

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

SUBJECT: Request that the Board adopt Board Order OE-46-10, proposed rules affecting Ch. NR 150, Wis. Adm. Code, related to changes in environmental analysis and review procedures for Department actions.

FOR: October 2013 Board meeting

TO BE PRESENTED BY: David Siebert, Director, Bureau of Energy, Transportation and Environmental Analysis

SUMMARY:

The Department proposes to repeal and amend Ch. NR 150, Wis. Adm. Code, Environmental Analysis and Review Procedures for Department Actions. Ch. NR 150 guides the Department's implementation of the Wisconsin Environmental Policy Act (WEPA, established by Ch. 274, Laws of 1971) and s. 1.11, Wis. Stats. As currently written, Ch. NR 150 Wis. Adm. Code, results in duplicative staff effort in analyzing multiple similar projects and provides little public value in the form of meaningful public comments. First promulgated in 1981, ch. NR 150 was last reviewed and revised in 1987.

The rule change will make the Department's WEPA compliance more effective, meaningful and consistent with WEPA and s. 1.11, Stats. The new rule emphasizes the analysis of broad issues and policies, reduces process and paperwork requirements for individual project actions, and provides clear procedures for public involvement.

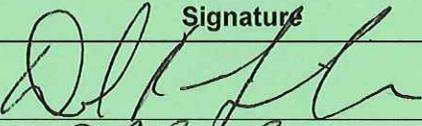
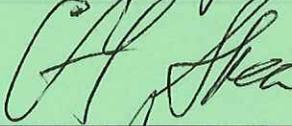
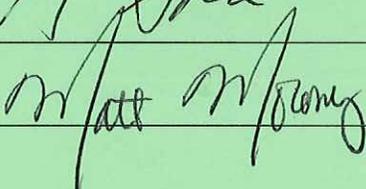
The new rule will require the Department to: 1) identify and analyze environmental issues important for their geographic, multidisciplinary, or policy scope; 2) analyze issues earlier, before alternative options have been foreclosed; 3) ensure that environmental analysis information addresses policy and decision-making; 4) provide meaningful public involvement in environmental analysis; and 5) address the information/policy-driven requirements of ss. 1.11(2)(e) and (h), Stats., as separate from the action/project-driven requirements of s. 1.11(2)(c), Stats. The new rule also eliminates process requirements that have become duplicative over time as a result of changes in statutory authorities and administrative practice. The new rule eliminates the use of Environmental Assessments as a means of WEPA compliance for individual actions, relying instead on the detailed analysis provisions in s. 1.11, Stats.

Bureau of Energy, Transportation and Environmental Analysis (BETEA) staff obtained the input of an internal team of staff from several Department programs. BETEA also involved potentially interested and affected external parties. Three public hearings in mid-April generated two appearances and 24 public comment letters and e-mails. There will be no impact on small business.

RECOMMENDATION: That the Board adopt Board Order OE-46-10

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

- Background memo
- Fiscal estimate and economic impact analysis (EIA) form
- Board order/rule
- Not Applicable

Approved by	Signature	Date
David Siebert, Bureau Director		9/13/13
Al Shea, Administrator		9/18/13
Cathy Stepp, Secretary		10/7/13

cc: Board Liaison – AD/8

CORRESPONDENCE/MEMORANDUM

DATE: September 16, 2013

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary *Mat Mowery*

SUBJECT: Background memo on Board Order OE-46-10, relating to CHAPTER NR 150, Environmental Analysis and Review Procedures for Department Actions

1. Subject of Proposed Rule:

The proposed rule addresses changes to CHAPTER NR 150, Environmental Analysis and Review Procedures for Department Actions.

2. Background:

The Wisconsin Environmental Policy Act (or WEPA) and ch.NR 150, Wis. Adm. Code, are cornerstone laws for the agency that date back to the early 1970's. The last major revision to this administrative code was in 1987. Given the many changes in Department activities since then, the code is now substantially outdated and contains many procedural requirements which create workload inefficiencies for Department staff and confusion for the public.

3. Why is the rule being proposed?

The rule change is needed to make the Department's WEPA compliance more effective, meaningful and consistent with WEPA and s. 1.11, Stats. The new rule emphasizes the analysis of broad issues and policies, reduces process and paperwork requirements for individual project actions, and provides clear procedures for public involvement.

4. Summary of the rule.

The new rule will require the Department to: 1) identify and analyze environmental issues important for their geographic, multidisciplinary, or policy scope; 2) analyze issues earlier, before alternative options have been foreclosed; 3) ensure that environmental analysis information addresses policy and decision-making; 4) provide meaningful public involvement in environmental analysis; and 5) address the information/policy-driven requirements of ss. 1.11(2)(e) and (h), Stats., as separate from the action/project-driven requirements of s. 1.11(2)(c), Stats. The new rule also eliminates process requirements that have become duplicative over time as a result of changes in statutory authorities and administrative practice. The new rule eliminates the use of Environmental Assessments as a means of WEPA compliance for individual actions, relying instead on the detailed analysis provisions in s. 1.11, Stats.

The fundamental department policy regarding WEPA, as currently embodied in ch. NR 150, will not change. The rule re-creation will result in a number of procedural changes and a new emphasis on how the department applies WEPA, especially to proactive strategy topics.

5. How does this proposal affect existing policy?

This rule makes no change to existing policy as declared in s. 1.11 Wis. Stats., as created by the Wisconsin Environmental Policy Act (WEPA). It incorporates NRB policy from the current version of the rule. It emphasizes an often overlooked aspect of WEPA, namely the benefit of conducting analyses

of broad issues and policies related to natural resource management rather than relying almost exclusively on project-specific environmental impact analyses.

6. Has Board dealt with these issues before?

Yes, but it has not done so in many years.

7. Who will be impacted by the proposed rule? How?

The public and DNR staff will benefit from broad issue and policy review procedures, and increased efficiency for project-specific analyses. The rule does not change the need for adequate department analysis of project-specific actions, but recognizes that many current permitting and internal planning processes now include sufficient analysis and public involvement that was not required in the 1970's and 1980's. The rule outlines a process for meaningful analysis that will better inform decision makers and the public of the environmental ramifications of pending decisions.

8. Soliciting public input on economic impact synopsis

The rule draft and economic impact were developed with input from an external advisory group that consisted of representatives of a number of conservation advocacy groups, industry groups, and legal firms.

An economic impact analysis was developed by a Department staff economist and released for a 30-day public comment period that began December 11, 2012. Two comment letters were received and staff prepared responses to the comments.

Three public hearings on the rule were conducted in the spring of 2013 in Eau Claire, Green Bay, and Madison, with 11 people attending and two people providing oral testimony. As part of the hearing public notification process, public review was also sought statewide via news releases and publicity on the Department's website. The Department also received twenty-four comment letters and emails. The comments covered a very broad range of questions and concerns, a few of which dealt with economic issues related to the proposed rule. Department staff prepared responses to all public comments and made several changes to the rules based on the comments received.

9. Environmental Analysis

This rule will result in no environmental impacts, but will assist the Department in identifying and addressing environmental concerns via broad issue and policy analyses.

10. Small Business Analysis

Chapter NR 150 is an administrative process rule that applies internally to the department, so impacts to businesses are minimal. Businesses that may be affected by this rule revision include mainly those that apply for DNR permits. The amount of redundant environmental analysis required for DNR actions will be reduced under the proposed rule.

NR 150 Revision Comments and Responses

Natural Resources Board Order No. OE-46-10

August 28, 2013

This document presents a summary of public comments received on the proposed revision of Chapter NR 150, Wisconsin Administrative Code, and the Department's responses.

PROCESS SUMMARY

The draft proposed code was approved to go to public hearing by the Wisconsin Natural Resources Board on February 27, 2013. The draft code was made available for public review from March 26 until May 3, 2013. Three public hearings on the draft proposed code were held in 2013 as follows: April 16 in Eau Claire, April 17 in Green Bay, and April 18 in Madison.

COMMENT SUMMARY

There were a total of 11 attendees at the three public hearings, one person testified on the record, and the Department received 24 comment letters and emails.

Comments in this document are summarized under general topics. Topics include one or more general comments and comment responses. Some topics also include specific comments in italic type and Department responses that are related to the topic but differ from the general comments.

Some of the comments received resulted in changes being made to the proposed code and rule package, as indicated in the comment responses.

COMMENTS AND RESPONSES

Comment category: elimination of environmental assessments (EAs)

Many commenters expressed concerns that the rule in general, or the elimination of environmental assessments (EAs) in the proposed rule, would result in a reduced level of environmental review and reduced opportunities for public involvement in Department decision-making. Some expressed concerns that eliminating EAs would reduce or eliminate opportunities for legal challenges to the Department's decisions. Some argued that eliminating EAs was inconsistent with or not in compliance with WEPA. Others felt that the elimination of EAs would be confusing to applicants and/or result in legal challenges. Finally, there were some commenters who objected to the elimination of the use of environmental impact statements (EISs) by substituting equivalent analysis or prior compliance. These subjects are all discussed in the sections below.

General comment: environmental review and protection, and public involvement

Many commenters expressed concerns that the rule in general, or the elimination of EAs in the proposed rule, would result in a reduced level of environmental review and reduced opportunities for public involvement in the WEPA process. Some quoted a sentence from the rule package

which stated that the proposed rule would result in less environmental review. Some objected to the elimination of the use of EISs.

General response

The proposed rule does not weaken transparency and public involvement, nor does it eliminate environmental analysis. The proposed rule does, however, eliminate redundant EA processes for equivalent analysis and prior compliance actions by relying on detailed analyses as called for in s. 1.11, Stats. Analysis and disclosure of the environmental effects of proposed Department actions will continue under the proposed rule. For clarification, in the final version of the draft rule, the definition of “environmental analysis” will be more closely associated with the requirements in s. 1.11(2)(c), Stats.

We agree that WEPA is an important tool for identifying and analyzing environmental issues. That is why the proposed changes to NR 150 are designed to improve the utility of environmental analysis information for environmental protection.

The sentence quoted by several commenters is from the “Effect on small business” section of the rule package. This is an inadvertently inaccurate statement of the effect of the proposed rule. The intended statement is that the proposed rule would reduce the number of **redundant** environmental analysis documents and the associated process workload. We regret the error. The statement is revised in the final rule package.

The proposed rule does not eliminate the use of the EIS process, but relies on that process to a greater extent than does the existing rule.

Specific comments and responses

Comment: *We respectfully request that the agency revise the proposed regulations to once again require that environmental assessments be completed for all Type 2 actions. If the agency no longer feels that any particular Type 2 action should not be so assessed, they should make that case and propose to delete that action or actions from the list.*

Response: Under the proposed rule there are no actions defined as type 2. All actions are categorized as being minor – requiring no review – or as requiring a detailed analysis, as called for in s. 1.11(2)(c), Stats.

Comment: *Under the proposed rule language, either a full EIS is prepared or no WEPA review is performed. In late 2006, Wisconsin Wetlands Association (represented by Midwest Environmental Advocates) filed suit against DNR, challenging the sufficiency of the Environmental Assessment (EA) issued for the Enbridge pipeline. It is alarming that, under the proposed revisions to NR 150, an EA would not have been prepared, and the Enbridge pipeline would likely have escaped further scrutiny as required by WEPA.*

Response: The proposed rule categorizes all actions as either minor – requiring no review – or as requiring a detailed analysis, as called for in s. 1.11(2)(c), Stats. All actions that are not listed as minor would receive a detailed analysis under the proposed rule.

The Department disagrees with the description of what would have happened on the Enbridge pipeline if it had occurred under the proposed rule. That project would likely have received the same analysis under the proposed NR 150.20(4)(b), but the analysis would have been called an EIS, and would have received the EIS process.

Comment: *Many of these defined actions cannot, in all cases, be "minor actions" because the definition is too broad or too vague.*

Response: The actions listed in the proposed NR 150.20(1) are restricted to those that meet the definition of "minor action" in the proposed NR 150.03(15). The definition is quite detailed.

Comment: *The EAs also involve and reflect internal correspondence among DNR staff regarding possible environmental impacts associated with the operation. It is unclear from the proposed new rules what will be the DNR's policy for collaboration between staff in different program areas going forward.*

Response: Collaboration between various Department programs is not precluded by an action being designated as equivalent analysis, nor is such collaboration specifically required under either the current or proposed versions of the rule. Under the proposed NR 150.05, all WEPA compliance processes would be overseen by the WEPA coordinator.

Comment: *It appears that the rule revisions are motivated at least in part by a tendency or inclination to view the DNR's "customers" as primarily being the businesses, corporations or individuals that are seeking permits or approvals from the agency. We believe that among the primary missions of the agency is its obligation to protect and manage the state's environmental resources in the long-term interests of all of its residents.*

Response: There is nothing stated nor implied in the proposed rule regarding the Department's customers. WEPA compliance procedural requirements are the responsibility of state agencies, not those seeking permits and approvals from state agencies.

Comment: *The proposed rule should establish a procedure by which a responsible official, acting on behalf of the DNR, documents that a given DNR action is a "minor action" and that unusual or extenuating circumstances do not warrant preparation of an EIS.*

Response: Verification of every minor action would present a very heavy workload for the Department with little or no benefit to environmental protection. Both the current and proposed versions of NR 150 take the opposite approach of relying on agency expertise to recognize the rare occasions for which a particular type 4 or minor action would need to receive an environmental analysis.

Comment: *We suggest adding a criterion (3) that requires the Department to prepare an EIS for projects that are of substantial interest to the general public, including projects that could have a significant impact on public lands or resources, affect a rare or protected environmental feature or affect an environmentally sensitive area of the state, or have created a local controversy.*

Response: While WEPA case law provides that an EIS cannot be compelled due to public controversy, the Department considers all public requests.

The proposed NR 150.20(4) has been modified in the final rule draft to include specificity concerning various impact considerations and public concerns.

Comment: *There needs to be a process to enable citizens to petition the WDNR to conduct an EIS on a proposed policy or action, and to challenge a determination that an action is exempt from further review due to there being a prior review or an equivalent review. We suggest a process similar to that prescribed under ch. 299.91, Wis. Stats., regarding environmental pollution. This will strengthen public participation in a manner intended under WEPA.*

Response: Citizens are free to petition the Department on the need for EIS analyses. There is also a provision for petitions for strategic analyses under the proposed NR 150.10(1)(b)6.

Comment: *"Equivalent Analysis:" This definition needs to be expanded and more clearly defined. I assume Equivalent Analysis means that the program responsible for an action (i.e. regulatory, or policy) has or will complete an analysis as part of their guidance or procedures. If this is the case, then each program should have guidelines that assure that WEPA compliance is met and documentation should be provided and reviewed by the WEPA coordinator. Please confirm if I have the correct understanding of Equivalent Analysis?*

Response: Equivalent analysis does not include evaluations of policy. Policies would be evaluated through strategic analyses. Equivalent analysis refers to those Department review processes that include environmental analysis and public involvement. Since some Department review processes are identified in the proposed rule as being equivalent, no further documentation or process would be required other than the WEPA compliance determination. We anticipate various program guidance updates to result from the proposed rule. The WEPA coordinator would also advise affected Department programs to insure ongoing WEPA compliance.

Comment: *Dairyland is particularly concerned that the proposed provisions of chapter NR 150 will result in more actions requiring a comprehensive Environmental Impact Statement ("EIS"), increasing costs to applicants for permits and delaying needed projects, and which will translate into a corresponding strain on the Department's resources. Dairyland is concerned that actions that previously required a less intensive EA may now require a much more burdensome EIS.*

Response: Most WEPA reviews of electric utility projects are led by the Wisconsin Public Service Commission (PSC) under ch. PSC 4, Wis. Adm. Code. Therefore changes to ch. NR 150, Wis. Adm. Code, will have little effect on electric utilities.

The commenter's characterization that EAs are less work intensive and costly than EISs is incorrect for ch. NR 150, Wis. Adm. Code. While it may not be true for other Wisconsin state agencies or for federal agencies, under the current s. NR 150.22(2), Wis. Adm. Code, EAs and EISs have the same content requirements. The note following s. NR 150.22(4)(d), Wis. Adm. Code, explains the relative complexity of EAs and EISs under ch. NR 150, Wis. Adm. Code. Under the proposed NR 150.30(2) introduction, EIS level of detail will vary with the scope of the project being evaluated. In this sense, the proposed code is not a substantive change from the current code.

The proposed NR 150 is designed to reduce WEPA compliance workload by reducing redundant process and documentation requirements through the use of equivalent analysis and prior compliance action definitions, lists and procedures.

Comment: *Dairyland would like the Department to respond with its opinion on whether the proposed revisions to chapter NR 150 will increase, decrease, or cause to remain the same, the number of actions that require an EIS.*

Response: The Department believes that the proposed rule will result in more EISs per year than the Department currently prepares. Many, if not most, of these EISs will resemble our current EAs in content and level of detail. The number of projects receiving an environmental analysis will not substantially change as a result of the proposed rule. There will, however, be a considerable reduction in process and documentation redundancy.

Comment: Any action that is not a major action does not require an EIS. The Department's proposal, however, explicitly defines what constitutes a "minor action" and requires an EIS for all other actions (unless the action is an "equivalent analysis" action or a "prior compliance" action). Notably, the Department will have discretion to deem a specific action an equivalent action or a prior compliance action on a case-by-case basis, see proposed NR 150.20(2)(b) and NR 150.20(3)(b), but the Department will not have discretion on a case-by-case basis to deem a specific action a "minor action" under proposed NR 150.20 (1). Nor does the Department include substantive and useful categorical exemptions through the enumerated minor actions in NR 150.20 (1) which would provide guidance on the type of actions that could be deemed minor.

Response: The commenter is correct in that actions listed in the proposed NR 150.20(1) are the "minor actions" of the Department, and that no other actions can be designated as "minor." This situation is no different than for the current code in which all type 4 actions listed under s. NR 150.03, Wis. Adm. Code, are all the current type 4 actions, and no other actions can be designated as type 4.

Neither the current nor proposed codes employ the concept of "categorical exemption."

Comment: Dairyland asks the Department to explain how a conflict with environmental policies that may be adopted on as small of a scale as a local municipality has a bearing as to the impact of an action such that the local municipality may cause an action to be "major" and require an EIS.

This situation may arise during Dairyland's maintenance, reconstruction, or construction of a transmission line that in the absence of a local ordinance would not otherwise require an EIS. For whatever reason, a locality might adopt an ordinance that requires an EIS for any utility project solely for the purpose of invoking proposed NR 150.03 (15) and requiring the Department to prepare an EIS, thereby delaying and greatly increasing the cost of the otherwise-minor project, and increasing the Department's workload.

Response: The definition for "minor action" in the proposed NR 150.03(15) is based in concepts found in s. NR 150.22(2), Wis. Adm. Code. The proposed code provides clear distinctions between actions that do not require detailed analyses and those that do.

We believe that the commenter intended to suggest that a local ordinance could be established so that the Department action associated with the local ordinance no longer met the definition of "minor action" under the proposed NR 150.03(15), thereby resulting in project delays. We find this scenario to be untenable for the following reasons.

1. Nearly all WEPA review of electric utility projects is led by the PSC under ch. PSC 4, Wis. Adm. Code, therefore changes to ch. NR 150, Wis. Adm. Code, will have little effect on WEPA compliance for electric utilities.
2. Consistency with local ordinances is a consideration for determining an action to require the EIS process under s. NR 150.22(2)a4, Wis. Adm. Code, so the proposed code does not present a change in this regard.
3. Section 196.491(3)(i), Stats., regarding electric utilities, states "If installation or utilization of a facility for which a certificate of convenience and necessity has been granted is precluded or inhibited by a local ordinance, the installation and utilization of the facility may nevertheless proceed."

4. Only a waterway or wetland crossing permit or incidental take permit from the Department could, conceivably, be involved in this scenario, and those permits are defined as equivalent analysis actions under the proposed code, not as minor actions.

General comment: WEPA determinations and challenges

Several commenters had concerns about proposed section NR 150.35 and the opportunities for public challenge.

General response

Legal requirements for challenges are found in ch. 227, Stats., and ch. NR 2, Wis. Adm. Code. The revision of NR 150 does not include substantive changes to these requirements. The proposed NR 150.35 has been clarified in the final rule package.

Specific comments and responses

Comment: *In 1994, the Court of Appeals interpreted existing NR 150.21(2) as providing no right to a contested case hearing on the Department's decision not to prepare an Environmental Impact Statement (EIS). North Lake Management District v. DNR, 182 Wis. 2d 500, 506 (1994) 513 N.W. 2d 703, XXX, citing WED XII. As currently drafted, the proposed section NR 150.35 re-opens the door to that very issue.*

Response: The Department disagrees that the proposed NR 150 "reopens the door" to the issue decided in the 1994 North Lake decision. As the commenter states, that case held there was no right to a contested case hearing on a DNR decision not to prepare an EIS. The Court of Appeals held that the issue was controlled by an earlier Wisconsin Supreme Court case, Wisconsin's Env'tl. Decade, Inc. v. DNR, 115 Wis. 2d 381, 340 N.W.2d 722 (1983) (WED XII). In WED XII, the Wisconsin Supreme Court upheld its earlier decision in WED III that had found: (1) there was no right to a contested case hearing on the issue of whether an EIS must be prepared, since the form of a hearing on whether an EIS should be prepared is authorized by law to be at the discretion of the agency; and (2) the agency must provide opportunity for public participation during whatever hearing is held and must assemble a reviewable record of the decision. WED XII, 115 Wis. 2d at 407-394, 340 N.W.2d at 735, 729.

The proposed rule avoids the question of when a detailed analysis is required by categorizing all Department actions as either minor actions, or those requiring a detailed analysis.

Comment: *We agree that for EISs, the department should publish a decision document that includes findings of facts, conclusions of law and a decision. However, for all other determinations made under proposed NR 150.20(1), (2) and (3), the record generated as part of this rulemaking package should be more than sufficient "findings of facts, conclusions of law and a decision" to justify the agency's approach to WEPA compliance under those circumstances. Indeed, through this rulemaking process the agency has identified a long list of actions that require no further agency review. Requiring the agency to generate yet another separate justification document each time it permits an enumerated no-EIS project without completing an EIS is unnecessary, burdensome, may cause undue delay and may open the door to frequent legal challenges. To effectuate the department's stated goal of streamlining the WEPA process, the proposed section 150.35(1) should be revised.*

Response: There are no determinations called for in the proposed NR 150.20(1).

Determinations under the proposed NR 150.20(2)(b) and (3)(b) are not related to the list of equivalent analysis actions in the proposed NR 150.20(2)(a) or to the list of prior compliance actions in the proposed NR 150.20(3)(a).

The proposed NR 150.35 has been revised in the final draft of the rule to clarify that WEPA determinations for listed equivalent analysis and prior compliance actions need not be made in a separate document.

Since the number of environmental analyses will not substantially change under the proposed rule, the number of required WEPA determinations also will not change. The Department therefore does not anticipate additional workload related to WEPA compliance determinations under the proposed code.

Comment: *Under the proposed rule, does the DNR make a WEPA compliance decision for minor, equivalent or prior compliance actions? That is, for an equivalency action, does the DNR at any point make a determination that the existing environmental analysis required by that particular process meets WEPA requirements?*

Response: A written determination under the proposed NR 150.35 would be required for:

1. An EIS under the proposed NR 150.30.
2. An equivalent analysis determination under the proposed NR 150.20(2)(b).
3. A prior compliance determination under the proposed NR 150.20(3)(b).
4. Actions listed as equivalent analysis under the proposed NR 150.20(2)(a) or listed as prior compliance under the proposed NR 150.20(3)(a) would continue to include a WEPA compliance determination. For example, a landfill feasibility approval would be an equivalent analysis action under the proposed NR 150.20(2)(a), but would still require, per s. 1.11, Stats., a compliance determination under s. 289.25, Stats. In that case, the WEPA compliance determination would be included in the feasibility approval decision. The proposed NR 150.35 has been amended to make this clear.

Comment: *The title of proposed section NR 150.35 – “WEPA COMPLIANCE DECISION” – implies that the Department’s determination that it has complied with the procedural requirements of WEPA is a “decision” or an “agency action” reviewable pursuant to Wis. Stat. ch. 227. Moreover, throughout the draft provision, language is used that could be read as characterizing the department’s WEPA compliance determinations as immediately reviewable in a contested case hearing or judicial review.*

To avoid any confusion in the newly-revised rule package, DBA requests the title of this proposed section be revised to “WEPA COMPLIANCE DETERMINATION” and a sentence be added to the end of the provision that clearly and unambiguously states, “WEPA compliance determinations are not final agency actions.” Also, for the sake of clarity and consistency the term “compliance decision” should be replaced with “compliance determination” throughout the entire rule.

Response: Case law is clear that the Department’s determination regarding the need for an EIS under the current ch. NR 150 may not be reviewed in a contested case hearing under s. 227.42, Stats., *North Lake Management District v. DNR*, 182 Wis.2d 500 (Ct. App. 1994). Case law also is clear that only final decisions of an agency are subject to judicial review under s. 227.52, Stats., and that a decision regarding WEPA compliance is not a final decision because it does not directly affect the legal rights, duties, or privileges of a person. *Sierra Club v. DNR*, 2007 WI

APP 181, 304 Wis.2d 614 (Ct. App. 2007). The final version of the draft code uses the language suggested by the commenter.

General comment: consistency and compliance with WEPA and NEPA

Several commenters expressed concern that the proposed rule, and specifically the elimination of EAs, does not meet the requirements of the National Environmental Policy Act (NEPA), WEPA, and case law for NEPA and WEPA. Since U.S. Council on Environmental Quality (CEQ) regulations include procedural requirements for federal EAs, these commenters believe that DNR must, therefore, retain EAs and use them according to CEQ regulations. Some saw the elimination of EAs as being a problem because WEPA process requirements under the proposed rule would be too lax, while others saw the proposed rule as being too demanding. All of these comments are based on the opinion that all WEPA procedural requirements are dictated by NEPA and NEPA case law.

General response

Section 1.11(2)(c) Stats., does require state agencies to substantially follow the guidelines of the CEQ, but only with regard to “detailed statements.” The Department does not view this as being a requirement to substantially follow NEPA “regulations” in general. The Department interprets, and has always interpreted, this to be a substantive rather than formulaic requirement.

The elimination of environmental assessments (EA) in the proposed code is based on the fact that there is no need for an EA under the action categorization proposed. The proposed rule categorizes all actions as either minor – requiring no review – or as requiring a detailed analysis, as called for in s. 1.11(2)(c), Stats. There is no determination to be made on whether a detailed analysis is required, and therefore no need for documentation (i.e. an EA) of that determination.

Much of the WEPA and NEPA case law over the last four decades has dealt with the question of when agencies must follow the EIS process and when they need not. The question revolves around the terms “major action” and “significant effects,” which have no adequate or meaningful definitions. The proposed rule is designed to avoid this problem and render the question irrelevant.

The proposed revisions to NR 150 are designed to increase attention on important environmental concerns and to provide analysis to inform state agencies, the state legislature, and other decision-makers of needs and options for improved environmental protection. Of particular note is “strategic analysis” in the proposed NR 150.10, which interprets and employs s. 1.11(2)(e), Stats., to address the broad issues that the Department faces and the policies that the Department formulates to carry out its statutory duties. The requirements of s. 1.11(2)(e), Stats., have long been ignored or confused with the requirements of s. 1.11(2)(c), Stats.

Specific comments and responses

Comment: *Because of the importance of the enumerated actions in proposed NR 150.20, Dairyland believes that the Department should expand the categorical exemptions contained in proposed NR 150.20 (1) list of “minor actions” to include actions that other agencies have deemed consistent with NEPA and the CEQ regulations. Doing so is consistent with the statutory requirement that all state agencies include a detailed statement “substantially following the guidelines issued by the council on environmental quality [“CEQ”] under P.L. 91-190, 42 USC 4331” Wis. Stat. § 1.11 (2)(c).*

Response: Because of differences in standards, authority, responsibilities and context, actions of the Department are not the same as actions of other agencies. Under WEPA, the Department is only responsible for its own actions.

Neither the current ch. NR 150, Wis. Adm. Code, nor the proposed code employ the CEQ concept of "categorical exclusion." There is no change in this regard.

Comment: "OE-46-10 Analysis Prepared by the DNR" refers to CEQ guidelines in [points] #6 and #8. Please add the underlined words in the final sentence of #6 (if you agree with the assertion) so it reads: "This proposed revision of NR 150 will remain substantially consistent with the CEQ guidelines and the DNR believes it will remain compliant with WEPA, s.1.11, Wis. Stats."

Response: For clarification, the following phrase will be added to OE-46_10 #6: "as required under s. 1.11(2)(c), Stats."

General comment: confusing to applicants and other agencies

Several commenters stated that permit applicants need to know what is required and that the outcome of any regulatory process must be predictable. They expressed concern that the NR 150 revision is not straightforward and predictable for applicants, especially where both state and federal agencies are involved. Questions were asked about potential changes in WEPA and NEPA coordination between the Department and other state and federal agencies.

General response

WEPA is an informational, not regulatory, requirement that is placed on state agencies, not permit applicants. The proposed rule simplifies the current review procedures. The proposed rule makes no changes to permitting requirements. We do not anticipate substantial confusion for permit applicants.

The proposed NR 150.40 sets out the manner in which the Department would cooperate with other state and federal agencies on WEPA and NEPA reviews. The proposed rule simplifies the language in the current rule in this regard, but makes no substantive changes. The proposed rule will not change how WEPA and NEPA reviews are coordinated between the Department and other state and federal agencies.

Comment category: equivalent analysis and prior compliance not the same as EA

General comment

Many commenters expressed concern that defining actions as equivalent analysis or prior compliance means that no environmental analysis or public disclosure would occur for those actions.

General response

Both equivalent analysis and prior compliance actions by definition receive environmental analysis and public disclosure. The proposed NR 150.20(2)(a) and (3)(a) have been modified to more clearly indicate this in the final version of the proposed code.

Specific comments and responses

Comment: We anticipate the DNR may argue that it always has authority to require an EIS under the preamble to proposed NR 150.20, and that any "equivalent analysis action" or "prior

compliance action" the DNR determines is or may be "major" can always receive review under this language. However, such on-the-fly decision making invites arbitrariness and deprives the public of the predictability and process to which it is entitled from its government. Thus, Proposed NR 150.20 does not save the deficiencies in Proposed NR 150.20(2) and (3).

Response: There is no provision in the proposed rule to determine that any action is "major."

Both the current and proposed versions of NR 150 specify the minimum review standards required for categories of actions and allow for Department discretion to determine if additional review is needed for particular actions or projects. There is no change in this regard.

General comment: permits (in general) as equivalent analyses

A number of commenters complained that permit reviews cannot be considered equivalent to WEPA reviews because permit reviews are narrowly focused on the permit requirements and do not look at all the issues that would be covered in an EA. Some commenters also argued that permit reviews do not include opportunities for public involvement. Several commenters used terms such as "assumed" and "presumed" to describe how some actions happened to have been included in the equivalent analysis list. Some commenters also referred to equivalent analysis actions as being "exempt" from WEPA compliance.

General response

The proposed NR 150.20(2)(a) and NR 150.03(10) do not define "equivalent analysis" actions to include all permit actions. Only a permit action that provides both an environmental analysis and public involvement meets the definition of an "equivalent analysis" action. The equivalent analysis actions listed in NR 150.20(2)(a) are not exempt from WEPA compliance. They simply have been identified as processes that meet the environmental analysis and public involvement requirements of the proposed NR 150.03(10). Equivalent analysis actions may also receive additional review using the EIS process under the proposed NR 150.20 introduction or NR 150.20(4).

General comment: permits as prior compliance

Some commenters objected to allowing prior compliance actions to "escape" the WEPA process, and stated that there is no basis to conclude that such prior environmental analysis documents will have been prepared for any of the actions identified in the proposed NR 150.20(3) in a manner consistent with WEPA.

General response

Prior compliance actions do not "escape" WEPA review, rather, the definition of prior compliance is that an analysis **has already** been done. All the actions listed as prior compliance in proposed NR 150.02(3)(a) have been included because each includes a previous WEPA review. Prior compliance actions may also receive additional review using the EIS process under the proposed NR 150.20 introduction or NR 150.20(4).

The use of prior compliance is not a change from the current rule. Currently actions may be identified as having prior compliance, and if so do not require additional analysis. The proposed rule also uses prior compliance as a category of actions.

Specific comments and responses

Comment: *The proposed rule changes again overreach by allowing "prior compliance actions" to escape the WEPA process, including the vague categories of "reissuance or modification of a permit or approval" or "confirmation of coverage under a general permit." Proposed NR 150.20(3). The proposed rule does not even define which types of permits the "reissuance" or "modification" may apply to: are they permits in any program, paying no regard to type of approval or size of the project? The provision is also non-sensical, failing to recognize that modifications may authorize major changes that significantly affect the environment, or that changes to the environment itself may have occurred since a prior permit was issued that warrant the WEPA process.*

Response: Most permit reissuances or modifications do not require an environmental analysis under the current ch. NR 150, Wis. Adm. Code. The department has found that the proposed NR 150.20(3)(a)8 is redundant to the other relevant proposed code sections [air and WPDES permitting under NR 150.20(3)(a)] and has therefore deleted it from the final version of the proposed code.

Recognition of actions covered under a general permit is defined in the proposed rule as prior compliance because issuance of general permits requires an environmental analysis. This is not a change from the current rule.

Comment: *We ask for additional limits on the DNR's ability to invoke proposed NR 150.20(3)(b), which allows the DNR to determine that there is "prior compliance" for a specific action not listed in proposed NR 150.20(3)(a), and thus bypass EIS procedures for that action. The proposed rule defines "prior compliance" as a proposed action for which "one or more environmental analysis documents exist for prior actions that are similar to the proposed action in kind, scale and environmental setting," but this definition does not set adequate limits on the use of prior compliance decisions. A clear limit on the scale or impact of a proposed action—above which "prior compliance" is not available—would ensure adequate WEPA analysis regardless of whether "similar" actions have undergone environmental analysis in the past.*

Response: Making determinations of prior compliance under the proposed NR 150.20(3)(b) is not a change from the current rule. The proposed rule provides more guidance on what constitutes prior compliance than does the current rule. Documentation of all prior compliance determinations would be required under the proposed NR 150.35.

General comment: WPDES and CAFO permits as equivalent analysis or prior compliance

A number of commenters were concerned about Wisconsin Pollutant Discharge Elimination System (WPDES) permitting in general, and WPDES permitting for confined animal feeding operations (CAFOs) in particular. The following is a typical comment.

Regarding implementation of the concept of "equivalent analysis," the public notification and participation requirements under Ch. NR 243 regarding the permitting of Confined Animal Feeding Operations (CAFOs) are not equivalent to the requirements proposed under the revised Ch. NR 150.

The rule proposes that CAFOs regulated under NR 243 be exempt from further analysis, on the basis that the NR 243 permit review is equivalent to an EIS review. We disagree that NR 243 requires an equivalent review process. First, the public notice requirement under NR 243 is not equivalent to an EIS public notice requirement. Second, it is unclear whether the adequacy of an

environmental review under NR 243 can be challenged in the way that an EIS can be challenged under NR 150. Also, it has been our understanding that WDNR would be conducting EIS reviews for CAFOs, so exempting them under NR 150 introduces an element of confusion. This proposal seems to reduce the transparency and public participation in the review process. We request that the review of CAFOs be removed from the proposed prior approval and equivalent review exemption status.

General response

Equivalent analysis actions and prior compliance actions are not “exempt” from review in the draft rule. The definition of “equivalent analysis” at NR 150.03(10) requires those actions to receive environmental analysis and public review and comment. The definition of “prior compliance” at NR 150.03(21) requires that an analysis has already been completed for a prior similar action.

WPDES CAFO permits do require environmental analysis, and public disclosure and comment. There is no reduction in transparency and public participation since all permitting documents are publicly available records and undergo public review.

The Department has never made a decision that all CAFO proposals would receive the EIS process.

The WPDES CAFO permit decision itself cannot include consideration of factors other than those specified in ch. NR 243, Wis. Adm. Code, and chapters 281 and 283, Stats., **regardless** of whether the permit process is treated as an equivalent analysis under the proposed rule or as a type 2 action under the current code [see s. 1.11(4), Stats.].

The following paragraphs discuss CAFO and other WPDES permitting in light of the proposed rule:

- The proposed rule does not remove environmental analysis requirements for WPDES permitting.
- WPDES permits for CAFOs are defined in the proposed rule as equivalent actions because the permitting review under ch. NR 243, Wis. Adm. Code, includes consideration of all environmental analysis content in addition to information specifically related to the permit, and includes public disclosure and comment. The proposed rule thus recognizes that it is redundant to require a separate environmental analysis for a WPDES CAFO review in addition to the review already required under ch. NR 243, Wis. Adm. Code.
- The proposed NR 150.20(4) also recognizes that many projects, including CAFOs, may require more than one Department action, and that the combination of actions may indicate that following the EIS process would best provide for detailed analysis and public disclosure.
- Further, the proposed NR 150.20 introduction provides the Department discretion to determine that any action, including WPDES CAFO permits, may be reviewed using the EIS process.
- Other WPDES permits that are covered in an area wide water quality management plan under s. 281.348, Stats., and ch. NR 121, Wis. Adm. Code, are defined in the proposed

rule as prior compliance because the area wide water quality management plan receives an environmental analysis and public review. The proposed rule thus recognizes that it is redundant to require another analysis of planned permits in addition to the analysis done for the plan.

- Recognition of actions covered under a general WPDES permit is defined in the proposed rule as prior compliance because issuance of general permits requires an environmental analysis. This is not a change from the current rule.

WEPA, s. 1.11, Stats., and ch. NR 150 are not regulatory and therefore do not control environmental impacts. WEPA is solely an informational tool. The proposed revisions to NR 150 are designed to focus attention on important environmental concerns, and to provide analysis to inform state agencies, the state legislature, and other decision-makers of needs and options for improved environmental protection.

Specific comments and responses

Comment: *The WPDES permitting process is limited in scope and does not produce any publicly noticed record of the DNR's analysis of impacts and alternatives. It addresses only water quality impacts and does not analyze or provide information regarding impacts to air quality, water quantity, or other impacts to the physical environment. In fact, when citizens have raised these issues in their comments on a draft WPDES permit, the DNR has dismissed those concerns as outside the scope of WPDES permitting. Additionally, the only information that the DNR provides in its notice to the public of a draft CAFO WPDES permit is a permit fact sheet, which includes a limited description of the CAFO and the basic regulatory and permit requirements.*

Response: The WPDES CAFO permit process considers: alternatives, air quality, groundwater, surface water quality, detailed facility design and impacts from traffic, noise, etc. All WPDES CAFO permitting receives public notification, and all permitting documents are available for public review. Under the current ch. NR 150, Wis. Adm. Code, there have been separate responses to public comments on EA versus permit issues. Under the proposed code responses to public comments will not be so separated.

Comment: *Although it is impractical for NR 150.20 to contain an exhaustive list of actions, there are two additional actions that could streamline Department WEPA compliance determinations. Under NR 150.20(2)(a), the following additions are recommended: 1) Issuance of a Wisconsin Pollutant Discharge Elimination System (WPDES) permit under s. 283.31 Stats., for new or increased discharges at an existing source, and 2) Issuance of an individual permit for water intake facilities under s. 30.21(1), Stats.*

Response: Permits issued under s. 283.31, Stats., cannot be defined as equivalent analysis actions because the statute does not include the environmental analysis required for that designation. Unless they are anticipated in an area wide water quality management plan, s. 283.31 permits are actions requiring the EIS process under the proposed NR 150.20(4)(a).

Section 30.21(1), Stats., does not involve an action by the Department and is therefore not subject to ch. NR 150, Wis. Adm. Code.

Comment: *Issuance of a WPDES permit to authorize new or increased discharges at existing sources occurs often enough to warrant specific mention. It is similar to the actions listed in NR 150.20(2)(a)4 for the air program and provides a parallel action for the wastewater permit*

program. It is possible that the "modification of a permit" action listed under NR 150.20(3)(a)8 may cover this situation, but that is not entirely clear. Because s. 283.93 Stats states that regulatory actions taken by the Department to eliminate or control environmental pollution shall be exempt from the provisions of s. 1.11 Stats., we believe adding this action to NR150.20(2)(a) would be appropriate.

Response: The commenter is correct that s. 283.93, Stats., exempts most regulatory actions of the Department to eliminate or control environmental pollution from s. 1.11, Stats. The final version of the draft rule removes exempt actions from the definition and list of minor actions.

Comment: *The proposed revisions to NR 150 create ambiguity in references to NR 150 requirements found in rules under which "equivalent analysis" is conducted. We request that these references be clarified to avoid confusion. For example, CAFO permits are considered "equivalent analysis actions" because the DNR can request additional information that is "necessary to comply with the requirements of ch. NR 150." This gives the DNR the ability to request information about impacts on the human environment that WEPA requires consideration of, beyond only water quality impacts that NR 243 is concerned with.*

However, under the proposed rule, NR 150 will say that CAFO permits do not need any additional environmental analysis beyond what NR 243 requires. This would seemingly render the provision in NR 243 that allows the DNR to request information to meet ch. 150 requirements meaningless.

Similarly, municipal wastewater facilities plans, approval of which is another equivalent analysis action under the proposed rule, must be reviewed "in accordance with ch. NR 150." Again, the proposed revision would seemingly render this provision meaningless.

We request that the references to ch. NR 150 in the two rules mentioned above, and any other similar instances, be replaced with references to 1.11, Stats. This would preserve the meaning and intent of these provisions when the proposed rule goes into effect.

Response: Under the proposed code, equivalent analysis actions must meet the definition of that designation. Actions listed as equivalent analysis that in the future are changed such that they no longer meet the definition will require removal from the list of equivalent analysis actions in NR 150. The WEPA Coordinator will monitor agency actions for WEPA compliance [see the proposed NR 150.05(1)].

Comment: *The fact that other types of WPDES permits are (correctly) not included, even though they are subject to the same kinds of public notice procedures as individual WPDES permits for animal feeding operations, e.g. Wis. Stat. 283.39-.49, .63, is an admission by the Department that the public notice procedures for WPDES permits are not "equivalent" to WEPA review.*

Response: WPDES permit processes other than those under ch. NR 243, Wis. Adm. Code, are not included as equivalent analysis actions under the proposed NR 150.20(1)(a) because they do not meet the definition of equivalent analysis. There is no required consideration of environmental effects other than those that are permit-related for non-243 WPDES permits.

Comment: *For those of us living in these most wonderfully diverse rural areas, this idea that the DNR can just do "equivalent analysis" is scientifically unsound. We have karst geology here that makes our groundwater vulnerable to pollution, some of the most pristine trout streams in the Midwest, while other places have water shortages and lakes to keep clean. We respect our local*

areas and recognize that full environmental assessments are needed for more thorough review of each situation.

Response: WPDES CAFO permitting includes consideration of surface waters and underlying bedrock.

Comment: *Thanks to the Environmental Assessment requirement and the opportunity to comment, there was a way to get information about the expansions. Without these protections, I would have been left to hearsay, rumor and innuendo. Just here within Manitowoc County we have dramatic differences in geologic activity and topology. When I think of the entire state, there must be vast differences. Thanks to an environmental assessment and permit transparency, I as a citizen get the information I need to better understand how proposed expansions will be properly managed.*

Response: WPDES CAFO permitting includes consideration of geology and topology.

General comment: high capacity well permits as equivalent analysis or minor

Many commenters expressed concern about treating high capacity well approvals as equivalent analysis actions or as minor actions, some stating that this amounted to well approvals being exempted from WEPA review. Several commenters were concerned about groundwater pumping and cumulative impacts in the central sands area of the state.

General response

The current ch. NR 150, Wis. Adm. Code, treats all high capacity wells as type 4 actions, meaning that no environmental review or public involvement is required. The proposed rule reflects the environmental analysis requirements of s. 281.34(4), Stats., and ch. NR 820, Wis. Adm. Code. The proposed rule has been changed so that no high capacity well approvals are considered to be equivalent analysis actions. High capacity well approvals that require environmental analysis pursuant to s. 281.34(4) and NR 820.30 will receive the EIS process under the proposed NR 150. All other high capacity well approvals are considered to be minor actions under the proposed rule. Minor actions can receive an EIS analysis process under the proposed NR 150.20 (introduction) or NR 150.20(4)(b), if warranted.

WEPA, s. 1.11, Stats., and ch. NR 150, Wis. Adm. Code, are not laws that regulate whether an action or project may be approved or undertaken, and therefore do not control environmental impacts. WEPA is a law that requires a government agency to collect and analyze certain information about a proposed action or project and make that information available to the public for comment. It is an informational tool only. The proposed revisions to ch. NR 150 are designed to increase attention on important environmental concerns and to provide analysis to inform state agencies, the state legislature, and other decision-makers of needs and options for improved environmental protection.

Specific comments and responses

Comment: DBA agrees that chapters NR 812 and 820 provide specific permitting and environmental review processes for high capacity wells. However, we have significant concerns that department staff is already using the Supreme Court's decision in the *Lake Beulah* case to broaden the specifically promulgated permitting and environmental review processes. For section NR 150.20(2)(17) to have meaning, the department must require its staff to comply with

existing promulgated rules. If the department wishes to implement new or different standards because of its interpretation of the *Lake Beulah* decision, it must undertake new rulemaking.

Response: This rule revision does not include substantive revisions to chs. NR 812 and 820, Wis. Adm. Code, nor does it direct permit review by DNR's groundwater staff. This rule revision does not direct or require staff to implement new or different standards for high capacity well reviews.

General comment: sand mining

Several commenters mentioned concerns about sand mining in the context of the proposed rule.

General response

Department regulatory authority over sand mining operations is limited. As a result, environmental analyses have not been required under ch. NR 150, Wis. Adm. Code, for sand mining proposals received to date. The Department has prepared an initial environmental analysis of silica sand mining in the state (see <http://dnr.wi.gov/topic/Mines/documents/SilicaSandMiningFinal.pdf>), and may follow up with a more detailed and updated strategic analysis.

General comment: timber management as equivalent analysis or minor

A number of commenters expressed concerns about timber management activities being "exempt" from review as minor actions or as prior compliance actions, and that the definition of "timber management" is too broad.

General response

The proposed rule does not "exempt" timber management from review. The proposed rule only considers "minor" those timber management actions that follow established Department protocols. These protocols are designed to avoid and minimize environmental concerns. The proposed rule only defines as prior compliance those timber management actions that are previously analyzed in a property master plan under ch. NR 44, Wis. Adm. Code. Timber management activities that do not follow protocols and were not covered in the property master plan would require the EIS process under the proposed NR 150.20(4).

Timber harvest and prescribed burning actions do not require environmental analysis under the current rule, so the proposed rule may actually require analysis of more timber management projects.

General comment: Chapter 30, 31 and wetland permits as equivalent analysis

Several comments were made that objected to the proposed rule defining waterway permitting under chs. 30 and 31, Stats., and wetland permitting under ch. 281, Stats., as equivalent analysis actions.

General response

Waterway and wetland permits are considered to be equivalent analyses under the proposed rule because such permitting includes broad environmental analyses and public involvement. Details of the broader analysis factors will be provided in the findings of fact within permit decision documents.

Specific comments and responses

Comment: *It appears that for environmental impact reviews of Ch. NR 30, Wis. Adm. Code project reviews, DNR proposes to base the concept of “equivalency” upon a determination related to a finding of “public interest.” Is this true?*

Response: Equivalency between the Chapter 30, Stats., permit review process and the environmental analysis process includes the fact that Chapter 30 permits require a public interest consideration, but also on the fact that the process includes the broader analyses as findings within the permit action.

Comment: *Under NR 150.20(2)(a), the following additions are recommended: ..., and 2) Issuance of an individual permit for water intake facilities under s. 30.21(1), Stats.*

Response: Section 30.21(1) does not involve an action by the Department, and is therefore not subject to ch. NR 150, Wis. Adm. Code.

Comment: *For example, the wetlands permitting statute (Wis. Stat. § 281.36) limits the DNR’s review of alternatives and require a preliminary weighing of wetlands mitigation to determine if the standards for permit approval are met. There are no such constraints under WEPA, which requires review of a broader range of alternatives and clear disclosure of the impacts separate from any mitigating measures. In the wetlands context and many other permitting contexts, a permit application review is by no means “equivalent” to the full analysis and disclosure of impacts that WEPA requires.*

Response: Section 281.36(3m)(b), Stats., requires a practicable alternatives analysis that includes avoiding and minimizing adverse impacts on wetland functional values and avoiding any other significant non-wetland adverse environmental consequences. Section 281.36(3n)(b) and (c), Stats., require a broad review of environmental effects, including significant adverse environmental effects other than wetland impacts and the net positive or negative environmental impact of the proposed project. Section 281.36(3p), Stats., provides for public notice and opportunity to comment.

Comment: *We are concerned that removing the clear criteria and scope for environmental analysis provided for by the EIS process will further contribute to this disconnect between an environmental analysis and a public interest finding, to the detriment of the state’s waters.*

This concern is heightened when also considering that the recently shortened decision-making timeframes and reduced flexibility for requesting additional information from the applicant for ch. 30 permit decisions have already led to questions about whether ch. 30 provides decision makers adequate time and access to information to perform environmental analyses that meet WEPA’s legal requirements.

Response: Under the current ch. NR 150, Wis. Adm. Code, no ch. 30 or 31, Stats., permitting actions require the EIS process. The proposed rule is not a change in this regard.

The Department must meet the regulatory timelines established by the legislature and must assure adequate environmental analysis and public disclosure pursuant to 1.11, Stats.

General comment: solid waste approvals as equivalent analysis

A number of commenters expressed concern that various solid waste facility reviews are defined as equivalent analysis actions and prior compliance actions in the proposed rule.

General response

The proposed rule does not weaken transparency and public involvement, nor does it remove environmental analysis requirements for solid waste facility reviews. The proposed rule does, however, provide different processes for meeting the environmental analysis requirements.

- The proposed rule defines large solid and hazardous waste feasibility determinations to be equivalent analyses because s. 291.27, Stats., requires an EIS under s. 1.11 Stats., for new hazardous waste facilities over 80 acres and one million cubic yards. Section 289.25, Stats., requires a s. 1.11, Stats., compliance determination. Sections 289.25 and 289.26, Stats., require public disclosure and comment.
- The proposed rule defines all other solid and hazardous waste feasibility decisions to be equivalent because of the s. 1.11, Stats., compliance determination requirement in s. 289.25 Stats., and the public disclosure and comment requirements in ss. 289.25 and 289.26, Stats.
- The draft proposed rule incorrectly identifies as prior compliance actions: solid or hazardous waste facility plan of operation approvals under s. 289.30, Stats., and facility license approvals under s. 289.31, Stats. Both are exempt from WEPA review by statute. This is corrected in the final rule.
- Other solid waste approvals are type 4 actions under the current ch. NR 150, Wis. Adm. Code, and are considered minor actions under the proposed code. There are, therefore, no changes in review requirements for these other actions.

General comment: county forest planning as an equivalent analysis

Several commenters expressed concern that county forest planning is defined as an equivalent analysis action in the proposed rule.

General response

The proposed rule does not weaken transparency and public involvement, nor does it remove environmental analysis requirements for county forest planning. The proposed rule does, however, provide different processes for meeting the environmental analysis requirements.

The current ch. NR 150, Wis. Adm. Code, requires an environmental assessment only for county forest plans that include one or more actions that would otherwise require an environmental assessment. The proposed NR 150 defines county forest planning under s. 28.11(5), Stats., as an equivalent analysis action because counties are required by the Department to follow a model plan which constitutes a detailed environmental analysis. The plan must be approved by the county board which is an open public process. All planning documents are public.

General comment: species introductions as prior compliance

Some expressed concern about species introductions as prior compliance actions.

General response

The proposed rule does not define species introductions as prior compliance actions. The proposed rule does, however, define as prior compliance actions those **research activities** that include species introductions if the research was previously analyzed in the property master plan under ch. NR 44, Wis. Adm. Code.

Comment: air pollution permits as equivalent analysis

One commenter expressed concern that air pollution permits are defined as equivalent analysis actions under the proposed rule.

Response

Air pollution permitting is defined in the proposed rule as an equivalent analysis action because s. 285.61(8)(a), Stats., requires compliance with s. 1.11, Stats., and full public disclosure and comment is required under ss. 285.61(4), (5), (6), and (7), Stats.

Comment category: multiple action projects section and segmentation

General comment

Several commenters took issue with the multiple action section [NR 150.20(4)(b)] of the proposed rule. Commenters found that subsection 2 regarding independent utility would always be true for multiple action projects because all parts of a project are interdependent, and therefore all multiple action projects would require the EIS process.

General response

This section has been revised to reflect the department's intent to define conditions under which the EIS procedures must be followed or may be followed.

Specific comments and responses

Comment: *In addition, NR 150.20(4)(b) states that the Department must issue a determination under NR 150.35 in instances where the Department makes a determination that EIS procedures are not needed when a project involves multiple department actions. Therefore, the first sentence in NR 150.35(1) should include a reference to the WEPA Compliance Determinations required by NR 150.20(4)(b).*

Response: The commenter is correct. In the final version of the proposed rule, both NR 150.35 and NR 150.20(4) have been modified.

Comment: *The currently proposed rule states that an EIS must be performed where multiple department actions are required, even if all of those actions fall under the equivalent analysis or prior compliance categories. We suggest adding a criterion (3) that requires the Department to prepare an EIS for projects that are of substantial interest to the general public, including projects that could have a significant impact on public lands or resources, affect a rare or protected environmental feature or affect an environmentally sensitive area of the state, or have created a local controversy.*

Response: The proposed final rule section NR 150.20(4) includes specificity concerning various impact considerations and public concerns.

Comment category: cumulative analysis is required in EISs

General comment

Several commenters noticed that the EIS content list in the proposed NR 150.30(2)(g) did not include a requirement to consider cumulative effects.

General Response

The requirement to include cumulative impacts was inadvertently left out of the draft that went out for public comment, although cumulative effects were included in the definition of environmental effect in the proposed NR 150.03(9).

Specific comments and responses

Comment: *Proposed NR 150.03(4) defines "cumulative effects" to mean "compounding effects resulting from repeated or other proximal actions, activities or projects." While we agree that addition of a definition of "cumulative effects" to NR 150 is necessary, as proposed the definition is inappropriately narrow, because it limits DNR's review to effects of actions that are (a) repeated-i.e., that are the exact same type of DNR action occurring over again; or (b) proximal-i.e., that are geographically related. Such a narrow definition will not provide adequate WEPA review for certain projects. The definition of "cumulative effects" should be revised to substantially mirror the federal definition of "cumulative impact", which is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7 (emphasis added).*

Response: The commenter's read of the definition is more narrow than intended by the Department. The Department also does not fully agree with the federal definition. The commenter interprets the phrase "same type" to mean "exact same type." This interpretation is negated by the definition's inclusion of the phrase "actions, activities or projects," clearly a broad view of "same type." The word "proximal" means closely related in space, time or order, not just geographically near or related. It is also an indefinite word, giving broad latitude for analysis. The subject of the definition is "compounding effects." The definition does not limit compounding effects to current activities, but also allows for consideration of effects or potential effects of past and future activities, regardless of who undertakes the activities. The definition is sufficiently and intentionally broad to include any activity that compounds effects. The federal definition is limited by use of the word "added" rather than "compounded" because cumulative effects can be greater than the sum of the whole of individual effects.

Comment category: EISs eliminated and EIS process changes

General comment

Several comments were made about the proposed rule eliminating EISs. A number of other EIS process-related comments were also made.

General response

The proposed rule does not eliminate the use of the EIS process, but relies on that process to a greater extent than does the existing rule.

Specific comments and responses

Comment: *There needs to be a more specific and stronger process for assuring "meaningful" or "quality" public involvement. The process needs to include a more certain method of public announcement for comment periods and hearings, and clear parameters for what constitutes a decision that is open to public challenge. See for example Page 12 – "(e) consideration of public comments. Any hearings.....in a manner that the Department - deems appropriate." The*

procedure for announcement of hearing should be stated. The procedure should be consistent and one that the public can count on whether it is via a webpage, distribution list of interested parties or whatever, but it should be specified.

Response: The proposed rule assumes that future methods of distributing public announcements will likely continue to evolve, and avoids mandating any particular methods that may become obsolete or ineffective in the future. The Department will continue to use the most effective means of public disclosure in fulfillment of the legislative intent of WEPA.

Comment: *The proposed rule includes public review procedures once the draft EIS is written and published. However, public involvement in the WEPA review process should begin much earlier, during the issue identification process under proposed NR 150.30(1)(f). Although the proposed rule allows an optional public scoping process at the issue identification stage, this provision is inadequate to ensure that the public is notified at the earliest stages of the WEPA process. Current law requires the DNR to inform the public and other affected agencies of their intent to complete an EIS during the issue identification stage in order to solicit public input on the appropriate scope and significant issues for the environmental analysis. We ask the DNR to retain this important opportunity for early public input.*

Response: The choice to make EIS public scoping discretionary under the proposed NR 150.30(1)(f)2 is based on Department experience. Department actions do not always warrant public involvement in scoping, but public scoping often improves the Department's environmental analysis and public confidence. The proposed NR 150.30(1)(f)2 recognizes that public interest in EISs will vary considerably. Our intent is that the WEPA coordinator will tend to err on the side of including public scoping when advising Department programs on WEPA compliance.

Comment: *Proposed NR 150.30(2)(h) loosens the requirements for identifying and explaining incomplete or unavailable information that should have been included in an EIS. Current law requires the DNR not only to identify incomplete information and describe its relevance (these two requirements are retained in the proposed rule), but also to "[s]ummarize credible scientific evidence which is relevant to the evaluation" and "[e]valuate adverse impacts based upon theoretical approaches or research methods generally accepted in the scientific community." In other words, current law calls on DNR's technical and scientific experts to make their best guess about the likely adverse impacts of a project. The proposed rule, on the other hand, merely requires the DNR to identify missing information and describe whether it is relevant, a more ambiguous and less rigorous standard for evaluation.*

Response: The proposed rule language does not change standards for WEPA compliance.

Comment: *Current law requires a public comment period of 45 to 90 days for an EIS. The proposed rule reduces this time to a minimum of 30 days. We ask the DNR to retain the 45-day minimum public comment period. Environmental impact statements are often lengthy and highly technical documents which require careful reading and analysis. In order to enable members of the public, who presumably engage in this analysis on top of their existing work and life obligations, full and adequate time for review and comment, we ask DNR to extend the timeline for public comment.*

Response: The proposed NR 150.30(3)(c) recognizes that the scope of EISs will vary considerably. The 30-day comment period was chosen as a reasonable minimum public review

period of time for most EISs. The proposed NR 150.30(3)(c)2 allows for reasonable extensions of public comment periods. The proposed rule also does not preclude the Department from choosing to provide longer public review periods when warranted.

Comment: Public hearings under WEPA provide crucial opportunities for members of the public to voice their concerns and ask important questions about proposed projects that will affect their health, safety, and environment for potentially decades to come. Although we understand that the DNR considers written and oral public comments equally in their decision making, for many concerned citizens there is no substitute for appearing in person to discuss proposed actions in their communities. In addition, a written WEPA compliance decision under proposed NR 150.35, even though it may explain the DNR's WEPA decision process after the fact to a certain extent, is no substitute for direct, real-time engagement with agency staff during a public hearing. Therefore, we respectfully request that DNR revise proposed NR 150.30(3)(d) to require a public hearing prior to making every WEPA compliance decision under proposed NR 150.35.

Response: The proposed NR 150.30(d) recognizes that the scope of, and public interest in, EISs will vary considerably. While not required under the proposed rule, hearings on actions receiving review under the EIS process would be provided whenever a hearing would serve public participation needs. The department would consider all reasonable requests for hearings.

Comment: We request that proposed NR 150.30(4)(a) be revised to require not only a summary of public comments received on the draft EIS, but also the DNR's response to these comments. Whether or not the DNR chooses to revise the draft EIS based on comments received, the public should be ensured an agency response to all comments. (Substantially similar or repetitive comments could be addressed collectively, as the DNR already does in many settings.)

Response: The final version of the draft rule will require that responses to comments be included under the proposed NR 150.30(4)(a).

Comment category: prior compliance determinations

Comment: Page 14 re: "(3) Prior Compliance (b) - The Department may determinethat there is prior compliance for specific actions...." Can we assume that under s. NR 150.35, the reason that prior compliance is met will be specified in the finding? If not, the reason should be clearly stated and with enough detail so that the public understands the Department's rationale.

Response: Yes, written determinations under the proposed NR 150.35 for prior compliance under the proposed NR 150.20(3)(b) will explain how the proposed action meets the definition of prior compliance.

Comment category: other comments

Comment: Wis. Admin. Code § NR 44.04(8)(b) refers to "procedures described in s. NR 150.21(3)." However, this section does not exist in the proposed rule. The reference should be amended to refer to § 150.30(1)(f) in the proposed rule. We did not see this in the list of amended rules provided in the public notice of the rule revision.

Response: The commenter is correct. The proposed rule package has been amended.

Comment: Proposed NR 150.03(1) defines "Action" as "any final decision by the department to exercise the department's statutory authority to affect the quality of the human environment." This definition is confusing, and suggests that only those DNR decisions that have as their purpose to "affect the quality of the human environment" will be considered "actions" for WEPA

purposes. Thus the definition appears to unlawfully exclude those actions that incidentally affect the quality of the human environment, as well as those actions for which the impacts on the human environment are entirely unknown (and thus would benefit from WEPA analysis). The proposal also limits the definition of "action" to a deliberate exercise of statutory authority, which improperly excludes DNR inactions which may, themselves, negatively impact the environment.

Response: The commenter is correct that the proposed NR 150.03(1) inadvertently defined "action" incorrectly. The final version of the rule defines "action" as "any final decision by the department to exercise the department's statutory authority that affects the quality of the human environment."

Inaction by the Department may, at times, result in impacts to the environment, but cannot, by definition, be considered action. Department activities are confined to those provided by statute. The introduction of strategic analysis is intended to provide a means of analyzing needs for environmental management or protection for which the Department does not currently have authority.

Comment: *On page 15 - item 150.30 (1) (j) Conflicting procedures, There should be a detailed statement as to the reason(s) why the requirements of chapter NR 150 cannot be followed because of conflicting procedures. The reason(s) should be both in the introduction/executive summary and/or the body of the EIS or equivalent document.*

Response: The proposed s. NR 150.30(1)(j), while including additional clarifying language, is not a substantive change from the current s. NR 150.22(2)(j).

Comment category: supportive comments

Comment: *Regarding page 17 - NR 150.50, Document Retention and Management. This is a great development. A document reference system or library has been talked about for a long time and it is' heartening to see that it has been included in the revisions.*

Response: Comment noted.

Comment: *We appreciate the efforts WDNR has made to make environmental reviews under 150 more efficient and more meaningful in terms of public review.*

Response: Comment noted.

Comment: *The proposed revision eliminates the type list in NR 150 in support of providing exemptions for minor actions, equivalent analysis actions and actions with prior compliance. DBA supports the DNR's efforts to reduce the duplication of efforts while also complying with the Wisconsin Environmental Policy Act (WEPA).*

Response: The proposed rule does not eliminate the type list, but does recategorize actions in several separate lists. The proposed NR 150 does not exempt actions defined as minor, equivalent analysis and prior compliance. Some actions are exempt from WEPA compliance by other laws, but not by NR 150. The final version of the draft rule eliminates exempt actions from the definition and list of "minor actions." Equivalent analysis and prior compliance actions require a detailed analysis under the proposed rule. Their designation as equivalent or prior only eliminates requirements for redundant review processes.

Comment: *We are hopeful that the proposed creation of strategic analyses to evaluate policies and issues of state-wide importance that have the potential for significant impacts on the environment, either collectively or individually, may improve the DNR's decision-making in a variety of areas. It is crucial that the DNR make use of this opportunity for decision makers and the public to obtain a thorough analysis of the impacts of and alternatives to [large-scale] issue areas and policies, that are not currently being addressed by piecemeal, permit by permit decision-making that does not adequately consider or evaluate the cumulative impacts of widespread or large- scale changes occurring in a number of Wisconsin industries. There are several policy issues with significant environmental and public health impacts that deserve a careful analysis under the proposed strategic analysis methodology.*

For example, since 2010, there has been explosive growth in the number of industrial sand mines due to increased demand for a type of sand that is abundant in Wisconsin and is used in the hydraulic fracturing process.² There is growing concern about increasing emissions of particulate matter, i.e., fugitive dust, discharges to surface water and groundwater, groundwater consumption, traffic volumes, and impacts on threatened and endangered species. There has not yet been any comprehensive analysis of the individual or cumulative impacts from this new and expanding industry. MEA requests that the DNR use its authority under the proposed new rules to conduct a strategic analysis of the impacts of and alternatives to permitting more and more of these frac sand mines and processing plants.

Similarly, the number of confined animal feeding operations, known as CAFOs or factory farms, has been skyrocketing, with large numbers of them concentrated closely together in a few regions of the state. Strategic analyses of the cumulative and indirect impacts of permitting numerous of these facilities in relatively small regions, and addressing their potential cumulative impacts on water quality and quantity, air emissions, odor, traffic, and rural atmosphere would be in order.

Response: We appreciate that the commenter sees great value in the proposed strategic analysis process. A strategic analysis is not, however, driven by the potential for significant environmental effects, but by unresolved resource use conflicts [see the proposed NR 150.03(25) and NR 150.10 introduction].

The commenter has identified two important issues that the Department has also considered for strategic analyses. The Department has prepared an initial analysis of silica sand mining in the state (see <http://dnr.wi.gov/topic/Mines/documents/SilicaSandMiningFinal.pdf>), and may follow up with a more detailed and updated analysis. The Department is also gearing up to strategically analyze water use issues in the central sands area of the state.

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matters, including developments in and around shorelands, wetlands, and navigable waters.

12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

There may be a small savings of state tax dollars (GPR) and of utility set-asides that are designated to evaluate impacts of energy and other utility projects that may impact waterways, wetlands, air quality, water quality, and other public resources. Rule changes may also make more efficient use of resources of affected businesses by requiring fewer new impact analyses for similar projects, which would in turn mean that businesses may need to provide less data when WDNR can use applicable data from similar projects that have previously been reviewed under ch. NR 150. However, the primary savings will be those resulting from conducting analyses of broad public policy issues when the analyses point to potential future savings opportunities, such as selecting lower-cost options, before such options are foreclosed by less-informed decisions.

Response to comments on ch. NR 150 FE/EIA

Business sectors participating in the ch. NR 150 External Advisory Group were contacted for comments. We received comments from the Dairy Business Association (DBA), and from Midwest Environmental Associates (MEA). Because the comments of both parties overlap to some degree, we have addressed them on the basis of comment content and not by party of origin.

Comment:

Throughout the fiscal note, the agency asserts that the proposed rule revisions will not have any financial impact on Wisconsin businesses because the WEPA rule is implemented internally at WDNR. We believe this statement is inaccurate for many business owners and an over-simplification of the WEPA process. The way the agency implements WEPA, and specifically which agency actions require an environmental assessment (EA) or environmental impact statement (EIS) to be generated, directly affects businesses that are planning to build or expand a facility in Wisconsin.

Response:

While we agree that WEPA compliance does have fiscal impacts on affected businesses, we contend that the proposed rule revisions will, in general, result in lower fiscal impacts for permit applicants. This is because the revised rule will result in fewer permit applications requiring additional WEPA review, and because WEPA review requirements will not change for those permit applications that still require additional WEPA review. Overall, therefore, the costs associated with WEPA compliance will decline for the businesses community under the revised rule.

Comment:

If the proposed rule revisions will create a more consistent and reliable permit process for certain industries, or if the revisions will eliminate the need for an EA or EIS for certain agency actions, the proposed rules may result in cost savings for businesses. However, if the revisions will inject further uncertainty in some permit processes or require an EA or EIS for more agency actions, the proposed rules would certainly result in increased costs for businesses.

Response:

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The proposed rule revisions will result in lower WEPA compliance related costs for affected businesses for the following reasons. First, proposed rule revisions will create a more consistent and reliable permit process for many permit applicants because they will be at less risk of WEPA compliance legal challenges. Secondly, for many permit applicants the proposed rule revisions will eliminate the need for additional WEPA review.

Comment:

Uncertainty, disputes and/or litigation are more likely to arise between those seeking DNR permits or approvals for major actions and those believing that an EIS is inadequate if the rule changes result in EIS's that depart significantly from current ones, or the current close correspondence between state and federal environmental review processes is lost. These disputes could result in significant delays and costs for businesses involved in projects, facilities, or programs that require EIS's to be prepared. Additional costs to the DNR, other organizations and citizens could also result.

Response:

The proposed rule revision provides clarification of EIS content and process, but the requirements remain substantially unchanged. The risk of uncertainty, disputes and litigation over EIS adequacy will, therefore, not change with the proposed rule revision

Comment:

The Department should be interested in whether the proposed rule changes are likely to result in better or more cost effective management and protection of the state's environmental resources.

Response:

Better and more cost effective management and protection of resources is one of the important goals of the proposed rule revision. The rule revision addresses this goal by focusing the Department's time and attention on the most important environmental policies, issues, and projects while avoiding duplication of time and effort for review of routine actions.

13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

The rule change will make the Department's WEPA compliance more effective, meaningful and consistent with WEPA and s. 1.11, Wis. Stats. The revised rule will emphasize the analysis of broad issues and policies, de-emphasize document production for individual project actions, and provide meaningful public involvement. The new rule will require that the Department: 1) identify and analyze environmental issues important for their geographic, multidisciplinary, or policy scope; 2) analyze issues earlier, when alternative options have not been foreclosed, and on an ongoing basis; 3) provide that environmental analysis information be incorporated into departmental policy and decision-making; 4) define and provide meaningful public involvement; 5) address the information/policy-driven requirements of s. 1.11(2)(e) and (h) as separate from the action/project-driven requirements of s. 1.11(2)(c); 6) identify and eliminate process requirements that have become duplicative over time as a result of changes in statutory authorities and administrative practice; and 7) replace the current ch. NR 150, Wis. Adm. Code, type list with criteria for identifying, prioritizing, analyzing and seeking public input on relevant issues.

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Alternatives to the proposed rule changes would include leaving NR 150 as it currently is. This alternative was rejected as not meeting the need to more effectively and efficiently implement s. 1.11, Wis. Stats.

14. Long Range Implications of Implementing the Rule

In the long term, this revised rule will result in the production of fewer new environmental analysis documents. Relying in significant part on previous analyses for similar projects will reduce costs for businesses for providing data needed for analyzing impacts of proposed projects. Freeing up Wisconsin DNR staff time from multiple programs will enable staff to analyze potential impacts from emerging industries and technologies, enabling all levels of government to better respond to potential problems and opportunities.

15. Compare With Approaches Being Used by Federal Government

This revised rule is similar to the existing rule, in that it substantially follows the guidelines of the federal Council on Environmental Quality as directed by s. 1.11, Wis. Stats..

16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

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

17. Contact Name

David Siebert

18. Contact Phone Number

608-264-6048

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

None

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

None

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
- Less Stringent Schedules or Deadlines for Compliance or Reporting
- Consolidation or Simplification of Reporting Requirements
- Establishment of performance standards in lieu of Design or Operational Standards
- Exemption of Small Businesses from some or all requirements
- Other, describe:

NR 150 is largely an internal process rule, so rule changes would have no measureable impact upon small businesses.

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

Not applicable.

5. Describe the Rule's Enforcement Provisions

This rule carries no enforcement provisions. Disputes regarding the need to conduct an EIS analysis have judicial avenues of appeal.

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

Yes No

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

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 2.085(4), 2.14(7), 300.03(5), 300.05(4), 305.03(5), 305.06(3m), 345.04(2)(e)6, and 345.04(2)(g)2; to **amend** NR 2.085(3), 2.157(title), 2.157(intro) 2.157(1), 19.01(5), 44.04(8)(b), 51.002(1), 51.85(4), 108.04(3)(b), 110.09(3), 110.10(1)(L), 110.11(1)(g), 126.07(2)(j), 134.09(2), 166.07(1)(a)3, 191.05(5), 310.14(4)(b), 327.04(4), NR 410.02(3), 410.03(2)(i), 410.03(3)(a)2, 512.16, 670.409(1)(c), 820.29(1), 820.29(2), 820.30(2)(a), 820.30(3)(a), 820.30(4)(b), 820.30(4)(c), 820.31(4)(b), 820.31(4)(c), 820.32(2), and 820.32(3); and to **repeal and recreate** NR 150; relating to the department's environmental analysis and review procedures under the Wisconsin Environmental Policy Act.

OE-46-10

Analysis Prepared by the Department of Natural Resources

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

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

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

The department proposes several housekeeping changes to some of these other administrative codes that would have obsolete ch. NR 150 references after the changes to ch. NR 150 are codified.

- 5. Plain language analysis:** WEPA and ch. NR 150 are cornerstone laws for the agency that date back to the early 1970's. The rule change will make the department's WEPA compliance more effective, meaningful and consistent with WEPA and s. 1.11, Stats. The new rule emphasizes the analysis of broad issues and policies, reduces process and paperwork requirements for individual project actions, and provides clear procedures for public involvement.

The new rule will require that the department: 1) identify and analyze environmental issues important for their geographic, multidisciplinary, or policy scope; 2) analyze issues earlier, when alternative options have not been foreclosed; 3) provide that environmental analysis information be incorporated into departmental policy and decision-making; 4) define and provide meaningful public involvement; 5) address the information and policy-driven requirements of s. 1.11(2)(e) and (h), Stats. as separate from the action and project-driven requirements of s. 1.11(2)(c); 6), Stats., identify and eliminate

process requirements that have become duplicative over time as a result of changes in statutory authorities and administrative practice; and 7) replace the current ch. NR 150 type list with criteria for identifying, prioritizing, analyzing and seeking public input on relevant issues.

The new rule eliminates the use of Environmental Assessments as a means of WEPA compliance for individual actions. The new rule adds new process and procedures for bigger picture strategic policy analyses.

The fundamental department policy regarding WEPA, as currently embodied in ch. NR 150, will not change. The rule recreation will result in a number of procedural changes and a new emphasis on how the department applies the Wisconsin Environmental Policy Act, especially to its policy development actions.

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

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

8. Summary of factual data and analytical methodologies: The Department of Natural Resources Bureau of Energy, Transportation and Environmental Analysis (ETEA) staff reviewed relevant WEPA case law and federal CEQ regulations, obtained the input of an internal team of staff from several department programs, and involved a broad range of potentially interested and affected external parties.

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

10. Effect on small business: Businesses that may be affected by this rule revision include mainly those that are required to apply for certain DNR permits for projects. The amount of redundant environmental analysis required for DNR actions will be reduced under the proposed rule.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03(2m), Stats., for rules proposed by the Department of Veterans Affairs: Not applicable.

12. Agency Contact Person:

David Siebert, Director, Bureau of Energy, Transportation and Environmental Analysis
(608) 264-6048 or David.Siebert@Wisconsin.gov

Section 1. NR 2.085(3) is amended to read:

NR 2.085 (3) If a contested case hearing will be held on a proposed action for which an environmental impact statement has been prepared, the informational hearing provided for by ~~s. NR 150.23 (4)~~ s. NR 150.30(3)(d) shall be combined with the contested case hearing if circumstances and statutes allow. At a combined hearing, the informational portion shall precede the contested portion.

Section 2. NR 2.085(4) is repealed.

Section 3. NR 2.14(7) is repealed.

Section 4. NR 2.157(1) (title) (intro.) and (a) is amended to read:

NR 2.157(1) (title) ~~DECISIONS WHEN AN ENVIRONMENTAL IMPACT STATEMENT OR ENVIRONMENTAL ASSESSMENT ANALYSIS IS COMPLETED.~~

(intro) For any decision arising out of a noncontested case hearing, the department may not commence, engage in, fund, approve, conditionally approve or disapprove an action that has been the subject of a department prepared ~~environmental assessment or environmental impact statement~~ analysis until it has made a written findings of fact, conclusions of law and decision on compliance with s. 1.11, Stats. The decision shall include findings on all of the following whether:

(a) The department has considered the ~~environmental impact statement or environmental assessment~~ analysis and comments received on it.

Section 5. NR 19.01(5) is amended to read:

NR 19.01(5) ENVIRONMENTAL IMPACT. If an environmental impact analysis, environmental impact report or environmental impact statement is required under ss. 1.11 and 23.11 (5), Stats., and ch. NR 150, the time periods for issuing an approval do not apply until ss. 1.11 and 23.11 (5), Stats., and ch. NR 150 have been complied with.

Section 6. NR 44.04(8)(b) is amended to read:

NR 44.04(8)(b) The department procedures described in s. NR ~~150.24 (3)~~ 30(1)(f) shall be followed, as appropriate, to identify pertinent issues to be evaluated in the planning process for a plan, plan revision or plan amendment and when preparing any environmental analysis required by ch. NR 150.

Section 7. NR 51.002(1) is amended to read:

NR 51.002(1) "Acquisition cost" means the fair market value of the property as determined by department appraisal guidelines, except as provided in s. 23.0917 (7) (b) to (d), Stats., and reasonable costs related to the purchase of the property. These costs are limited to the cost of appraisals, land surveys, relocation payments, title evidence, recording fees, initial posting of signage consistent with s. 23.09165 (3), Stats., with cost share not to exceed \$1,000, attorney fees for department required reviews with cost share not to exceed \$1,000, historical, cultural, and environmental ~~assessments~~ analyses required by the department completed through contract by professional consultants. "Acquisition cost" does not include environmental clean-up costs, brokerage fees paid by the buyer, and real estate transfer taxes.

Section 8. NR 51.85(4) is amended to read:

NR 51.85(4) The department is responsible for any environmental ~~assessments~~ analyses, historical or cultural assessments, permits and miscellaneous approvals required to implement the project. Friends groups may not begin work until all applicable permits have been obtained.

Section 9. NR 108.04(3)(b) is amended to read:

NR 108.04(3)(b) Approval of plans and specifications is not to be construed as a department determination on the issuance of a Wisconsin pollutant discharge elimination system permit, an opinion as to the ability of the proposed system to comply with effluent limitations in such permit, an approval of the environmental assessment analysis that may be prepared for this project or an approval for any activities requiring a permit under ch. 30, 31 or 281, Stats. Approval of plans and specifications is also not to be construed as department certification of the ability of a proposed industrial pretreatment facility to comply with applicable pretreatment standards.

Section 10. NR 110.09(3) (intro.) is amended to read:

NR 110.09(3) (intro.) **CONTENT OF AN ENVIRONMENTAL ASSESSMENT ANALYSIS.** An adequate environmental assessment analysis must be an integral, though identifiable, part of any facilities plan submitted to the department under sub. (1). ~~The information submitted in the environmental assessment will be used by the department for determining whether or not an environmental impact statement is necessary.~~ The analyses that constitute an adequate environmental assessment analysis shall include:

Section 11. NR 110.10(1)(L) is amended to read:

NR 110.10(1)(L) *Environmental assessment analysis.* The department may require the submittal of an environmental assessment analysis meeting the requirements of s. NR 110.09 (3) for large or complex sewer projects, for those projects which are proposed to be constructed in environmentally sensitive areas, or for projects which involve significant public controversy.

Section 12. NR 110.11(1)(g) is amended to read:

NR 110.11(1)(g) *Environmental assessment analysis.* The department may require the submittal of an environmental assessment analysis meeting the requirements of s. NR 110.09 (3) for large or complex lift station projects, for those projects constructed in environmentally sensitive areas or for projects which could involve significant public controversy.

Section 13. NR 126.07(2)(j) is amended to read:

NR 126.07(2)(j) An environmental assessment analysis which meets the requirements of the Wisconsin Environmental Policy Act, s. 1.11, Stats., and which includes an evaluation of feasible alternatives and provides clear justification for selecting a particular course of action based on monetary, environmental and other considerations. ~~{The assessment analysis shall be available for public information and public participation in evaluation of the project.}~~

Section 14. NR 134.09(2) is amended to read:

NR 134.09(2) If the department finds that the proposed drillhole location, construction, abandonment and site reclamation will adequately protect the waters of the state, it shall grant the approval. If it finds that the exploration as proposed will not provide such protection, the department may grant an approval subject to such conditions as it deems necessary to provide such protection, or it may deny the approval if it determines that such protection cannot be provided. Written approvals of drillhole construction plans shall be issued, issued with conditions or denied within 20 business days after the department receives a complete application as described in sub. (1). If it is determined, pursuant to ch. NR 150 that an ~~environmental assessment or an~~ environmental impact statement is required to comply with s. 1.11, Stats., this time limit shall be extended. Approval of drillhole construction plans shall terminate one year after date of issuance, if such construction has not commenced.

Section 15. Chapter NR 150 is repealed and recreated to read:

Chapter NR 150

ENVIRONMENTAL ANALYSIS AND REVIEW PROCEDURES

NR 150.01	Purpose.	NR 150.20	Environmental analysis of department actions
NR 150.02	Applicability	NR 150.30	EIS action analysis
NR 150.03	Definitions	NR 150.35	WEPA compliance determination
NR 150.04	Policy	NR 150.40	Cooperation with other agencies
NR 150.05	WEPA Coordinator	NR 150.50	Document retention and management
NR 150.10	Strategic analysis		

NR 150.01 Purpose. This chapter outlines the definitions, procedures and criteria to be used by the department in the implementation of s. 1.11, Stats. The purpose of this chapter is to assure that the department decision-makers, other decision-makers, and the interested public have information to be able to fully consider the short- and long-term effects of department policies, plans, programs, and actions on the quality of the human environment.

NOTE: Section 1.11, Stats. was enacted as ch. 274, laws of 1971, amended by ch. 204, laws of 1973, and is known as the Wisconsin environmental policy act or WEPA.

NR 150.02 Applicability. This chapter shall apply to all department actions which may negatively affect the quality of the human environment and to consideration of strategic natural resource issues or policies which may involve unresolved conflicts concerning alternative uses of available resources.

NR 150.03 Definitions.

(1) "Action" means any final decision by the department to exercise the department's statutory authority that affects the quality of the human environment.

(2) "Alternatives" means other actions or activities which may be reasonably available to achieve the same or altered purpose of the proposed action or project, including the alternative of no action.

(3) "Applicant" means a person who applies for a permit, license or approval granted or issued by the department.

(4) "Cumulative effects" means compounding effects resulting from repeated or other proximal actions, activities or projects.

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

(6) "EIR" means environmental impact report.

(7) "EIS" means environmental impact statement.

(8) "Environmental analysis" means a detailed analysis that evaluates a proposed action or project's effect on the human environment and studies, develops and describes alternatives to the proposed action or project.

(9) "Environmental effect," "effect," "environmental impact," "impact," "effect on the environment," or "environmental consequence" means a direct, indirect, secondary, or cumulative change to the quality of the human environment.

(10) "Equivalent analysis" means department programmatic procedures that include an environmental analysis and provide for public disclosure and comment.

(11) "Facility development" has the meaning in s. NR 44.03(7).

(12) "Human environment" means the natural or physical environment, including the components, structures, and functioning of ecosystems, and the relationship of people with that environment, including aesthetic, historic, cultural, economic, social, and human health-related components.

(13) "Issue" means a general subject, topic or question concerning the use of, or effect on, natural resources about which the department may or may not have authority.

(14) "Lead agency" means the state or federal agency with primary concern or responsibility for a given project or action as determined by law, interagency consultation or written agreement.

(15) "Minor action" means a department action that is not in conflict with local, state or federal environmental policies and is not likely to do any of the following: set precedent for reducing or limiting environmental protection; result in deleterious effects over large geographic areas; result in long-term deleterious effects that are prohibitively difficult or expensive to reverse; result in deleterious effects on especially important, critical or sensitive environmental resources; involve broad public controversy; or result in substantial risk to human life, health or safety.

(16) "Mitigating measure" means an action or activity proposed or undertaken by federal or other state agencies, the department or an applicant to reduce the severity or extent of environmental effects that would result from a proposed action or activity.

(17) "NEPA" means the national environmental policy act under 42 USC 4321 et. seq.

(18) "Person" includes any natural person, firm, partnership, joint venture, joint stock company, association, public or private corporation, the state of Wisconsin and all political subdivisions, cooperative, estate, trust, receiver, executor, administrator, fiduciary, and any representative appointed by order of any court or otherwise acting on behalf of others.

(19) "Policy" means a written plan or set of guiding principles, priorities or protocols to guide department action that has been enacted as a statute, promulgated as an administrative rule, issued as a department manual code, or approved in writing by the natural resources board or the department secretary.

(20) "Prime farm land" means land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops and that is available for these uses, as defined in U.S. Department of Agriculture, Natural Resources Conservation Service National soil survey handbook, title 430-VI.

NOTE: U.S. Department of Agriculture, Natural Resources Conservation Service National soil survey handbook, title 430-VI is available online at: <http://soils.usda.gov/technical/handbook/>.

(21) "Prior compliance" means that one or more environmental analysis documents exist for prior actions that are similar to the proposed action in kind, scale and environmental setting.

(22) "Project" means one or more actions and other activities related to a single undertaking by the department or an applicant.

(23) "Protocols" means written department procedures to guide department action, other than statutes or administrative codes, that have been approved by the natural resources board or the department secretary.

(24) "Secondary effects" means reasonably foreseeable indirect effects caused by an action or project later in time or farther removed in distance, including induced changes in the pattern of land use, population density or growth rate and related effects on the human environment.

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

(26) "Unresolved conflicts concerning alternative uses of available resources" means an unsettled disagreement concerning a department policy affecting natural resources, between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin.

(27) "WEPA" means s. 1.11, Stats.

NOTE: S. 1.11, Stats. was enacted as ch. 274, laws of 1971, amended by ch. 204, laws of 1973, and is known as the Wisconsin environmental policy act or WEPA.

NR 150.04 Policy. (1) (a) In accordance with the Wisconsin and national environmental policy acts and regulations issued by the president's council on environmental quality, it is the intention of the natural resources board to declare a policy that will encourage productive and enjoyable harmony among people and their environment; to promote efforts which will prevent or eliminate damage to the environment; and to enrich the understanding of the important ecological systems and natural resources of the state.

(b) The board recognizes the potential for impact of many state and federal actions on all components of the human environment. Therefore, the board declares that it is the continuing policy of the department of natural resources, as the primary environmental agency in state government, to develop an understanding of the environmental consequences of its actions and to use all practicable means and measures to create and maintain conditions under which people and nature can exist in productive harmony and fulfill the requirements of present and future generations.

(2) In order to carry out the policy set forth under sub. (1), the department shall do all the following:

(a) Acknowledge WEPA as an obligation shared by all units of the department to the extent that any unit contemplating regulatory or management actions subject to WEPA review under this chapter shall evaluate and be aware of the environmental consequences of such actions.

(b) Recognize its role as an environmental agency in state government and that it shall set an example in meeting the spirit and intent of WEPA.

(c) Develop, where possible, agreements and understandings with other state, federal and local agencies to minimize duplication in meeting environmental review requirements and establish a mechanism for resolution of interagency conflict.

(d) Develop appropriate strategic analyses for any issue or policy which involves unresolved conflicts concerning alternative uses of available resources.

(e) Develop appropriate environmental effects information and analysis along with a discussion of meaningful alternatives and make this available to the decision-maker in a timely manner for all actions where such an evaluation is required by this chapter; and recognize that decisions subject to WEPA requirements cannot be made until the appropriate environmental review process is completed.

(f) Implement the environmental review procedure as an integrated process, not a separate sequence of activities, that must be part of the initial planning process for department projects and initiated at an early stage of the regulatory review process.

(g) Consider the findings of environmental analyses and comments received from the public in making decisions on proposed actions.

(h) Recognize that the department has an affirmative duty within its resources to comment on the environmental review documents of other agencies by virtue of its jurisdiction by law, special expertise or authority.

NR 150.05 WEPA Coordinator. The department shall designate a qualified staff person as WEPA coordinator to coordinate and oversee performance of WEPA requirements under this chapter. The WEPA coordinator shall do all the following:

(1) Advise the department to ensure that it is in compliance with this chapter, and s. 1.11, Stats.

(2) Participate on behalf of the department in inter-agency WEPA activities.

(3) Act as contact for other state, federal and local agencies seeking assistance or opinions on environmental analysis matters.

(4) Advise the department and the natural resources board on strategic natural resource issues or policies needing analysis under s. NR 150.10.

(5) Prepare and submit to the chief clerk of each house of the legislature the department's annual WEPA report required by s. 1.11(2)(j), Stats.

NR 150.10 Strategic analysis. Pursuant to s. 1.11(2)(e), Stats., the department shall study, develop, and describe alternatives for natural resource issues or policies which involve unresolved conflicts concerning alternative uses of available resources.

(1) IDENTIFICATION OF ISSUES.

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

1. The rule or manual code involves unresolved conflicts concerning alternative uses of available resources.
2. The department has substantial discretion in formulating important provisions of the rule or manual code.

(b) *Requests.* The department shall conduct a strategic analysis when requested by any of the following:

1. The governor.
2. The standing committee in the state assembly with jurisdiction over matters related to the environment or natural resources.
3. The standing committee in the state senate with jurisdiction over matters related to the environment or natural resources.

4. The natural resources board.

5. The secretary of the department.

6. A member of the public whose request is approved by vote of the natural resources board.

(c) *Other issues or policies.* The department may conduct a strategic analysis for any of the following:

1. A complicated or complex issue.

2. An issue that is new to the state.

3. An issue or policy that will likely lead to future department actions that will require an EIS.

4. Issues for which there is a high potential for legislation or new department policy.

5. Planning and development of controversial resource-oriented projects.

6. Any other issue or policy that involves unresolved conflicts concerning alternative uses of available resources.

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

(a) *Consultation.* The department may consult with and obtain the comments of any agency that has expertise with respect to any issue involved.

(b) *Public scoping.* The department shall use a public scoping process. The process may consist of comment periods, meetings, hearings, workshops, surveys, questionnaires, interagency committees, or other appropriate methods or activities, and may be integrated with other public participation requirements.

(3) ANALYSIS.

(a) *Purpose.* The purpose of the analysis is to inform decision-makers and the public of alternative courses of action and the anticipated effects of those alternatives on the quality of the human environment.

(b) *Intent.* Using available ecological and other scientific information, the analysis shall consider the alternatives and environmental effects in a dispassionate manner and may not advocate a particular position about alternatives.

(c) *Authorship.* Any part of the analysis may be prepared by the department, a consultant to the department, or another state, federal, tribal or local agency. The department may rely on any relevant information from any source.

(d) *Format.* The document shall follow a format relevant to the scope of the analysis.

(e) *Presentation.* The analysis shall be written in plain language and should use appropriate graphics to aid decision-makers and the public.

(4) PUBLIC REVIEW.

(a) *Document publication.* The department shall publicly announce that the analysis is available for public comment and shall make the analysis available to the governor, legislature, local governments, other concerned state agencies, federal agencies, tribal agencies, natural resources board, department secretary and administrators, and the public as required by s. NR 150.50. Copies of the analysis shall be provided to any individual or group requesting a copy. A charge may be assessed to cover reproduction and handling costs for requests for paper copies of documents. The announcement also may be distributed to any of the following entities:

1. All local and regional units of government that may be affected by the issue or policy.
2. Regional and statewide information outlets.
3. Groups, clubs, committees, or individuals which have demonstrated an interest and have requested receipt of this type of information.
4. All participants in the scoping process not covered in subs. 1 to 3.

(b) *Public announcement content.* The public announcement shall include a brief description of the analysis, the date by which public comments on the analysis must be received by the department, the name and address of a contact within the department who will receive comments and respond to questions, and the locations where copies of the analysis are available for review.

(c) *Public comment period.*

1. Unless otherwise provided by law, the department shall provide a minimum of 45 days after the date the analysis is publicly announced to receive comments from other agencies and the public.
2. Unless otherwise provided by law, the department may grant reasonable requests from any person to extend the comment period for the analysis.
3. If a hearing is held under par. (d), the public comment period shall be extended for a minimum of 7 days after the date the hearing is held.

(d) *Hearing.* The department may hold one or more public hearings on the analysis in the manner and locations that the department deems appropriate to the scope of the analysis. Any hearings held shall be announced to the public in a manner that the department deems appropriate.

(e) *Consideration of public comments.* Following the public comment period, the department shall summarize and consider all comments received within the public comment period. The department may revise the analysis based on comments received. The comment summary shall be made public pursuant to s. NR 150.50 along with the final version of the analysis and any supporting documents.

NR 150.20 Environmental analysis of department actions. This section establishes appropriate procedures for the environmental analysis that WEPA requires for all department actions except those specifically

exempted by statute. Notwithstanding subs. (1) to (3), the department may determine to follow the EIS procedures in s. NR 150.30 for any action.

(1) MINOR ACTIONS. The following actions do not require environmental analysis under this chapter because they are minor actions:

(a) A real estate action, including property boundary establishment or modification, purchase, sale, easement, lease, or designation.

(b) Facility development that follows protocols.

(c) Natural resource management, timber management, or environmental restoration that follows protocols.

(d) The operation, repair, maintenance, or in-kind replacement of existing department facilities.

(e) A research action that does not involve species introductions or substantive manipulation of resources, or that does involve species introductions or substantive manipulation of resources but follows protocols for doing so.

(f) A natural resource inventory or mapping action.

(g) Issuance of a grant or other financial assistance action.

(h) Issuance of high capacity well approvals under s. 281.34(2), Stats., except for wells under s. 281.34(4), Stats.

(i) Issuance of high capacity well approvals under s. 281.34(4), Stats., that are exempted from environmental analysis requirements under s. NR 820.30(2) and (3), Wis. Adm. Code.

(j) Reissuance or issuance of a routine or small-scale permit.

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

(l) Confirmation of coverage under a general permit.

(2) EQUIVALENT ANALYSIS ACTIONS.

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

1. Property planning under ch. NR 44.

2. County forest planning under s. 28.11(5), Stats.

3. Areawide water quality management planning or priority watershed planning under ch. NR 121.

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

5. Approval of a withdrawal of county forest land under s. 28.11(11), Stats.

6. An incidental take permit under ch. NR 27 and s. 29.604(6m), Stats.

7. A solid or hazardous waste feasibility approval or a commercial PCB waste storage or treatment facility feasibility approval under ss. 289.25 and 289.53, Stats., and chs. NR 157, 182, 512 and 670.

8. Issuance of an individual wetland permit under s. 281.36(3m), Stats.

9. Approval of a bulkhead line ordinance for modification of an existing shoreline under s. 30.11, Stats.

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

11. Issuance of an individual permit for structures on the beds of navigable waters or to construct culverts and bridges across navigable waters under s. 30.12(3m) or 30.123(8), Stats.

12. Issuance of an individual permit under s. 30.19, Stats., including an individual permit to construct or alter waterways.

13. Issuance of an individual permit to change the course of or enclose a navigable stream under s. 30.195 or 30.196, Stats.

14. Issuance of an individual permit or contract under s. 30.20, Stats., to remove material from the bed of a navigable waterway under ch. NR 345, or for non-metallic mining and reclamation in and near navigable waters under ch. NR 340.

15. Issuance of a barge fleeting permit under ch. NR 327.

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

17. An approval of a drainage board action affecting navigable waters under s. 88.31, Stats., for permits under s. 88.31 or ch. 30 or 31, Stats.

18. An approval of a municipal wastewater facilities plan under s. NR 110.08.

19. Issuance of an individual permit for an animal feeding operation under ch. NR 243.

(b) The department may determine under s. NR 150.35 that there is equivalent analysis for a specific action not listed in par. (a).

(3) PRIOR COMPLIANCE ACTIONS.

(a) The following actions require a WEPA compliance determination under s. NR 150.35 but do not require additional environmental analysis under this chapter because one or more environmental analysis documents exist for prior actions that are similar to the proposed action in kind, scale and environmental setting:

1. Facility development planned under ch. NR 44.

2. Natural resource management, timber management, or environmental restoration planned under ch. NR 44.

3. A research action that involves species introductions or substantive manipulation of resources that was planned under ch. NR 44.

4. Approval of a solid waste disposal facility or hazardous waste facility plan of operation under s. 289.30, Stats.

5. Issuance of a solid waste or hazardous waste facility license under s. 289.31, Stats.

6. Approval of an extension of a wastewater collection system under s. 281.41, Stats., that is covered under an area wide water quality management plan under s. 281.348, Stats, and ch. NR 121.

7. Issuance or reissuance of an individual WPDES permit under s. 283.31, Stats., that is covered under an area wide water quality management plan under s. 281.348, Stats., and ch. NR 121.

8. Issuance or reissuance of an individual or general stormwater permit under ch. NR 216, Wis. Adm. Code and s. 283.33, Stats.

(b) The department may determine under s. NR 150.35 that there is prior compliance for a specific action not listed in par. (a).

(4) EIS ACTIONS AND PROJECTS. (a) *EIS actions*. The department shall comply with the EIS procedures in s. NR 150.30 for all actions not included under sub. (1), (2), or (3).

(b) *EIS projects.* The department may decide to follow the EIS procedures in s. NR 150.30 for projects of such magnitude and complexity that one or more of the following apply:

1. The project involves multiple department actions.
2. The project may be in conflict with local, state or federal environmental policies.
3. The project may set precedent for reducing or limiting environmental protection.
4. The project may result in deleterious effects over large geographic areas.
5. The project may result in long-term deleterious effects that are prohibitively difficult or expensive to reverse.
6. The project may result in deleterious effects on especially important, critical or sensitive environmental resources.
7. The project involves broad public controversy.
8. The project may result in substantial risk to human life, health or safety.

NR 150.30 EIS action analysis.

(1) **PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT.** The department shall prepare a draft EIS and a final EIS.

(a) *Notification.* As required by s. 23.40(2), Stats., the department shall notify an applicant when the department determines that it will follow the detailed environmental analysis for EIS procedures for a proposed project.

(b) *Purpose.* The purpose of an EIS is to inform decision-makers and the public of the anticipated effects on the quality of the human environment of a proposed action or project and alternatives to the proposed action or project. The EIS is an informational tool that does not compel a particular decision by the agency or prevent the agency from concluding that other values outweigh the environmental consequences of a proposed action or project.

(c) *Intent.* The EIS shall address the entire proposed project including all related department actions. An EIS shall consider the proposed action or project, alternatives and anticipated environmental effects in a dispassionate manner, and may not advocate a particular position about a proposed action or project. The EIS shall provide a level of detail commensurate with the complexity of the action or project being evaluated.

(d) *Authorship.* The department is responsible for the accuracy and completeness of the EIS. However, any part of an EIS may be prepared by an applicant, the department, a consultant to the applicant or department, or another state, federal, tribal or local agency. In preparing an EIS, the department may rely on an EIR provided by an applicant pursuant to par. (g), documents prepared or relied upon by other agencies, or any other source of relevant information. The department shall disclose its information sources in compliance with sub. (2)(i).

(e) *Format.* While there is no specific format required for an EIS, the department shall use a format that substantially follows the guidelines issued by the U.S. council on environmental quality under 42 USC 4331, as required by s. 1.11(2)(c), Stats. An EIS shall be written in plain language and should use appropriate graphics to aid decision-makers and the public.

NOTE: 42 USC 4331 was enacted as P.L. 91- 190 and is known as "the national environmental policy act."

(f) *Issue identification.*

1. The department shall consult with other agencies as provided under s. 1.11(2)(d), Stats.
2. The department may use a public scoping process. The process may consist of comment periods, meetings, hearings, workshops, surveys, questionnaires, interagency committees, or other appropriate methods or activities, and may be integrated with other public participation requirements.

(g) *Environmental Impact Report (EIR)*. Pursuant to s. 23.11(5), Stats., the department may require an applicant for certain proposed projects to submit an EIR. The department may request any applicant to submit an EIR. The purpose of an EIR is to help the department develop the EIS by having the applicant provide a detailed, comprehensive description of the proposed project, reasonable alternatives to the proposed project, the present environmental conditions in the area potentially affected by the proposed project, and anticipated environmental effects of the proposed project and alternatives.

(h) *Cooperation with other agencies*. In developing an EIS, the department may cooperate with other state, federal, tribal or local agencies in accordance with s. NR 150.40(2).

(i) *Consultant services*. The department may enter into contracts for environmental consultant services under s. 23.41(3), Stats., to assist the department in the preparation of an environmental impact statement or to provide pre-application services as provided under s. 23.40(5), Stats.

(j) *Conflicting procedures*. The department may follow procedures for environmental review and analysis other than those contained in this chapter if the procedural requirements of this chapter conflict with statutory review procedures or with procedures and rules of another agency that is the lead agency for the environmental analysis. If other procedures for environmental review and analysis are followed, the department shall comply with this chapter to the maximum extent feasible.

(2) **EIS CONTENT**. An EIS shall emphasize environmental issues relevant to the evaluation of the action and provide a level of detail commensurate with the complexity of the action. As required by s. 1.11(2)(c), Stats., the EIS shall include all of the following:

(a) A description of the proposed project that includes all the following:

1. Project location.
2. Type of facilities.
3. Time schedules.
4. Maps and diagrams.
5. Other information that the department deems necessary.

(b) A description of the purpose and need of the proposed project.

(c) A list of known state, federal, tribal, and local approvals required for the proposed project.

(d) A summary of the process used to identify major issues and the issues identified for detailed analysis.

(e) A list of reasonable alternatives to the proposed project, particularly those that might avoid all or some of the adverse environmental effects of the project, including a description of proposed preventive and mitigating measures and an explanation of the criteria used to discard certain alternatives from additional study.

(f) A description of the human environment that will likely be affected by the proposed project and alternatives to the proposed project.

(g) An evaluation of the probable positive and negative direct, secondary and cumulative effects of the proposed project, and alternatives to the proposed project, on the human environment, including all the following:

1. Effects on scarce resources such as: archeological, historic or cultural resources, scenic and recreational resources, prime farm lands, threatened or endangered species, and ecologically critical areas.
2. A summary of the adverse environmental effects which cannot be avoided.
3. Consistency with plans or policies of local, state, federal or tribal governments.
4. The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and ir retrievable commitments of resources.

5. The potential to establish a precedent for future actions or to foreclose future options.

6. The degree of risk or uncertainty in predicting environmental effects or effectively controlling potential deleterious environmental impacts, including those relating to public health or safety.

7. The degree of controversy over the effects on the quality of the human environment.

(h) Identification of information that is incomplete or unavailable and a description of the relevance of such information.

(i) Sources of information or verbiage.

(3) DRAFT EIS - PUBLIC REVIEW.

(a) *Document publication.* The department shall publicly announce that the draft EIS is available for public comment and shall make the draft EIS available in a manner determined by the department and as required under s. 1.11(2)(d), Stats., and s. NR 150.50. Copies of the draft EIS shall be provided to any individual or group requesting a copy. A charge may be assessed to cover reproduction and handling costs for requests for copies of documents. The announcement also may be distributed to the following entities:

1. All local and regional units of government which have jurisdiction over the area that may be affected by the proposed project or reasonable alternatives to the proposed project.

2. Information outlets accessible in the local, regional, or statewide areas affected by the proposed project.

3. Groups, clubs, committees, or individuals that have demonstrated an interest in and requested receipt of this type of information.

4. All participants in the scoping process not listed in subds. 1 to 3.

(b) *Public announcement content.* The public announcement shall include: a brief description of the proposed project, a brief description of the administrative procedures to be followed under this chapter, the date by which public comments on the draft EIS are to be submitted to the department, the name and address of a contact within the department who will receive comments and respond to questions, and the locations where copies of the draft EIS are available for review.

(c) *Public comment period.*

1. Unless otherwise provided by law, the department shall provide a minimum of 30 days after the date the draft EIS is publicly announced to receive comments from other agencies and the public.

2. Unless otherwise provided by law, the department may grant reasonable requests from any person to extend the comment period for the draft EIS.

3. If a hearing is held under par. (d), the public comment period shall be extended for a minimum of 7 days after the date the hearing is held.

(d) *Hearing.* If no public hearing is otherwise required on the proposed action, the department may hold one or more public hearings prior to making its WEPA compliance determination under s. NR 150.35. Any hearings held pursuant to this chapter shall be announced to the public and held in a manner consistent with s. 1.11(2)(d), Stats.

NOTE: A public hearing required by another statute fulfills s. 1.11(2)(d), Stats.

(4) FINAL EIS. Following the public review period on the draft EIS, the department shall prepare a final EIS.

(a) *Content.* The final EIS shall include the draft EIS, a summary of the comments received on the draft EIS and the department's response to the comments. The final EIS may include revisions to draft EIS text or figures and may vary from the draft EIS in scope based on comments received on the draft EIS or other pertinent information that becomes known to the department.

(b) *Final EIS publication.* The final EIS shall be made publicly available under s. NR 150.50. Copies of the final EIS shall be provided to any individual or group requesting a copy. A charge may be assessed to cover reproduction and handling costs for requests for copies of documents.

NR 150.35 WEPA Compliance determination. Actions under sections NR 150.20(2) to (4) cannot be taken until a determination is published regarding compliance with this chapter.

(1) For all EISs under s. NR 150.20(4) and determinations under s. NR 150.20(2)(b) and (3)(b), the department shall publish findings of fact, conclusions of law and a determination that summarizes the procedures and process steps used to achieve compliance with this chapter.

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

NR 150.40 Cooperation with other agencies.

(1) **REVIEW OF OTHER AGENCY ENVIRONMENTAL ANALYSES.** The department may comment on the environmental analyses prepared by other state and federal agencies for WEPA or NEPA compliance. To the extent possible, the department shall review and comment on each relevant environmental analysis within the time period specified by the sponsoring or lead agency. The department may reply that it has no comment and should so reply when it is satisfied that its views are adequately reflected in the environmental analysis.

(2) **INTERAGENCY PROCEDURES ON PROPOSED ACTIONS INVOLVING NEPA OR WEPA.**

(a) The department may conduct an environmental review process jointly with another state, federal or local agency. The joint process shall meet the requirements of this chapter and may be determined by law, interagency consultation or written agreement.

(b) The department may adopt an environmental analysis prepared by another agency as the department's EIS on the proposed action if the environmental analysis substantially meets the requirements of s. NR 150.30. The department shall comply with the public review requirements in s. NR 150.30(3), publish a determination on the proposed action under s. NR 150.35, and make all associated documents available to the public under s. NR 150.50.

NR 150.50 Document retention and management. The department shall maintain a publicly accessible and searchable record system to provide public access to public announcements, strategic analyses, EIS analyses, and WEPA compliance determinations prepared by the department in compliance with this chapter. The record system shall be maintained in a manner consistent with the department's record retention policy.

Section 16. NR 166.07(1)(a)3 is amended to read:

NR 166.07(1)(a)3 Preparing environmental assessment analysis reports and evaluations.

Section 17. NR 191.05(5) is amended to read:

NR 191.05(5) Upon review, the department shall indicate if the proposed project requires the preparation of an environmental impact report by the sponsor and an environmental assessment analysis by the department. If an environmental assessment analysis is required, the application is not considered complete until the environmental assessment analysis has been completed, circulated for public comment, the period for public comment ended and has been certified as being determined to be in compliance with the Wisconsin environmental policy act.

Section 18. NR 300.03(5) is repealed.

Section 19. NR 300.05(4) is repealed.

Section 20. NR 305.03(5) is repealed.

Section 21. NR 305.06(3m) is repealed.

Section 22. NR 310.14(4)(b) is amended to read:

NR 310.14(4)(b) The department may not determine an application is complete unless the department determines that the applicant has provided all information necessary for any environmental assessment or environmental impact statement analysis required under s. 1.11, Stats., and ch. NR 150.

Section 23. NR 327.04(4) is amended to read:

NR 327.04(4) An application may not be considered complete until the appropriate environmental impact review analysis is completed under s. 1.11, Stats., and ch. NR 150.

Section 24. NR 345.04(2)(e)6 is repealed.

Section 25. NR 345.04(2)(g)2 is repealed.

Section 26. NR 410.02(3) is amended to read:

NR 410.02(3) "Environmental assessment analysis" has the meaning given in s. NR 150.02(9) NR 150.03(8).

Section 27. NR 410.03(2)(i) is amended to read:

NR 410.03(2)(i) \$1,500, if an environmental assessment analysis under ch. NR 150 is required.

Section 28. NR 410.03(3)(a)2 is amended to read:

NR 410.03(3)(a)2 An additional \$2,500 if the permit application is for an indirect source which requires an environmental assessment analysis under ch. NR 150.

Section 29. NR 512.16 (intro.) is amended to read:

NR 512.16 (intro.) **Environmental review.** To aid the department in complying with ch. NR 150, and in determining the need for an environmental impact report or environmental impact statement, the feasibility report shall include an environmental assessment analysis section. This assessment analysis shall include the following items:

Section 30. NR 670.409(1)(c) is amended to read:

NR 670.409(1)(c) The preliminary environmental assessment or environmental impact statement (EIS) analysis if required by s. 1.11, Stats. NR 150.

Section 31. NR 820.29(1) is amended to read:

NR 820.29(1) HIGH CAPACITY WELLS IN GROUNDWATER PROTECTION AREAS. Unless another time period is specified by law, the department shall complete its review and make a determination on all applications for approval of proposed high capacity wells in groundwater protection areas within 65 business days after receipt of a complete application unless the department notifies the applicant under s. NR 820.30 (4) (a) or (b) that additional information is needed in order for the department to prepare an environmental assessment analysis for the proposed high capacity well.

Section 32. NR 820.29(2) is amended to read:

NR 820.29(2) HIGH CAPACITY WELLS NEAR SPRINGS. Unless another time period is specified by law, the department shall complete its review and make a determination on all applications for approval of proposed high capacity wells near springs within 65 business days after receipt of a

complete application unless the department notifies the applicant under s. NR 820.31 (4) (a) or (b) that additional information is needed in order for the department to prepare an environmental assessment analysis for the proposed high capacity well.

Section 33. NR 820.30(2)(a) is amended to read:

NR 820.30(2)(a) The department may approve a high capacity well as described in pars. (b) to (e) within a groundwater protection area without preparing an environmental assessment analysis if it determines that construction and operation of the proposed well will not result in significant adverse environmental impact. The information specified under subs. (1) (h) to (j) is not required for a proposed well if any of the conditions in pars. (b) to (e) apply. Based on information submitted by the applicant under sub. (1) and other available information, the department may determine that supplemental information and review is needed in order to issue or deny the necessary approval. The department shall include in any approval issued using the standards under s. 281.34, Stats., conditions to ensure that the high capacity well will not result in significant adverse environmental impacts to trout streams, outstanding resource waters and exceptional resource waters. The conditions may include but are not limited to conditions as to location, depth of lower drillhole, depth interval of well screen, pumping capacity, pumpage schedule, months of operation, rate of flow and conservation measures.

Section 34. NR 820.30(3)(a) is amended to read:

NR 820.30(3)(a) The department may approve a proposed high capacity well without completing an environmental assessment analysis under ch. NR 150 if the proposed well is not a well described in subs. (2) (b) to (e) and the department determines that construction and operation of the proposed well will not result in significant adverse environmental impacts to the stream or lake and at least one of the conditions in subds. 1. to 5. is satisfied. In making this determination, the department shall consider impacts caused by other wells on the high capacity property and take into account actual or current conditions of the Class 1, 2 or 3 trout stream, outstanding resource water or exceptional resource water.

Section 35. NR 820.30(4)(b) is amended to read:

NR 820.30(4)(b) Within 65 business days of receipt of a complete application, the department shall identify additional informational requirements necessary to evaluate the proposed well and may determine that the applicant shall develop and submit an environmental impact report in accordance with s. NR 150.25.

Section 36. NR 820.30(4)(c) is amended to read:

NR 820.30(4)(c) Following receipt of the requested information, the department shall ~~prepare an~~ follow the environmental assessment analysis ~~in accordance with the procedures of s. NR 150.22 and shall develop and publish a news release in accordance with s. NR 150.24~~ ch. NR 150.

Section 37. NR 820.31(4)(b) is amended to read:

NR 820.31(4)(b) Within 65 business days of receipt of a complete application, the department shall identify additional informational requirements necessary to evaluate the proposed well and may determine that the applicant shall develop and submit an environmental impact report in accordance with s. NR 150.25.

Section 38. NR 820.31(4)(c) is amended to read:

NR 820.31(4)(c) Following receipt of the requested information, the department shall ~~prepare an~~ follow the environmental assessment analysis ~~in accordance with the procedures of s. NR 150.22 and shall develop and publish a news release in accordance with s. NR 150.24~~ ch. NR 150.

Section 39. NR 820.32(2) is amended to read:

NR 820.32(2) If the department determines that a proposed high capacity well will result in an annual water loss of greater than 95%, the department shall notify the applicant that the proposed well may result in a water loss of greater than 95%. Within 65 business days of receipt of a complete application, the department shall identify additional informational requirements necessary to evaluate the proposed well and may determine that the applicant shall develop and submit an environmental impact report in accordance with s. NR 150.25.

Section 40. NR 820.32(3) is amended to read:

NR 820.32(3) Following receipt of all requested information, the department shall ~~prepare an~~ follow the environmental assessment analysis in accordance with the procedures of s. NR 150.22, and ~~shall develop and publish a news release in accordance with s. NR 150.24~~ ch. NR 150.

Section 41. EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Section 42. BOARD ADOPTION. This rule was adopted and approved by the State of Wisconsin Natural Resources Board on

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

BY _____

Cathy Stepp, Secretary