Optimization Pilot Program**

3 **ATCP 52.08 Purpose.** This subchapter implements the commercial nitrogen optimization pilot
4 program created under s. 92.14 (16), Stats.

5 **ATCP 52.09 Definitions.** In this subchapter:

6 (1) “Agricultural producer” means an individual farmer or a group of farmers each of whom
7 operates an eligible farm. Agricultural producers may collaborate with a legal entity for project
8 management purposes, including completing the application.

9 (2) “Applicant” means a person or persons who submits an application.

10 (3) “Commercial Fertilizer” means any substance that contains one or more plant nutrients, is
11 used for its plant nutrient content, and is designed for use or claimed to have value in promoting
12 plant growth. “Commercial Fertilizer” includes agricultural and nonagricultural fertilizers,
13 fertilizer materials, mixed fertilizers, custom mixed fertilizers, and combination products
14 containing fertilizer. “Commercial Fertilizer” does not include unmanipulated animal or

15 vegetable manure, marl, liming material, wood ashes, or sewage sludge other than finished
16 sewage sludge products.

17 (4) "Department" means the state of Wisconsin department of agriculture, trade and consumer
18 protection.

19 (5) "Eligible farm" means a farm, as defined in s. 91.01(13), Stats., which produced at least
20 \$6,000 in gross farm revenues during the taxable year preceding the year in which an application
21 is filed requesting the department fund a nitrogen optimization pilot program grant or a total of at
22 least \$18,000 in gross farm revenues during the 3 taxable years preceding the year in which an
23 application is filed.

24 (6) "Nitrogen optimization" means a project with the potential to use nitrogen in a manner that
25 will sustain soil fertility and crop production while reducing nitrogen loss to the atmosphere,
26 groundwater and surface water.

27 (7) "Grant recipient" means any person(s) or their authorized agent who has been awarded a grant.

28 **ATCP 52.10 Application requirements and procedures.**

29 (1) REQUEST FOR PROPOSALS. The department shall issue at least one request for proposals in each
30 fiscal biennium for which funding is available. The request for proposals shall describe the
31 required form and content of grant proposals and shall specify a deadline for submitting grant
32 proposals. Applicants must submit grant proposals to the department in the manner prescribed by
33 the department's request for proposals. The department shall publish the request for proposals on
34 its webpage. The department shall also issue a press release announcing its request for proposals
35 to news media likely to give notice to the public. The department shall announce grant awards
36 within 45 days of the deadline for submitting grant proposals.

37 (2) CRITERIA. The department shall consider any of the following when evaluating grant proposals
38 and making grant awards:

- 39 (a) How the project will address commercial nitrogen optimization.
- 40 (b) Location of the project to assure awards are distributed across the state.
- 41 (c) The proposed length and scale of the project.
- 42 (d) The innovative approaches to commercial nitrogen optimization being studied in the project.
- 43 (e) Whether the proposal complies with the department's request for proposals.
- 44 (f) Whether the proposed project meets the standards prescribed in this emergency rule.
- 45 (g) The viability of the proposed project.
- 46 (h) The management and technical qualifications of the grant recipient.
- 47 (i) The ability of the University of Wisconsin System institution to collaborate with the grant recipient.
- 48 (j) The adequacy of the project plan and budget.
- 49 (k) Whether the grant proposal and budget adequately identifies the nature of project expenses to be
50 reimbursed under the proposed grant.

51 **ATCP 52.11 Grant Activities.** The department may award grants for projects undertaken by
52 agricultural producers that are designed to do any of the following:

- 53 (1) Reduce nitrates in groundwater and surface water.
- 54 (2) Collect data to ascertain the balance of the appropriate amount of nitrogen to a crop at the right
55 time while reducing nitrogen loss to the atmosphere, groundwater or surface water.
- 56 (3) Install conservation practices to assist with nitrogen optimization coupled with monitoring
57 runoff and testing soils.
- 58 (4) Optimize commercial nitrogen use via agronomic methods and techniques.

59 **ATCP 52.12 Permitted Use of Grant Funds.** Permitted uses for grant funds include the
60 following:

61 (1) Personnel for coordinator role, including expenses for salaries and wages, contract and
62 consulting services, and travel.

63 (2) Incentive or stipend payments to agricultural producers who participate in nitrogen
64 optimization field study.

65 (3) Water quality monitoring.

66 (4) Soil testing.

67 (5) Project monitoring support to University of Wisconsin System institutions.

68 (6) Rent payments for equipment necessary to implement practices.

69 (7) Equipment purchases necessary for project implementation. Equipment purchases over \$2,500
70 must have department pre-approval.

71 (8) Other materials and services required to implement practices, including, but not limited to,
72 agronomy services including custom application, nutrient management planning and cover crop
73 seed.

74 **ATCP 52.13 Project Monitoring Support.** The department shall enter into a contract with a
75 University of Wisconsin System institution, as defined in s. 118.55 (10) (a) 2., Stats., or institutions
76 for project monitoring support. The contract may not exceed twenty percent of the total grant
77 program appropriation.

78 **ATCP 52.14 Grant Contracts.**

79 (1) **CONTRACT REQUIRED.** A successful grant applicant shall enter into a contract with the
80 department before any grant money is distributed to the applicant. No funding commitment is
81 final until the contract is executed.

82 (2) **CONTRACT PROVISIONS.** A grant contract shall be reasonably designed to ensure that the grant
83 recipient carries out the recipient's obligations with respect to the grant. The contract shall be

84 signed by an authorized department official and by the applicant. The parties may amend the
85 contract by mutual written consent.

86 (3) BREACH OF CONTRACT. The department may void a contract and seek return of any funds
87 released under the contract for failure by the grant recipient to perform the recipient's obligations
88 under the contract.

89 (4) REPORTING. Every contract shall set forth a schedule of progress reports and payments. A
90 grant recipient shall provide the department reports annually and a final report. The final report
91 may be substituted for the annual report in the final project year. Reimbursement payments shall
92 be conditioned upon the receipt of reimbursement requests, related documents and reports, as
93 provided in the contract.

94 SECTION 2. EFFECTIVE DATE. This rule takes effect upon publication in the state newspaper and
95 shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats., subject to extensions
96 under s. 227.24 (2), Stats.

(END OF RULE TEXT)

Dated this 4th day of October, 2024.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION


By: Randy Romanski, Secretary