

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:** Approval of the New Public Input Process for Creating or Updating Department of Natural Resources (DNR) Guidance (Previously - New Policy Development Manual Code)

**FOR:** April 2013 Board meeting

**TO BE PRESENTED BY:** Kristy Rogers, Director of Process Improvement

**SUMMARY:**

Department staff have developed a new internal process that increases the public's opportunity to provide input on the development of DNR guidance. (This topic was previously referred to as "New Policy Development Manual Code" at that January Natural Resources Board meeting.) Several stakeholders have expressed concern that the DNR is establishing guidance that directly impacts them without them being notified and being able to provide input into the process. This new process will help address that concern by promoting participation and transparency.

Guidance is formal written direction that explains how the DNR will approach making decisions when there are not specific details in the law. Program guidance can include recommended actions or suggested permit conditions when certain factors or criteria are present. Program guidance may also clarify implementation of legal authority or guide decision-making where legal authority allows discretion in decisions.

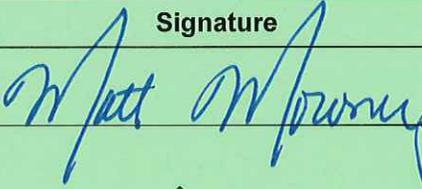
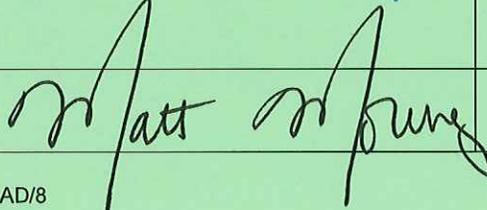
Under the new process, any interested member of the public will now be able to provide input on the development of new or updated guidance. DNR will solicit comments by posting a notice on the DNR webpage and by notifying known stakeholders. Anyone may submit comments during the comment period. DNR will consider all comments and the final guidance will be distributed.

The new public input process will not replace or duplicate the current public input processes that we currently implement. The new process is intended to establish a formal mechanism where it does not exist now.

**RECOMMENDATION:** Department staff recommends approval of the new process.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- Background memo
- Draft Manual Code - Public Input Process for Creating or Updating Guidance
- External Comments and Response Summary

Approved by	Signature	Date
Matt Moroney, Deputy Secretary		4/8/13
Not Applicable		
Cathy Stepp, Secretary		4/10/13

DATE: April 8, 2013

TO: Natural Resources Board

FROM: Secretary Cathy Stepp

SUBJECT: New Public Input Process for Creating or Updating DNR Guidance

Thank you in advance for considering the approval of a new process for developing DNR guidance. The concept of this new process, previously referred to as “New Policy Development Manual Code”, was initially presented to the Natural Resources Board in January 2013.

Over the past several months, several stakeholders have expressed concerns about a lack of transparency and participation in some of the Department’s decision-making – specifically the establishment of Department guidance that directly impacts them. While many of the Department’s programs involve stakeholders in making decisions, there is currently no consistent formal process that provides an opportunity for all interested parties to participate in guidance development. An excellent team of Department staff have developed a new formal process that will now provide that opportunity.

**Background:**

The state and federal government and the Natural Resources Board may grant the Department the authority to define the specific implementation details of regulations and programs. This is often described as broad decision-making authority. Broad decision-making authority is often expressed in statutes and rules through phrases like, “the department may modify....on a case by case basis”, ...as determined by the department”, or “the department may require additional....”, etc. To help staff consistently implement broad decision-making authority, Department programs create guidance.

Guidance is formal written direction that explains how to approach making decisions when there are not specific details in the law. Guidance can include recommended actions or suggested permit conditions when certain factors or criteria are present. Guidance may also clarify implementation of legal authority or guide decision-making where legal authority allows discretion in decisions.

**Proposed Process:**

The Department is proposing a new process for developing guidance that is designed to accomplish the following three goals:

- Increase transparency;
- Establish opportunities for public input and notification; and
- Increase communication and notification to the Secretary’s Office and the Natural Resources Board.

The new process will apply to the significant modification of existing or the creation of new guidance that impacts external stakeholders. The new process does not apply to procedural guidance, guidance that has already received formal public input through another process, Department legal opinions, and guidance that governs Department enforcement activities.

The new process establishes two new key steps. The first key step is a standard internal routing procedure to ensure that Department leadership is informed of proposed guidance. Division

Administrators and the Secretary's Office will now be notified of all proposed guidance. It is envisioned that controversial or unique guidance may be shared with the Natural Resources Board during the "Department's Secretary's Matters" portion of the meetings. In addition, interested Natural Resources Board members can sign up to receive notifications of proposed guidance on the new Department webpage at <http://dnr.wi.gov/news/input/Guidance.html>.

The second key step is the establishment of a 21-day public comment period that will be publicized using our website and automated email distribution lists. While 21 days is the standard comment period, there is built-in flexibility to decrease or increase the comment period depending on a number of factors including complexity and length of a proposed guidance.

Department staff will consider all comments received during the comment period when finalizing the draft guidance. Once the guidance is finalized, it will be posted on the website along with a comment summary for 21 days.

**External Comments:**

To "test" the new process, the Department started using it in March 2013. The Department received comments from 13 groups/individuals during the 21-day comment period. The comments were overwhelmingly positive with several very constructive suggestions. The comments, along with a summary of the Department's changes in response to those comments are attached.

**Recommendation:**

The Department requests that the Natural Resources Board approve the new public input process for creating or updating guidance. As a new process, it will not be perfect and there will be challenges. The Department is committed to evaluating this process in one year and making any needed changes to ensure the process is providing value to Department leadership, customers, and staff.

Department of Natural Resources  
Manual code ##### –  
Public Input Process for Creating or Updating Guidance

**Subject:** Public input process for creating or updating Department guidance.

**Scope:** This manual code applies to the significant modification of existing or the creation of new guidance that impacts external stakeholders. This manual code does not apply to procedural guidance, guidance that has received formal public input through another process, Department legal opinions, and guidance that governs Department enforcement activities.

**Background:** The state and federal government and the Natural Resources Board may grant the Department the authority to define the specific implementation details of regulations and programs. This is often described as broad decision-making authority. Broad decision-making authority is often expressed in statutes and rules through phrases like, “the department may modify...on a case-by-case basis”. “...as determined by the department”, or “the department may require additional...”, etc. The following are a few examples: NR 20.40(10)(d), NR 132.06(3)(k), NR 206.10(4)(c), NR 243.14(10), Wis Adm. Code; s. 29.541(1)(b), Wis. Stats.

To help staff consistently implement rules and statutes that contain broad decision-making authority, the Department establishes guidance. The Department actively seeks public input on many decisions; however, there is currently no consistent process to obtain public input on new or updated guidance that impacts external Department customers. This manual code creates a consistent Department process for obtaining public input on that type of guidance.

**Definitions:**

“Guidance” means written communications issued by the Secretary’s office, Department leadership team (DLT), division administrators, or a single program which may or may not have impacts to private rights and interests. Guidance may be set forth in several different written formats including handbooks, manual codes, directives from managers, etc. There are two types of guidance:

1. “Procedural Guidance” means documents that deal with internal management of the agency such as internal standard operating procedures and processes.
2. “**Program Guidance**”\* means documents that explain implementation of statutory and administrative rules in context of existing case law and typical operating procedure. Program guidance can include documents that recommend actions or suggest the imposition of permit conditions when certain factors or criteria are present, clarify implementation or application of legal authority, or guide decision making where legal authority allows discretion in decisions. Program guidance provides expected responses to fact situations that frequently occur. If expected responses to certain fact situations become uniform or standard, rules must be promulgated to implement the responses. Program guidance does not include individual permit decisions or the imposition of permit conditions on a case by case basis.

\*All program guidance documents must contain the following disclaimer:

*This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.*

“**Significant**” means something that is not merely clarifying in nature and that may affect the outcome of a Department decision.

**Policy:**

To promote transparency and public involvement, it is the Department’s policy that a public input process is conducted prior to implementing significant modifications to existing or the creation of new program guidance that falls under the scope of this manual code.

The goal of this public input process is to obtain feedback from the public and take that feedback into consideration before finalizing guidance. If there is unknown conflict or controversy that is discovered through this public input process, Department programs will need to analyze whether or not additional public participation steps outside of this process are necessary before moving forward with finalizing the guidance.

**Procedure:**

Staff should follow the steps outlined in the attached process map titled “Public Input Process for Creating or Updating Guidance” unless the Secretary’s Office explicitly approves an alternative approach at the Division Administrator’s request. Alternative approaches may be considered based on the following:

- Time sensitivity
- Public safety issue
- Level of public interest
- Degree of impact on customers
- Prior public input/notification activities

The Secretary’s Office may reduce the standard public comment period of 21 days as part of an approved alternative approach taking into consideration the items listed above. Bureau Directors may extend the standard public comment period of 21 days taking into consideration the complexity or length of a proposed guidance.

For questions concerning this manual code, please consult your assigned policy coordinator or legal staff.

**Related Manual Codes:**

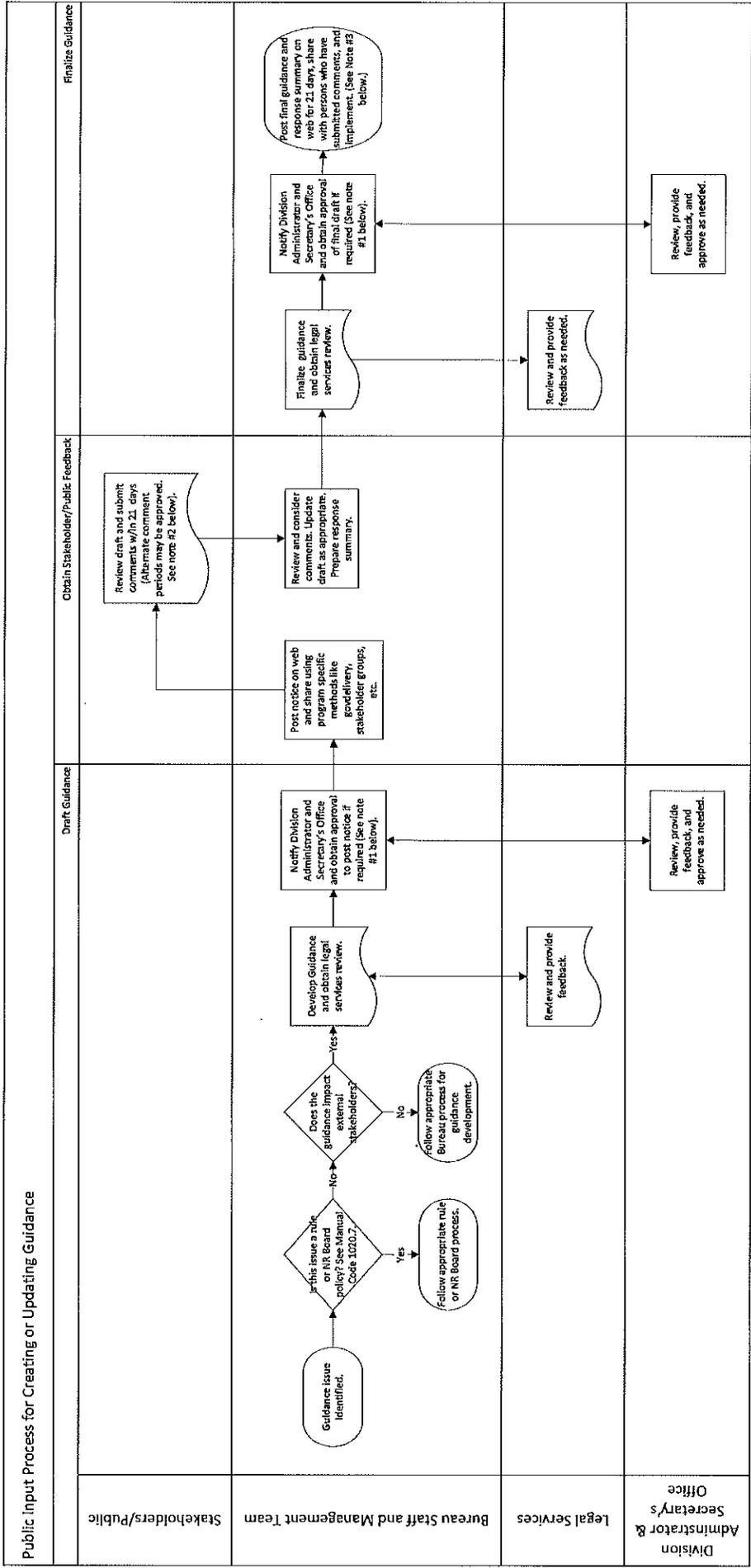
1020.7 Policy Development

1210.1 Consistency in Development and Implementation of Policies and Directives

1311 Policies and Procedures Manual

\_\_\_\_\_/s/\_\_\_\_\_  
Matt Moroney, Deputy Secretary

Date:



Notes:

- Decisions should be made at the Bureau level as much as possible. The Bureau Director or Bureau Management Team is responsible for:
  - Determining if a change to existing guidance is "significant"; and
  - Analyzing the complexity/controversy level of the guidance and deciding whether or not approvals from the Division, and Secretary's office are needed.
- The Secretary may approve a comment period of less than 21 days. Bureau Directors may approve a comment period of longer than 21 days based upon the complexity or length of the proposed guidance.
- Implementation of the guidance may begin immediately after final internal approval. Department staff will strive to post final guidance within 45 days of the expiration of the public comment period.

Public Input Process for Creating or Updating Guidance –  
Summary of Changes Based on Public Comments

Thank you to all of the individuals and groups that provided feedback on the Department of Natural Resources (Department) proposed new guidance titled, “Public Input Process for Creating or Updating Guidance”. Included in this document are all of the public comments received.

The Department made the following changes based on the feedback:

1. Removed the category of “technical guidance”. Upon further evaluation, it was discovered that “technical” guidance falls under the category of “program guidance”. There is no need for a separate category for technical guidance.
2. Added an additional note to the flowchart to clarify the final steps in the process and the timeframe for those steps. The Department will begin implementing guidance immediately after final internal approval. The Department will strive to finalize and post guidance within 45 days of the expiration of the public comment period.
3. Added an option for Bureau Directors to establish a public comment period that is longer than the standard 21-day period based on the length or complexity of the guidance.
4. Added a task that the Department will prepare a “response summary” to the public comments. The response summary will outline the changes that were made based on comments and include a copy of all of the comments.

This is a new process for the Department that will need to be evaluated through time. The Department’s goal is to evaluate this process in one year. Any needed changes can then be made to ensure that the process is providing value for Department customers and staff.

If you have any questions, please contact Kristy Rogers at (608) 261-4383 or [Kristy.Rogers@wisconsin.gov](mailto:Kristy.Rogers@wisconsin.gov).

March 21, 2013

Ms. Cathy Stepp, Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
PO Box 7921  
Madison, WI 53707-7921

**VIA EMAIL ONLY**  
[DNRSecretary@wisconsin.gov](mailto:DNRSecretary@wisconsin.gov)

RE: Comments on Proposed "Public Input Process for Creating or Updating Program Guidance"

Dear Secretary Stepp:

Thank you for providing an opportunity to comment on the proposed "Public Input Process for Creating or Updating Program Guidance." The following comments are provided jointly on behalf of the Wisconsin Farm Bureau Federation, Wisconsin Potato & Vegetable Growers Association, Wisconsin State Cranberry Growers Association, Wisconsin Pork Association and the Wisconsin Cattlemen's Association.

We support the creation of a public input process for the development or revision of agency program guidance. We thank you for pursuing the development of a public input requirement.

However, we provide the following suggestions for amendments to the proposed draft.

**A. All Guidance Revisions Should be Included in the Public Input Process**

Your draft states that, "This manual code applies to the significant modification of existing or the creation of new program guidance..." (*Emphasis added.*) The draft then defines "significant" as "something that is not merely clarifying in nature and that may affect the outcome of a Department decision." We urge you to delete the word "significant" from this policy and apply the public input process to *any* modification of program guidance, as well as to the creation of new guidance.

We believe that there may be instances whereby the regulated community's view of an amendment to program guidance could be very different from the agency's view. In fact, we

Ms. Cathy Stepp, Secretary

March 21, 2013

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view any change that “clarifies” program guidance as potentially significant and something that rises to the level of needing public input. We believe that the public process, itself, will reveal whether proposed amendments to guidance are significant. In order to simplify the process and ensure that all changes are reviewed with public input, we respectfully request that you delete the word “significant” from the “scope” section of the proposed public input process.

### **B. Guidance Does Not Create a Legal Requirement**

We appreciate the inclusion of the disclaimer in the proposed public input process, but we suggest that it be refined to make it very clear that program guidance is not a law and does not create or change any legal requirements. Accordingly, we suggest the following amendments to the proposed disclaimer:

This document is intended solely as guidance and does not have the force of law. This document does not create or eliminate any legal requirements. However, it may reference contain any mandatory requirements except where requirements found in statutes or administrative rules are referenced. This guidance does not establish or affect legal rights or obligations and it is not finally determinative of any of the issues addressed in the guidance. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

### **C. Following Public Input Process is Mandatory**

In the “procedure” section of the proposed public input process, you state that, “Staff should follow the steps outlined in the attached process map...” (*Emphasis added.*) We respectfully request that you amend this sentence to state that staff “must” follow these procedures and that you also add an introductory sentence to this section stating that, “This public input process is mandatory when program guidance is amended or created.”

Ms. Cathy Stepp, Secretary  
March 21, 2013  
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Thank you for your consideration. If you have any questions regarding these comments, please contact me directly at (608) 252-9358 or [jkl@dewittross.com](mailto:jkl@dewittross.com).

Very truly yours,

**DeWitt Ross & Stevens** s.c.



Jordan K. Lamb

JKL:jkl

- cc. Matt Moroney, Deputy Secretary, WDNR (*via email only*)  
Kristy Rogers, WDNR (*via email only*)  
Paul Zimmerman, Wisconsin Farm Bureau Federation (*via email only*)  
Duane Maatz, Wisconsin Potato & Vegetable Growers Assn. (*via email only*)  
Tom Lochner, Wisconsin State Cranberry Growers Assn. (*via email only*)  
Mike Wehler, Wisconsin Pork Assn. (*via email only*)  
Terry Quam, Wisconsin Cattlemen's Assn. (*via email only*)



March 22, 2013

Kristy J. Rogers  
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Via Email: [kristy.rogers@wisconsin.gov](mailto:kristy.rogers@wisconsin.gov)

Via Email: [kari.fleming@wisconsin.gov](mailto:kari.fleming@wisconsin.gov)

RE: Proposed guidance establishing a new public input process for the development of DNR program guidance.

Proposed guidance for implementing requirements from U.S. EPA-approved Total Maximum Daily Loads (TMDLs) in to Wisconsin Pollutant Discharge Elimination System (WPDES) permits.

Dear Ms. Rogers and Ms. Fleming,

Through its web site (<http://dnr.wi.gov/news/input/Guidance.html>) and other communications, DNR invited comments to the subject guidance documents. Because of common issues and the interplay between the two, we are commenting on both documents here.

The Great Lakes Legal Foundation (the Foundation) is a public interest law firm with a mission to provide legal and policy expertise to advance economic growth and increase job opportunities in the upper Midwest. Relevant here, the Foundation has made it a priority to monitor agency policies relating to guidance and permit requirements.

Our overarching goal is to assure any such guidance or permit terms are not an attempt by an agency to bypass the statutory rulemaking process found at Wis. Stat. Ch. 227 (Chapter 227). As discussed below, such efforts are unlawful. Moreover, any regulatory requirements arising from these policies, including permit terms and conditions, are invalid and unenforceable.

In that regard, we have concerns the proposed guidance establishing a new public input process for the development of DNR program guidance might be construed by agency personnel or the public as an alternative to the required public input process required under Chapter 227. In essence, the process on guidance, no matter how well intentioned, falls far short of the process that is a legal predicate for regulation.

In that vein, and as discussed in more detail below, we have some preliminary concerns that DNR might be circumventing Chapter 227 rulemaking requirements when establishing permit limits through the process outlined in the subject proposed guidance for implementing EPA-approved Total Maximum Daily Loads (TMDLs) into Wisconsin Pollutant Discharge Elimination System (WPDES) permits.

**Background: Guidance is a Poor Substitute for Rulemaking**

State agencies have momentous power over Wisconsin citizens, landowners, and businesses.<sup>1</sup> Surveys of

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<sup>1</sup> If an administrative rule is properly adopted and is within the power of the legislature to delegate, there is no material difference between it and a law. 63 Atty. Gen. 159.

businesses consistently cite regulatory burdens as one of the main limitations on job growth.<sup>2</sup> Recognizing the sometimes severe impacts of regulatory programs on the business community and individual liberties, Wisconsin's legislature and governors went to great lengths to assure agencies follow a well-defined process to preclude regulation by agency fiat.

This process is set forth in Wisconsin statutes in Subchapter II of Chapter 227, Administrative Rules. Many of the procedures, the bulk added by 2003 Wis. Act 118 and 2011 Wis. Act 21, mirror the federal Administrative Procedure Act and related court decisions. These statutory procedures are extensive, and include requirements relating to:

- Preparation and Approval of Scope Statement
- Rule Drafting Protocols
- Preparation of Economic Impact Analysis
- Review by Legislative Council Rules Clearinghouse
- Agency Public Hearing
- Initial Regulatory Flexibility Analysis
- Submission of Final Draft Rule to Governor
- Submittal of Rule to Legislature
  - Standing Committee Review
  - Joint Committee for Review of Administrative Rules (JCRAR).

It would be more than a little tedious to review the details of these requirements, but suffice it to say they were thoroughly debated and enacted by Wisconsin elected officials.<sup>3</sup> They are the law and any agency policies that have the "effect of law" that are not duly promulgated in accordance with these procedures are invalid and unenforceable.<sup>4</sup>

Wisconsin law expressly provides that a state agency must promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."<sup>5</sup>

In addition, the Chapter 227 process is triggered if the policy or guidance meets the definition of a "rule." Wisconsin statutes define a "rule" as a "regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency."<sup>6</sup>

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<sup>2</sup> Public Notice, National Poll on Government Regulations, <http://thepublicnotice.org/2011/09/11/memo-national-poll-on-government-regulations/>.

<sup>3</sup> For a detail discussion on the rulemaking process, see, Wisconsin Legislator Briefing Book 2013-14; Chapter 5 – Administrative Rulemaking, [http://legis.wisconsin.gov/lc/publications/briefingbook/ch05\\_admrules.pdf](http://legis.wisconsin.gov/lc/publications/briefingbook/ch05_admrules.pdf).

<sup>4</sup> See Wis. Stat. § 227.40(4)(a) providing that "the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures." (Emphasis ours)

<sup>5</sup> Wis. Stat. § 227.10(1).

<sup>6</sup> Wis. Stat. § 227.01(13).

This expansive definition of “rule” has been refined over the years and exceptions have been added. Despite these statutory exceptions, most agency actions are included in the broad definition of “rule.” Once an action is defined as a rule, the agency must follow the formal rulemaking process in Chapter 227 to develop and implement its policy choice.<sup>7</sup>

“Guidance,” on the other hand, is not defined in Chapter 227. More important, there are no requirements an agency must follow on issuance of guidance; that is, it can be an email to field staff or a detailed 49-page guidance on TMDL development, which is the subject of these comments. Guidance, therefore, can never substitute for rule-making, in law or substance.

### **DNR’s Proposal for Public Input when Creating or Updating Program Guidance**

Under this proposal, DNR defines “Guidance” as “written communications issued by the Secretary’s office, Department leadership team (DLT), division administrators, or a single program which may have impacts to private rights and interests.”<sup>8</sup> If the communication meets this definition, DNR staff “should follow the steps outlined in the attached process map titled ‘Public Input Process for Creating or Updating Program Guidance.’”

*Providing the regulated community and the public a meaningful opportunity for input on guidance is strongly supported by the Great Lakes Legal Foundation.*

The broad definition of “guidance” appears sufficient to cover most situations of concern, but the process does not provide the regulatory community and the public the protections and opportunities for input found in Chapter 227. Therefore, the validity of the proposal rests on agency personnel understanding the distinction between guidance, as defined here, and rule, as defined in the statutes.

In that regard, the proposal merely states that “If expected responses to certain fact situations become uniform or standard, rules must be promulgated to implement the responses.”<sup>9</sup> We question whether in practice DNR staff has too much latitude to continue past practices of issuing “guidance” that should be promulgated as rule.

One experience that may, in part, have given rise to the proposed policy on guidance was DNR response to the *Lake Beulah* court decision on high capacity wells.<sup>10</sup> While the meaning of the decision in some respects might be debatable, no one can reasonably assert the court could or did give DNR a waiver to the rulemaking requirements of Chapter 227. However, the Foundation asserts DNR’s initial response to *Lake Beulah* was to implement policies that were in effect rules, and that these rules were not promulgated in accordance with Chapter 227. It follows, then, that any regulatory requirements arising from these policies were invalid and unenforceable.

For example, DNR published a policy entitled “High Capacity Well Applications – DNR Reviews following the *Lake Beulah* Supreme Court Decision. [Attachment 1.] That document sets forth new policies relating to, among other matters, applications within 2000 feet of surface waters or wetlands. The new application procedures may entail requirements for extensive information on anticipated water use, detailed soil borings, hydrologic testing and other information such as groundwater or surface water monitoring, and hydrologic testing.

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<sup>7</sup> See *Regulation Nation: The Wisconsin Perspective-What Is A Rule?*, Great Lakes Legal Foundation, October 25, 2012, [http://gllf-regwatch.org/documents/regulatory/WI/Regulation.Nation.The.WI.Perspective\\_What.is.a.Rule.pdf](http://gllf-regwatch.org/documents/regulatory/WI/Regulation.Nation.The.WI.Perspective_What.is.a.Rule.pdf).

<sup>8</sup> Proposed guidance establishing a new public input process for the development of DNR program guidance, <http://dnr.wi.gov/news/input/documents/guidance/ProgramGuidancePublicNoticeDraft.pdf>.

<sup>9</sup> Id at pp. 1.

<sup>10</sup> *Lake Beulah Mgmt. Dist. et al. v. Dep’t of Natural Resources*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

The imposition of such requirements that could cost tens of thousands of dollars would as a matter of policy be best done through rulemaking; and as a matter of law, had to be done through rulemaking. For example, see *Schoolway Transp. Co. v. Div. of Motor Vehicles*, where an agency's changed interpretation of a statute prompted by an opinion of the attorney general was held to be a rule.<sup>11</sup>

The Foundation is unaware of DNR's current policies in response to *Lake Beulah*, but our experiences on this and other issues leads us to believe this new policy on guidance may not adequately address the most important issue relating to the guidance – when is a guidance a rule that must be promulgated in accordance with Chapter 227.

In that regard, we suggest that a more extensive discussion on rulemaking requirements in the policy may be needed. In addition, the policy on guidance should reference Executive Order #50, which sets forth requirements for agency rulemaking. Of particular relevance is that part of the order stating:

Each agency that develops any document interpreting, clarifying, or explaining status and rules that regulate individuals or entities or local governmental units, shall submit a copy to the Governor's Office of Regulatory Compliance via [AdministrativeRules1@Wisconsin.gov](mailto:AdministrativeRules1@Wisconsin.gov) prior to its finalization by that agency.

It is our understanding that this provision in Executive Order #50 was intended to implement the rulemaking requirements discussed here. For example the order states:

WHEREAS, Wis. Stat. § 227.10(1) requires that each agency statement of policy and each interpretation of a statute adopted to govern its enforcement or administration of that statute shall be promulgated as rules; and Wis. Stat. § 227.01 (13) define a "rule" as a "regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency."

In conclusion, while the Foundation supports the concepts underpinning the proposed process for guidelines, we respectfully request a more vigorous process to assure any "guidance" is not as a matter of law a rule. If the policy is a rule, the scope and importance of the rights afforded the regulated community and the public cannot be overstated. The lack of any meaningful rights if not deemed a rule is conversely paramount. Beyond further clarifications within the policy, following the procedures set forth in E.O. #50 would be helpful.

#### **Proposed Guidance for Implementing Requirements from U.S. EPA-approved TMDLs**

We continue to evaluate the proposed guidance relating to TMDLs, but several things caught our initial attention. As one might expect in the light of the above comments, the Foundation is particularly concerned that the regulated community and the public be afforded the rights and protections set forth in the Chapter 227 rulemaking provisions prior to imposition of regulatory mandates arising out of the TMDL process.

Thus, we have questions relating to whether the implementation of this process results in enforceable permit limits without involving Chapter 227 rulemaking. In that regard, the draft guidance states:

Once the TMDL is approved, all issuances and reissuance of WPDES permits for point sources addressed by the TMDL need to be consistent with the WLAs in the TMDL.<sup>12</sup>

<sup>11</sup> *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976).

<sup>12</sup> TMDL Guidance, Page 7, <http://dnr.wi.gov/news/input/documents/guidance/TMDLGuidance.pdf>.

In *Wisconsin Electric Power Co. v. DNR*, chlorine limits imposed in pollution discharge permits that were more stringent than the limits set forth in the administrative rules were held to be rules despite any discretion the agency had because of its duty to uphold the state's water quality standards.<sup>13</sup> It seems to follow that limits resulting from the subject TMDL process are rules. Or at a minimum, the TMDLs that cause the limits should be developed through rulemaking.

Furthering our concern is DNR's rationale for the guidance. On this point, the TMDL guidance states that:

Wisconsin administrative rules that apply to establishing TMDLs, which along with applicable statutes are summarized in Appendix C, were developed at different times over a 20-year period during which state and national understanding of TMDLs evolved. The result is administrative rules with conflicting expectations as to the appropriate procedure for TMDL establishment and incorporation into WPDES permits.<sup>14</sup>

This statement suggests the guidance in effect overwrites statutes and rules. We question whether DNR has authority to issue regulatory decrees through guidance to clarify its conflicting and confusing regulations. It would appear clarifying rulemaking would be the correct response. That is, guidance to clarify the law is okay so long as the guidance does not become the law. The TMDL guidance appears to be the latter.

Overall, we are encouraged that DNR is taking steps to shine the light on guidance, but we question whether the larger issue of mandates through guidance instead of rulemaking is adequately addressed.

While we raise some questions here relating TMDL guidance, the Foundation has yet to form a position as to the validity of this process. We expect further research and discussions with DNR would be appropriate on both matters.

Sincerely,

**Robert Fassbender**  
President,  
Great Lakes Legal Foundation  
[fassbender@greatlakeslegalfoundation.org](mailto:fassbender@greatlakeslegalfoundation.org)  
608-310-5315

CC: DNR Secretary Cathy Stepp  
DNR Deputy Secretary Matt Moroney  
Governor's Office, Office of Regulatory Compliance

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<sup>13</sup> *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980).

<sup>14</sup> TMDL Guidance, Page 2.

## High Capacity Well Applications DNR Reviews following the *Lake Beulah* Supreme Court Decision

Prior to July 2011, when reviewing high capacity well applications the DNR primarily considered potential impacts to public water supply wells, large springs, and trout streams and outstanding and exceptional resource waters within 1200 feet of the proposed well. In 2011, the Wisconsin Supreme Court's decision in *Lake Beulah Management District v. DNR*, 2011 WI 54 concluded that "the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state". In order to fulfill this general duty, DNR now conducts environmental reviews of potential impacts of proposed high capacity wells on a more comprehensive range of waters of the state. **This document is intended to provide some general suggestions regarding applications for high capacity wells. By following these suggestions, applications will generally be more complete, which will facilitate DNR review of the application, and the proposed well will be less likely to adversely impact waters of the state.**

- **List and Locate All Wells on a Property**

DNR reviewers consider the combined effect of all wells on a property when evaluating potential impacts. Because of this, it is important that high capacity well applications include accurate locations, well construction information and actual or estimated pumping capacity and water use for all existing wells on the property.

- **Stay as Far Away from Trout Streams, ORWs and ERWs as Feasible**

Applicants for high capacity wells should avoid siting high capacity wells close to trout streams; ORWs and ERWs. New wells should be located as far from one of these types of water bodies as feasible, given the physical, economic and practical limitation of any given property.

- **Avoid Other Surface Water Features**

Applicants should also take into account the presence of other surface water features (lakes, streams and wetlands) and site wells as far from these features as practicable, especially headwater streams, small lakes and other water bodies that have been designated as Areas of Special Natural Resource Interest (ASNRI). The DNR Surface Water viewer (<http://dnrmaps.wi.gov/imf/imf.jsp?site=SurfaceWaterViewer>) is one tool available to help identify water resources in the vicinity of the proposed well.

- **Try to stay at least 1000' from other wells**

Applicants should similarly attempt to minimize the potential for impacts to private water supply wells on adjacent properties by locating high capacity wells as far away as possible from these wells. If the nearest water supply well is greater than 1000 feet from the proposed high capacity well, it is less likely that the proposed well will impact existing water supply wells. This 1000-foot recommendation generally applies to water table wells constructed in unconsolidated sediments, and there may be cases where additional review is needed at distances greater than 1000 feet.

**An application proposing to site a high capacity well within 2000 feet of other surface waters or wetlands should include:**

- Information about anticipated water use, such as number of acres to be irrigated, dates of water use, projected average and maximum weekly or monthly water use, or whether the well will be used on a regular or back-up basis
- Detailed soil boring logs, if available
- Hydrologic test results, if available
- Photos of the water body/wetland of concern

In some cases, DNR may require groundwater or surface water monitoring, hydrologic testing, or other information in order to accurately assess a well's potential impacts. If DNR determines that a proposed well(s) is likely to cause significant adverse environmental impact to a water of the state, the well application will be denied or the approval conditioned to minimize those impacts. DNR reviewers attempt to work with applicants to arrive at practicable changes to the well location, construction, capacity, and pumping limits that will minimize the potential for significant environmental impacts. A high capacity well application would be denied if no practical and environmentally protective solution were possible.

Reviews to determine potential environmental impacts use the best available information; however, this usually involves using generalized aquifer parameters. Applicants who feel that the results of these analyses are overly conservative are encouraged to provide the DNR with additional information (such as pumping test results and/or drawdown data) to allow an evaluation that is more reflective of conditions at their specific site.

The table on the attached page summarizes the DNR's high capacity well reviews following the *Lake Beulah* decision.



McGILLIVRAY  
WESTERBERG  
& BENDER LLC  
ATTORNEYS

March 22, 2013

*Via Email*

Cathy L. Stepp, Secretary  
Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, WI 53707-7921  
[DNRSecretary@Wisconsin.gov](mailto:DNRSecretary@Wisconsin.gov)

*Re: Comments on Proposed Guidance; Public Input Process for Creating or Updating Program Guidance.*

Dear Secretary Stepp:

Thank you for the opportunity to comment on the Department of Natural Resources' Proposed Guidance related to a Public Input Process for Creating or Updating Program Guidance ("Proposed Guidance"). I write on my own behalf, as an attorney who periodically represents clients before the Department or who are interested in Department matters.

Overall, I am in agreement with the Proposed Guidance as it affords the public more transparency than is currently offered, and I appreciate the Department's concern for allowing the public input on matters the Department oversees. I realize that 2011 Act 21 made it more difficult for agencies to pass regulations and, while the transparency and process surrounding rulemaking are preferable, this Proposed Guidance will at least afford the public some measure of input on issues that are not directly addressed by regulations.

My concerns with the Proposed Guidance stem from the disclaimer in italics after the definition of "Technical Guidance," especially the first and second italicized sentences. I am concerned that these sentences, when read with the definition of "Program Guidance," will lead to more challenges to the Department's authority to impose certain permit conditions or take enforcement action. Such challenges have become more common since Wis. Stat. § 227.10(2m) was enacted in 2011.

As the Proposed Guidance recognizes, the DNR frequently administers broadly-written statutes empowering the agency to oversee public and natural resources, such as Wis. Stat. chs. 30 and 281. Some of this authority actually derives from the Wisconsin Constitution in the Public Trust Doctrine, Wis. Const. art. IX, § 1. As the Wisconsin

Letter to Secretary Cathy L. Stepp

March 22, 2013

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Supreme Court has recently noted, the statutes the DNR must administer are frequently generally phrased, and rely for specifics on agency expertise in fact-intensive, technical situations. *Lake Beulah Management District v. DNR*, 2011 WI 54, ¶¶ 43, 46. In order to execute its duties, the DNR must be able to impose tailor-made conditions on permits as warranted by the facts and science of a particular situation, consistent with general standards and the DNR's broadly-stated authority. As the *Lake Beulah* court put it in the high-capacity well permitting context, "[t]he fact that these are broad standards does not make them non-existent ones." *Id.* ¶ 43. The Court also rejected Wis. Stat. § 227.10(2m) as a basis for narrower DNR authority, stating that it "does not affect our analysis in this case." *Id.* ¶ 39 n.31.

The Proposed Guidance rightly notes that individual permit decisions and imposition of permit conditions on a case-by-case basis are not "Program Guidance." Nonetheless, I am concerned that should any elements of Program Guidance become incorporated into a permit term or condition, permit applicants or others will cite the first italicized sentence of the disclaimer as written to say the permit term or condition is inapplicable or unenforceable. Similarly, they may cite the second sentence's reference to "obligations" in the same way. There is at least enough ambiguity on this matter that I am concerned the wording of the disclaimer may become an issue down the road.

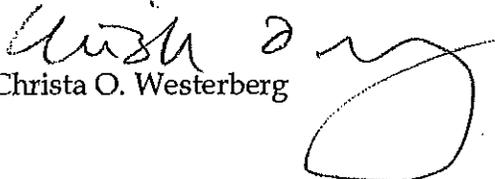
Thus, I would recommend amending the first italicized sentence as follows:  
*"This document is intended as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced, or except where requirements are incorporated into permits, approvals, licenses, agreements, and similar documents in programs the Department of Natural Resources is charged with implementing by statute or administrative rule."*

I would also recommend removing the reference to "or obligations" in the second sentence of the disclaimer, and adding "as informed by this guidance where appropriate" to the last sentence of the disclaimer.

Thank you again for the opportunity to comment on the Proposed Guidance. Please let me know if you have any questions.

Sincerely,

McGILLIVRAY WESTERBERG & BENDER LLC

  
Christa O. Westerberg



We Energies  
333 W. Everett St.  
Milwaukee, WI 53203  
bruce.ramme@we-energies.com

Bruce W. Ramme, Ph.D., P.E.  
Vice President – Environmental

March 22, 2013

Submitted Electronically

DNRSecretary@wisconsin.gov

Cathy Stepp, Secretary  
Wisconsin Department of Natural Resources

**RE: Comments on Wisconsin Department of Natural Resources Public Input Process for Creating or Updating Department Program Guidance**

Dear Secretary Stepp:

Wisconsin Electric Power Company, doing business as We Energies, submits these comments in response to the proposed Wisconsin Department of Natural Resources (WDNR) Public Input Process for Creating or Updating Department Program Guidance. When you announced this initiative, you indicated that making program guidance available for input is intended to make program decision-making more consistent and more transparent. We appreciate your efforts to expand WDNR's policy development process to include notification and public input opportunities.

We Energies is an investor-owned electric and gas utility that serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula and more than 1 million natural gas customers in Wisconsin. Operation of our combined electric, gas and steam utility is subject to a wide range of WDNR programs and regulatory requirements. As you know, we are active in participating in rule-making activities and other policy actions.

We Energies looks forward to providing constructive comments and suggesting workable alternatives. Our goal is to protect the environment and comply with regulations in a manner that is most compatible with our company's operations. Ultimately this will allow our company to manage regulatory costs, construct and operate energy facilities, and provide reliable utility service to our customers. We welcome the opportunity to provide our input when WDNR publishes internal program guidance for public comment.

WDNR is currently accepting public comment on this new public input process itself. Included below are a few considerations and comments regarding WDNR's *Manual Code ##### - Public Input Process for Creating or Updating Program Guidance*.

- **Scope:** The Scope statement indicates that, “This manual code applies to the *significant* modification of existing or the creation of new *program guidance* that impacts external stakeholders.” The Definitions section includes a definition of the term *Significant* and a description of *Program Guidance*. These are important definitions because they define the scope of this new public input procedure. It may be useful for each program to have an internal working definition of these terms so that applicable guidance that impacts department decision-making is covered under this new procedure.

In addition, the new public input opportunity appears to only apply to new or significantly modified guidance. We understand the need to identify a reasonable starting point for accepting public comment on program guidance, but request that existing program guidance also be made available as part of the new procedure. Existing program guidance clearly also affects decision making, and impacts stakeholders. Defining the scope of this initiative to also publish existing program guidance would make the new WDNR’s policy development process more complete.

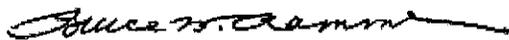
We offer two suggestions. First, existing program guidance could be made available, perhaps as part of the program information posted on WDNR’s website. Second, it may be reasonable to create a means for stakeholders to request that the department accept public comment on existing guidance, if there appears to be a need to review or revise it. This may occur as a result of new federal regulations, evolution of underlying science, continuing development of technology, etc.

- **Timeline for Implementation.** The draft process includes a flow chart of the new process and the parties involved in it, including public stakeholders. We suggest adding a default schedule to the third segment of the process, to help manage the timeline for finalizing guidance. This would allow those providing public input to know when the Department could be expected to finalize guidance after the completion of the public notice period.

Thank you for the opportunity to provide our comments. We appreciate that you are acting to improve program implementation activities. We would also like to recognize and thank participating staff in advance, since this change in department practice will require additional program coordination and response.

Please contact me, or Kathleen Standen, Manager – Environmental Regulatory, at 608 283-3009 or [kathleen.standen@we-energies.com](mailto:kathleen.standen@we-energies.com), if you would like to discuss our comments in more detail.

Sincerely,



Bruce W. Ramme  
Vice President Environmental

Copy: Kristy Rogers, WDNR – Office of the Secretary

**Paul G. Kent**

222 West Washington Avenue, Suite 900  
P.O. Box 1784  
Madison, WI 53701-1784  
pkent@staffordlaw.com  
608.259.2665

**Marney Hoefler**

222 West Washington Avenue, Suite 900  
P.O. Box 1784  
Madison, Wisconsin 53701-1784  
mhoefler@staffordlaw.com  
608.259.2685

March 22, 2013

*VIA Email and U.S. Mail*

Secretary Cathy L. Stepp  
Office of the Secretary  
WI Department of Natural Resources  
P.O. Box 7921  
Madison WI, 53707-7921

Ms. Kristy J. Rogers  
Section Chief  
WI Department of Natural Resources  
P.O. Box 7921  
Madison, Wisconsin 53707-7921

RE: DNR Program Guidance on Public Input Process for Creating or Updating  
Department Guidance

Dear Secretary Stepp and Ms. Rogers,

Thank you for this opportunity to submit comments on the Department's proposed program guidance on the public input process for creating or updating Department Guidance. We are writing on behalf of the Municipal Wastewater Group – Wastewater Division (MEG) which is an association of over 100 municipalities throughout the state of Wisconsin who own and operate wastewater treatment facilities.

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0321131244

**Madison Office**

222 West Washington Avenue 608.256.0226  
P.O. Box 1784 888.655.4752  
Madison, Wisconsin Fax 608.259.2600  
53701-1784 www.staffordlaw.com

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Suite 430 888.655.4752  
Milwaukee, Wisconsin Fax 414.982.2889  
53226-3282 www.staffordlaw.com

March 22, 2013

Page 2

We applaud the effort to make the development of guidance documents more transparent and to obtain public comment. We have a few comments to further strengthen those goals.

First, 21 days is not an adequate time to review and comment on technical issues. For example, issues such as total maximum daily loads, phosphorus limits, trading and adaptive management will require review by technical experts which often cannot be arranged and obtained in that time frame. We request that the comment period be at least 45 days. This issue could be dealt with by also engaging stakeholders during the development of the draft guidance. Our members are on the front lines of implementing the limits that are the result of the guidance and can provide valuable insight into how guidance may result in unintended consequences.

Second, we request that the Department develop a more concise manner for providing notice on the request for comments. For instance, sending notices out on gov delivery, providing a short summary in the weekly DNR news and sending a brief notice out to known interested stakeholders would be options to assure greater awareness of the proposed guidance documents. The proposed guidance document should not just be posted on the proposed program guidance website but with the relevant program website. For instance, the current proposed TMDL guidance is posted only on the proposed guidance website. It should also be posted on the Department's TMDL webpage.

Third, the transparency and public input process should not be just limited to the development of program guidance but should also include the development of technical guidance. The distinction between "program guidance" and "technical guidance" is not a bright line. For example, the recently issued TMDL guidance has a number of technical judgments. In addition, in many cases "technical" issues have significant policy ramifications on how a program will or will not be implemented. To avoid future disputes over what constitutes "policy" and to provide meaningful input, we request that the policy be inclusive of technical guidance.

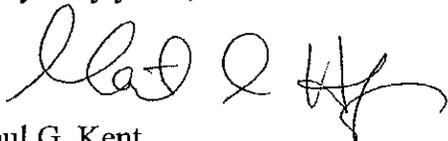
Finally, while there is a place for guidance, the additional public comment process provided for the development of guidance does not absolve the Department of its responsibility to develop and promulgate rules where they are imposing mandatory requirements upon the regulated community. *See Wis. Stat. § 227.01(13).*

March 22, 2013

Page 3

Again, thank you for this opportunity to submit comments. Please feel free to contact us if you have any questions.

Very truly yours,

Handwritten signature in black ink, appearing to be "Paul G. Kent" followed by "Margaret I. Hoefler".

Paul G. Kent  
Margaret I. Hoefler

PGK/MIH:mai

## Rogers, Kristy J - DNR

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**From:** Dave Taylor <davet@madsewer.org>  
**Sent:** Wednesday, March 20, 2013 12:10 PM  
**To:** DNR SECRETARY  
**Subject:** Program Guidance

Secretary Stepp:

DNR is seeking comments on proposed guidance establishing a new public input process for the development of DNR program guidance. The District strongly supports the effort to achieve greater transparency and participation in the department's decision-making process. With regard to the proposed guidance document we offer the following comments:

1. Documents that the Department is likely to seek comment on may vary in terms of complexity. For complex documents, the standard 21 day public notice period may be too short. The District recommends that the guidance document explicitly allow for a longer public notice period on a case by case basis. Situations where a longer public notice period may make sense include, but are not limited to:
  - a. the level of public interest is high
  - b. the guidance document is lengthy
  - c. the subject matter is complex
  - d. the degree of impact on customers is high
2. The Department should be required to develop a responsiveness summary to comments received during the public notice period as part of publishing the final guidance document.

As an aside, the District notes that at the same time the Department public noticed the new public input process, it also public noticed the guidance document titled "TMDL Development and Implementation Guidance: Integrating the WPDES and Impaired Waters Programs (Edition #2), subject to the same 21 day public notice period, with comments due by March 22<sup>nd</sup>. Many individuals may not have even received the notification until well after it was published. Given the complex nature of this document, the timing of its release, etc., the District recommends extending the public notice period of this document.

Sincerely,

David S. Taylor  
Director of Special Projects  
Madison Metropolitan Sewerage District  
1610 Moorland Road  
Madison, WI 53713  
Phone: 608-222-1201, ext. 276  
Fax: 608-222-2703  
Email: [davet@madsewer.org](mailto:davet@madsewer.org)

**Rogers, Kristy J - DNR**

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**From:** Mickey Odawa <odawa@mac.com>  
**Sent:** Wednesday, March 20, 2013 9:54 AM  
**To:** DNR SECRETARY  
**Subject:** WDNR Program Guidance and Transparency

To: Cathy Stepp, Secretary  
c/o [DNRSecretary@wisconsin.gov](mailto:DNRSecretary@wisconsin.gov)  
Wisconsin Department of Natural Resources  
Subject: WDNR Program Guidance and Transparency

Dear Ms Stepp,

Courte Oreilles Lakes Association (COLA) represents 393 members and 663 property owners on Lac Courte Oreilles and Little Lac Courte Oreilles lakes in Sawyer County, Wisconsin. For over 50 years COLA's charter has been to protect the water quality of these two local, state and regional treasures. Lac Courte Oreilles is classed as an Outstanding Resource Water, and we're doing all we can to keep it that way despite an ongoing battle to control phosphorous loading and aquatic invasive species.

We applaud any steps the Wisconsin Department of Natural Resources can take to protect the environment against such odds. As such, we add our collective voice in support of any measures designed to enable transparency and affect real progress. We trust your new guidance process is a sincere effort to allow those with the most at risk, the residents of the State of Wisconsin, to have substantive input on objective setting and implementation. It's our hope that this input finds its way into better, clearer decision making.

Thank you. We applaud your efforts and see this as a great step toward positive change.

Sincerely,

Courte Oreilles Lakes Association  
Rob Englestad, President  
[www.cola-wi.org](http://www.cola-wi.org)

**Rogers, Kristy J - DNR**

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**From:** Rich Hoff <rhoff@stresau.com>  
**Sent:** Monday, March 18, 2013 6:24 AM  
**To:** DNR SECRETARY  
**Subject:** Program Guidance Comment

*Ms. Rogers,*

*We thank the Department for this opportunity to provide comments on up-coming programs and procedures. We envision this as a more direct and timely portal of communication between the Department and external stakeholders. Thanks!*

**Richard Hoff**

Compliance Specialist | [Stresau Laboratory, Inc.](http://StresauLaboratory.com) | [rhoff@stresau.com](mailto:rhoff@stresau.com)  
N8265 Medley Road, Spooner, WI 54801 | Office: 715-635-2777 | Fax: 715-635-7979



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## Rogers, Kristy J - DNR

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**From:** Day, Betsey <Betsey.Day@stantec.com>  
**Sent:** Friday, March 15, 2013 12:18 AM  
**To:** DNR SECRETARY  
**Subject:** COMMENTS: Proposed guidance establishing a new public input process for the development of DNR program guidance

Dear Secretary Stepp:

During my 26-year environmental consulting career I have interacted extensively with state regulatory agencies in WI, IA, MN, MI, IN, MA, ME, NH, VT, CT, RI – primarily in the realm of waterways, wetlands and endangered species - and nowhere have I had to work with the lack of regulatory discipline and the level of unpredictability that exist within the WDNR. For this reason, I am very much in favor of the proposal to publicize internal guidance and gather public input prior to finalization – particularly that guidance which concerns implementation details of regulations - provided:

- Guidance developed by section-level staff is subject to objective evaluation by assigned policy coordinators as to whether it has an impact on external stakeholders – so that this level of guidance has a chance to be evaluated by stakeholders under this proposed process; AND
- Leadership insists on strict adherence to new, revised, and existing regulatory/program guidance by all lower levels of staff who make or review permit decisions, or who train staff who are engaged in this work.

If comprehensively implemented throughout WDNR, the proposed process will provide an opportunity I have been seeking for years, as an environmental professional, to point out when I believe staff are going beyond regulatory authority. However, I am concerned that the constant reinterpretation of permit review standards that commonly takes place at the section staff level without due regard to the limits of authority set forth in relevant statutes and codes will take the form of “Technical Guidance”, thereby exempting it from the applicability of the proposed manual code.

Therefore, while I applaud this proposal for developing a public input process for creating or updating WDNR Regulatory/Program Guidance, I would recommend that Technical Guidance also be included within the scope of the proposed manual code, if the Technical Guidance applies (or has the effect of applying) practice procedures to regulatory decision-making.

Thanks you for your consideration of these comments.

**Elizabeth A. (Betsey) Day, PWS, PH**  
Senior Environmental Project Manager  
Stantec  
209 Commerce Parkway PO Box 128  
Cottage Grove WI 53527  
Ph: 608-839-2028  
Fx: 608-839-1995  
Cell: 608-712-2513  
[betsey.day@stantec.com](mailto:betsey.day@stantec.com)  
**stantec.com**

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## Rogers, Kristy J - DNR

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**From:** Emerson, Jeffrey - DOT  
**Sent:** Wednesday, March 06, 2013 10:32 AM  
**To:** DNR SECRETARY  
**Subject:** Public input

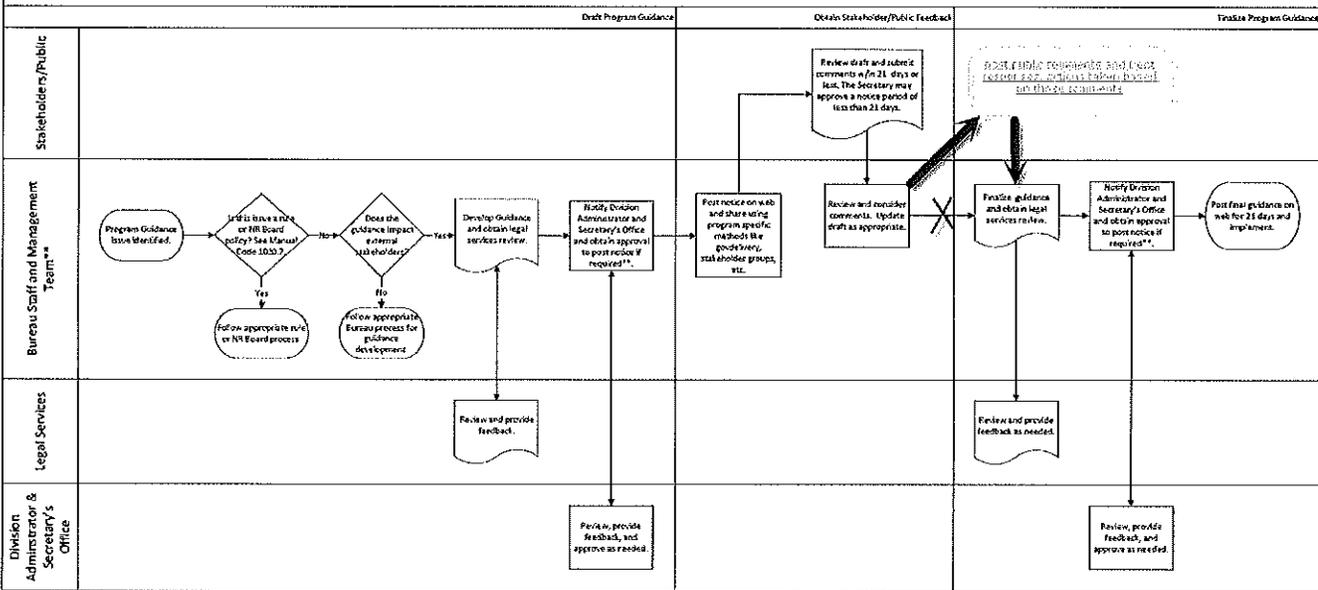
I would recommend another notification to the public, after you have received comments from the 21 day period. The second notification would summarize the public comments, and the actions those comments generate.

For the goal of transparency, demonstrating that you received input and then showing how you responded will add significant value in the public's eye.

Here is the flow chart indicating this action:



Public Input Process for Creating or Updating Program Guidance



## Rogers, Kristy J - DNR

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**From:** John Durben <chilihead@frontiernet.net>  
**Sent:** Tuesday, March 05, 2013 3:29 PM  
**To:** DNR SECRETARY  
**Subject:** New Public Input Process for DNR Program Guidance

**Categories:** assign

One quick comment regarding the New Public Input Process page on the Department site. I think the new format is a step in the right direction. I think it will be a useful tool for the department to disseminate information in a timely manner. In addition public individuals who are concerned about their resources and want to know what is going on will have the information at their finger tips. It also affords them the opportunity to provide input or request clarification on issues.

At this point, I think it is a keeper.

John E. Durben, President  
Wisconsin Council of Sport Fishing Organizations (WCSFO)

## Rogers, Kristy J - DNR

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**From:** Forest County Zoning <fczone@co.forest.wi.us>  
**Sent:** Friday, March 01, 2013 11:50 AM  
**To:** DNR SECRETARY  
**Subject:** program guidance

Thank you so much for this opportunity.

Program guidance for landowners in Forest County become authoritative mandates that make NR rules different for us than for others around the state. Because of guidance documents Department employees bar access to provisions in state statute at will and with little or no recourse.

- Program guidance should not subvert provisions in state statute.
- Program Guidance should not give Department employees blanket authority to use words that have broad implications. Be specific.  
For example: "diminish" or "significant impact" How do you quantify these words. Be specific. The wetland flow may be diminished by 1 cubic foot per second but the road acts as a filter for that water. Is this a significant impact? When an area is over vegetated does the loss of three trees and a bush diminish the landscape? Where do these word begin and end.
- Department Employees should not spend landowners money. Making a project very expensive is a way of deterring a project. The landowner should decide how they want to approach a enabling statute depending on the particular landform characteristics they are working with. The Department should not be able to mandate expensive alternatives of their choosing. For example, a road fill is authorized by statute and will cost 3K, but...we want you to install a boardwalk that costs 30K. They practice avoidance for us to the tune of our pocket books and landowners have no say in the matter.
- Guidance document should be made available to counties for comment 60 days before they are set in stone.
- A clear method should be adopted to permit variations to administration of statute that doesn't rely on the judgment of one Department employee.
- A clear method should be adopted to adjust or modify guidance documents upon application and hearing at a local level.

Sincerely,

Pam LaBine  
Forest County Zoning, Solid Waste and Recycling Administrator  
200 East Madison Street Crandon, WI. 54520  
715-478-1387 or 715-889-0389

## **Rogers, Kristy J - DNR**

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**From:** Free, Dean <Dean.Free@aecom.com>  
**Sent:** Friday, March 01, 2013 10:55 AM  
**To:** DNR SECRETARY  
**Subject:** Program Guidance - Initial Suggestions

I have found that North Dakota has simple but useful environmental guidance.  
I would set up guidance by department.  
<http://www.ndhealth.gov/wm/Publications/>

Also, I think the WDNR should make an electronic copy of all submittals like IA does, since online access is simplified;  
once procedure is figured out.  
<https://programs.iowadnr.gov/solidwaste/>

**My thoughts for you consideration.**

**Dean R. Free, PE**  
Project Engineer - Middleton, WI  
Environment  
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