STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WT-19-19

Relating to: Targeted Performance Standards and Prohibitions to abate pollution of groundwater by nitrate in sensitive areas

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rules will be proposed as permanent rules.

2. Detailed description of the objective of the proposed rule:

The purpose of the proposed revisions to ch. NR 151, Wis. Adm. Code, and limited incorporation by reference of those proposed revisions to ch. NR 243, is to establish agricultural nonpoint source performance standards targeted to abate pollution of nitrate in areas of the state with highly permeable soils which are susceptible to groundwater contamination (sensitive areas) for the purpose of achieving compliance with the nitrate groundwater standards. Pursuant to s. 281.16(3)(a), Stats., the Department of Natural Resources is directed to promulgate by rule nonpoint source performance standards and prohibitions that are designed to comply with state surface water quality standards and groundwater quality standards. Where statewide nonpoint source performance standards have been substantially implemented, they have not proven sufficient to achieve surface water quality standards or groundwater standards in sensitive areas . The department has found that surface water quality standards or groundwater standards in sensitive areas will not be attained by simply implementing the statewide performance standards and prohibitions and, pursuant to NR 151.004 Wis. Admin Code, targeted performance standards are necessary to attain surface water quality standards or groundwater standards.

The rule revisions will define sensitive areas in the state and the performance standards needed to protect surface and groundwater quality in these areas. Soil maps based, in part, on soil permeability in conjunction with groundwater quality information may be used to define sensitive areas. Information related to soil permeability, groundwater quality, and modeling may be used to refine sensitive area designations. Performance standards may include modifications to: nutrient management plans; application rates of manure or commercial fertilizer; timing of nutrient application; crop rotations; setbacks from drinking water supplies for manure and fertilizer applications; and additional changes or management practices expected to achieve surface water quality standards and groundwater standards in the sensitive areas.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The current Subch. II of ch. NR 151 (Agricultural Performance Standards and Prohibitions) was originally promulgated in 2002 and revised in 2010 and 2018. It contains statewide performance standards and prohibitions for agricultural and nonagricultural facilities designed to achieve surface water quality standards and groundwater standards. Section NR 151.004 provides for targeted performance standards to be created if the statewide standards are insufficient to achieve surface water quality standards or groundwater standards in sensitive areas. In 2018, the targeted performance standard at NR 151.075 was created to reduce the risk of groundwater contamination posed by pathogens from manure applied to land in areas of the state with shallow soils over Silurian dolomite bedrock.

Existing facilities are not required to comply with the agricultural performance standards or prohibitions unless cost sharing is made available. The department has already promulgated rules under which cost sharing is made available and those rules will apply to this proposed targeted performance standard.

Nitrate is the most widespread groundwater contaminant in Wisconsin and it is especially prevalent in areas with highly permeable soils. Evidence suggests that the statewide standards are insufficient to achieve surface water quality and groundwater standards in areas with highly permeable soils. Highly permeable soils may be found throughout the state, and the proposed target standards that are developed as part of this rulemaking effort will only apply to these sensitive areas.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

State water and sewage statute at ch. 281 Stats. authorizes the department to promulgate agricultural performance standards to achieve surface water and groundwater quality standards.

Section 281.16 (3)(a), Stats., authorizes the department to promulgate rules prescribing performance standards and prohibitions for agricultural facilities and agricultural practices that are nonpoint sources. The performance standards and prohibitions shall be designed to achieve water quality standards by limiting nonpoint source pollution. "Nonpoint source water pollution" is defined as pollution of waters of the state that does not result from a point source. Section 281.16(1)(f), Stats.

Waters of the state include surface water and groundwater. Sections 281.01(18) and 283.01(20) Stats define "Waters of the state" as those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

Section NR 151.004 Wis. Admin. Code clarifies that if the department finds that water quality standards or groundwater standards will not be attained using statewide performance standards and prohibitions, but the implementation of targeted performance standards would attain water quality standards or groundwater standards, the department shall promulgate the targeted performance standards by rule.

State pollution discharge elimination statute at ch. 283 Stats. provides authority for the department to require agricultural point sources to comply with agricultural performance standards which are protective of water quality standards. Section 283.31(3), Stats., provides authority for the department to issue a permit for the discharge of any pollutant from a point source to waters of the state on condition that the discharges will meet groundwater protection standards and any more stringent limitations necessary to meet state water quality standards. Section 283.31(4), Stats provides authority to proscribe conditions for permits that assure compliance with the requirements of s. 283.31(3) Stats. Section 283.13(5), Stats. provides authority to include more stringent limitations in permits when necessary to meet water quality standards or other state requirements.

Section 227.11 (2)(a)(intro.), Stats., provides that a state agency, "may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute", subject to certain restrictions.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

It is estimated that department employees will spend approximately 3,000 hours developing this rule. This estimate includes staff time related to obtaining advice and comments from stakeholders through a technical advisory committee.

6. List with description of all entities that may be affected by the proposed rule:

Entities affected by this rule include: rural residents with private wells; users of community and non-community wells; agricultural producers and their consultants; agricultural cooperatives and fertilizer

retailers; county land conservation departments; and the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP).

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The United States Department of Agriculture – Natural Resources Conservation Service (NRCS) develops technical standards that apply to agricultural facilities and practices. Technical standards may be required for agricultural producers to qualify for federal grant or cost-share assistance, and to qualify for state tax credits through the Farmland Preservation Program administered by DATCP. Applicable NRCS technical standards will be incorporated in this ch. NR 151 targeted performance standard by reference.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

It is estimated that the economic impact of this rulemaking would be "moderate" (between $50,000 and $5 million per year, combined for all impacted stakeholders). It will likely have an impact on small business, namely agricultural producers and supporting businesses – the level of impact is currently indeterminate and will be assessed during the rulemaking process.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding three to four public hearings in the spring of 2021. Hearing locations will likely be: Wisconsin Rapids, La Crosse, and Madison.

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Preston D. Cole, Secretary

7/15/19

Date Submitted