

RESPONSE SUMMARY
December 7, 2012

Report to the Small Business Regulatory Review Board
Phase 2: Review of Rules

OVERVIEW OF PUBLIC COMMENT PERIOD:

On November 6, 2012, the Department of Natural Resources (Department) posted the draft report for public comment. The draft report was posted on the Department web page, <http://dnr.wi.gov>, search "rules review". Comments were accepted through December 5, 2012.

The availability of the draft report for review and comment was publicized through a press release, a GovDelivery email notice to subscribers of small business related topics, and an article in the DNR Small Business Advisor newsletter. In addition, notification was provided to the Department Small Business Environmental Council, the Natural Resources Board, and the Small Business Regulatory Review Board.

Nineteen written comments were received on the draft report. Eight of the comments were submitted by individuals. The rest were submitted on behalf of the following twenty-one organizations: Midwest Environmental Advocates, Milwaukee Riverkeeper, Sierra Club – John Muir Chapter, River Alliance of Wisconsin, Wisconsin Wetlands Association, Lakeshore Natural Resources Partnership, Wisconsin Lakes, The Nature Conservancy – Wisconsin Chapter, Clean Wisconsin, Wisconsin Wildlife Federation, Wisconsin League of Conservation Voters, Wisconsin Great Lakes Coalition, Alliance for the Great Lakes, Town & Country Resource Conservation & Development, Inc., Union Cab of Madison Cooperative, Inc., St. Paul District Corps of Engineers Regulatory Branch - US Army Corps of Engineers, Public Health Madison and Dane County, Weekly Timber & Pulp Inc., Invisible, Inc., We Energies, and Wisconsin Independent Businesses, Inc.

CHANGES TO REPORT

In several instances, comments resulted in changes to the report. All report changes are described below.

Most notably, the draft recommendations concerning chs. NR 102, 104, and 207, Wis. Adm. Code, have been removed from the final report. A new recommendation concerning an obsolete section of ch. NR 104, Wis. Adm. Code, was added. See below for details.

Comments also prompted the following clarifying changes to the wording of the recommendation on ch. NR 16, Wis. Adm. Code. The report changes are presented in underline (new text) and ~~strikeout~~ (deleted text) below.

1. Captive Wildlife Management, s. NR 16, Wis. Adm. Code

The Department recommends reducing the frequency that owners must report the status of captive wild animals to the Department. This modification will require a change to the underlying statute, ch. 169, Wis. Stats.

This chapter regulates bird shooting preserves, white-tailed deer farms, wild fur farms and bird and game-breeders who may be hobbyists or small businesses. These rules require reporting and record-keeping which are likely not a significant burden for small business because the information gathered would not be viewed as more detailed than a farm manager

would maintain in the absence of these requirements. However, even regulations that may not be burdensome by themselves require additional attention to detail that can be a challenge considering all of the other activities that an individual or business needs to be attentive to. Even a minor simplification could be viewed as beneficial.

~~These rules require the owners of farm-raised white-tailed deer to remove wild deer before introducing farm-raised deer to an enclosure and establish fencing requirements. Deer farm owners may view these requirements as a burden. Owners of harmful wild animals such as bear, cougars and mute swans are subject to additional standards to protect animal and human safety and the environment. Owners of harmful wild animals may view these requirements as a burden.~~

One change, which requires statutory authorization, is to simplify the requirement that farm owners make certain quarterly reports of the numbers of captive animals bought, sold, or which have died. Additional review may reveal other simplifications for reporting. Many Captive Wild Animal Farm license holders are individual hobbyists but some would meet the definition of a small business.

The Department does not recommend any other significant changes at this time. Note that the department does not recommend any changes that would impact deer farms. Both the departments of Natural Resources and Agriculture, Trade & Consumer protection have regulatory authority over deer farms. The departments have not consulted as part of this regulatory review process and deer farm-related rule or statute changes would not be appropriate. This chapter was established in October 2003, and is still current and applicable to activities in the trade of native and harmful wild animals today. The initial requirements of this chapter are established in ch. 169, Wis. Stats., and implemented by this chapter.

The intent of the underlying statute is to establish accountability among people who possess captive wild animals which are, in most situations, also native species in Wisconsin. The current rules allow commerce in captive animals where it will not impact free roaming wild animals that are held in the public trust. These rules help assure that free-roaming wild animals are not used illegally and to the detriment of wild populations, and people interested in wild animals. However, the amount of accountability created by the quarterly reporting requirement is limited. In most cases, it would still be necessary for a conservation officer or an informant to observe the illegal possession of wild animals in order for a citation to be issued. The time invested by the Department in processing reports and time invested by owners in the reporting process may not justify the benefits to enforcing the protections.

During the time these rules have been in effect, the Department has made limited use of the requirement to report captive animal transactions. In most cases, it is and will continue to be necessary for a conservation officer or informant to observe the illegal activity in order for a citation to be issued. Owners of certain captive wild animals would continue to be license under Ch. 169 Stats. and other regulations related to animal health.

Reducing the frequency that owners must report the status of captive wild animals to the Department will simplify, reduce, and eliminate a minor burden to hobbyists and other farm owners.

The final change to the report concerns s. NR 104.06(2)(b), Wis. Adm. Code. This change was initiated by Department staff. It is a simple update to remove language that was superseded by provisions in s. NR 106.51, Wis. Adm. Code. The new text added to the report is presented below.

~~“... as a monthly geometric mean based on not less than 5 samples per month nor exceed 89°F at any time at the edge of the mixing zones established by the department under s. NR 102.05(3).”~~

The requirement to not exceed 89°F at the edge of an authorize mixing zone in s. NR 104.06(2)(b), Wis. Adm. Code, is no longer valid as it is superseded by the provisions in s. NR 106.51, Wis. Adm. Code. This section of ch. NR 104, Wis. Adm. Code is unnecessary and confusing and may be deleted entirely without any risk to public health of the environment.

SUMMARY OF PUBLIC COMMENTS & DEPARTMENT RESPONSES

Comments are either presented in full or summarized on the following pages, along with the Department response. The comments are grouped by topic, with topics receiving the most comments presented first.

Ch. NR 102, 104, and 207, Wis. Adm. Code

Comment: The majority of the comments received on the draft report requested removal of the recommendations on chs. 102, 104, and 207, Wis. Adm. Code, due to the scope, complexity, and controversial nature of the recommendations.

Comments to this effect were submitted by several individuals.

Similar comments were submitted on behalf of the following fourteen organizations: River Alliance of Wisconsin, Wisconsin Wetlands Association, Town & Country Resource Conservation & Development, Inc., Lakeshore Natural Resources Partnership, Wisconsin Lakes, The Nature Conservancy – Wisconsin Chapter, Clean Wisconsin, Wisconsin Wildlife Federation, Milwaukee Riverkeeper, Wisconsin League of Conservation Voters, Wisconsin Great Lakes Coalition, Alliance for the Great Lakes. The following is an excerpt from that comment letter. “Due to the scope, complexity and controversial nature of these recommendations, we believe they do not meet the criteria for inclusion in this process and we would like to see them removed from the report. The one exception to this is the updating of variance waters in NR 104. This is a straightforward cleaning up of rules to reflect recent changes in water quality standards.” Union Cab of Madison Cooperative, Inc. submitted a separate letter endorsing these comments.

We Energies commented that revisions to these rules may impact the company; they intend to review and if applicable submit comment on any proposed revisions during the administrative rule process.

Response: The Department agrees and has removed these recommendations from the report. Any changes to these rules will be addressed separately through the ordinary administrative rule process.

Ch. NR 351 and 352, Wis. Adm. Code

Comment: Several commenters expressed concern about the scope and potential impacts associated with recommendations on chs. NR 351 and 352, Wis. Adm. Code.

The following comment was provided by River Alliance of Wisconsin, Wisconsin Wetlands Association, Town & Country Resource Conservation & Development, Inc., Lakeshore Natural Resources Partnership, Wisconsin Lakes, The Nature Conservancy – Wisconsin Chapter, Clean Wisconsin, Wisconsin Wildlife Federation, Milwaukee Riverkeeper, Wisconsin League of Conservation Voters, Wisconsin Great Lakes Coalition, and Alliance for the Great Lakes. “We support the proposed rules upon the condition that the Scoping Statement for this rulemaking clearly limits the scope of this effort to the items described above. This is needed to deflect any public or political pressure to use this rulemaking to further relax the standards of review for wetland development projects. With both rules last modified in 2003, we assume that some updates have been made to the previously referenced federal regulations, rules, memoranda of agreement, guidance letters, and interpretive documents. When incorporating any additional

implementing elements, the Department should: 1. Exercise its full discretion to modify new federal laws or interpretations to ensure projects will still comply with Wisconsin's Water Quality Standards for Wetlands (NR 103). 2. Limit changes to NR 351 (exemptions) to those needed to clarify implementation standards for the exemptions already listed in 281.36(4). Any additional exemptions would require an update to this provision of the statute."

We Energies commented that revisions to ch. NR 351, Wis. Adm. Code may impact the company; they intend to review and if applicable submit comment on any proposed revisions during the administrative rule process.

Response: It is the Department's recommendation to revise NR 351 and 352 for the sole purpose of making the rules consistent with federal law and recent state law changes. Eliminating references to non-federal wetlands and clarifying references to federal law and guidance will achieve this purpose, and will not alter Wisconsin's wetland water quality standards. We will work with the US Army Corps of Engineers to ensure that references to federal law are accurate and up-to-date. No new exemptions will be created by revising NR 351, as the Department does not have the statutory authority to do so by rule.

Comment: The St. Paul District Corps of Engineers Regulatory Branch of the US Army Corps of Engineers commented as follows on the recommendations related to chs. NR 351 and 352, Wis. Adm. Code. "We support inclusion of implementation information derived from our federal regulations and guidance. However, many of the incorporated references in NR 351 and 352 are dated and are no longer supported by our agency. We recommend that any incorporation of implementing information reference updated regulation, Regulatory Guidance Letters, St. Paul District guidance, and Memorandums. I would be happy to assist the State in determining the appropriate references. Further, we recommend that the language used to incorporate any Corps documents (by reference) be flexible enough to allow state rule to remain consistent with federal implementation in the future. If the federal program updates a regulation or manual, we believe it would be a good idea for the state rule to be flexible enough to adopt such an update without the requirement for formal rule making."

Response: It is the Department's recommendation to revise chs. NR 351 and 352, Wis. Adm. Code, for the sole purpose of making the rules consistent with federal law and recent state law changes. Eliminating references to non-federal wetlands and clarifying references to federal law and guidance will achieve this purpose, and will not alter Wisconsin's wetland water quality standards. We appreciate the US Army Corps of Engineers' input and offer of assistance to ensure that references to federal law are accurate and up-to-date. We agree with the suggestion to make rule language clear but also flexible, so that it can accommodate future law or guidance changes without requiring future revisions, and will strive to use rule language that will accomplish this.

Chs. NR 113 and 114, Wis. Adm. Code

Comment: Two comments were received concerning the recommendations on chs. 113 and 114, Wis. Adm. Code.

Public Health Madison and Dane County provided this comment. "I have recently reviewed the draft Phase 2 Report prepared as part of the Retrospective review of DNR rules affecting small business. I am concerned about the proposal to add thresholds and exemptions to NR 113 and NR 114. The draft did not give specifics about what these exemptions or thresholds would be

which makes comment difficult. My position as a public health official is that any business handling these wastes needs to meet the standards regardless of whether they pump 1 tank a year or hundreds of tanks a year. I would like to have more details on the proposed thresholds and exemptions that are being considered in these chapters.”

The following comment was provided by River Alliance of Wisconsin, Wisconsin Wetlands Association, Town & Country Resource Conservation & Development, Inc., Lakeshore Natural Resources Partnership, Wisconsin Lakes, The Nature Conservancy – Wisconsin Chapter, Clean Wisconsin, Wisconsin Wildlife Federation, Milwaukee Riverkeeper, Wisconsin League of Conservation Voters, Wisconsin Great Lakes Coalition, and Alliance for the Great Lakes. “Explain what is an “incidental service business” and what they would be exempted from specifically. Does this affect manure spreading rules at all?”

Response: Thresholds and exemptions will be proposed to codes to simplify the constraints on small businesses that perform incidental services relating to septage servicing. Many of these incidental services are not regulated or not regulated consistently across Wisconsin. These proposed thresholds and exemptions generally do not impact mainstream septage servicing activities. Regardless of the business, minimum standards for septage disposal, including pathogen control and vector attraction reduction will remain. Health and safety concerns as well as environmental protection will not be jeopardized. Specifics will be worked out through the administrative rule process.

Chs. NR 106, 216, Wis. Adm. Code, and s. 283.17(2), Wis. Stats.

Comment: A comment letter submitted by Midwest Environmental Advocates, Milwaukee Riverkeeper, and Sierra Club – John Muir Chapter, provides specific law and rule revisions to correct inconsistencies between state requirements and the federal Clean Water Act. The following is an excerpt from that letter.

“In line with these criteria, we have identified a number of rules that were not included in the proposed draft that we believe should be repealed or modified, because the regulatory or statutory provisions are obsolete and/or no longer needed and create confusion regarding the legally applicable standards that impact small businesses. These include a number of provisions in the Department’s water permitting program that were specifically disapproved by the United States EPA years ago, and therefore never became legally effective under the Clean Water Act. In addition, there are numerous additional provisions in the water permitting program which were identified in the July 18, 2011 letter from the United States EPA to Secretary Stepp (“EPA Legal Authority Letter”) as deviating from the Clean Water Act’s requirements, and which the State is required to promptly correct. Several of those provisions can be easily corrected, and the deviations from the Clean Water Act eliminated, by simple repeals or modifications, and we propose that those changes also be made as part of the Small Business Regulatory Review process. This can be done without affecting the Department’s implementation of the WPDES permit program.

These proposed changes will simplify and reduce the burden for small businesses in Wisconsin by ensuring that only legally applicable requirements are included in Wisconsin statutes and regulations, thereby reducing the burden on small business owners of wading through years of EPA and DNR communications to understand which regulations do, in fact, create Clean Water Act obligations. Without these revisions Small Businesses may follow the language of Wisconsin regulations and statutes, but unknowingly be in violation of the Clean Water Act.

The attached enclosure identifies rules that can be modified to cure the disapproval or inconsistency by simply striking some or all of the rule language. The rules that were independently disapproved by US EPA are Wis. Admin. Code ss. NR 106.10(10), NR 106.0145(2)(b)2, (3), and (7)(b); NR 106.06(6), and NR 106.08(5). They are referenced as #2 through 5 on the attached document and were identified as paragraphs 8 and 10 in the EPA Legal Authority Letter Enclosure. We have included references to the paragraphs identifying deviations in the enclosure to EPA's July 18, 2011 letter for each of these needed rule changes, for ease of reference."

Response: The changes you are proposing that would respond to EPA communications that Wisconsin regulations are inconsistent with federal regulations are not directly related to the small business regulatory review. Those suggested changes are of interest to a larger audience (e.g. municipal permittees and stormwater permittees) and merit a more rigorous rule-making process that provides for full public participation and review by EPA. The concerns you have raised are being addressed through various rule-making initiatives currently underway, proposed statutory changes, or other administrative processes.

Ch. NR 16, Wis. Adm. Code

Comment: Comments from one individual and from the Sierra Club – John Muir Chapter stated concerns about relaxing rules for deer farms, under ch. NR 16, Wis. Adm. Code.

Response: The Department agrees that these rules and laws are important and exist for the protection of people and free-roaming wild and captive wild animals. We agree that there should be no change to the current requirement to remove all wild deer from a proposed enclosure to be licensed as a deer farm. Wild deer are a public resource and we do not recommend any changes to this requirement.

We agree that changes to deer farm laws are not appropriate for this project. If changes to current reporting requirements are proposed, they should not apply to deer farms. We agree that there are current, known health threats. Additionally, changes to deer farm regulations would require close consultation with the Department of Agriculture, Trade & Consumer Protection (DATCP), the other agency with regulatory authority over deer farms. Consultation of that type has not occurred and rule/statute changes are not appropriate for this small business review effort. We have modified our phase 2 recommendations the department's Report to the Small Business Regulatory Review Board to clarify that we do not propose any regulation changes related to deer farms.

The Department does believe that, for certain other species, a reduced frequency of reporting may be appropriate. For instance, the Department has made limited use of certain reports bird dog trainers are required to submit annually concerning the number of birds they purchase and use for their dog training activities. Staff resources necessary to enter data from those reports are not readily available, further limiting that information's usefulness. People possessing species such as pheasants are subject to DATCP requirements for premise registration and National Poultry Improvement Plan certification, so there are further regulations for captive game birds. Additionally, quarterly reporting may not be necessary for as many species as are currently require, but annual reporting could be continued.

We believe it is possible to relax some requirements, not related to deer farms, while continuing to provide protection to our natural resources and the health of privately owned wild animals.

Ch. NR 185, Wis. Adm. Code

Comment: The Sierra Club – John Muir Chapter commented in opposition to the repeal of solid waste management planning criteria under ch. 185, Wis. Adm. Code, even though the underlying statute has been repealed, noting that such a repeal would conflict with the Governor’s Task Force on Waste Materials Recovery and Disposal recommendation to promote effective solid waste planning and implementation as well as regional cooperation for both.

Response: With the statutory basis for the rule no longer in place, maintaining ch. NR 185, Wis. Adm. Code, would be confusing to small businesses and others. Elimination of the code does not preclude voluntary planning.

ss. 285.11(12) and 285.40, Wis. Stats.

Comment: “We Energies supports the Department’s recommendation to repeal the annual plan submittal and result reporting requirements of the state acid rain law ss. 285.11(12) and 285.41, Wis. Stats. This will alleviate a duplicative reporting requirement for We Energies and will also reduce the Department’s administrative burden in processing these annual reports and in including this requirement as part of facility permitting and inspections.”

Response: The Department agrees.

Chs. NR 305 and 353, Wis. Adm. Code

Comment: We Energies commented that revisions to chs. NR 305 and 353, Wis. Adm. Code, may impact the company; they intend to review and if applicable submit comment on any proposed revisions during the administrative rule process.

Response: Duly noted.

Ch. NR 506, Wis. Adm. Code

Comment: “We Energies supports eliminating the annual solid waste landfill compliance certification reporting requirement of s. NR 506.19(1), Wis. Adm. Code. We agree that eliminating this reporting requirement will reduce paperwork for landfill owners and eliminate the Department’s administrative burden related to processing these annual reports, with no resulting reduction in public health or environmental protection.”

Response: The Department agrees.

Ch. NR 850, Wis. Adm. Code

Comment: “There are just a few of us small aquaculture farms that are expected to pay into the Great Lakes annual water fee. It doesn’t seem fair to wrap us into big businesses and municipalities that make millions of dollars and can easily pass the expense onto the consumer who is really paying for this new fee. Furthermore, Chicago uses one Billion gallons per day and dumps the used great lakes water into the Chicago River which carries it away into Mexico,

doesn't seem just or fair. It will be very difficult for our small farm to make up the difference this year to pay this new fee/tax on us. I find it hard to believe that our \$3,300.00 annually will make a difference to the overall problems of the great lakes while at the same time making it a hardship for us few small trout farms. There should be an exemption for very small businesses that gross a certain amount of money per year or has few employees. I thought we were trying to keep people employed in this state. Our farm generally makes under \$100,000 per year and we employ a few part-time people, we are trying to expand but costs and fees keep rising making it very difficult."

Response: As stated in s. NR 850.04 (4), Wis. Adm. Code, the existing water use fee cap for small businesses is \$1,000. Further, s. NR 850.03 (6), Wis. Adm. Code references the definition of "small business" contained in s. 227.114 (1) of the Wisconsin Statutes, that is: "a business entity, including its affiliates, which is independently owned and operated and not dominant in its field and which employs 25 or fewer full-time employees or which has gross sales of less than \$5,000,000."

Ch. NR 80, Wis. Adm. Code

Comment: One comment expressed a general concern about repealing ch. NR 80, Wis. Adm. Code, on the use of pesticides on land and water areas of the state of Wisconsin.

Response: This rule is no longer needed because the fifteen chemicals addressed by this rule are either regulated by DATCP under ATCP 30, are banned by US EPA, or are no longer used as pesticides, but are used for other purposes subject to different regulations. The Pesticide Review Board referenced in this rule no longer exists. Repeal of this rule will have no effect on public health or the environment.

Deer Registration Stations

Comment: The Department should have additional deer registration stations and they should not have to be geographically spaced, so that more businesses can benefit from the customer traffic generated.

Response: The department currently considers the geographic locations of deer registration stations so that they are conveniently located. When stations are well situated geographically, we have declined requests to set up additional stations in part because of the additional staff time required for visiting the locations, distributing supplies, and picking up registration stubs. While we would like to provide this opportunity to any business that requests it, we are also considering efficient use of our wildlife manager's time. Electronic registration of deer, and elimination of in-person check stations, is something that has been suggested during a recent review of deer management. We will make sure that the benefits of the current registration requirements are considered when future decisions are made. For now, in-person registration of deer continues to be important to gather accurate harvest information as well as deer-age information that is collected at certain registration stations.

Hunting License Fees

Comment: Non-Resident Hunting License Fees curtail Wisconsin tourism/spending.

Response: Wisconsin's non-resident license fee compares favorably with our surrounding states in 2012; Michigan \$138, Minnesota \$141, Wisconsin \$160, Illinois \$300 or \$325, Iowa \$426. We value the economic activity generated by travelling hunters and also consider that deer season is a kind of "homecoming" for families and friends returning to hunt and celebrate the Thanksgiving holiday. No fee increases are anticipated in the next state budget cycle which should mean stable fees for at least the next two years.

Department Guidance Concerning Annosum Root Rot

Comment: Weekly Timber & Pulp, Inc. commented in opposition to Department guidance on Annosum root rot, citing equipment and training costs, inadequate research, lack of economic data, and over-regulation of the logging industry.

Response: The proposed annosum guide is not an administrative rule, nor is it intended to be. The guide is in the proposal stage and applies only on state-owned lands. The proposed guide is scheduled to be discussed at the December 2012 meeting of the Council on Forestry, for their recommendation to Division of Forestry. For more information about the proposed annosum guide, see <http://dnr.wi.gov>, search "annosum". For more information on the Council on Forestry, see <http://council.wisconsinforestry.org/>.

General Comments & Questions about the Project

Comment: "On behalf of Wisconsin Independent Businesses, Inc. and its members, I write to you in regard to the Department's draft Phase 2 Report to the Small Business Regulatory Review Board. We support the Report's recommendations and the implementation of the recommendations through the administrative rule-making process or legislative action."

Response: Duly noted.

Comment: Invisible, Inc. provided the following comment. "Why are you using - "small business" means a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000, s. 227.114 (1), Wis. Stats.? Does this match the Federal definition? How much input have you had from this demographic? Are you aware that most SBs this size don't have the resource of time to even respond to you? What criteria have you used to assure me that you are fulfilling your Ombudsman Role? Phase 1 states there are 3,700+ pages. Have you been aggressive enough in this task? I have no objection to the changes proposed."

Response: The "small business" definition in the statutes is referenced in Executive Order 61, which is the basis for this review. The federal definition of small business is different. Two opportunities for public input were incorporated into this review, one in April-May 2012 and another in November-December 2012. The criteria for this review are explained in the report and are based on Executive Order 61. This review included an analysis of each administrative code chapter the Department administers.

Comment: One individual commented that the Department should protect of the environment, not small business.

Response: The recommendations included in the report will not have a negative impact on the environment.