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EmR1417

The emergency rule was adopted by the Natural Resources Board On August 13, 2014, approved by the Governor on August 27, 2014 and signed by Policy Director Michael L. Bruhn for Secretary Cathy Stepp, also on August 27, 2014.

The scope statement number is SS 051-14, the governor approved the scope statement on May 15, 2014, and the scope statement was published in register No. 701 on May 31, 2014.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD  
REPEALING, AMENDING, AND CREATING RULES

**OE-10-14(E)**

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 150.10 (1m) (b), and 150.20 (3) (a) 4. and 5.; to **amend** NR 150.03 (1), (15) (intro.), (19), (25) and (26), 150.10 (1) and (1m) ( a), (c) (intro.) and (2) (a), 150.20 (1), (1m) (j), (k), and (L), (2) (a) (intro.), 4., 10., 11., and 16., (3) (a) (intro.), and (4) (b) (intro.), and 150.35; and to **create** NR 150.20 (1) (Note), (1m) (k) (Note), and (m) to (y), and (2) (a) 20. to 27. relating to the department's environmental analysis and review procedures under the Wisconsin Environmental Policy Act.

**Analysis Prepared by the Department of Natural Resources**

- 1. Statute interpreted:** Section 1.11, Stats.
- 2. Statutory authority:** Sections 1.11 and 227.11, Stats.
- 3. Explanation of agency authority:** The department has general authority to promulgate rules under s. 227.11 (2)(a), Stats., that interprets the specific statutory authority granted in s. 1.11, Stats.
- 4. Related statute or rule:** Wisconsin Environmental Policy Act (WEPA) compliance is a requirement for all state agencies and department programs. As a result, many statutes and codes are WEPA and ch. NR 150-related.

Statute chapters: 16, 23, 30, 33, 160, 196, 227, 285, 289, 291, 292 and 293.

Administrative Code chapters NR: 1, 2, 19, 44, 48, 52, 60, 103, 107, 108, 110, 113, 126, 128, 131, 132, 133, 134, 162, 166, 182, 191, 200, 243, 299, 300, 305, 310, 327, 345, 347, 406, 410, 489, 512, 670, 700-754, 820, and 852.

**5. Plain language analysis:**

Chapter NR 150 was revised and went into effect April 1, 2014. An emergency rule is needed to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the

recent ch. NR 150 rewrite is being met all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts. Once the emergency rule is approved, a permanent rule will subsequently be required.

The pre-2014 version of ch. NR 150 classified the promulgation of most administrative rules as “Type 3 actions”, a classification requiring some form of public notice but no additional environmental analysis as part of the formal rules process. The proposed rule changes would be simple changes to clarify that emergency rules are “minor actions”, requiring no additional environmental analysis, and that the process for developing permanent rules is an “equivalent analysis action” under the new ch. NR 150, similar to how they were treated under the pre-2014 ch. NR 150. The April 2014 version of the rule was not clear to this, and the department wants to make sure that current administrative rules development processes are clear in the emergency rule.

Procedures for WEPA compliance determinations, publication requirements, and plan approvals for various actions and policies have been clarified.

The emergency rule includes clarification changes regarding strategic analysis requirements. Consistent with the intent of the current rule, the emergency rule clarifies that a strategic analysis is required for review of significant policies, but for other policies or issues the strategic analysis can be used as a discretionary tool. Clarifying changes to key definitions help to achieve this in the emergency rule.

The list of minor actions, not requiring additional environmental analysis, has been expanded to include actions that originally were intended to be outlined in program guidance. The April 2014 version relied on reference to “routine and small-scale” permits or approvals as a catch-all category for minor actions that would be listed in guidance and reviewed by the public through the guidance review process. The revision in the emergency rule clarifies by rule and note this list of activities that are minor actions, which includes in rule:

- Issuance of a minor source air construction permits
- Any emergency action that protects public health, safety or welfare.
- Issuance of licenses for servicing septage, and approvals of county programs to regulate the disposal of septage.
- Issuance of operator certifications and licenses or registrations for well drillers and pump installers.
- Issuance of aquatic plant management permits
- Model ordinances developed to assist municipalities in the creation of ordinances.
- Review and approval of municipal ordinances or approval of changes to municipal floodplain or shoreland-wetland maps.
- New or increased water withdrawals of less than 100,000 gallons per day averaged over a 90-day period, that result in an intrabasin transfer or a diversion to a straddling community

The list of equivalent analysis actions, for which a detailed environmental analysis and public disclosure was already conducted as part of department programmatic procedure, has been expanded and edited to provide additional clarity on actions covered under this subsection, and includes:

- Development of total maximum daily loads.
- Issuance, reissuance, revocation and reissuance or modification of a WPDES permit that authorizes a new source discharge that is subject to antidegradation review
- Approval of a variance from a water quality standard
- Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700-754.
- Issuance of a regulatory approvals, liability clarification letters, exemptions and technical assistance under ch. 292, Stats., and chs. NR 700-754.

## **6. Summary of, and comparison with, existing or proposed federal statutes and regulations:**

The 1970 Wisconsin Environmental Policy Act (WEPA) and s. 1.11, Stats., were modeled after the federal National Environmental Policy Act (NEPA) of 1969. NEPA created the Council on Environmental Quality (CEQ), which established guidelines and regulations to implement the Act. As with other state agencies' WEPA rules, ch. NR 150 and these clarifying provisions are based in part upon the federal CEQ guidelines. This proposed revision of ch. NR 150 will remain substantially consistent with the CEQ guidelines as required under s. 1.11 (2)(c), Stats.

**7. Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan and Minnesota):**

Neighboring states have significant differences in their related laws, so the opportunity to gain from their experience is limited. For example, Minnesota requires that counties also follow WEPA-like analysis procedures, whereas Wisconsin counties have no such requirements. Illinois' law covers only actions conducted by the state itself, whereas in Wisconsin, WEPA applies to all actions by other entities that are subject to state approvals.

**8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen:** Department of Natural Resources staff obtained the input of an internal team of staff from several department programs, building on the prior review of relevant WEPA case law and federal CEQ regulations, and involvement of a broad range of potentially interested and affected external parties.

**9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact report:** Chapter NR 150 is an administrative process rule that applies internally to the department, so impacts to businesses are minimal.

**10. Effect on small business (initial regulatory flexibility analysis):**

There will be no impact to small business as a result of this emergency rule revision. This emergency rule revision will benefit small businesses to the extent that it clarifies any ambiguity in favor of the intent of the rule, as presented to the public and approved by the NRB.

**11. Agency contact person:**

Jim Pardee  
Phone: (608) 266-0426

**12. Place where comments are to be submitted and deadline for submission:**

Written comments may be submitted at the public hearings, by regular mail, fax or email to:

Jim Pardee (OB/7)  
Department of Natural Resources  
Bureau of Energy, Transportation and Environmental Analysis  
101 S Webster St, Madison, WI 53703

Fax: (608) 264-6048  
E-mail: james.pardee@wisconsin.gov

Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

Hearing dates and the comment submission deadline are to be determined.

SECTION 1. NR 150.03 (1), (15) (intro.), (19), (25), and (26) are amended to read:

NR 150.03 (1) “Action” means any final decision by the department to exercise the department’s statutory authority that affects the quality of the human environment including those identified in s. NR 150.20 (1m) to (3), but does not include policies as defined in sub. (19).

(15) (intro.) “Minor action” means a department action that does not need to comply with s. 1.11 (2) (c), Stats., because it is not in conflict with local, state or federal environmental policies and is not likely to do any of the following:

(19) “Policy” means a written plan or set of guiding principles, priorities, or protocols to guide department action that has been ~~enacted as a statute, promulgated as an administrative rule,~~ issued as a department manual code, or approved in writing by the natural resources board or the department secretary, but does not include actions as defined in sub. (1).

(25) “Strategic analysis” means an environmental and alternatives analysis of any ~~issue or~~ policy which involves unresolved conflicts concerning alternative uses of available resources, within the meaning of s. 1.11 (2) (e), Stats.

(26) “Unresolved conflicts concerning alternative uses of available resources” means an unsettled disagreement between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin concerning a department policy affecting the utilization of a substantial natural resources, between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin or physical resource where such utilization would be of sufficient magnitude that on a statewide or regional basis would have a considerable and important impact to the natural resources of the state. To be considered an unresolved conflict concerning alternative uses of available resources, the disagreeing parties must have identified a technically and economically feasible alternative use of the contested physical or natural resource, or both, and have the ability to reasonably implement that alternative.

SECTION 2. NR 150.10 (1) and (1m) (a) are amended to read:

NR 150.10 (1) ~~GENERAL REQUIREMENT PURPOSE. Pursuant to~~ This section establishes the procedures to fulfill the requirements of s. 1.11 (2) (e) and (h), Stats., the department shall study, develop, and describe alternatives for natural resource issues or policies which involve unresolved conflicts concerning alternative uses of available resources.

(1m) (a) ~~Administrative rules and manual codes~~ Policies. The department shall conduct a strategic analysis for all new or revised ~~administrative rules and manual codes~~ policies if both of the following apply:

1. The ~~rule or manual code~~ policy involves unresolved conflicts concerning alternative uses of available resources.

2. The department has substantial discretion in formulating important provisions of the ~~rule or manual code~~ policy.

SECTION 3. NR 150.10 (1m) (b) is repealed.

SECTION 4. NR 150.10 (1m) (c) (intro.) and (2) (a) are amended to read:

NR 150.10 **(1m)** (c) *Other issues or policies.* (intro.) ~~The~~ While not required under this section, the department may ~~conduct a use the~~ strategic analysis processes in subs. (2) to (4) for any of the following issues or policies:

**(2)** (a) *General requirement.* The department shall determine the scope of ~~important issues to be analyzed~~ the analysis, potential alternative approaches, potentially affected natural resources, and likely effects of the alternatives on those resources. The department shall also identify incomplete or unavailable information that is relevant to a reasoned choice among alternatives.

SECTION 5. NR 150.20 (1) is amended to read:

NR 150.20 **(1)** ~~PROCEDURES ESTABLISHED PURPOSE. This section establishes appropriate procedures for the environmental analysis that WPEA requires for all department actions except those specifically exempted by statute. Notwithstanding subs. (1m) to (3), the department may determine to follow the EIS procedures in s. NR 150.30 for any action~~ This section establishes the procedures to fulfill the requirements of s. 1.11 (2) (c), Stats.

SECTION 6. NR 150.20 (1) (Note) is created to read:

NR 150.20 (1) (Note) There are several statutory exemptions from s. 1.11, Stats. For example, s. 283.93, Stats., exempts WPDES permit actions from compliance with s. 1.11, Stats., except for WPDES permit actions for new sources.

SECTION 7. NR 150.20 (1m) (j), and (k) are amended to read:

NR 150.20 **(1m)** (j) Reissuance, modification, revocation and reissuance, or issuance of a routine or small-scale permit.

(k) ~~Issuance of a~~ A routine or small-scale approval or action, or an approval associated with a permit.

SECTION 8. NR 150.20 (1m) (k) (Note) is created to read:

NR 150.20 **(1m)** (k) (Note) Examples of routine or small scale approvals or actions, or approvals

associated with a permit include: approval of construction plans and specifications for municipal wastewater treatment facilities and sewer collection facilities, plans and specifications approvals for industrial facilities, plans and specifications approvals for public water systems, plans and specifications approvals of CAFO reviewable facilities under s. 281.41, Stats, approvals of land application sites, approvals of land application or nutrient management plans or modifications to the plans, approvals of additives to wastewater or cooling water, listing and de-listing of impaired waters, small-scale water loss approvals, approvals of geothermal heat exchange projects, and routine variances from department rule requirements.

SECTION 9. NR 150.20 (1m) (L) is amended to read:

NR 150.20 **(1m)** (L) Confirmation of coverage under a general or registration permit.

SECTION 10. NR 150.20 (1m) (m) to (y) are created to read:

NR 150.20 **(1m)** (m) Issuance of a minor source construction permit under ch. NR 406 or an operation permit renewal or revision under ss. 285.60, and 285.62, Stats.

(n) Promulgation of emergency administrative rules under ch. 227, Stats.

(o) Any enforcement action.

(p) Any emergency action that protects public health, safety or welfare.

(q) Issuance of licenses for servicing septage, and approvals of county programs to regulate the disposal of septage.

(r) Issuance of operator certifications under s. 281.17 (3), Stats., and licenses or registrations for well drillers and pump installers.

(s) Issuance of aquatic plant management permits under ch. NR 109.

(t) Decisions related to evaluations of existing reviewable facilities and systems under ch. NR 243.

(u) Model ordinances developed to assist municipalities in the creation of ordinances.

(v) Review and approval of municipal ordinances or approval of changes to municipal floodplain or shoreland-wetland maps.

(w) Denial, termination, revocation, or suspension of a grant, permit, license, approval, variance, land application site, or of any proposed activity.

(x) New or increased water withdrawals of less than 100,000 gallons per day averaged over a 90-day period, that result in an intrabasin transfer or a diversion to a straddling community under s. 281.346 (4) (c), Stats.

(y) The issuance of general permits under ch. 30, Stats., whose standards are established in administrative code.

SECTION 11. NR 150.20 (2) (a) (intro.), 4., 10., 11., and 16. are amended to read:

NR 150.20 (2) (a) (intro.) The following actions ~~require a WEPa compliance determination under s. NR 150.35 but~~ do not require additional environmental analysis under this chapter because a detailed environmental analysis and public disclosure are conducted as part of the department programmatic procedure:

4. Issuance of a major source construction permit under ch. NR 405 or 408 or an initial operation permit under ss. 285.60, 285.61, and 285.62, Stats., for a new source or modification or relocation of an existing air emission source.

10. Issuance of findings of public interest for a proposed submerged land lease for modification of an existing shoreline under s. 30.11, Stats.

11. Issuance of an individual permit ~~for~~ or contract under subchapter II of ch. 30, Stats and s. 30.208, Stats., including structures on the beds of navigable waters or to construct culverts and bridges across navigable waters under ss. 30.12 (3m) or 30.123 (8), Stats.

16. Issuance of a permit ~~to construct, raise, enlarge or abandon, order, or approval for the regulation of a dam in navigable or nonnavigable waters under ch. 31, Stats., or establishment of historic or a new level, a flow release or approval of a drawdown of a controlled lake or flowage under s. 31.02, Stats and ch. NR 333.~~

SECTION 12. NR 150.20 (2) (a) 20. to 27. are created to read:

NR 150.20 (2) (a) 20. Promulgation of permanent administrative rules under ch. 227, Stats.

21. Development of total maximum daily loads.

22. Issuance, reissuance, revocation and reissuance, or modification of a WPDES permit that authorizes a new source discharge that is subject to antidegradation review under ch. NR 207.

23. Approval of a variance from a water quality standard under ch. 283, Stats.

24. Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700 to 754.

25. Issuance of a regulatory approvals, liability clarification letters, exemptions and technical assistance under ch. 292, Stats., and chs. NR 700 to 754.

26. Issuance of an aquatic plant management permit under NR 107.05 that meets the criteria under NR 107.04 (3).

27. Approvals of aquatic plant management plans under NR 109.09 and lake management plans under NR 191.45.

SECTION 13. NR 150.20 (3) (a) (intro.) is amended to read:

NR 150.20 (3) (a) (intro.) The following actions ~~require a WEPa compliance determination under s. NR 150.35 but~~ do not require additional environmental analysis under this chapter because one or more

environmental analysis documents exist for prior actions that are similar to the proposed action in kind, scale, and environmental setting:

SECTION 14. NR 150.20 (3) (a) 4. and 5. are repealed.

SECTION 15. NR 150.20 (4) (b) (intro.) is amended to read:

NR 150.20 (4) (b) *EIS projects*. (intro.) ~~The~~ While not required under this section, the department may decide to follow the EIS procedures in s. NR 150.30 for projects of such magnitude and complexity that one or more of the following apply:

SECTION 16. NR 150.35 is amended to read:

NR 150.35 **WEPA Compliance determination**. (1) Actions under s. NR 150.20 (2) ~~to~~ (4) (b) and (3) (b) cannot be taken until a determination is published regarding compliance with this chapter unless statutory deadlines preclude compliance with the procedural requirements of this chapter. Actions under s. NR 150.20 (1m), (2)(a) and (3)(a) are compliant with WEPA and do not require a determination prior to the action being taken.

(2) For actions under s. NR 150.20 (2) ~~(a)~~ (b) and (3) ~~(a)~~ (b), the department may publish the WEPA determination as part of the permit or approval document.

SECTION 17. STATEMENT OF EMERGENCY. Significant revisions to ch. NR 150 became effective on April 1, 2014. The changes proposed are needed to clarify procedures for the review and analysis of new administrative rules and other actions and policies to assure that the intent of the recent revisions to ch. NR 150 is being met and potential procedural questions do not invalidate years of work and public engagement. Additionally, the changes will clarify the intent of the April 1, 2014 revisions for procedures for WEPA compliance determinations, publication requirements, and plan approvals for various actions and policies, to prevent any misunderstandings or resulting challenge or delay regarding that intent.

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary to allow timely processing and implementation of department rule proposals, actions and policies. Preservation of the public welfare necessitates putting the forgoing rule into effect prior to the time that it would take if the Department complied with normal rule promulgation procedures.

SECTION 18. EFFECTIVE DATE. This rule shall take effect on the day of publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.



SECTION 19. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 13, 2014.

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Cathy Stepp, Secretary

(SEAL)