

**ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES**

The Wisconsin Natural Resources Board proposes an order to create ch. NR 151 relating to runoff pollution performance standards.

WT-8-00

Analysis Prepared by Department of Natural Resources

Statutory authority: ss. 92.15, 281.16 and 281.19, Stats.

Statutes interpreted: ss. 92.15, 227.11(2), 281.11, 281.12, 281.16, 281.65, 281.97 and 281.98, Stats.

Chapter NR 151, Runoff Management, is a new rule under which the department will administer performance standards and prohibitions in response to two legislative acts, 1997 Wisconsin Act 27 and 1999 Wisconsin Act 9. These acts require changes to the department's Nonpoint Source Water Pollution Abatement Program and to the department of agriculture, trade and consumer protection's Soil and Water Resources Management Program. Chapter NR 151 is an integral part of promulgating a series of inter-related administrative rules to implement a re-design of Wisconsin's nonpoint source programs and related water regulations as set forth in these legislative acts. Other related components of this effort that are being conducted concurrently include: repeal and recreation of ch. NR 120, Priority Watershed and Priority Lake Program; creation of ch. NR 152, Model Ordinances for Construction Site Erosion Control and Storm Water Management; creation of ch. NR 153, Runoff Management Grant Program; creation of ch. NR 154, Best Management Practices and Cost-share Conditions; creation of ch. NR 155, Urban Nonpoint Source Water Pollution Abatement and Storm Water Management Grant Program; amendment of ch. NR 216, Storm Water Discharge Permits; and repeal and recreation of ch. NR 243, Animal Feeding Operations. The department of agriculture, trade and consumer protection is revising ch. ATCP 50, Soil and Water Resource Management, to incorporate changes in its programs required under 1997 Wisconsin Act 27 and 1999 Wisconsin Act 9.

Chapter NR 151 establishes runoff pollution performance standards for non-agricultural practices, as well as runoff pollution performance standards and prohibitions for agricultural practices, and runoff pollution performance standards for transportation facilities. These standards are intended to be minimum standards necessary to achieve water quality standards. In some areas where the performance standards may not achieve the water quality standards, the chapter also cites a process to establish, by rule, targeted performance standards. The code also includes requirements for department approval of local livestock operation ordinances that exceed state performance standards and prohibitions. In addition, provisions for department implementation and enforcement of performance standards are established. The chapter also specifies a process for the development and dissemination of department technical standards to implement the non-agricultural and transportation facility performance standards.

Section 1. Chapter NR 151 is created to read:

Chapter NR 151

RUNOFF MANAGEMENT

Subchapter I – General Provisions

NR 151.001	Purpose
NR 151.002	Definitions
NR 151.003	Regional treatment exclusion
NR 151.004	State targeted performance standards

Subchapter II – Agricultural Performance Standards and Prohibitions

NR 151.01	Purpose
NR 151.015	Definitions
NR 151.02	Sheet, rill and wind erosion
NR 151.05	Manure storage facilities
NR 151.06	Clean water diversions
NR 151.07	Nutrient management
NR 151.08	Manure management prohibitions
NR 151.09	Implementation and enforcement procedures for cropland performance standards
NR 151.095	Implementation and enforcement procedures for livestock performance standards and prohibitions
NR 151.096	Local livestock operation ordinances and regulations
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Subchapter III – Non-Agricultural Performance Standards

NR 151.10	Purpose
NR 151.11	Construction site performance standard for new development and redevelopment
NR 151.12	Post-construction performance standard for new development and redevelopment
NR 151.13	Developed urban area performance standard
NR 151.14	Non-municipal property fertilizer performance standard
NR 151.15	Implementation and enforcement

Subchapter IV –Transportation Facility Performance Standards

NR 151.20	Purpose and applicability
NR 151.21	Definitions
NR 151.22	Responsible party
NR 151.23	Construction site performance standard
NR 151.24	Post-construction performance standard
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NR 151.26	Enforcement

Subchapter V – Technical Standards Development Process for Non-Agricultural Performance Standards

NR 151.30	Purpose
NR 151.31	Technical standards process
NR 151.32	Dissemination of technical standards

Subchapter I – General Provisions

NR 151.001 Purpose. This chapter establishes runoff pollution performance standards for non-agricultural facilities and transportation facilities and performance standards and prohibitions for agricultural facilities and practices designed to achieve water quality standards as required by s. 281.16(2) and (3), Stats. This chapter also specifies a process for the development and dissemination of department technical standards to implement the non-agricultural performance standards as required by s. 281.16(2)(b), Stats. If these performance standards and prohibitions do not achieve water quality standards, this chapter specifies how the department may develop targeted performance standards in conformance with s. NR 151.004.

NR 151.002 Definitions. In this chapter:

(1) "Adequate sod, or self-sustaining vegetative cover" means maintenance of sufficient vegetation types and densities such that the physical integrity of the streambank or lakeshore is preserved. Self-sustaining vegetative cover includes grasses, forbs, sedges and duff layers of fallen leaves and woody debris.

(2) "Agricultural facilities and practices" has the meaning given in s. 281.16(1), Stats.

(3) "Average annual rainfall" means a calendar year of precipitation, excluding snow, which is considered typical.

(4) "Best management practices" or "BMPs" means structural or non-structural measures, practices, techniques or devices employed to avoid or minimize soil, sediment or pollutants carried in runoff to waters of the state.

(5) "Combined sewer system" means a system for conveying both sanitary sewage and stormwater runoff.

(6) "Connected imperviousness" means an impervious surface that is directly connected to a separate storm sewer or water of the state via an impervious flow path.

(7) "Construction site" means an area upon which one or more land disturbing construction activities occur, including areas that are part of a larger common plan of development or sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan. A long-range planning document that describes separate construction projects, such as a 20-year transportation improvement plan, is not a common plan of development.

(8) "DATCP" means the department of agriculture, trade and consumer protection.

(9) "Department" means the department of natural resources.

(10) "Design storm" means a hypothetical discrete rainstorm characterized by a specific duration, temporal distribution, rainfall intensity, return frequency and total depth of rainfall.

(11) "Development" means residential, commercial, industrial or institutional land uses and associated roads.

(12) "Effective infiltration area" means the area of the infiltration system that is used to infiltrate runoff and does not include the area used for site access, berms or pretreatment.

(13) "Erosion" means the process by which the land's surface is worn away by the action of wind, water, ice or gravity.

(14) "Exceptional resource waters" means waters listed in s. NR 102.11.

(15) "Final stabilization" means that all land disturbing construction activities at the construction site have been completed and that a uniform perennial vegetative cover has been established with a density of at least 70% of the cover for the unpaved areas and areas not covered by permanent structures or that employ equivalent permanent stabilization measures.

(16) "Illicit discharge" means any discharge to a municipal separate storm sewer that is not composed entirely of runoff, except discharges authorized by a WPDES permit or any other discharge not requiring a WPDES permit such as water line flushing, landscape irrigation, individual residential car washing, fire fighting and similar discharges.

(17) "Impervious surface" means an area that releases as runoff all or a large portion of the precipitation that falls on it, except for frozen soil. Rooftops, sidewalks, driveways, parking lots and streets are examples of surfaces that typically are impervious.

(18) "In-fill area" means an undeveloped area of land located within existing urban sewer service areas, surrounded by already existing development or existing development and natural or man-made features where development cannot occur.

(19) "Infiltration" means the entry and movement of precipitation or runoff into or through soil.

(20) "Infiltration system" means a device or practice such as a basin, trench, rain garden or swale designed specifically to encourage infiltration, but does not include natural infiltration in pervious surfaces such as lawns, redirecting of rooftop downspouts onto lawns or minimal infiltration from practices, such as swales or road side channels designed for conveyance and pollutant removal only.

(21) "Karst feature" means an area or surficial geologic feature subject to bedrock dissolution so that it is likely to provide a conduit to groundwater, and may include caves, enlarged fractures, mine features, exposed bedrock surfaces, sinkholes, springs, seeps or swallets.

(22) "Land disturbing construction activity" means any man-made alteration of the land surface resulting in a change in the topography or existing vegetative or non-vegetative soil cover, that may result in runoff and lead to an increase in soil erosion and movement of sediment into waters of the state. Land disturbing construction activity includes clearing and grubbing, demolition, excavating, pit trench dewatering, filling and grading activities.

(23) "Landowner" means any person holding fee title, an easement or other interest in property, which allows the person to undertake cropping, livestock management, land disturbing construction activity or maintenance of storm water BMPs on the property.

(24) "Local governmental unit" has the meaning given in s. 92.15(1)(b), Stats.

(25) "MEP" or "maximum extent practicable" means a level of implementing best management practices in order to achieve a performance standard specified in this chapter which takes into account the best available technology, cost effectiveness and other competing issues such as human safety and welfare, endangered and threatened resources, historic properties and geographic features. MEP allows flexibility in the way to meet the performance standards and may vary based on the performance standard and site conditions.

(26) "Municipality" has the meaning given in s. 281.01 (6), Stats.

(27) "Navigable waters" and "navigable waterway" has the meaning given in s. 30.01(4m), Stats.

(28) "New development" means development resulting from the conversion of previously undeveloped land or agricultural land uses.

(29) "NRCS" means the natural resources conservation service of the U.S. department of agriculture.

(30) "Ordinary highwater mark" has the meaning given in s. NR 115.03(6).

(31) "Outstanding resource waters" means waters listed in s. NR 102.10.

(32) "Percent fines" means the percentage of a given sample of soil, which passes through a # 200 sieve.

Note: Percent fines can be determined using the "American Society for Testing and Materials", volume 04.02, "Test Method C117-95 Standard Test Method for Materials Finer than 75- μ m (No. 200) Sieve in Material Aggregates by Washing". Copies can be obtained by contacting the American society for testing and materials, 100 Barr Harbor Drive, Conshohocken, PA 19428-2959, or phone 610-832-9585, or on line at: "<http://www.astm.org>".

(33) "Performance standard" means a narrative or measurable number specifying the minimum acceptable outcome for a facility or practice.

(34) "Pervious surface" means an area that releases as runoff a small portion of the precipitation that falls on it. Lawns, gardens, parks, forests or similar vegetated areas are examples of surfaces that typically are pervious.

(35) "Pollutant" has the meaning given in s. 283.01(13), Stats.

(36) "Pollution" has the meaning given in s. 281.01(10), Stats.

(37) "Population" has the meaning given in s. 281.66(1)(c), Stats.

(38) "Preventive action limit" has the meaning given in s. NR 140.05(17).

(39) "Redevelopment" means areas where development is replacing older development.

(40) "Runoff" means storm water or precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

(41) "Sediment" means settleable solid material that is transported by runoff, suspended within runoff or deposited by runoff away from its original location.

(42) "Separate storm sewer" means a conveyance or system of conveyances including roads with drainage systems, streets, catch basins, curbs, gutters, ditches, constructed channels or storm drains, which meets all of the following criteria:

(a) Is designed or used for collecting water or conveying runoff.

(b) Is not part of a combined sewer system.

(c) Is not draining to a storm water treatment device or system.

(d) Discharges directly or indirectly to waters of the state.

(43) "Storm water management plan" means a comprehensive plan designed to reduce the discharge of pollutants from storm water, after the site has undergone final stabilization, following completion of the construction activity.

(44) "Targeted performance standard" means a performance standard that will apply in a specific area, where additional practices beyond those contained in this chapter, are necessary to meet water quality standards.

(45) "Technical standard" means a document that specifies design, predicted performance and operation and maintenance specifications for a material, device or method.

(46) "Top of the channel" means an edge, or point on the landscape landward from the ordinary high water mark of a surface water of the state, where the slope of the land begins to be less than 12% continually for at least 50 feet. If the slope of the land is 12% or less continually for the initial 50 feet landward from the ordinary high water mark, the top of the channel is the ordinary high water mark.

(47) "TR-55" means the United States department of agriculture, natural resources conservation service (previously soil conservation service), Urban Hydrology for Small Watersheds, Second Edition, Technical Release 55, June 1986, which is incorporated by reference for this chapter.

Note: Copies of this document may be inspected at the offices of the department's bureau of watershed management, NRCS, the secretary of state and the revisor of statutes, all in Madison, WI.

(48) "Transportation facility" means a highway, a railroad, a public mass transit facility, a public-use airport, a public trail or any other public work for transportation purposes such as harbor improvements under s. 85.095(1)(b), Stats. "Transportation facility" does not include building sites for the construction of public buildings and buildings that are places of employment that are regulated by the department of commerce pursuant to s. 101.1205, Stats.

(49) "Type II distribution" means a rainfall type curve as established in the "United States Department of Agriculture, Soil Conservation Service, Technical Paper 149, published 1973", which is incorporated by reference for this chapter. The Type II curve is applicable to all of Wisconsin and represents the most intense storm pattern.

Note: Copies of this document may be inspected at the offices of the department's bureau of watershed management, NRCS, the secretary of state and the revisor of statutes, all in Madison, WI.

(50) "Waters of the state" has the meaning given in s. 283.01 (20), Stats.

(51) "WPDES permit" means a Wisconsin pollutant discharge elimination system permit issued under ch. 283, Stats.

NR 151.003 Regional treatment exclusion. (1) Post-construction runoff within a non-navigable surface water that flows into a BMP, such as a wet detention pond, is not required to meet the performance standards of subchs. III and IV. Post-construction BMPs may be located in non-navigable surface waters.

(2) Except as allowed under sub. (3), post-construction runoff from new development shall meet the post-construction performance standards prior to entering a navigable surface water.

(3) Post-construction runoff from any development within a navigable surface water that flows into a BMP is not required to meet the performance standards of subchs. III and IV if:

(a) The BMP was constructed prior to the effective date of this rule ...[revisor insert date] and the BMP either received a permit issued under ch. 30, Stats., or the BMP did not require a ch. 30, Stats., permit; and

(b) The BMP is designed to provide runoff treatment from future upland development.

(4) Runoff from existing development, redevelopment and in-fill areas shall meet the post-construction performance standards in accordance with pars. (a) and (b).

(a) To the maximum extent practicable, BMPs shall be located to treat runoff prior to discharge to navigable surface waters.

(b) Post-construction BMPs for such runoff may be located in a navigable surface water if allowable under all other applicable federal, state and local regulations such as ch. NR 103 and ch. 30, Stats.

Note: This allows the location of BMPs in navigable surface waters where necessary to augment management practices upstream of the navigable surface water to meet the performance standards.

(5) The discharge of runoff from a BMP, such as a wet detention pond, or after a series of such BMPs is subject to this chapter.

Note: This section does not supersede any other applicable federal, state or local regulation such as ch. NR 103 and ch. 30, Stats.

NR 151.004 State targeted performance standards. For some areas, implementation of the statewide performance standards and prohibitions in this chapter may not be sufficient to achieve water quality standards. In those cases, the department shall determine if a specific waterbody will not attain water quality standards after substantial implementation of the performance standards and prohibitions in this chapter, using actual or predicted modeling or monitoring. If the department finds that water quality standards will not be attained using statewide performance standards and prohibitions but the implementation of targeted performance standards would attain water quality standards, the department shall promulgate the targeted performance standards by rule.

Note: Pursuant to s. 281.16(2)(a) and (3)(a), Stats., the performance standards shall be designed to meet state water quality standards.

Subchapter II - Agricultural Performance Standards and Prohibitions

NR 151.01 Purpose. The purpose of this subchapter is to prescribe performance standards and prohibitions in accordance with the implementation and enforcement procedures contained in ss. NR 151.09 and 151.095 for agricultural facilities, operations and practices.

NR 151.015 Definitions. In this subchapter:

(1) "Agricultural land use" means the use of land for agricultural practices.

(3) "Conservation practice" means a best management practice designed to reduce or prevent soil or sediment loss to the waters of the state.

(4) "Crop producer" means an owner or operator of an operation engaged in crop related agricultural practices specified in s. 281.16(1)(b), Stats.

(5) "Cropland practice" means the method, activity or management measure used to produce or harvest crops.

(6) "County land conservation committee" means the committee created by a county board under s. 92.06, Stats. "County land conservation committee" includes employees or agents of the committee whom, with committee authorization, act on behalf of the committee.

(7) "Direct runoff" means a discharge of a significant amount of pollutants to waters of the state resulting from any of the following practices:

(a) Runoff from a manure storage facility.

(b) Runoff from an animal lot that can be predicted to reach surface waters of the state through a defined or channelized flow path or man-made conveyance.

(c) Discharge of leachate from a manure pile.

(d) Seepage from a manure storage facility.

(e) Construction of a manure storage facility in permeable soils or over fractured bedrock without a liner designed in accordance with s. NR 154.04(3).

(8) "Freeboard" means a protection elevation requirement designed as a safety factor which is usually expressed in terms of a specific number of feet above a storage level or flood level and compensates for the effects of runoff from unexpected storms and other events that may cause a loss of storage volume.

(9) "Livestock facility" means a structure or system constructed or established on a livestock operation.

(10) "Livestock producer" means an owner or operator of a livestock operation.

(11) "Livestock operation" has the meaning given in s. 281.16(1)(c), Stats.

(12) "Manure" means a material that consists primarily of excreta from livestock, poultry or other animals.

(13) "Manure storage facility" means an impoundment made by constructing an embankment or excavating a pit or dugout or by fabricating a structure to contain manure and other animal or agricultural wastes.

(13m) "Municipality" has the meaning given in s. 281.01(6), Stats.

(14) "NOD" means a notice of discharge issued under s. NR 243.24(4).

(15) "Operator" means a person responsible for the oversight or management of equipment, facilities or livestock at a livestock operation, or is responsible for land management in the production of crops.

(16) "Preventive action limit" has the meaning given in s. NR 140.05(17).

(17) "Residual cover" means vegetation, or organic debris that provides soil surface protection from raindrop impact.

(18) "Site that is susceptible to groundwater contamination" under s. 281.16(1)(g), Stats., means any one of the following:

(a) An area within 250 feet of a private well.

(b) An area within 1000 feet of a municipal well.

(c) An area within 300 feet upslope or 100 feet downslope of karst features.

(d) A channel with a cross-sectional area equal to or greater than 3 square feet that flows to a karst feature.

(e) An area where the soil depth to groundwater or bedrock is less than 2 feet.

(f) An area where the soil does not exhibit one of the following soil characteristics:

1. At least a 2-foot soil layer with 40 percent fines or greater above groundwater and bedrock.

2. At least a 3-foot soil layer with 20 percent fines or greater above groundwater and bedrock.

3. At least a 5-foot soil layer with 10 percent fines, or greater above groundwater and bedrock.

Note: See s. NR 151.002(32) for definition of percent fines.

(19) "Stored manure" means manure that is kept in a manure storage facility or an unconfined manure pile.

(20) "Substantially altered" means a change initiated by an owner or operator that results in a relocation of a structure or facility or significant changes to the size, depth or configuration of a structure or facility including:

(a) Replacement of a liner in a manure storage structure.

(b) An increase in the volumetric capacity or area of a structure or facility by greater than 20%.

(c) A change in a structure or facility related to a change in livestock management from one species of livestock to another such as cattle to poultry.

(21) "Tolerable soil loss" or "T" means the maximum rate of erosion, in tons per acre per year, allowable for particular soils and site conditions that will maintain soil productivity.

(22) "Unconfined manure pile" means a quantity of manure that is at least 175 ft³ in volume and which covers the ground surface to a depth of at least 2 inches and is not confined within a manure storage facility, livestock housing facility or barnyard runoff control facility or covered or contained in a manner that prevents storm water access and direct runoff to surface water or leaching of pollutants to groundwater.

(24) "Water quality management area" or "WQMA" means the area within 1,000 feet from the ordinary high-water mark of navigable waters that consist of a lake, pond or flowage, except that, for a navigable water that is a glacial pothole lake, the term means the area within 1,000 feet from the high-water mark of the lake; the area within 300 feet from the ordinary high-water mark of navigable waters that consist of a river or stream; and a site that is susceptible to groundwater contamination, or that has the potential to be a direct conduit for contamination to reach groundwater.

NR 151.02 Sheet, rill and wind erosion. All land where crops or feed are grown shall be cropped to achieve a soil erosion rate equal to, or less than, the “tolerable” (T) rate established for that soil.

Note: Soil loss will be calculated according to the revised universal soil loss equation II as referenced in ch. ATCP 50 and appropriate wind loss equations as referenced in ch. ATCP 50.

NR 151.05 Manure storage facilities. (1) APPLICABILITY. All livestock producers building new manure storage facilities, substantially altering manure storage facilities, or choosing to abandon their manure storage facilities shall comply with this section.

(2) NEW CONSTRUCTION AND ALTERATIONS. (a) New or substantially altered manure storage facilities shall be designed, constructed and maintained to minimize the risk of structural failure of the facility, minimize leakage of the facility in order to comply with groundwater standards, and maintain one foot of freeboard storage or adequate freeboard storage to the equivalent volume of a 25-year, 24-hour storm, whichever is greater.

(b) A new manure storage facility means a facility constructed after the effective date of this rule ...[revisor insert date].

(c) A substantially altered manure storage facility is a manure storage facility that is substantially altered after the effective date of this rule ...[revisor insert date].

(3) CLOSURE. (a) Closure of a manure storage facility shall occur when an operation where the facility is located ceases operations, or manure has not been added or removed from the facility for a period of 24 months. Manure facilities shall be closed in a manner that will prevent future contamination of groundwater and surface waters.

(b) The owner or operator may retain the facility for a longer period of time by demonstrating to the department that all of the following conditions are met:

1. The facility is designed, constructed and maintained in accordance with sub. (2).
2. The facility is designed to store manure for a period of time longer than 24 months.
3. Retention of the facility is warranted based on anticipated future use.

(4) FAILING AND LEAKING EXISTING FACILITIES. Manure storage facilities in existence as of the effective date of this rule ...[revisor insert date] that pose an imminent threat to public health or fish and aquatic life or are causing a violation of groundwater standards shall be upgraded, replaced or abandoned in accordance with this section.

NR 151.06 Clean water diversions. (1) All livestock producers within a water quality management area shall comply with this section.

(2) Runoff shall be diverted away from contacting feedlot, manure storage areas and barnyard areas within water quality management areas except that a diversion to protect a private well under s. NR

151.015 (18) (a) is required only when the feedlot, manure storage area or barnyard area is located upslope from the private well.

NR 151.07 Nutrient management. (1) All crop producers and livestock producers that apply manure or other nutrients directly or through contract to agricultural fields shall comply with this section.

Note: Manure management requirements for concentrated animal feeding operations covered under a WPDES permit are contained in ch. NR 243.

(2) This performance standard does not apply to industrial waste and byproducts regulated under ch. NR 214, municipal sludge regulated under ch. NR 204, septage regulated under ch. NR 113 or manure directly deposited by pasturing or grazing animals on fields dedicated to pasturing or grazing.

Note: In accordance with ss. ATCP 50.04, 50.48 and 50.50, nutrient management planners, Wisconsin certified soil testing laboratories and dealers of commercial fertilizer are advised to make nutrient management recommendations based on the performance standard for nutrient management, s. NR 151.07, to ensure that their customers comply with this performance standard.

(3) Manure, commercial fertilizer and other nutrients shall be applied in conformance with a nutrient management plan.

(a) The nutrient management plan shall be designed to limit or reduce the discharge of nutrients to waters of the state for the purpose of complying with state water quality standards and groundwater standards.

(b) Nutrient management plans for croplands in watersheds that contain impaired surface waters or in watersheds that contain outstanding or exceptional resource waters shall meet the following criteria:

1. Unless otherwise provided in this paragraph, the plan shall be designed to manage soil nutrient concentrations so as to maintain or reduce delivery of nutrients contributing to the impairment of impaired surface waters and to outstanding or exceptional resource waters.

2. The plan may allow for an increase in soil nutrient concentrations at a site if necessary to meet crop demands.

3. For lands in watersheds containing exceptional or outstanding resource waters, the plan may allow an increase in soil nutrient concentrations if the plan documents that any potential nutrient delivery to the exceptional or outstanding resource waters will not alter the background water quality of the exceptional or outstanding resource waters. For lands in watersheds containing impaired waters, the plan may allow an increase in soil nutrient concentrations if a low risk of delivery of nutrients from the land to the impaired water can be demonstrated.

(c) In this standard, impaired surface waters are waters identified as impaired pursuant to 33 USC 1313 (d) (1) (A) and 40 CFR 130.7. Outstanding or exceptional resource waters are identified in Ch. NR 102.

(4) This section is in effect on January 1, 2005 for existing croplands under s. NR 151.09 (4) that are located within any of the following:

(a) Watersheds containing outstanding or exceptional resource waters.

(b) Watersheds containing impaired waters.

(c) Source water protection areas defined in s. NR 243.03 (29).

(5) This section is in effect on January 1, 2008 for all other existing croplands under s. NR 151.09(4).

(6) This section is in effect for all new croplands under s. NR 151.09(4) one year after the effective date of the rule ...[revisor inserts date].

Note: The purpose of the phased implementation of this standard is to allow the department sufficient time to work with the department of agriculture, trade and consumer protection and local governmental units to develop and implement an information, education and training program on nutrient management for affected stakeholders.

NR 151.08 Manure management prohibitions. (1) All livestock producers shall comply with this section.

(2) A livestock operation shall have no overflow of manure storage facilities.

(3) A livestock operation shall have no unconfined manure pile in a water quality management area.

(4) A livestock operation shall have no direct runoff from a feedlot or stored manure into the waters of the state.

(5) (a) A livestock operation may not allow unlimited access by livestock to waters of the state in a location where high concentrations of animals prevent the maintenance of adequate sod or self-sustaining vegetative cover.

(b) This prohibition does not apply to properly designed, installed and maintained livestock or farm equipment crossings.

NR 151.09 Implementation and enforcement procedures for cropland performance standards. (1) **PURPOSE.** The purpose of this section is to identify the procedures the department will follow in implementing and enforcing the cropland performance standards pursuant to ss. 281.16 (3) and 281.98, Stats. This section will also identify circumstances under which an owner or operator of cropland is required to comply with the cropland performance standards. In this section, "cropland performance standards" means performance standards in ss. NR 151.02 and 151.07.

(2) **ROLE OF MUNICIPALITIES.** The department may rely on municipalities to implement the procedures and make determinations established in this section.

Note: In most cases, the department will rely on municipalities to fully implement the cropland performance standards. The department intends to utilize the procedures in this section in cases where a municipality has requested assistance in implementing and enforcing the cropland performance standards or in cases where a municipality has failed to address an incident of noncompliance with the

performance standards in a timely manner. The department recognizes that coordination between local municipalities, the department of agriculture, trade and consumer protection and other state agencies is needed to achieve statewide compliance with the performance standards. Accordingly, the department plans on working with counties, the department of agriculture, trade and consumer protection and other interested partners to develop a detailed intergovernmental strategy for achieving compliance with the performance standards that recognizes the procedures in these rules, state basin plans and the priorities established in land and water conservation plans.

Note: The department implementation and enforcement procedures for livestock performance standards relating to manure management are included in s. NR 151.095 and ch. NR 243.

(3) LANDOWNER AND OPERATOR REQUIREMENTS. (a) *Introduction.* This section identifies compliance requirements for landowners and operators based on whether the cropland is existing or new and whether cost sharing is required and made available to the landowner or operator.

(b) *General requirements.* If any cropland is meeting a cropland performance standard on or after the effective date of the standard, the cropland performance standard shall continue to be met by the existing landowner or operator, heirs or subsequent owners or operators of the cropland. If a landowner or operator alters or changes the management of the cropland in a manner that results in noncompliance with the performance standard, the landowner or operator shall bring the cropland back into compliance, regardless of whether cost-sharing is made available. This paragraph does not apply to croplands completing enrollment determined to be existing under sub. (4) (b) 2.

Note: The department or a municipality may use conservation plans, cost share agreements, deed restrictions, personal observations or other information to determine whether a change has occurred.

(c) *Existing cropland requirements.* 1. A landowner or operator of an existing cropland, defined under sub. (4)(b), shall comply with a cropland performance standard if all of the following have been done by the department:

a. Except as provided in subd. 2. and 3., a determination is made that cost sharing has been made available in accordance with sub. (4)(d) on or after the effective date of the cropland performance standard.

b. The landowner or operator has been notified in accordance with sub. (5) or (6).

2. A landowner or operator of existing cropland, defined under sub. (4)(b), shall comply with a cropland performance standard, regardless of whether cost sharing is available, in situations where the best management practices and other corrective measures needed to meet the performance standards do not involve eligible costs.

3. A landowner or operator of an existing cropland that voluntarily proposes to construct or reconstruct a manure storage system shall comply with s. NR 151.07, regardless of whether cost sharing is made available, if the nutrient management plan is required pursuant to a local permit for the manure storage system.

Note: Although the requirement for the nutrient management plan in this subd. 3 is tied to construction of a new manure storage system, the department intends to implement the nutrient management standard through s. NR 151.09 rather than through s. NR 151.095.

(d) *New cropland requirements.* A landowner or operator of a new cropland, defined under sub. (4)(b), shall comply with the cropland performance standards, regardless of whether cost sharing is available.

Note: Under s. 281.16 (3)(e), Stats., a landowner or operator may not be required by the state or a municipality through an ordinance to bring existing croplands into compliance with the cropland performance standards, technical standards or conservation practices unless cost-sharing is available in accordance with this section.

(4) DEPARTMENT DETERMINATIONS. (a) *Scope of determinations.* If croplands are not in compliance with a cropland performance standard, the department shall make determinations in accordance with the procedures and criteria in this subsection.

(b) *Cropland status.* The department shall classify non-complying croplands to be either new or existing for purposes of administering this section and s. 281.16 (3) (e), Stats. In making the determination, the department shall base the decision on the following:

1. An existing cropland is one that meets all of the following criteria:

a. The cropland was being cropped as of the effective date of the standard.

b. The cropland is not in compliance with a cropland performance standard in this subchapter as of the effective date of the standard. The reason for non-compliance of the cropland may not be failure of the landowner or operator to maintain an installed best management practice in accordance with a cost-share agreement or contract.

2. An existing cropland also includes land enrolled on the effective date of the rule ...[revisor insert date] in the conservation reserve or conservation reserve enhancement program administered by the United States Department of Agriculture.

3. A new cropland is one that does not meet the definition under subd. 1. or 2., including:

a. Land without a previous history of cropping that is converted to cropland after the effective date of the standard. "Without a previous history of cropping" means land where crops have not been grown and harvested for agricultural purposes in the last 10 years prior to the conversion to cropland.

b. Cropland that is in existence and in compliance with a performance standard on or after the effective date of the standard and that undergoes a change in a cropland practice that results in noncompliance with the performance standards.

Note: The department or a municipality may use conservation plans, cost share agreements, deed restrictions, personal observations or other information to determine whether a change has occurred.

4. Change in ownership may not be used as the sole basis for determining whether a cropland is existing or new for purposes of administering this subsection.

(c) *Eligible costs.* 1. If cost sharing is required to be made available under sub. (3) (c), the department shall determine the total cost of best management practices and corrective measures needed to bring a cropland into compliance with performance standards and shall determine which of those costs are eligible for cost-sharing for the purposes of administering this section and s. 281.16 (3) (e), Stats.

2. The cost-share eligibility provisions identified in chs. NR 153 and 154 shall be used in identifying eligible costs for installation of best management practices and corrective measures.

3. The technical assistance eligibility provisions identified in ss. NR 153.15 (1) and 153.16 (1) or ch. ATCP 50 shall be used in identifying eligible costs for planning, design and construction services.

4. If cost sharing is provided by DATCP or the department, the corrective measures shall be implemented in accordance with the BMPs and technical standards specified in ch. NR 154 or subch. VIII of ch. ATCP 50.

Note: Under chs. NR 153 and 154, eligible costs typically include capital costs and significant other expenses, including design costs, incurred by the landowner or operator. Eligible costs do not include the value or amount of time spent by a landowner or operator in making management changes.

(d) *Determination of cost-share availability.* 1. For purposes of administering this section and s. 281.16(3)(e), Stats., if cost sharing is required to be made available under sub. (3), the department shall make a determination as to whether cost sharing has been made available on or after the effective date of the cropland standard to cover the eligible costs for a landowner or operator to comply with the cropland performance standard.

2. Cost sharing under s. 281.65, Stats., shall be considered available when all of the following have been met:

a. Cost share dollars are offered in accordance with either of the following: the department has entered into a runoff management grant agreement under ch. NR 153 or a nonpoint source grant agreement under ch. NR 120, and a notice under sub. (5) has been issued by the department or a municipality; or the department directly offers cost share assistance and issues a notice under sub. (5).

b. The grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., provide at least 70% of the eligible costs to implement the best management practices or other corrective measures for croplands needed to meet a cropland performance standard.

c. In cases of economic hardship determined in accordance with s. NR 154.03 (4), the grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., cover not less than 70% and not greater than 90% of the eligible costs to implement the best management practices or other corrective measures needed to meet a cropland performance standard.

3. For funding sources other than those administered by s. 281.65, Stats., the department may make a determination of cost share availability after consulting with DATCP and ch. ATCP 50.

Note: Under s. 281.16 (3) (e), DATCP is responsible for promulgating rules that specify criteria for determining whether cost-sharing is available from sources other than s. 281.65, Stats., including s. 92.14, Stats. Pursuant to s. 281.16 (3) (e), Stats., a municipality is required to follow the department's

definition of cost-share availability if funds are utilized under s. 281.65, Stats. If funds are utilized from any other source, a municipality must defer to DATCP's definition of cost share availability.

(5) NOTIFICATION REQUIREMENTS AND COMPLIANCE PERIODS FOR EXISTING CROPLANDS WHEN COST-SHARING IS REQUIRED. (a) *Landowner notification.* 1. The department shall notify a landowner or operator in writing of the determinations made under sub. (4) and implementation requirements for existing croplands where cost sharing is required for compliance.

2. The notice shall be sent certified mail, return receipt requested or personal delivery.

3. The following information shall be included in the notice:

a. A description of the cropland performance standard being violated.

b. The cropland status determination made in accordance with sub. (4) (b).

c. The determination made in accordance with sub. (4) (c) as to which best management practices or other corrective measures that are needed to comply with cropland performance standards are eligible for cost sharing.

Note: Some best management practices required to comply with cropland performance standards involve no eligible cost to the landowner or operator and are not eligible for cost sharing.

d. The determination made in accordance with sub. (4)(d) that cost sharing is available for eligible costs to achieve compliance with cropland performance standards, including a written offer of cost sharing.

e. An offer to provide or coordinate the provision of technical assistance.

f. A compliance period for meeting the cropland performance standard.

g. An explanation of the possible consequences if the landowner or operator fails to comply with provisions of the notice, including enforcement or loss of cost sharing, or both.

h. An explanation of state or local appeals procedures.

(b) *Compliance schedule.* 1. A landowner or operator that receives the notice under par. (a) shall install or implement best management practices and corrective measures to meet the performance standards in the time period specified in the notice, if cost sharing is available in accordance with sub. (4) (d) 2.

2. The compliance period identified in the notice in par. (a) shall be determined by the department as follows:

a. The compliance period shall begin on the postmark date of the notice or the date of personal delivery.

b. The length of the compliance period shall be from 60 days to 3 years unless otherwise provided for in this subdivision.

c. The length of the compliance period may be less than 60 days if the site is an imminent threat to public health, fish and aquatic life.

d. The department may authorize an extension up to 4 years on a case-by-case basis provided that the reasons for the extension are beyond the control of the landowner or operator. A compliance period may not be extended to exceed 4 years in total.

3. Once a landowner or operator achieves compliance with a cropland performance standard, compliance with the standard shall be maintained by the existing landowner or operator and heirs or subsequent owners, regardless of cost sharing.

(6) NOTIFICATION REQUIREMENTS AND COMPLIANCE PERIODS FOR EXISTING CROPLANDS IN SITUATIONS WHEN NO ELIGIBLE COSTS ARE INVOLVED. (a) *Landowner notification.*

1. The department shall notify a non-complying landowner or operator of existing croplands of the determinations made under sub. (4).

2. The notice shall be sent certified mail, return receipt requested, or via personal delivery.

3. The following information shall be included in the notice:

a. A description of the cropland performance standard that is being violated and the determination that corrective measures do not involve eligible costs under sub. (4) (c).

b. The cropland status determination made in accordance with sub. (4) (b).

c. A compliance period for achieving the cropland performance standard. The compliance period may not exceed the time limits in par. (b).

d. An explanation of the consequences if the landowner or operator fails to comply with provisions of the notice.

e. An explanation of state or local appeals procedures.

(b) *Compliance period.* 1. The compliance period for existing croplands where best management practices and other corrective measures do not involve eligible costs shall be in accordance with the following:

a. The compliance period shall begin on the postmark date of the notice or the date of personal delivery.

b. The length of the compliance period shall be from 60 days to 2 years unless otherwise provided for in this subsection.

c. The length of the compliance period may be less than 60 days if the site is an imminent threat to public health, fish and aquatic life.

2. Once compliance with a cropland performance standard is attained, compliance with the standard shall be maintained by the existing landowner or operator and heirs or subsequent owners.

(c) *Combined notices.* The department may meet multiple notification requirements under par. (a), sub. (5) and s. NR 151.095 within any single notice issued to a landowner or operator.

(7) ENFORCEMENT. (a) *Authority to initiate enforcement.* The department may take enforcement action pursuant to s. 281.98, Stats., or other appropriate actions, against the landowner or operator of a cropland for failing to comply with the cropland performance standards in this subchapter or

approved variances to the cropland performance standards provided by the department under s. NR 151.097.

(b) *Enforcement following notice and direct enforcement.* The department shall provide notice to the landowner or operator of an existing cropland in accordance with subs. (5) and (6) prior to the department initiating enforcement action under s. 281.98, Stats.

Note: The implementation and enforcement procedures in this section are limited to actions taken by the department under s. 281.98, Stats., for noncompliance with a cropland performance standard. Pursuant to other statutory authority, the department may take direct enforcement action without cost sharing against a crop producer for willful or intentional acts or other actions by a landowner or operator that pose an immediate or imminent threat to human health or the environment.

Note: An owner or operator of a new cropland is required to meet the cropland performance standards by incorporating necessary management measures at the time the new cropland is created. This requirement shall be met regardless of cost sharing. The department may pursue direct enforcement under s. 281.98, Stats. against landowners or operators of new croplands not in compliance.

(8) NOTIFICATION TO MUNICIPALITIES. The department shall notify the appropriate municipality, including a county land conservation committee, prior to taking any of the following actions under this section:

(a) Contacting a landowner or operator to investigate compliance with cropland performance standards.

(b) Issuing a notice under sub. (5) or (6) to a landowner or operator.

(c) Taking enforcement action under s. 281.98, Stats., against a landowner or operator for failing to comply with cropland performance standards in this subchapter.

(d) Notification is not required if the site is an imminent threat to public health or fish and aquatic life.

NR 151.095 Implementation and enforcement procedures for livestock performance standards and prohibitions. (1) PURPOSE. The purpose of this section is to identify the procedures the department will follow in implementing and enforcing the livestock performance standards and prohibitions pursuant to ss. 281.16(3) and 281.98, Stats. If a livestock performance standard is also listed as a cropland performance standard under s. NR 151.09, the department may choose the procedures of either s. NR 151.09 or this section to obtain compliance with the standard. This section will also identify circumstances under which an owner or operator of a livestock facility is required to comply with livestock performance standards and prohibitions. In this section, "livestock performance standards and prohibitions" means the performance standards and prohibitions in ss. NR 151.05, 151.06 and 151.08.

Note: The nutrient management standard in s. NR 151.07 should be implemented through the procedures in s. NR 151.09.

(2) ROLE OF MUNICIPALITIES. The department may rely on municipalities to implement the procedures and make determinations outlined in this section.

Note: In most cases, the department will rely on municipalities to fully implement the livestock performance standards and prohibitions. The department intends to utilize the procedures in this section in cases where a municipality has requested assistance in implementing and enforcing the performance standards or prohibitions or in cases where a municipality has failed to address an incident of noncompliance with the performance standards or prohibitions in a timely manner. The department recognizes that coordination between local municipalities, the department of agriculture, trade and consumer protection and other state agencies is needed to achieve statewide compliance with the performance standards and prohibitions. Accordingly, the department plans on working with counties, the department of agriculture, trade and consumer protection and other interested partners to develop a detailed intergovernmental strategy for achieving compliance with the performance standards and prohibitions that recognizes the procedures in these rules, state basin plans and the priorities established in land and water conservation plans.

Note: Additional implementation and enforcement procedures for livestock performance standards and prohibitions are in ch. NR 243, including the procedures for the issuance of a NOD.

(3) EXEMPTIONS. The department may follow the procedures in ch. NR 243 and is not obligated to follow the procedures and requirements of this section in the following situations:

(a) If the livestock operation holds a WPDES permit.

(b) If the department has determined that the issuance of a NOD to the owner or operator of the livestock operation is warranted. Circumstances in which a NOD may be warranted include:

1. The department has determined that a livestock facility has a point source discharge under s. NR 243.24.

2. The department has determined that a discharge to waters of the state is occurring and the discharge is not related to noncompliance with the performance standards or prohibitions.

3. The department has determined that a municipality is not addressing a facility's noncompliance with the performance standards and prohibitions in a manner consistent with the procedures and timelines established in this section.

(4) LIVESTOCK OWNER AND OPERATOR REQUIREMENTS. (a) *Introduction.* This section identifies compliance requirements for a livestock owner or operator based on whether a livestock facility is existing or new and whether cost sharing is required to be made available to a livestock owner or operator.

(b) *General requirements.* If any livestock facility is meeting a livestock performance standard or prohibition on or after the effective date of the standard or prohibition, the livestock performance standard or prohibition shall continue to be met by the existing owner or operator, heirs or subsequent owners or operators of the facility. If an owner or operator alters or changes the management of the livestock facility in a manner that results in noncompliance with a livestock performance standard or prohibition, the owner or operator shall bring the livestock facility back into compliance regardless of cost-share availability.

(c) *Existing livestock facility requirements.* 1. An owner or operator of an existing livestock facility, defined under sub. (5) (b), shall comply with a livestock performance standard or prohibition if all of the following have been done by the department:

a. Except as provided in subd. 2., a determination is made that cost sharing has been made available in accordance with sub. (5) (d) on or after the effective date of the livestock performance standard or prohibition.

b. The owner or operator of the livestock facility has been notified in accordance with sub. (6) or (7).

2. An owner or operator of an existing livestock facility, defined under sub. (5) (b), shall comply with the livestock performance standards and prohibitions, regardless of whether cost sharing is available, in situations where best management practices and other corrective measures needed to meet the performance standards do not involve eligible costs.

(d) *New livestock facility requirements.* An owner or operator of a new livestock facility, defined under sub. (5) (b), shall comply with the livestock performance standards and prohibitions, regardless of whether cost sharing is available.

Note: Under s. 281.16 (3) (e), Stats., an owner or operator may not be required by the state or a municipality through an ordinance or regulation to bring existing livestock facilities into compliance with the livestock performance standards or prohibitions, technical standards or conservation practices unless cost-sharing is available in accordance with this section.

(5) DEPARTMENT DETERMINATIONS. (a) *Scope of determinations.* If a livestock facility is not in compliance with a livestock performance standard or prohibition, the department shall make determinations in accordance with the procedures and criteria in this subsection.

(b) *Livestock facility status.* The department shall classify a non-complying livestock facility on an operation to be either new or existing for purposes of administering this section and s. 281.16 (3) (e), Stats. In making the determination, the department shall base the decision on the following:

1. An existing livestock facility is one that meets all of the following criteria:

a. The facility is in existence as of the effective date of the livestock performance standard or prohibition.

b. The facility is not in compliance with a livestock performance standard or prohibition in this subchapter as of the effective date of the livestock performance standard or prohibition. The reason for noncompliance of the livestock facility may not be failure of the owner or operator to maintain an installed best management practice in accordance with a cost-share agreement or contract.

2. A new livestock operation or facility is one that does not meet the definition under subd. 1., including:

a. A livestock operation or facility that is established or installed after the effective date of the livestock performance standard or prohibition, including the placement of livestock structures on a site that did not previously have structures, or placement of animals on lands that did not have animals as of

the effective date of the livestock performance standard or prohibition, unless the land is part of an existing rotational grazing or pasturing operation.

b. For a livestock operation that is in existence as of the effective date of the livestock performance standard or prohibition that establishes or constructs or substantially alters a facility after the effective date of the livestock performance standard or prohibition, the facilities constructed, established or substantially altered after the effective date of the livestock performance standard or prohibition are considered new, except as specified in subd. 3.

c. A livestock facility that is in existence and in compliance with a livestock performance standard or prohibition on or after the effective date of the livestock performance standard or prohibition and that undergoes a change in the livestock facility that results in noncompliance with the livestock performance standard or prohibition.

3. Pursuant to the implementation procedures in this section, if the department or a municipality directs an owner or operator of an existing livestock facility to construct a facility as a corrective measure to comply with a performance standard or prohibition on or after the effective date of the livestock performance standard or prohibition, or directs the owner or operator to reconstruct the existing facility as a corrective measure on or after the effective date of the livestock performance standard or prohibition, the constructed facilities are not considered new for purposes of installing or implementing the corrective measure.

4. A livestock facility that meets the criteria in subd. 1 and has subsequently been abandoned shall retain its status as an existing livestock facility if livestock of similar species and number of animal units are reintroduced within 5 years of abandonment.

5. Change in ownership may not be used as the sole basis for determining whether a livestock facility is existing or new for purposes of administering this subsection.

(c) *Eligible costs.* 1. If cost sharing is required to be made available under sub. (4) (c), the department shall determine the total cost of best management practices and corrective measures needed to bring a livestock facility into compliance with a livestock performance standard or prohibition and shall determine which of those costs are eligible for cost-sharing for the purposes of administering this section and s. 281.16 (3) (e), Stats.

2. The cost-share eligibility provisions identified in chs. NR 153 and 154 shall be used in identifying eligible costs for installation of best management practices and corrective measures.

3. The technical assistance eligibility provisions identified in ss. NR 153.15 (1) and 153.16 (1) or ch. ATCP 50 shall be used in identifying eligible costs for planning, design and construction services.

4. If cost sharing is provided by DATCP or the department, the corrective measures shall be implemented in accordance with the best management practices and technical standards specified in ch. NR 154 or subch. VIII of ch. ATCP 50.

Note: Under chs. NR 153 and 154, eligible costs typically include capital costs and significant other expenses, including design costs, incurred by the owner or operator of the livestock operation.

Eligible costs do not include the value or amount of time spent by an owner or operator in making management changes.

(d) *Determination of cost-share availability.* 1. For purposes of administering this section and s. 281.16(3)(e), Stats., if cost sharing is required to be made available under sub. (4) (c), the department shall make a determination as to whether cost sharing has been made available on or after the effective date of the livestock performance standard or prohibition to cover eligible costs for an owner or operator to comply with a livestock performance standard or prohibition.

2. Cost sharing under s. 281.65, Stats., shall be considered available when all of the following have been met:

a. Cost share dollars are offered in accordance with either of the following: the department has entered into a runoff management grant agreement under ch. NR 153 or a nonpoint source grant agreement under ch. NR 120, and a notice under sub. (6) or under s. NR 243.24 (4) has been issued by the department or a municipality; or the department directly offers cost sharing and issues a notice under sub. (6) or s. NR 243.24(4).

b. The grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., provide at least 70% of the eligible costs to implement the best management practices or other corrective measures needed for a livestock facility to meet a livestock performance standard or prohibition.

c. In cases of economic hardship determined in accordance with s. NR 154.03 (4), the grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., cover not less than 70% and not greater than 90% of the eligible costs to implement the best management practices or other corrective measures needed for a livestock facility to meet a livestock performance standard or prohibition.

d. If an existing livestock operation with less than 250 animal units wants to expand at the time it is upgrading a facility to meet a performance standard or prohibition pursuant to a notice in sub. (6) or under s. NR 243.24(4), the grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., shall also provide at least 70% of eligible costs needed to bring any expansion of facilities of up to 300 animal units into compliance with the performance standard or prohibition. In cases of economic hardship, the grants in subd. 2.a., alone or in combination with other funding determined to be available under subd. 3., shall also provide between 70% and 90% of the eligible costs needed to bring any expansion of facilities of up to 300 animal units into compliance with the performance standards and prohibitions.

Note: For livestock operations with less than 250 animal units, that portion of any expansion of facilities to accommodate more than 300 animal units is not eligible for cost sharing under s. NR 153.15(2)(d)1. For an existing livestock operation with greater than 250 animal units, but less than the number of animal units requiring a WPDES permit under s. NR 243.12(1)(a), (b) or (c), cost sharing may be provided under s. NR 153.15(2)(d)2., for at least 70 % of eligible costs to bring up to a 20% increase in

livestock population into compliance with the performance standards and prohibitions; however, cost sharing for eligible costs up to a 20% expansion in livestock population is not required to be made available for compliance.

3. For funding sources other than those administered by s. 281.65, Stats., the department may make a determination of cost share availability after consulting with DATCP and ch. ATCP 50.

Note: Under s. 281.16 (3) (e), Stats., DATCP is responsible for promulgating rules that specify criteria for determining whether cost-sharing is available from sources other than s. 281.65, Stats., including s. 92.14, Stats. Pursuant to s. 281.16 (3) (e), Stats., a municipality is required to follow the department's definition of cost share availability if funds are utilized under s. 281.65, Stats. If funds are utilized from any other source, a municipality shall defer to DATCP's definition of cost share availability.

(6) NOTIFICATION REQUIREMENTS AND COMPLIANCE PERIODS FOR EXISTING LIVESTOCK FACILITIES WHEN COST-SHARING IS REQUIRED. (a) *Owner or operator notification.* 1. The department shall notify an owner or operator in writing of the determinations made under sub. (5) and implementation requirements for existing livestock facilities where cost sharing is required for compliance.

2. The notice shall be sent certified mail, return receipt requested or personal delivery.

3. The following information shall be included in the notice:

a. A description of the livestock performance standard or prohibition being violated.

b. The livestock facility status determination made in accordance with sub. (5) (b).

c. The determination made in accordance with sub. (5)(c) as to which best management practices or other corrective measures needed to comply with a livestock performance standard or prohibition are eligible for cost sharing.

Note: Some best management practices required to comply with a livestock performance standard or prohibition involves no eligible costs to the owner or operator.

d. The determination made in accordance with sub. (5)(d) that cost sharing is available for eligible costs to achieve compliance with a livestock performance standard or prohibition, including a written offer of cost sharing.

e. An offer to provide or coordinate the provision of technical assistance.

f. A compliance period for meeting the livestock performance standard or prohibition.

g. An explanation of the possible consequences if the owner or operator fails to comply with provisions of the notice, including enforcement or loss of cost sharing, or both.

h. An explanation of state or local appeals procedures.

(b) *Compliance period.* 1. An owner or operator that receives the notice under par. (a) shall install or implement best management practices and corrective measures to meet a performance standard or prohibition in the time period specified in the notice, if cost-sharing is available in accordance with sub. (5) (d) 2.

2. The compliance period identified in the notice in par. (a) shall be determined by the department as follows:

a. The compliance period shall begin on the post-mark date of the notice or the date of personal delivery.

b. The length of the compliance period shall be from 60 days to 3 years unless otherwise provided for in this subdivision.

c. The length of the compliance period may be less than 60 days if the site is an imminent threat to public health or fish and aquatic life.

d. The department may authorize an extension up to 4 years on a case-by-case basis provided that the reasons for the extension are beyond the control of the owner or operator of the livestock facility. A compliance period may not be extended to exceed 4 years in total.

3. Once an owner or operator achieves compliance with a livestock performance standard or prohibition, compliance with the standard or prohibition shall be maintained by the existing owner or operator and heirs or subsequent owners or operators, regardless of cost-sharing.

(7) NOTIFICATION REQUIREMENTS AND COMPLIANCE PERIODS FOR EXISTING LIVESTOCK FACILITIES IN SITUATIONS WHEN NO ELIGIBLE COSTS ARE INVOLVED. (a) *Owner or operator notification.* 1. The department shall notify a non-complying owner or operator of an existing livestock facility of the determinations made under sub. (5).

2. The notice shall be sent certified mail, return receipt requested or personal delivery.

3. The following information shall be included in the notice:

a. A description of the livestock performance standard or prohibition that is being violated and the determination that corrective measures do not involve eligible costs under sub. (5) (c).

b. The livestock operation status determination made in accordance with sub. (5) (b).

c. A compliance period for meeting the livestock performance standard or prohibition. The compliance period may not exceed the time limits in par. (b).

d. An explanation of the consequences if the owner or operator fails to comply with provisions of the notice.

e. An explanation of state or local appeals procedures.

(b) *Compliance period.* 1. The compliance period for existing livestock facilities where best management practices and other corrective measures do not involve eligible costs shall be in accordance with the following;

a. The compliance period shall begin on the postmark date of the notice or the date of personal delivery.

b. The length of the compliance period shall be from 60 days to 2 years unless otherwise provided for in this subdivision.

c. The length of the compliance period may be less than 60 days if the site is an imminent threat to public health, or fish and aquatic life.

2. Once compliance with a livestock performance standard or prohibition is attained, compliance with the performance standard or prohibition shall be maintained by the existing owner or operator and heirs or subsequent owners or operators.

(c) *Combined notices.* The department may meet multiple notification requirements under par. (a), sub. (6) and s. NR 151.09 within any single notice issued to the owner or operator.

(8) ENFORCEMENT. (a) *Authority to initiate enforcement.* The department may take action pursuant s. 281.98, Stats., or other appropriate actions, against the owner or operator of a livestock operation for failing to comply with the livestock performance standards and prohibitions in this subchapter or approved variances to the livestock performance standards provided by the department under s. NR 151.097.

(b) *Enforcement following notice and direct enforcement.* The department shall provide notice to the owner or operator of an existing livestock facility in accordance with sub. (6) or (7) prior to the department initiating enforcement action under s. 281.98, Stats.

Note: The implementation and enforcement procedures in this section are limited to actions taken by the department under s. 281.98, Stats., for noncompliance with a livestock performance standard or prohibition. Pursuant to other statutory authority, the department may take direct enforcement action without cost-sharing against a livestock producer for willful or intentional acts or other actions by a producer that pose an imminent or immediate threat to human health or the environment.

Note: An owner or operator of a new livestock facility is required to meet the livestock performance standards and prohibitions at the time the new facility is created. This requirement shall be met regardless of cost sharing.

(9) NOTIFICATION TO MUNICIPALITIES. The department shall notify the appropriate municipality, including a county land conservation committee, prior to taking any of the following actions under this subsection:

(a) Contacting an owner or operator to investigate compliance with livestock performance standards and prohibitions.

(b) Issuing a notice under sub. (6) or (7) to an owner or operator.

(c) Taking enforcement action under s. 281.98, Stats., against an owner or operator for failing to comply with a livestock performance standard or prohibition in this subchapter.

(d) Notification is not required if the site is an imminent threat to public health or fish and aquatic life.

NR 151.096 Local livestock operation ordinances and regulations. (1) LOCAL REGULATIONS THAT EXCEED STATE STANDARDS; APPROVAL REQUIRED. (a) Except as provided in par. (b), a local governmental unit may not enact a livestock operation ordinance or regulation for water quality protection that exceeds the performance standards or prohibitions in ss. NR 151.05 to 151.08 or the related conservation practices or technical standards in ch. ATCP 50, unless the local governmental

unit obtains approval from the department under sub. (2), or receives approval from DATCP pursuant to s. ATCP 50.60.

(b) Paragraph (a) does not apply to any of the following:

1. Local ordinances or regulations that address cropping practices that are not directly related to the livestock operation.
2. Local ordinances or regulations enacted prior to the effective date of this rule ... [revisor insert date] .

Note: See s. 92.15, Stats. A person adversely affected by a local livestock regulation may oppose its adoption at the local level. The person may also challenge a local regulation in court if the person believes that the local governmental unit has violated sub. (1) or s. 92.15, Stats. A local governmental unit is responsible for analyzing the legal adequacy of its regulations, and may exercise its own judgment in deciding whether to seek state approval under this section.

Note: Subsection (1) does not limit or expand the application of s. 92.15, Stats., to ordinances or regulations enacted prior to the effective date of this rule ... [revisor insert date].

(2) DEPARTMENT APPROVAL. (a) To obtain department approval under sub. (1) for an existing or proposed regulation, the head of the local governmental unit or the chair of the local governmental unit's governing board shall do all of the following:

1. Submit a copy of the livestock operation ordinance or regulation or portion thereof to the department and to the department of agriculture, trade and consumer protection.
2. Identify the provisions of the regulation for which the local governmental unit seeks approval.
3. Submit supporting documentation explaining why the specific regulatory provisions that exceed the performance standards, prohibitions, conservation practices or technical standards are needed to achieve water quality standards, and why compliance cannot be achieved with a less restrictive standard.

(b) The department shall notify the local governmental unit in writing within 90 calendar days after the department receives the ordinance or regulation as to whether the ordinance or regulation, or portion thereof is approved or denied and shall state the reasons for its decision. Before the department makes its decision, the department shall solicit a recommendation from DATCP. If the department find the regulatory provisions are needed to achieve water quality standards, the department may approve the ordinance or regulation or portion thereof.

(3) LOCAL PERMITS. Local permits or permit conditions are not subject to the review and approval procedures in this section unless the permit conditions are codified in a local ordinance or regulation.

Note: A local permit requirement does not, in and of itself, violate sub. (1), but permit conditions codified in a local ordinance or regulation must comply with sub. (1). If a local governmental unit routinely requires permit holders to comply with uncodified water quality protection standards that exceed state standards, those uncodified requirements may be subject to court challenge for noncompliance with s.

92.15, Stats. and sub. (1) as *de facto* regulatory enactments. A local governmental unit may forestall a legal challenge by codifying standard permit conditions and obtaining any necessary state approval under this section. The department will review codified regulations, but will not review individual permits or uncodified permit conditions under sub. (2).

NR 151.097 Variances. (a) The department may grant a variance to the performance standards, technical standards or other non-statutory requirements in this subchapter.

(b) The department may not grant a variance solely on the basis of economic hardship.

(c) The department may grant a variance only if all of the following conditions are met:

1. Compliance with the performance standard or technical standard is not feasible due to site conditions. This condition does not apply to research activities conducted as part of a planned agricultural research and farming curriculum.

2. The landowner or operator will implement best management practices or other corrective measures that ensure a level of pollution control that will achieve a level of water quality protection comparable to that afforded by the performance standards in this subchapter.

3. The conditions for which the variance is requested are not created by the landowner or operator or their agents or assigns. This condition does not apply to research activities conducted as part of a planned agricultural research and farming curriculum.

(d) The department shall use the following process when administering a variance request:

1. The landowner or operator shall submit the variance request to the department or governmental unit, including a county land conservation committee within 60 days of receiving the notice.

2. The governmental unit shall forward any variances that it receives to the department. The department may consider a recommendation from the governmental unit concerning acceptance of the variance request.

3. The department shall make its determination based on the factors in par. (c).

4. The department shall notify the landowner or operator and the governmental unit of its determination. If the variance is granted, the department or governmental unit shall send to the landowner or operator an amended notice.

5. The period of time required to make a ruling on a variance request does not extend the compliance periods allowed under ss. NR 151.09 and 151.095.

Note: The department may consider decisions made by a governmental unit, in accordance with local ordinance provisions, when making its determination whether to accept or deny the variance.

Subchapter III - Non-Agricultural Performance Standards

NR 151.10 Purpose. This subchapter establishes performance standards, as authorized by s. 281.16(2)(a), Stats., for non-agricultural facilities and practices that cause or may cause nonpoint runoff

pollution. These performance standards are intended to limit nonpoint runoff pollution in order to achieve water quality standards. Design guidance and the process for developing technical standards to implement this section are set forth in subch. V.

NR 151.11 Construction site performance standard for new development and redevelopment.

(1) DETERMINATION OF AVERAGE ANNUAL BASIS. In this section, average annual basis is calculated using the appropriate annual rainfall or runoff factor, also referred to as the R factor, or an equivalent design storm using a type II distribution, with consideration given to the geographic location of the site and the period of disturbance.

Note: The USLE and its successors RUSLE and RUSLE2, utilize an R factor which has been developed to estimate annual soil erosion, averaged over extended time periods. The R factor can be modified to estimate monthly and single-storm erosion. A design storm can be statistically calculated to provide an equivalent R factor as an average annual calculation.

(2) APPLICABILITY. Except as provided under sub. (3), this section applies to all the following:

(a) A construction site that has 5 or more acres of land disturbing construction activity, unless any of the following are met:

1. The department has received a notice of intent for the construction project in accordance with subch. III of ch. NR 216 before the effective date of this rule...[revisor insert date].

Note: Prior to submitting a notice of intent pursuant to subch. III of ch. NR 216, a construction site erosion control plan in conformance with s. NR 216.46 and a storm water management plan in conformance with s. NR 216.47 must be developed.

2. The department of commerce has received a notice of intent for the construction project in accordance with s. Comm 61.115 before the effective date of this rule...[revisor insert date].

3. A bid is advertised or construction contract signed where no bid is advertised, before the effective date of this rule...[revisor insert date].

(b) After March 10, 2003, any construction site that has at least one acre of land disturbing construction activity, except where bids are advertised, or construction contracts signed where no bids are advertised, before the effective date of this rule...[revisor insert date].

Note: The 5- and 1-acre land disturbance thresholds are consistent with subch. III of ch. NR 216 and EPA phase II storm water discharge rules regarding applicability of land disturbing construction permits.

(3) EXEMPTIONS. This section does not apply to the following:

(a) Construction projects that are exempted by federal statutes or regulations from the requirement to have a national pollutant discharge elimination system permit issued under 40 CFR 122, for land disturbing construction activity.

(b) Transportation facilities, except transportation facility construction projects that are part of a larger common plan of development such as local roads within a residential or industrial development.

Note: Transportation facility performance standards are given in subch. IV.

(c) Nonpoint discharges from agricultural facilities and practices.

(d) Nonpoint discharges from silviculture activities.

(e) Routine maintenance for project sites that have less than 5 acres of land disturbance if performed to maintain the original line and grade, hydraulic capacity or original purpose of the facility.

(4) RESPONSIBLE PARTY. The landowner or other person performing services to meet the performance standards of this subchapter, through a contract or other agreement, shall comply with this section.

Note: Other persons include anyone responsible for disturbing the land or implementing or maintaining BMPs, such as a general contractor or landscape architect.

(5) PLAN. A written plan shall be developed and implemented for each construction site and shall incorporate the requirements of this section.

Note: The written plan may be that specified within s. NR 216.46, the erosion control portion of a construction plan or other plan.

(6) REQUIREMENTS. The plan required under sub. (5) shall include the following:

(a) Best management practices that, by design, achieves, to the maximum extent practicable, a reduction of 80% of the sediment load carried in runoff, on an average annual basis, as compared with no sediment or erosion controls, until the construction site has undergone final stabilization. No person shall be required to exceed an 80% sediment reduction to meet the requirements of this paragraph. Erosion and sediment control BMPs may be used alone or in combination to meet the requirements of this paragraph. Credit toward meeting the sediment reduction shall be given for limiting the duration or area, or both, of land disturbing construction activity, or other appropriate mechanism.

Note: Soil loss prediction tools that estimate the sediment load leaving the construction site under varying land and management conditions, or methodology identified in subch. V., may be used to calculate sediment reduction.

(b) Notwithstanding par. (a), if BMPs cannot be designed and implemented to reduce the sediment load by 80%, on an average annual basis, the plan shall include a written and site-specific explanation why the 80% reduction goal is not attainable and the sediment load shall be reduced to the maximum extent practicable.

(c) Where appropriate, the plan shall include sediment controls to do all of the following to the maximum extent practicable:

1. Prevent tracking of sediment from the construction site onto roads and other paved surfaces.
2. Prevent the discharge of sediment as part of site de-watering.
3. Protect separate storm drain inlet structures from receiving sediment.

(d) The use, storage and disposal of chemicals, cement and other compounds and materials used on the construction site shall be managed during the construction period to prevent their transport by runoff into waters of the state. However, projects that require the placement of these materials in

waters of the state, such as constructing bridge footings or BMP installations, are not prohibited by this paragraph.

(7) LOCATION. The BMPs used to comply with this section shall be located prior to runoff entering waters of the state.

Note: While regional treatment facilities are appropriate for control of post-construction pollutants they should not be used for construction site sediment removal.

NR 151.12 Post-construction performance standard for new development and redevelopment. (1) GENERAL. In this section:

(a) "Post-construction site" means a construction site subject to regulation under this subchapter, after construction is completed and final stabilization has occurred.

(b) Average annual rainfall is determined by the following years and locations: Madison, 1981 (Mar. 12-Dec. 2); Green Bay, 1969 (Mar. 29-Nov. 25); Milwaukee, 1969 (Mar. 28-Dec. 6); Minneapolis, 1959 (Mar. 13-Nov. 4); Duluth, 1975 (Mar. 24-Nov. 19). Of the 5 locations listed, the location closest to a project site best represents the average annual rainfall for that site.

(2) APPLICABILITY. This section applies to a post-construction site that is or was subject to the construction performance standards of s. NR 151.11, except any of the following:

(a) A post-construction site where the department has received a notice of intent for the construction project, in accordance with subch. III of ch. NR 216, within 2 years after the effective date of this rule...[revisor insert date].

(b) A post-construction site where the department of commerce has received a notice of intent, in accordance with s. Comm 61.115, within 2 years after the effective date of this rule...[revisor insert date].

(c) A redevelopment post-construction site with no increase in exposed parking lots or roads.

(d) A post-construction site with less than 10% connected imperviousness based on complete development of the post-construction site, provided the cumulative area of all parking lots and rooftops is less than one acre.

Note: Projects that consist of only the construction of bicycle paths or pedestrian trails generally meet this exception as these facilities have minimal connected imperviousness.

(e) Agricultural facilities and practices.

(f) An action for which a final environmental impact statement was approved before the effective date of this rule...[revisor insert date].

(g) An action for which a finding of no significant impact is made under ch. NR 150 before the effective date of this rule...[revisor insert date].

(h) Underground utility construction such as water, sewer and fiberoptic lines, but not including the construction of any above ground structures associated with utility construction.

(3) RESPONSIBLE PARTY. The landowner of the post-construction site or other person contracted or obligated by other agreement to implement and maintain post-construction storm water BMPs shall comply with this section.

(4) STORM WATER MANAGEMENT PLAN. A written storm water management plan shall be developed and implemented for each post-construction site and shall incorporate the requirements of this subsection.

Note: Examples of storm water management plans that may be used to comply with this section may be that specified within s. NR 216.47 or the municipal storm water management program specified within s. NR 216.07(7).

(5) REQUIREMENTS. The plan required under sub. (4) shall include:

(a) *Total suspended solids.* Best management practices shall be designed, installed and maintained to control total suspended solids carried in runoff from the post-construction site as follows:

1. For new development, by design, reduce to the maximum extent practicable, the total suspended solids load by 80%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed an 80% total suspended solids reduction to meet the requirements of this subdivision.

2. For redevelopment, by design, reduce to the maximum extent practicable, the total suspended solids load by 40%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed a 40% total suspended solids reduction to meet the requirements of this subdivision.

3. For in-fill development under 5 acres that occurs within 10 years after the effective date of this rule ...[revisor insert date], by design, reduce to the maximum extent practicable, the total suspended solids load by 40%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed a 40% total suspended solids reduction to meet the requirements of this subdivision

4. For in-fill development that occurs 10 or more years after the effective date of this rule...[revisor insert date], by design, reduce to the maximum extent practicable, the total suspended solids load by 80%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed an 80% total suspended solids reduction to meet the requirements of this subdivision

5. Notwithstanding subds. 1 to 4., if the design cannot achieve the applicable total suspended solids reduction specified, the storm water management plan shall include a written and site-specific explanation why that level of reduction is not attained and the total suspended solids load shall be reduced to the maximum extent practicable.

Note: Pollutant loading models such as SLAMM, P8 or equivalent methodology may be used to evaluate the efficiency of the design in reducing total suspended solids. Information on how to access SLAMM and P8 is available at: <http://www.dnr.state.wi.us/org/water/wm/nps/slamm.htm> or contact the

storm water coordinator in the runoff management section of the bureau of watershed management at (608) 267-7694.

(b) *Peak discharge*. 1. By design, BMPs shall be employed to maintain or reduce the peak runoff discharge rates, to the maximum extent practicable, as compared to pre-development conditions for the 2-year, 24-hour design storm applicable to the post-construction site. Pre-development conditions shall assume “good hydrologic conditions” for appropriate land covers as identified in TR-55 or an equivalent methodology. The meaning of “hydrologic soil group” and “runoff curve number” are as determined in TR-55. However, when pre-development land cover is cropland, rather than using TR-55 values for cropland, the runoff curve numbers in Table 2 shall be used.

Hydrologic Soil Group	A	B	C	D
Runoff Curve Number	56	70	79	83

Note: The curve numbers in Table 2 represent mid-range values for soils under a good hydrologic condition where conservation practices are used and are selected to be protective of the resource waters.

2. This paragraph does not apply to:

a. A post-construction site where the change in hydrology due to development does not increase the existing surface water elevation at any point within the downstream receiving water by more than 0.01 of a foot for the 2-year, 24-hour storm event.

Note: Hydraulic models such as HEC-RAS or another methodology may be used to determine the change in surface water elevations.

b. A redevelopment post-construction site.

c. An in-fill development area less than 5 acres.

Note: The intent of par. (b) is to minimize streambank erosion under bank full conditions.

(c) *Infiltration*. BMPs shall be designed, installed and maintained to infiltrate runoff to the maximum extent practicable in accordance with the following, except as provided in subds. 5. to 8.:

1. For residential developments one of the following shall be met:

a. Infiltrate sufficient runoff volume so that the post-development infiltration volume shall be at least 90% of the pre-development infiltration volume, based on an average annual rainfall. However, when designing appropriate infiltration systems to meet this requirement, no more than 1% of the project site is required as an effective infiltration area.

b. Infiltrate 25% of the post-development runoff volume from the 2-year, 24-hour design storm with a type II distribution. Separate curve numbers for pervious and impervious surfaces shall be used to calculate runoff volumes and not composite curve numbers as defined in TR-55. However, when

designing appropriate infiltration systems to meet this requirement, no more than 1% of the project site is required as an effective infiltration area.

2. For non-residential development, including commercial, industrial and institutional development, one of the following shall be met:

a. For this subdivision only, the “project site” means the rooftop and parking lot areas.

b. Infiltrate sufficient runoff volume so that the post-development infiltration volume shall be at least 60% of the pre-development infiltration volume, based on an average annual rainfall. However, when designing appropriate infiltration systems to meet this requirement, no more than 2% of the project site is required as an effective infiltration area.

c. Infiltrate 10% of the post-development runoff volume from the 2-year, 24-hour design storm with a type II distribution. Separate curve numbers for pervious and impervious surfaces shall be used to calculate runoff volumes and not composite curve numbers as defined in TR-55. However, when designing appropriate infiltration systems to meet this requirement, no more than 2% of the project site is required as an effective infiltration area.

3. Pre-development condition shall be the same as specified in par. (b).

Note: A model that calculates runoff volume, such as SLAMM, P8 or an equivalent methodology may be used. Information on how to access SLAMM and P8 is available at:

<http://www.dnr.state.wi.us/org/water/wm/nps/slamm.htm> or contact the storm water coordinator in the runoff management section of the bureau of watershed management at (608) 267-7694.

4. Before infiltrating runoff, pretreatment shall be required for parking lot runoff and for runoff from new road construction in commercial, industrial and institutional areas that will enter an infiltration system. The pretreatment shall be designed to protect the infiltration system from clogging prior to scheduled maintenance and to protect groundwater quality in accordance with subd. 8. Pretreatment options may include, but are not limited to, oil/grease separation, sedimentation, biofiltration, filtration, swales or filter strips.

Note: To achieve the infiltration requirement for the parking lots or roads, maximum extent practicable should not be interpreted to require significant topography changes that create an excessive financial burden. To minimize potential groundwater impacts it is desirable to infiltrate the cleanest runoff. To achieve this, a design may propose greater infiltration of runoff from low pollutant sources such as roofs, and less from higher pollutant source areas such as parking lots.

5. Exclusions. The runoff from the following areas are prohibited from meeting the requirements of this paragraph:

a. Areas associated with tier 1 industrial facilities identified in s. NR 216.21(2)(a), including storage, loading, rooftop and parking.

b. Storage and loading areas of tier 2 industrial facilities identified in s. NR 216.21(2)(b).

Note: Runoff from tier 2 parking and rooftop areas may be infiltrated but may require pretreatment.

- c. Fueling and vehicle maintenance areas.
- d. Areas within 1000 feet upgradient or within 100 feet downgradient of karst features.
- e. Areas with less than 3 feet separation distance from the bottom of the infiltration system to the elevation of seasonal high groundwater or the top of bedrock, except this subd. 5.e. does not prohibit infiltration of roof runoff.
- f. Areas with runoff from industrial, commercial and institutional parking lots and roads and residential arterial roads with less than 5 feet separation distance from the bottom of the infiltration system to the elevation of seasonal high groundwater or the top of bedrock.
- g. Areas within 400 feet of a community water system well as specified in s. NR 811.16(4) or within 100 feet of a private well as specified in s. NR 812.08(4) for runoff infiltrated from commercial, industrial and institutional land uses or regional devices for residential development.
- h. Areas where contaminants of concern, as defined in s. NR 720.03(2), are present in the soil through which infiltration will occur.
- i. Any area where the soil does not exhibit one of the following characteristics between the bottom of the infiltration system and the seasonal high groundwater and top of bedrock: at least a 3-foot soil layer with 20 percent fines or greater; or at least a 5-foot soil layer with 10 percent fines or greater. This subdivision paragraph does not apply where the soil medium within the infiltration system provides an equivalent level of protection. This subd. 5.i. does not prohibit infiltration of roof runoff.

Note: The areas listed in subd. 5. are prohibited from infiltrating runoff due to the potential for groundwater contamination.

- 6. Exemptions. The following are not required to meet the requirements of this paragraph:
 - a. Areas where the infiltration rate of the soil is less than 0.6 inches/hour measured at the bottom of the infiltration system.
 - b. Parking areas and access roads less than 5,000 square feet for commercial and industrial development.
 - c. Redevelopment post-construction sites.
 - d. In-fill development areas less than 5 acres.
 - e. Infiltration areas during periods when the soil on the site is frozen.
 - f. Roads in commercial, industrial and institutional land uses, and arterial residential roads.
- 7. Where alternate uses of runoff are employed, such as for toilet flushing, laundry or irrigation, such alternate use shall be given equal credit toward the infiltration volume required by this paragraph.
- 8. a. Infiltration systems designed in accordance with this paragraph shall, to the extent technically and economically feasible, minimize the level of pollutants infiltrating to groundwater and shall maintain compliance with the preventive action limit at a point of standards application in accordance with ch. NR 140. However, if site specific information indicates that compliance with a preventive action limit is not achievable, the infiltration BMP may not be installed or shall be modified to prevent infiltration to the maximum extent practicable.

b. Notwithstanding subd. 8.a., the discharge from BMPs shall remain below the enforcement standard at the point of standards application.

(d) *Protective areas*. 1. In this paragraph, “protective area” means an area of land that commences at the top of the channel of lakes, streams and rivers, or at the delineated boundary of wetlands, and that is the greatest of the following widths, as measured horizontally from the top of the channel or delineated wetland boundary to the closest impervious surface. However, in this paragraph, “protective area” does not include any area of land adjacent to any stream enclosed within a pipe or culvert, such that runoff cannot enter the enclosure at this location.

a. For outstanding resource waters and exceptional resource waters, and for wetlands in areas of special natural resource interest as specified in s. NR 103.04, 75 feet.

b. For perennial and intermittent streams identified on a United States geological survey 7.5-minute series topographic map, or a county soil survey map, whichever is more current, 50 feet.

c. For lakes, 50 feet.

d. For highly susceptible wetlands, 50 feet. Highly susceptible wetlands include the following types: fens, sedge meadows, bogs, low prairies, conifer swamps, shrub swamps, other forested wetlands, fresh wet meadows, shallow marshes, deep marshes and seasonally flooded basins. Wetland boundary delineation shall be made in accordance with s. NR 103.08(1m). This paragraph does not apply to wetlands that have been completely filled in accordance with all applicable state and federal regulations. The protective area for wetlands that have been partially filled in accordance with all applicable state and federal regulations shall be measured from the wetland boundary delineation after fill has been placed.

e. For less susceptible wetlands, 10 percent of the average wetland width, but no less than 10 feet nor more than 30 feet. Less susceptible wetlands include degraded wetlands dominated by invasive species such as reed canary grass.

f. In subd. 1.a., d. and e., determinations of the extent of the protective area adjacent to wetlands shall be made on the basis of the sensitivity and runoff susceptibility of the wetland in accordance with the standards and criteria in s. NR 103.03.

g. For concentrated flow channels with drainage areas greater than 130 acres, 10 feet.

2. This paragraph applies to post-construction sites located within a protective area, except those areas exempted pursuant to subd. 4.

3. The following requirements shall be met:

a. Impervious surfaces shall be kept out of the protective area to the maximum extent practicable. The storm water management plan shall contain a written site-specific explanation for any parts of the protective area that are disturbed during construction.

b. Where land disturbing construction activity occurs within a protective area, and where no impervious surface is present, adequate sod or self-sustaining vegetative cover of 70% or greater shall be established and maintained. The adequate sod or self-sustaining vegetative cover shall be sufficient to provide for bank stability, maintenance of fish habitat and filtering of pollutants from upslope overland flow

areas under sheet flow conditions. Non-vegetative materials, such as rock riprap, may be employed on the bank as necessary to prevent erosion such as on steep slopes or where high velocity flows occur.

Note: It is recommended that seeding of non-aggressive vegetative cover be used in the protective areas. Vegetation that is flood and drought tolerant and can provide long-term bank stability because of an extensive root system is preferable. Vegetative cover may be measured using the line transect method described in the university of Wisconsin extension publication number A3533, titled “Estimating Residue Using the Line Transect Method”.

c. Best management practices such as filter strips, swales or wet detention basins, that are designed to control pollutants from non-point sources may be located in the protective area.

Note: Other regulations, such as ch. 30, Stats., and chs. NR 103, 115, 116 and 117 and their associated review and approval process may apply in the protective area.

4. Exemptions. This paragraph does not apply to:

a. Redevelopment post-construction sites.

b. In-fill development areas less than 5 acres.

c. Structures that cross or access surface waters such as boat landings, bridges and culverts.

d. Structures constructed in accordance with s. 59.692(1v), Stats.

e. Post-construction sites from which runoff does not enter the surface water, except to the extent that vegetative ground cover is necessary to maintain bank stability.

Note: A vegetated protective area to filter runoff pollutants from post-construction sites described in subd. 4.e. is not necessary since runoff is not entering the surface water at that location. Other practices necessary to meet the requirements of this section, such as a swale or basin, will need to be designed and implemented to reduce runoff pollutants prior to runoff entering a surface water of the state.

(e) *Fueling and vehicle maintenance areas.* Fueling and vehicle maintenance areas shall, to the maximum extent practicable, have BMPs designed, installed and maintained to reduce petroleum within runoff, such that the runoff that enters waters of the state contains no visible petroleum sheen.

Note: A combination of the following BMPs may be used: oil and grease separators, canopies, petroleum spill cleanup materials, or any other structural or non-structural method of preventing or treating petroleum in runoff.

(f) *Location.* To comply with the standards required under this subsection, BMPs may be located on-site or off-site as part of a regional storm water device, practice or system, but shall be installed in accordance with s. NR 151.003.

(g) *Timing.* The BMPs that are required under this subsection shall be installed before the construction site has undergone final stabilization.

NR 151.13 Developed urban area performance standard. (1) INFORMATION AND EDUCATION. (a) *Applicability.* This section applies to any incorporated municipality with an average

density of 1,000 people per square mile or greater, based on the latest decennial census made by the United States census, as well as any commercial and industrial areas contiguous to these areas.

Note: The municipality has primary responsibility for complying with this section. However, the general population is expected to follow municipal ordinance requirements and requests to carry out activities such as: proper curbside placement of leaves for collection, relocating vehicles for street sweeping and utilizing proper disposal methods for oils and other chemicals.

(b) *Requirements.* For areas identified under par. (a), all of the following shall be implemented by March 10, 2008:

1. A public information and education program, utilizing materials identified by the department, promoting beneficial on-site reuse of leaves and grass clippings and proper use of lawn and garden fertilizers and pesticides, proper management of pet wastes and prevention of dumping oil and other chemicals in storm sewers. Information and education materials shall include instruction on how to apply fertilizers in accordance with a nutrient application schedule, based on appropriate soil tests, and the application of pesticides in accordance with an integrated pest management plan.

2. A municipal program, as appropriate, for the collection and management of leaf and grass clippings, including public education about this program.

3. The application of lawn and garden fertilizers on municipally controlled properties, with pervious surface over 5 acres each, shall be done in accordance with a site specific nutrient application schedule based on appropriate soil tests. The nutrient application schedule shall be designed to maintain the optimal health of the lawn or garden vegetation.

4. Detection and elimination of illicit discharges to storm sewers.

(2) **PERMITTED MUNICIPALITIES.** (a) *Applicability.* This section applies to municipalities that are subject to the municipal storm water permit requirements of subch. I of ch. NR 216.

Note: A municipal separate storm sewer system could become subject to subch. I of ch. NR 216 if it is designated by the department to be a significant contributor of pollutants to waters of the state under s. NR 216.02(4).

(b) *Program.* A municipality shall develop and implement a storm water management program, including the adoption and administration of any necessary ordinance, to meet the following requirements:

Note: The program to meet the requirements of this section may be the same as the municipal storm water management program required by s. NR 216.07(7) or some other plan.

1. *Stage 1 requirements.* The municipalities listed under par. (a), shall implement the following by March 10, 2008:

a. All of the requirements contained in sub. (1)(b).

b. To the maximum extent practicable, a 20% reduction in total suspended solids in runoff that enters waters of the state as compared to no controls.

Note: It is expected that the municipality will be able to achieve the 20% reduction by municipal street sweeping, using either conventional or high efficiency sweepers, regular catch basin cleaning, de-icer management, and education to change human behavior toward reducing pollution.

2. *Stage 2 requirements.* To the maximum extent practicable, the municipalities listed under par. (a) shall implement a 40% reduction in total suspended solids in runoff that enters waters of the state as compared to no controls, by March 10, 2013.

Note: It is expected that the municipality will be able to achieve the 40% reduction through the use of high efficiency street sweeping or structural BMP retrofit practices. The stage 2 requirements may include application of BMPs to privately owned lands, such as shopping centers.

(c) *Location.* To comply with the standards required under this subsection, BMPs may be located on-site or off-site as part of a regional storm water device, practice or system, but shall be installed in accordance with s. NR 151.003.

(d) *Exclusion.* This section does not apply to areas subject to subch. II of ch. NR 216.

NR 151.14 Non-municipal property fertilizer performance standard. (1) APPLICABILITY.

This section applies when all of the following conditions are met:

- (a) The property is not owned by a municipality.
- (b) The property has over 5 acres of pervious surface where fertilizers are applied.
- (c) The property discharges runoff to waters of the state.

(2) RESPONSIBLE PARTY. The landowner shall comply with this section.

(3) REQUIREMENTS. No later than March 10, 2008, the application of lawn and garden fertilizers on these properties shall be done in accordance with site-specific nutrient application schedules based on appropriate soil tests. The nutrient application schedule shall be designed to maintain the optimal health of the lawn or garden vegetation.

Note: The landowner should consider using slow release fertilizers or “spoon feeding” nutrients to reduce the concentration of nitrates reaching groundwater.

NR 151.15 Implementation and enforcement. (1) IMPLEMENTATION. This subchapter shall be implemented as follows:

(a) *Construction sites and post-construction sites.* For sites defined in ss. NR 151.11 (2) and 151.12 (1) and (2):

1. The provisions of ss. NR 151.11 and 151.12 shall be implemented through subch. III of ch. NR 216.

2. The department shall make available model ordinances that reflect and implement the performance standards in ss. NR 151.11 and 151.12.

Note: These model ordinances are in ch. NR 152. Municipalities are encouraged to adopt the requirements of ss. NR 151.11 and 151.12, into local ordinances that reflect these models. Incentives are

included in the grant programs identified in chs. NR 153 and 155, for municipalities that adopt the performance standards into their ordinances, provide an information and education program and track and report their enforcement activity.

(b) *Developed urban areas.* 1. The provisions of ss. NR 151.13(1) and 151.14 shall be enforced under sub. (2).

2. The provisions of s. NR 151.13 (2) shall be implemented through subch. I of ch. NR 216.

(2) ENFORCEMENT. The department shall enforce this subchapter under s. 281.98, Stats.

Note: The department may also enforce performance standards implemented through ch. NR 216 under ss. 283.89 and 283.91, Stats.

Subchapter IV – Transportation Facility Performance Standards

NR 151.20 Purpose and applicability. (1)(a) This subchapter establishes performance standards, as authorized by s. 281.16(2)(a), Stats., for transportation facilities that cause or may cause runoff pollution, except as provided in sub. (2). These performance standards are intended to limit runoff pollution in order to achieve water quality standards. Design guidance and the process for developing technical standards to implement this subchapter are set forth in subch. V.

(b) Transportation facilities that are directed and supervised by the department of transportation and that are regulated by an administrative rule administered by the department of transportation, where the department determines in writing that the rule meets or exceeds the performance standards of this subchapter and is implemented in accordance with the administrative rule provisions, shall be deemed to meet the requirements of the portions of this subchapter determined by the department.

(2)(a) This subchapter does not apply to any of the following:

1. Actions for which a final environmental impact statement is approved before the effective date of this rule...[revisor insert date].

2. Actions for which a finding of no significant impact is made under ch. Trans 400 before the effective date of this rule...[revisor insert date].

3. Actions that are documented in an environmental report, as defined in s. Trans 400.04 (10), completed before the effective date of this rule...[revisor insert date] that fit the criteria or conditions for approval as a categorical exclusion in 23 CFR 771.117, April 1, 2000, or has met the review criteria of paragraph 23.a. of chapter 3 of federal aviation administration order 5050.4A issued on October 8, 1985.

(b) Notwithstanding par. (a), the construction site performance standards under s. NR 151.23 and the protective area requirements under s. NR 151.24 (6) apply to transportation facilities subject to this subchapter.

(3) In s. NR 151.23, average annual basis is calculated using the appropriate annual rainfall or runoff factor, also referred to as the R factor, or an equivalent design storm using a type II distribution, with consideration given to the geographic location of the site and the period of disturbance.

Note: The USLE and its successors RUSLE and RUSLE2, utilize an R factor which has been developed to estimate annual soil erosion, averaged over extended time periods. The R factor can be modified to estimate monthly and single-storm erosion. A design storm can be statistically calculated to provide an equivalent R factor as an average annual calculation.

(4) In s. NR 151.24, average annual rainfall is determined by the following years and locations: Madison, 1981 (Mar. 12-Dec. 2); Green Bay, 1969 (Mar. 29-Nov. 25); Milwaukee, 1969 (Mar. 28-Dec. 6); Minneapolis, 1959 (Mar. 13-Nov. 4); Duluth, 1975 (Mar. 24 –Nov. 19). Of the 5 locations listed, the location closest to a project site best represents the average annual rainfall for that site.

NR 151.21 Definitions. In this subchapter:

(1) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(2) "Borrow site" means an area outside of a project site from which stone, soil, sand or gravel is excavated for use at the project site, except the term does not include commercial pits.

(3) "Highway" has the meaning given in s. 340.01(22), Stats.

(4) "Material disposal site" means an area outside of a project site, which is used, for the lawful disposal of surplus materials or materials unsuitable for use within the project site that is under the direct control of the contractor. A municipally owned landfill or private landfill that is not managed by the contractor is excluded from this definition.

(5) "Minor reconstruction" means reconstruction that is limited to 1.5 miles in continuous or aggregate total length of realignment and that does not exceed 100 feet in width of roadbed widening.

(6) "Prime contractor" means a person authorized or awarded a contract to perform, directly or using subcontractors, all the work of a project directed and supervised by the transportation facility authority.

(7) "Private road or driveway" has the meaning given in s. 340.01(46), Stats.

(8) "Public-use airport" means either of the following as described in 49 USC 47102(17):

(a) A public airport.

(b) A privately-owned airport used or intended to be used for public purposes that is either:

1. A reliever airport as designated by the secretary of the United States department of transportation to relieve congestion at a commercial service airport and to provide more general aviation access to the overall community.

2. Determined by the secretary of the United States department of transportation to have at least 2,500 passenger boardings each year and to receive scheduled passenger aircraft service.

(9) "Public mass transit facility" means any area of land or water which is used, or intended for use, by bus or light rail, and any appurtenant areas which are used, or intended for use, by bus or light

rail, including buildings or other facilities or rights-of-way, either publicly or privately owned, that provide the public with general or special service on a regular and continuing basis.

(10) "Public trail" means a "state ice age trail area" designated under s. 23.17 (2), Stats., a state trail under s. 23.175(2)(a), Stats., an "all-terrain vehicle trail" under s. 23.33(1)(d), Stats., an "off-the-road motorcycle trail" under s. 23.33(9)(b)4, Stats., a "recreational trail" under s. 30.40(12m), Stats., a "walkway" under s. 30.40(22), Stats., a state trail under s. 84.06(11), Stats., a "bikeway" under s. 84.60(1)(a), Stats., a "snowmobile trail" under s. 350.01(17), Stats., a "public snowmobile corridor" under s. 350.12(3j)(a)1, Stats., or any other trail open to the public as a matter of right.

(11) "Railroad" means any area of land or water which is used, or intended for use, in operating a railroad as defined in s. 85.01(5), Stats., and any appurtenant areas which are used, or intended for use, for railroad buildings or other railroad facilities or rights-of-way, together with all railroad buildings and facilities located thereon.

(12) "Reconditioning" has the meaning given in s. 84.013(1)(b), Stats.

(13) "Reconstruction" has the meaning given in s. 84.013(1)(c), Stats.

(14) "Resurfacing" has the meaning given in s. 84.013(1)(d), Stats.

(15) "Transportation facility authority" means any person or entity that is authorized to approve work on a transportation facility by contract, permit or with its own forces or by force account. A permit or approval granted by the department pursuant to ch. 283, Stats., does not qualify as authorization needed to meet this definition.

NR 151.22 Responsible party. (1) TRANSPORTATION FACILITY AUTHORITY. (a) The transportation facility authority shall develop a design plan to meet the performance standards of ss. NR 151.23 and 151.24 for land disturbing construction activity at the transportation facility construction site.

Note: This design plan may be the erosion control plan specified in s. Trans 401.07.

(b) The transportation facility authority, in consultation with the department, shall approve the implementation plan submitted under sub. (2)(a). The transportation facility authority shall incorporate the implementation plan into the contract for project construction.

(c) The transportation facility authority shall administer and enforce the implementation plan submitted by the prime contractor under sub. (2)(a) under the contract for project construction. The transportation facility authority shall ensure that the prime contractor follows and maintains the implementation plan under par. (b). If the prime contractor does not follow the implementation plan incorporated into the contract for project construction, the transportation facility authority shall control erosion and sediment at the construction site consistent with the design plan prepared under par. (a) or implementation plan prepared under sub. (2)(a).

(d) Before accepting the completed project, the transportation facility authority shall verify in writing that the prime contractor has satisfactorily completed the implementation plan pursuant to sub. (2)(b). The transportation authority shall submit the written verification to the prime contractor and to the

authority in charge of maintenance of the transportation facility. Upon written verification by the transportation facility authority under this paragraph, the prime contractor is released from the responsibility under this subchapter, except for any responsibility for defective work or materials, damages by its own operations, or as may be otherwise required in the project construction contract.

(2) PRIME CONTRACTOR. (a) The prime contractor shall develop and submit to the transportation facility authority an implementation plan that identifies applicable BMPs and contains a schedule for implementing the BMPs in accordance with design plan to meet the performance standards under sub. (1)(a). The implementation plan shall identify an array of BMPs that may be employed to meet the performance standards. The implementation plan shall also address the design and implementation of BMPs required in ss. NR 151.23 and 151.24 for land disturbing construction activity within borrow sites and material disposal sites that are related to the construction project.

Note: This implementation plan may be the erosion control implementation plan specified in s. Trans 401.08.

(b) The prime contractor shall implement the implementation plan as required by the contract for project construction prepared pursuant to sub. (1)(b).

(c) A transportation authority that carries out the construction activity with its own employees and resources shall comply with the prime contractor requirements contained in this subsection, including preparing and carrying out an implementation plan.

(3) SINGLE PLAN. For transportation projects that are not administered under ch. Trans 401, the requirements of this subchapter may be developed under one plan instead of 2 separate plans as described under subs. (1)(a) and (2)(a). A plan created under this subsection shall contain both the design components required under sub. (1)(a) and the implementation components required under sub. (2)(a).

Note: This single plan may be the erosion control plan specified in s. NR 216.46.

(4) MAINTENANCE AUTHORITY. Upon execution of the written verification prepared under sub. (1)(d) by the transportation facility authority, the authority in charge of maintenance of the transportation facility shall maintain the BMPs to meet the performance standards of this subchapter. However, BMPs no longer necessary for erosion and sediment control shall be removed by the maintenance authority.

NR 151.23 Construction site performance standard. (1) APPLICABILITY. Except as provided under sub. (2), this section applies to all of the following:

(a) A transportation facility construction site that has 5 or more acres of land disturbing construction activity, unless any of the following are met:

1. The department has received a notice of intent for the transportation construction project in accordance with subch. III of ch. NR 216 before the effective date of this rule...[revisor insert date].

Note: Prior to submitting a notice of intent pursuant to subch. III of ch. NR 216, a construction site erosion control plan in conformance with s. NR 216.46 and a storm water management plan in conformance with s. NR 216.47 shall be developed.

2. A bid is advertised or construction contract signed where no bid is advertised, before the effective date of this rule...[revisor insert date].

(b) After March 10, 2003, any transportation facility construction site that has at least one acre of land disturbing construction activity, except where bids are advertised, or construction contracts signed where no bids are advertised, before the effective date of this rule...[revisor insert date].

(2) EXEMPTION. This section does not apply to the following:

(a) Transportation facility construction projects that are exempted by federal statutes or regulations from the requirement to have a national pollutant discharge elimination system permit issued under 40 CFR 122, for land disturbing construction activity.

(b) Transportation facility construction projects that are part of a larger common plan of development, such as a residential or industrial development, and are in compliance with the performance standards of subch. III.

(c) Routine maintenance for transportation facilities that have less than 5 acres of land disturbance if performed to maintain the original line and grade, hydraulic capacity or original purpose of the facility.

Note: Construction projects such as installations of utilities within a transportation right-of-way that are not directed and supervised by the department of transportation are subject to the performance standards of subch. III and are not subject to this subchapter.

(3) PLAN. (a) A written design plan shall be developed for each construction site and shall incorporate the requirements of this section.

Note: The design plan may be the erosion control plan specified in s. NR 216.46 or the design plan in s. NR 151.22 (1)(a).

(b) The plan required under s. NR 151.22 (2)(a) or (3) shall be properly installed to implement the plan under s. NR 151.22 (1)(a).

(4) REQUIREMENTS. The design plan required under sub. (3) shall include the following:

(a) BMPs that, by design, achieve, to the maximum extent practicable, a reduction of 80% of the sediment load carried in runoff, on an average annual basis, as compared with no sediment or erosion controls, as specified in s. NR 151.22 (1)(a) or (3), until the construction site has undergone final stabilization. No person shall be required to exceed an 80% sediment reduction to meet the requirements of this paragraph. Erosion and sediment control BMPs may be used alone or in combination and shall be installed according to any associated implementation plan to meet the requirements of this paragraph. Credit toward meeting the sediment reduction shall be given for limiting the duration or area, or both, of land disturbing construction activity, or other appropriate mechanism.

Note: Soil loss prediction tools that estimate the sediment load leaving the construction site under varying land and management conditions, or methodology identified in subch. V., may be used to calculate sediment reduction.

(b) Notwithstanding par. (a), if BMPs cannot be designed and implemented to reduce the sediment load by 80%, based on an average annual rainfall, the design plan shall include a written and site-specific explanation why the 80% reduction goal is not attainable and the sediment load shall be reduced to the maximum extent practicable.

(c) Where appropriate, the design plan shall include sediment controls to do all of the following to the maximum extent practicable:

1. Prevent tracking of sediment from the construction site onto roads and other paved surfaces.
2. Prevent the discharge of sediment as part of site de-watering.
3. Protect the separate storm drain inlet structure from receiving sediment.

(d) The use, storage and disposal of chemicals, cement and other compounds and materials used on the construction site shall be managed during the construction period to prevent their transport by runoff into waters of the state. However, projects that require the placement of these materials in waters of the state, such as constructing bridge footings or BMP installations, are not prohibited by this paragraph.

(5) LOCATION. The BMPs used to comply with this section shall be located prior to runoff entering waters of the state.

Note: While regional treatment facilities are appropriate for control of post-construction pollutants they should not be used for construction site sediment removal.

NR 151.24 Post–construction performance standard. (1) APPLICABILITY. This section applies to a transportation facility that is or was subject to the construction performance standards of s. NR 151.23, except any of the following:

(a) A transportation construction site where the department has received a notice of intent for the construction project in accordance with subch. III of ch. NR 216 within 2 years after the effective date of this rule...[revisor insert date].

(b) A transportation facility construction site that has undergone final stabilization within 2 years after the effective date of this chapter...[revisor insert date].

(c) Reconditioning or resurfacing of a highway.

(d) Minor reconstruction of a highway. Notwithstanding the exemption under this paragraph, the protective areas requirements in sub. (6) apply to minor reconstruction of a highway.

(e) A redevelopment transportation facility with no increase in exposed parking lots or roads.

(f) A transportation facility with less than 10% connected imperviousness based on complete development of the transportation facility, provided the cumulative area of all parking lots and rooftops is less than one acre.

Note: Projects that consist of only the construction of bicycle paths or pedestrian trails generally meet this exception as these facilities have minimal connected imperviousness.

(g) Protective area requirements under sub. (6) do apply to actions described in s. NR 151.20 (2).

(h) A transportation facility, the construction of which involves activity described in s. NR 151.23 (1)(a)2. but that has less than one acre of land disturbing construction activity.

(i) Transportation facility construction projects that are part of a larger common plan of development, such as a residential or industrial development, that are in compliance with the performance standards of subch. III.

(j) Routine maintenance for transportation facilities if performed to maintain the original line and grade, hydraulic capacity or original purpose of the facility.

(2) PLAN. A written plan shall be developed and implemented for each transportation facility and shall incorporate the requirements of subs. (3) to (10).

Note: Examples of plans that may be used to comply with this section may be that specified within s. NR 216.47, the municipal storm water management program specified within s. NR 216.07(7) or the erosion control plan specified in s. Trans 401.07.

(3) TOTAL SUSPENDED SOLIDS. Best management practices shall be designed, installed and maintained to control total suspended solids carried in runoff from the transportation facility as follows:

(a) For new transportation facilities, by design, reduce to the maximum extent practicable, the suspended solids load by 80%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed an 80% total suspended solids reduction to meet the requirements of this paragraph.

(b) For highway reconstruction and non-highway redevelopment, by design, reduce to the maximum extent practicable, the total suspended solids load by 40%, based on an average annual rainfall, as compared to no runoff management controls. No person shall be required to exceed a 40% total suspended solids reduction to meet the requirements of this paragraph.

(c) Notwithstanding pars. (a) and (b), if the design cannot achieve the applicable total suspended solids reduction specified, the design plan shall include a written and site-specific explanation why that level of reduction is not attained and the total suspended solids load shall be reduced to the maximum extent practicable.

Note: Pollutant loading models such as SLAMM, P8 or equivalent methodology may be used to evaluate the efficiency of the design in reducing total suspended solids. Information on how to access SLAMM and P8 is available at: <http://www.dnr.state.wi.us/org/water/wm/nps/slamm.htm> or contact the storm water coordinator in the runoff management section of the bureau of watershed management at (608) 267-7694.

(4) PEAK DISCHARGE. (a) By design, BMPs shall be employed to maintain or reduce the peak runoff discharge rates, to the maximum extent practicable, as compared to pre-development site conditions for the 2-year, 24-hour design storm applicable to the transportation facility. Pre-development

conditions shall assume “good hydrologic conditions” for appropriate land covers as identified in TR-55 or an equivalent methodology. The meaning of “hydrologic soil group” and “runoff curve number” are as determined in TR-55. However, when pre-development land cover is cropland, rather than using TR-55 values for cropland, the runoff curve numbers in Table 2 of subch. III shall be used.

Note: The curve numbers in Table 2 represent mid-range values for soils under a good hydrologic condition where conservation practices are used and are selected to be protective of the resource waters.

(b) This subsection does not apply to:

1. A transportation facility where the change in hydrology due to development does not increase the existing surface water elevation at any point within the downstream receiving surface water by more than 0.01 of a foot for the 2-year, 24-hour storm event.

Note: Hydraulic models such as HEC-RAS or another methodology may be used to determine the change in surface water elevations.

2. A highway reconstruction site.

3. A transportation facility that is part of a redevelopment project.

Note: The intent of sub. (4) is to minimize streambank erosion under bank full conditions.

(5) INFILTRATION. (a) Except as provided in pars. (d) to (g), BMPs shall be designed, installed and maintained to infiltrate runoff to the maximum extent practicable in accordance with one of the following:

1. Infiltrate sufficient runoff volume so that the post-development infiltration volume shall be at least 60% of the pre-development infiltration volume, based on an average annual rainfall. However, when designing appropriate infiltration systems to meet this requirement, no more than 2% of the project site is required as an effective infiltration area.

2. Infiltrate 10% of the post-development runoff volume from the 2-year, 24-hour design storm with a type II distribution. Separate curve numbers for pervious and impervious surfaces shall be used to calculate runoff volumes and not composite curve numbers as defined in TR-55. However, when designing appropriate infiltration systems to meet this requirement, no more than 2% of the project site is required as an effective infiltration area.

(b) Pre-development condition shall be the same as specified in sub. (4)(a).

Note: A model that calculates runoff volume, such as SLAMM, P8 or an equivalent methodology may be used. Information on how to access SLAMM and P8 is available at:

<http://www.dnr.state.wi.us/org/water/wm/nps/slamm.htm> or contact the storm water coordinator in the runoff management section of the bureau of watershed management at (608) 267-7694.

(c) Before infiltrating runoff, pretreatment shall be required for parking lot runoff and for runoff from new road construction in commercial, industrial and institutional areas that will enter an infiltration system. The pretreatment shall be designed to protect the infiltration system from clogging prior to scheduled maintenance and to protect groundwater quality in accordance with par. (g). Pretreatment

may include, but is not limited to, oil/grease separation, sedimentation, biofiltration, filtration, swales or filter strips.

Note: To minimize potential groundwater impacts it is desirable to infiltrate the cleanest runoff. To achieve this, a design may propose greater infiltration of runoff from low pollutant sources such as roofs, and less from higher pollutant source areas such as parking lots.

(d) The following are prohibited from meeting the requirements of this subsection:

1. Areas associated with tier 1 industrial facilities identified in s. NR 216.21(2)(a), including storage, loading, rooftop and parking.

2. Storage and loading areas of tier 2 industrial facilities identified in s. NR 216.21(2)(b).

Note: Runoff from tier 2 parking and rooftop areas may be infiltrated but may require pretreatment.

3. Fueling and vehicle maintenance areas.

4. Areas within 1000 feet upgradient or within 100 feet downgradient of karst features.

5. Areas with less than 3 feet separation distance from the bottom of the infiltration system to the elevation of seasonal high groundwater or the top of bedrock.

6. Areas with runoff from industrial, commercial and institutional parking lots and roads and residential arterial roads with less than 5 feet separation distance from the bottom of the infiltration system to the elevation of seasonal high groundwater or the top of bedrock.

7. Areas within 400 feet of a community water system well as specified in s. NR 811.16(4) or within 100 feet of a private well as specified in s. NR 812.08(4) for runoff infiltrated from commercial, industrial and institutional land uses or regional devices for residential development.

8. Areas where contaminants of concern, as defined in s. NR 720.03(2), are present in the soil through which infiltration will occur.

9. Any area where the soil does not exhibit one of the following characteristics between the bottom of the infiltration system and seasonal high groundwater and top of bedrock:

a. At least a 3-foot soil layer with 20 percent fines or greater.

b. At least a 5-foot soil layer with 10 percent fines or greater.

c. Where the soil medium within the infiltration system does not provide an equivalent level of protection.

Note: The areas listed in par. (d) are prohibited from infiltrating runoff due to the potential for groundwater contamination.

(e) Transportation facilities located in the following areas and otherwise subject to the requirements of this subchapter are not required to meet the requirements of this subsection:

1. Areas where the infiltration rate of the soil is less than 0.6 inches/hour measured at the bottom of the infiltration system.

2. Parking areas and access roads less than 5,000 square feet for commercial and industrial development.

3. Redevelopment post-construction sites.
4. In-fill development areas less than 5 acres.
5. Infiltration areas during periods when the soil on the site is frozen.
6. Roads in commercial, industrial and institutional land uses, and arterial residential roads.
7. Highways.

(f) Where alternate uses of runoff are employed, such as for toilet flushing, laundry or irrigation, such alternate use shall be given equal credit toward the infiltration volume required by this subsection.

(g) 1. Infiltration systems designed in accordance with this subsection shall, to the extent technically and economically feasible, minimize the level of pollutants infiltrating to groundwater and shall maintain compliance with the preventive action limit at a point of standards application in accordance with ch. NR 140. However, if site specific information indicates that compliance with a preventive action limit is not achievable, then the infiltration BMP may not be installed or shall be modified to prevent infiltration to the maximum extent practicable.

2. Notwithstanding subd.1., the discharge from BMPs shall remain below the enforcement standard at the point of standards application.

(6) PROTECTIVE AREAS. (a) In this subsection, "protective area" means an area of land that commences at the top of the channel of lakes, streams and rivers, or at the delineated boundary of wetlands, and that is the greatest of the following widths, as measured horizontally from the top of the channel or delineated wetland boundary to the closest impervious surface. However, in this paragraph, "protective area" does not include any area of land adjacent to any stream enclosed within a pipe or culvert, such that runoff cannot enter the enclosure at this location.

1. For outstanding resource waters and exceptional resource waters, and for wetlands in areas of special natural resource interest as specified in s. NR 103.04, 75 feet.

2. For perennial and intermittent streams identified on a United States geological survey 7.5-minute series topographic map, or a county soil survey map, whichever is more current, 50 feet.

3. For lakes, 50 feet.

4. For highly susceptible wetlands, 50 feet. Highly susceptible wetlands include the following types: fens, sedge meadows, bogs, low prairies, conifer swamps, shrub swamps, other forested wetlands, fresh wet meadows, shallow marshes, deep marshes and seasonally flooded basins. Wetland boundary delineation shall be made in accordance with s. NR 103.08(1m). This paragraph does not apply to wetlands that have been completely filled in accordance with all applicable state and federal regulations. The protective area for wetlands that have been partially filled in accordance with all applicable state and federal regulations shall be measured from the wetland boundary delineation after fill has been placed.

5. For less susceptible wetlands, 10% of the average wetland width, but no less than 10 feet nor more than 30 feet. Less susceptible wetlands include degraded wetlands dominated by invasive species such as reed canary grass.

6. In subd. 1, 4 and 5, determinations of the extent of the protective area adjacent to wetlands shall be made on the basis of the sensitivity and runoff susceptibility of the wetland in accordance with the standards and criteria in s. NR 103.03.

7. For concentrated flow channels with drainage areas greater than 130 acres, 10 feet.

(b) 1. Beginning with land acquired within a protective area for a transportation facility on or after the effective date of this rule...[revisor insert date], no impervious surface of a transportation facility may be constructed within a protective area, unless the transportation facility authority determines, in consultation with the department, that there is no practical alternative. If there is no practical alternative to locating a transportation facility within a protective area, the transportation facility may be constructed in the protective area only to the extent the transportation facility authority, in consultation with the department, determines is reasonably necessary, and the transportation facility authority shall state in the design plan prepared pursuant to s. NR 151.22(1)(a), why it is necessary to construct the transportation facility within a protective area.

2. If a transportation facility is constructed within a protective area, adequate sod or self-sustaining vegetative cover of 70% or greater shall be established and maintained in the area that is the width of the protective area, or the greatest width practical, and throughout the length of the protective area in which the transportation facility is located. The adequate sod or self-sustaining vegetative cover required under this paragraph shall be sufficient to provide for bank stability, maintenance of fish habitat and filtering of pollutants from upslope overland flow areas under sheet flow conditions. Non-vegetative materials, such as rock riprap, may be employed on the bank as necessary to prevent erosion such as on steep slopes or where high velocity flows occur.

Note: It is recommended that seeding of non-aggressive vegetative cover be used in the protective areas. Vegetation that is flood and drought tolerant and can provide long-term bank stability because of an extensive root system is preferable. Vegetative cover may be measured using the line transect method described in the university of Wisconsin-extension publication number A3533, titled "Estimating Residue Using the Line Transect Method".

3. Best management practices such as filter strips, swales or wet detention basins, that are designed to control pollutants from nonpoint sources may be located in the protective width area.

Note: Other regulations, such as ch. 30, Stats., and chs. NR 103, 115, 116 and 117 and their associated review and approval process may apply in the protective area.

4. This subsection does not apply to:

- a. Non-highway transportation redevelopment sites.
- b. Transportation facilities that cross or access surface waters, such as boat landings, bridges and culverts.
- c. Structures constructed in accordance with s. 59.692(1v), Stats.
- d. Transportation facilities from which runoff does not enter the surface water, except to the extent that vegetative ground cover is necessary to maintain bank stability.

Note: A vegetated protective area to filter runoff pollutants from transportation facilities described in subd. 4.d. is not necessary since runoff is not entering the surface water at that location. Other practices necessary to meet requirement of this section, such as a swale or basin, will need to be designed and implemented to reduce runoff pollutants prior to runoff entering a surface water of the state.

(7) FUELING AND VEHICLE MAINTENANCE AREAS. Fueling and vehicle maintenance areas shall, to the maximum extent practicable, have BMPs designed, installed and maintained to reduce petroleum within runoff, such that the runoff that enters waters of the state contains no visible petroleum sheen.

Note: A combination of the following BMPs may be used: oil and grease separators, canopies, petroleum spill cleanup materials, or any other structural or non-structural method of preventing or treating petroleum in runoff.

(8) LOCATION. To comply with the standards required under this section, BMPs may be located on-site or off-site as part of a regional storm water device, practice or system, but shall be installed in accordance with s. NR 151.003.

(9) TIMING. The BMPs required under this section shall be installed before the construction site has undergone final stabilization.

(10) SWALE TREATMENT. (a) *Applicability.* Except as provided in par. (b), transportation facilities that use swales for runoff conveyance and pollutant removal meet all of the requirements of this section, if the swales are designed to the maximum extent practicable to do all of the following:

1. Be vegetated. However, where appropriate, non-vegetative measures may be employed to prevent erosion or provide for runoff treatment, such as rock riprap stabilization or check dams.

Note: It is preferred that tall and dense vegetation be maintained within the swale due to its greater effectiveness at enhancing runoff pollutant removal.

2. Carry runoff through a swale for 200 feet or more in length that is designed with a flow velocity no greater than 1.5 feet per second for the peak flow generated using either a 2-year, 24-hour design storm or a 2-year design storm with a duration equal to the time of concentration as appropriate. If a swale of 200 feet in length cannot be designed with a flow velocity of 1.5 feet per second or less, the flow velocity shall be reduced to the maximum extent practicable.

Note: Check dams may be included in the swale design to slow runoff flows and improve pollutant removal. Transportation facilities with continuous features such as curb and gutter, sidewalks or parking lanes do not comply with the design requirements of this subsection. However, a limited amount of structural measures such as curb and gutter may be allowed as necessary to account for other concerns such as human safety or resource protection.

(b) *Exemptions.* 1. Notwithstanding par. (a), the department may, consistent with water quality standards, require other provisions of this section, in addition to swale treatment, be met on a transportation facility with an average daily traffic rate greater than 2500 and where the initial surface water of the state that the runoff directly enters is any of the following:

- a. An outstanding resource water.
 - b. An exceptional resource water.
 - c. Waters listed in s. 303(d) of the federal clean water act that are identified as impaired in whole or in part, due to nonpoint source impacts.
 - d. Waters where targeted performance standards are developed pursuant to s. NR 151.004.
2. The transportation facility authority shall contact the department's regional storm water staff or the department's liaison to the department of transportation to determine if additional BMPs beyond a water quality swale are needed under this paragraph.

NR 151.25 Developed urban area performance standard. (1) APPLICABILITY. This section applies to transportation facilities under the sole and exclusive jurisdiction of the department of transportation that are located within municipalities regulated under subch. I of ch. NR 216.

Note: Transportation facilities that are not under the sole and exclusive jurisdiction of the department of transportation are subject to the performance standards in s. NR 151.13.

(2) REQUIREMENTS. (a) The department of transportation shall develop and implement a storm water management plan to control pollutants from transportation facilities described in sub. (1). The plan shall do the following to the maximum extent practicable:

1. Beginning not later than March 10, 2008, by design, implement a storm water management plan that attains a 20% reduction in total suspended solids in runoff that enters waters of the state as compared to no storm water management controls.
2. Beginning not later than March 10, 2013, by design, implement a storm water management plan that attains a 40% reduction in total suspended solids in runoff that enters waters of the state as compared to no storm water management controls.

(b) The department of transportation shall inform and educate appropriate department of transportation staff and any transportation facility maintenance authority contracted by the department of transportation to maintain transportation facilities owned by the department of transportation regarding nutrient, pesticide, salt and other deicing material and vehicle maintenance management activities in order to prevent runoff pollution of waters of the state.

NR 151.26 Enforcement. This subchapter shall be enforced as follows:

(1) If a transportation facility that is exempted from prohibitions, permit or approval requirements by s. 30.12(4), Stats., does not comply with the performance standards of this subchapter, the department shall initiate the conflict resolution process specified in the cooperative agreement between the department of transportation and the department established under the interdepartmental liaison procedures under s. 30.12(4)(b), Stats.

(2) The department shall enforce this subchapter where applicable for transportation facilities not specified in sub. (1) under s. 281.98, Stats.

Subchapter V – Technical Standards Development Process for Non-Agricultural Performance Standards

NR 151.30 Purpose. This subchapter specifies the process for developing and disseminating technical standards to implement the performance standards in subchs. III and IV, as authorized by s. 281.16 (2)(b), Stats., and establishes the procedures that the department shall use to determine if technical standards adequately and effectively implement, as appropriate, the performance standards in subchs. III and IV. This subchapter applies to technical standards developed or implemented by any agency of the state of Wisconsin.

NR 151.31 Technical standards development process. (1) The department shall develop and revise technical standards to implement the performance standards in ss. NR 151.11, 151.12, 151.13, 151.23, 151.24 and 151.25 through a process outlined as follows:

(a) The department may decide that a new or revised technical standard is necessary to implement a performance standard.

(b) Any person may request the department to develop or revise a technical standard designed to meet a performance standard. The request shall be made in writing to the director of the department's bureau of watershed management and shall include the performance standard for which technical standard development or revision may be needed, and an explanation why a new or revised technical standard is requested.

(c) The department shall evaluate a request submitted pursuant to par. (b), to determine if it is necessary to develop or revise a technical standard to implement a performance standard. If the department determines that a new or revised technical standard is not necessary to implement a performance standard, it shall reply to the requester in writing as to the reasons that a technical standard does not need to be developed or revised.

(d) If the department determines that a new or revised technical standard is necessary to implement a performance standard, it shall:

1. Determine the state agency responsible for the technical standard.
2. If the responsible state agency is not the department, request the responsible state agency to develop or revise a technical standard.
3. If the responsible agency denies the request to develop or revise a technical standard, the department may initiate conflict resolution procedures outlined under any existing memorandum of understanding or agreement between the department and the responsible agency. If no conflict resolution procedures exist, the department may attempt to resolve the disagreement through stepped negotiations between increasing higher levels of management.

(e) The department shall use the following procedures when it acts to develop or revise technical standards to implement the performance standards in subchs. III and IV.

1. Convene a work group to develop or revise the technical standard that includes agencies and persons with technical expertise and direct policy interest. The work group shall include at least one representative from the agency or person that made an initial request to develop or revise the technical standard.

2. The work group shall publish a class 1 public notice and consider public comments received on the technical standard prior to providing recommendations to the department under subd. 3.

3. The work group shall provide a recommended technical standard to the department within 18 months of its formation unless the director of the bureau of watershed management grants an extension to this deadline.

(f) 1. Notwithstanding other provisions of this section, and acting jointly with the department of transportation and in consultation with other appropriate stakeholders, the department shall:

a. Develop a technical standard that, by design, meets the performance standard established in s. NR 151.23 (3). This technical standard shall address slope erosion and channel erosion and identify BMPs that may be used given a variety of site conditions.

b. Annually review this technical standard.

Note: This technical standard is sometimes referred to as the standardized erosion control reference matrix for transportation.

2. For transportation facility construction sites, the technical standard developed under this paragraph shall also indicate any conditions under which it may not be used to implement the performance standard established in s. NR 151.23 (3).

3. This technical standard and future revisions become effective upon signatures from both secretaries of the department and the department of transportation, or their designees.

(2) (a) Upon receipt of a proposed technical standard or technical standard revision, either developed by the department or a responsible state agency, the department shall determine if the technical standard will effectively achieve or contribute to achievement of the performance standards in subchs. III and IV. The department shall provide its determination in writing to the responsible state agency that prepared the proposed technical standard.

(b) If the department determines that a proposed technical standard will not adequately or effectively implement a performance standard in subchs. III and IV, the proposed technical standard may not be used to implement a performance standard in whole or in part.

(c) If the department determines that a proposed technical standard will adequately and effectively implement a performance standard in subchs. III and IV in whole or in part, the new or revised technical standard shall be used in lieu of any existing standards to implement the performance standard beginning with plans developed after the date of this determination.

(d) The department may determine a portion of a technical standard is adequate and effective to implement the performance standards under subch. III or IV.

(3) The department shall accept technical standards and best management practices developed by the department, the department of commerce, the department of transportation or other appropriate state agencies, existing on the effective date of this rule...[revisor insert date] unless the department identifies a technical standard as not adequate or effective to implement a performance standard in subchs. III and IV in whole or in part, and informs the responsible state agency of this determination and the basis for it.

(4) Until the processes under subs. (1) and (2) are completed, an existing technical standard identified by the department under sub. (3), or previously accepted by the department as adequate and effective to implement a performance standard under subch. III or IV shall be recognized as appropriate for use under this chapter.

(5) The department may identify technical standards that exist or are developed by qualified groups or organizations as adequate and effective to implement the performance standards under subch. III or IV.

(6) Except as provided in s. NR 151.26, if a technical standard that the department determines is not adequate or effective to implement a performance standard in whole or in part is used to implement a performance standard under subch. III or IV, the department may initiate enforcement proceedings for failure to meet the performance standard under s. 281.98, Stats.

NR 151.32 Dissemination of technical standards. (1) Technical standards developed or revised under this section may be made available through the responsible state agency's appropriate rules, manuals or guidance in keeping with normal publication schedules. If the responsible state agency does not publish appropriate manuals or guidance, the department shall request the agency provide the department with a copy of the technical standard. Where provided, the department shall publish or reproduce the technical standard for public use.

(2) The department shall maintain a list of technical standards that it has determined adequate and effective to implement the performance standards under subch. III or IV and make the list available upon request.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on January 22, 2002 and May 22, 2002.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Darrell Bazzell, Secretary

(SEAL)