

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

SUBJECT:

Request that the Board adopt Emergency Board Order OE-20-14(E), proposed rules affecting chapter NR 150 Wis. Adm. Code related to the Department's environmental analysis and review procedures.

FOR: May 2015 Board meeting

PRESENTER'S NAME AND TITLE: David Siebert, Director, Bureau of Environmental Analysis & Sustainability

SUMMARY:

Chapter NR 150 was revised and went into effect April 1, 2014. An emergency rule (Board Order OE-10-14(E)) was approved by the Natural Resources Board in August (effective August 31, 2014) for two purposes: 1) to clarify the procedures for review and analysis of new administrative rules in order to ensure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and 2) for additional housekeeping changes to ensure that the intent of the April 2014 ch. NR 150 rewrite is being met - all in a manner consistent with past WEPA compliance approaches that have been upheld by courts.

The August emergency rule was to expire on January 28, 2015. A 60-day extension was granted by JCRAR on January 13, 2015, and a second 60 day extension was granted by JCRAR on Wednesday, March 11, 2015, that will extend the August emergency rule to an expiration date of May 27, 2015.

This new emergency rule (Board Order OE-20-14(E)) is consistent with the scope statement approved in February 2015. It adds additional clarification and different rule language not contained in the existing August emergency rule, needed while a new permanent rule is promulgated. The new permanent rule (Board Order OE-21-14) will be released for public comment prior to a hearing date in June.

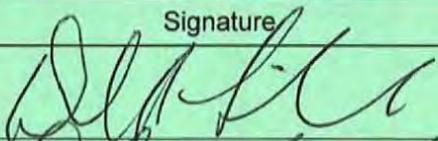
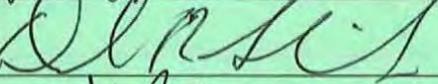
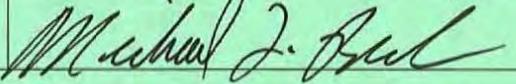
The proposed new emergency rule and permanent rule (scheduled for the June NRB meeting) clarify that emergency rules are "minor actions," requiring no additional environmental analysis, and that the process for developing permanent rules is an "equivalent analysis action." The rules also clarify: applicable definitions related to those rules and actions; procedures for WEPA compliance determinations and publication requirements; and strategic analysis requirements.

The proposed new emergency and permanent rules expand the list of "minor actions," and expand and amend the list of "equivalent analysis actions" for which a detailed environmental analysis and public disclosure are part of program review.

RECOMMENDATION: That the Board adopt Emergency Board Order OE-20-14(E).

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

- background memo
- Fiscal estimate and economic impact analysis (EIA) form
- Response summary
- Attachments to background memo
- Environmental assessment or impact statement
- Board order/rule

Approved by	Signature	Date
Dave Siebert, Director Bureau of Environmental Analysis and Sustainability		4/27/15
for Mark Aquino, Administrator Office of Business Support and Science		4/27/15
Cathy Stepp, Secretary		4/29/15

cc: Board Liaison - AD/8

Program attorney - LS/8

Department rule coordinator - LS/8

CORRESPONDENCE/MEMORANDUM

DATE: April 27, 2015

TO: All Members of the Natural Resources Board

FROM: Cathy Stepp, Secretary

SUBJECT: Background memo relating to the request that the Board approve the Emergency Board Order OE-20-14(E) for changes to NR 150

Subject of the proposed rule

The proposed emergency rule addresses the Department's environmental analysis and review procedures.

Background

Chapter NR 150 was substantially revised and went into effect in April 2014. It was the product of nearly three years of public outreach, internal input and staff review. To clarify key elements of process, an emergency rule was approved by the Board in August 2014, and that emergency rule expires in May 2015.

Due to the time needed to complete the permanent rule process, the Department is seeking adoption of a new emergency rule, based on the revised scope statement approved by the Board in February 2015, in order to provide clarity of process and procedures from the time of Board adoption until the permanent rule is taken up by the Board and takes effect. This new emergency rule will provide a consistent approach through completion of the permanent rule revision process.

Why is the rule being proposed?

The proposed revisions to NR 150 include housekeeping changes to ensure that the intent of the April 2014 rewrite is being met in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts.

Summary of proposed emergency rule

The proposed changes to the April 2014 permanent rule include the following:

- The procedures for publicizing WEPA compliance determinations are clarified;
- An emergency rule process is a "minor action," requiring no additional environmental analysis;

- The process for developing a permanent rule is an “equivalent analysis” process, requiring no separate and additional environmental analysis document and public participation process beyond that which is already involved in the rules process that includes the agency, the Board and the Legislature;
- The strategic analysis process is required for review of significant policies, but for other policies or issues the strategic analysis process can be used as a discretionary tool;
- The list of “minor actions” not requiring additional environmental analysis, is expanded by specifically listing those actions that originally were intended to be outlined in program guidance. The April 2014 permanent rule relied on reference to “routine and small-scale permits or approvals” as a catch-all category for minor actions that would be listed by the Department in guidance and reviewed by the public through the guidance review process. Additions to the minor action list include:
 - Educational activities
 - Model ordinances developed to assist municipalities in the creation of ordinances
 - Consultation offered to third parties
 - Routine variances from department rule requirements
 - Denial, termination, revocation, or suspension of a grant, permit, license, approval, variance, land application site, or of any proposed activity
 - Any enforcement action
 - Any emergency action that protects public health, safety, or welfare
 - Issuance of a minor source construction permit under ch. NR 406 or an operation permit renewal or revision under ss. 285.60, and 285.62, Stats., for air emission sources
 - Issuance of licenses for servicing septage, and approvals of county programs to regulate the disposal of septage under s. 281.48, Stats.
 - Issuance of operator certifications under s. 281.17 (3), Stats., and licenses or registrations for well drillers and pump installers
 - Approvals of geothermal heat exchange projects
 - Approvals of additives to wastewater or cooling water
 - Issuance of general permits established by administrative code under ch. 30, Stats.
 - Issuance of aquatic plant management permits under ch. NR 109

- Listing and delisting of an impaired water as defined in s. NR 151.002 (16m)
- Review and approval of municipal ordinances or approval of changes to municipal floodplain or shoreland-wetland maps
- Temporary drawdowns of dams under s. 31.02, Stats.
- Reconstruction and repairs of dams under s. 31.13, Stats.
- Transfer of dam ownership under s. 31.14, Stats.
- Dam inspections under s. 31.19, Stats.
- Approvals of emergency action plans, inspection, operation and maintenance plans, dam failure analysis, or stability analysis plans under ch. NR 333
- Review and approval of hydrologic and hydraulic studies for floodplain mapping under s. NR 116.07
- Approval of construction plans and specifications under s. 281.41, Stats., for municipal, industrial and industrial pretreatment wastewater facilities, public water systems and CAFO reviewable structures
- Decisions related to evaluations of existing reviewable facilities and systems for concentrated animal feeding operations under ch. NR 243
- Approvals of land application or nutrient management plans or modifications to the plans
- Approvals of land application sites
- Issuance of natural heritage inventory permits, approvals, or licenses under ch. NR 29 except for permits issued under s. NR 29.604 (6m)
- Issuance of an order or any action relating to the forest croplands or managed forest land programs under subch. I or VI of ch. NR 77;
- The proposed emergency rule expands and amends the list of “equivalent analysis actions,” for which a detailed environmental analysis and public disclosure is already conducted as part of department programmatic procedures. Whereas, the April 2014 rule lumped certain action types, the additions to the list are made to provide additional specificity on those actions covered under this subsection. Additions to the equivalent analysis actions list include:
 - Cooperative state trail planning
 - Development of total maximum daily loads as defined in s. NR 151.002 (46m)

- Issuance, reissuance, revocation and reissuance, or modification of a WPDES permit that authorizes a new source discharge that is subject to antidegradation review under ch. NR 207
- Approval of a variance from a water quality standard under ch. 283, Stats.
- Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700 to 754
- Issuance of regulatory approvals, liability clarification letters, exemptions and technical assistance under ch. 292, Stats., and chs. NR 700 to 754
- Except for facilities specified in s. 291.27, Stats., the approval of a feasibility and plan of operation report and issuance of a license for either a new or existing hazardous waste treatment, storage, or disposal facility or class 3 modification of an existing hazardous waste treatment, storage, or disposal facility under ch. NR 670 and s. 291.25, Stats.
- Issuance of findings of public interest under s. 30.11(5), Stats., for a proposed lease of the bed of a lake or lease of rights to fill in a bed of a lakes or a navigable stream
- Issuance of a report under s. 13.097, Stats., that includes the required department findings under s. 13.097(4), Stats., and conclusions under s. 13.097(6), Stats., regarding whether legislation that proposes to convey lake bed or amend a prior conveyance of lake bed area is consistent with protecting and enhancing a public trust purpose
- Review of existing or proposed uses for an existing lakebed grant, existing lease of the bed of a lake, or existing lease of rights to fill in a bed of a lakes or a navigable stream to ensure the existing or proposed uses are consistent with the purposes and uses for which the grant or lease was issued
- Issuance of an aquatic plant management permit under s. NR 107.05 that meets the criteria under s. NR 107.04 (3)
- Approvals of aquatic plant management plans under s. NR 109.09 and lake management plans under s. NR 191.45

Summary of proposed emergency rule: addressing some statements that have been shared in comments and through the media regarding regulation of CAFOs

While the Department anticipates public comments on the emergency rule and permanent rule to include the following topic areas, below we respond to several recently publicized statements related to the Department's regulation and review of concentrated animal feeding operations (CAFOs).

Comment:

Under the new rule, CAFOs "are now considered a minor action that will not require an environmental analysis"

DNR Response:

CAFOs will not be considered minor actions. NR 150 and WEPA impose informational and procedural requirements on the Department, but are not regulatory. Environmental analyses under NR 150 identify potential environmental effects of proposed actions and alternatives, but do not (and cannot) require permit conditions or decisions.

CAFOs cannot operate until they have received a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. WPDES permits for new sites are equivalent analysis actions under NR 150. This is not changed by the proposed rule. Categorizing CAFO WPDES permit issuance as an equivalent analysis action acknowledges that the permit issuance/reissuance process itself involves an appropriate level of environmental analysis and public disclosure and does not require the creation of an additional analysis document with an additional review process.

It is true that there are a number of **approvals associated with issuance** of a WPDES permit which are identified as minor actions. Those actions were also considered to be minor under the April 2014 version of NR 150. The environmental analysis required as part of the WPDES permit process encompasses and includes those other approvals.

Comment:

The new rule "...limits the public involvement" in the review process for CAFOs

DNR Response:

The emergency rule does not limit public involvement. For the WPDES process, the public has opportunities for comment on draft permits and for legal challenges to the permit. The rule does not change anything about the regulatory processes for CAFOs or for any other DNR action.

Comment:

The rule "... reduces the Natural Resources Board oversight of the DNR's environmental review process"

DNR Response:

The emergency rule does not reduce the Natural Resources Board oversight of the DNR's environmental review process. The role of the NRB is established by statute. The April 2014 version of the permanent rule did not create any new oversight for the board, but could be misconstrued as such. Amending the rule, regarding the process for initiating a strategic analysis, eliminates this potentially confusing language.

How does this proposed rule affect existing policy?

The emergency rule (and proposed permanent rule) changes would clarify what was intended and what was presented to the public through the Natural Resources Board process for development of the April 2014 revisions.

Has the Board dealt with these issues before?

On October 27, 2013, the Board approved the updated ch. NR 150. The rule took effect in April 2014. In June 2014, the Board approved the Statement of Scope for Emergency Board Order OE-10-14(E) and Board Order OE-09-14, and conditionally approved the public hearing notice and notice of submittal of proposed rules to the Legislative Council Clearing House, for housekeeping changes to comply with the intent of the recent ch. NR 150 rewrite. In August 2014, the Board adopted Emergency Board Order OE-10-14(E).

In February 2015, the Board approved the Statement of Scope for Emergency Board Order OE-20-14(E) and Board Order OE-21-14, and conditionally approved the public hearing notice and notice of submittal of proposed rules to the Legislative Council Clearing House.

Who will be impacted by the proposed rule? How?

DNR staff will have more clarity regarding the implementation of ch. NR 150 and regarding the required review process for administrative rules. DNR staff and the public will have more clarity regarding publication requirements and WEPA compliance determinations for various permits and plan approvals.

Soliciting public input on economic impact analysis

On March 23, 2015, DNR released a general public announcement soliciting review comments on economic impacts of the proposed rule. In addition, on March 24 DNR contacted business sectors who participated in the ch. NR 150 External Advisory Group during 2012 and 2013 for comments on a draft Fiscal Estimate and Economic Impact Analysis (FE/EIA), as part of the process in promulgating the companion new permanent rule. This group included representatives of the housing, energy, dairy, engineering consultancy, legal and general construction sectors of the state's economy. In addition, it included representatives of private conservation organizations representing individuals with a diversity of interests in natural resources management issues.

DNR received no comments on the Economic Impact Analysis.

Environmental Analysis

The Department has made a preliminary determination that adoption of the proposed rule would not require an environmental analysis under ch. NR 150, Wis. Adm. Code.

Small Business Analysis.

There will be no impact to small business as a result of this rule revision. This rule revision will benefit small businesses to the extent that it clarifies any ambiguity in favor of the intent of the rule, as presented to the public and approved by the NRB.

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis

Original Updated Corrected

2. Administrative Rule Chapter, Title and Number

Chapter NR 150 - Environmental Analysis and Review Procedures for Department Actions

3. Subject

Implementation of Wisconsin Environmental Policy Act, s. 1.11, Wis. Stats.

4. Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

5. Chapter 20, Stats. Appropriations Affected

No

6. Fiscal Effect of Implementing the Rule

No Fiscal Effect Increase Existing Revenues Increase Costs
 Indeterminate Decrease Existing Revenues Could Absorb Within Agency's Budget
 Decrease Cost

7. The Rule Will Impact the Following (Check All That Apply)

State's Economy Specific Businesses/Sectors
 Local Government Units Public Utility Rate Payers
 Small Businesses (if checked, complete Attachment A)

8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes No

9. Policy Problem Addressed by the Rule

Chapter NR 150 was revised and went into effect April 1, 2014. This rule (Board Order OE-21-14) is needed for two purposes: 1) to clarify the procedures for review and analysis of new administrative rules in order to ensure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and 2) for additional housekeeping changes to ensure that the intent of the April 2014 ch. NR 150 rewrite is being met - all in a manner consistent with past WEPA compliance approaches that have been upheld by courts.

This new rule (Board Order OE-21-14) broadens the scope and adds additional clarification and different rule language not contained in the current permanent rule.

This new permanent rule clarifies that emergency rules are "minor actions," requiring no additional environmental analysis, and that the process for developing permanent rules is an "equivalent analysis action," as well as clarifying the various applicable definitions related to those rules and actions. The April 2014 revision of NR 150 was not perfectly clear on this point. This rule also clarifies procedures for WEPA compliance determinations and publication requirements.

The proposed new permanent rule includes changes that clarify strategic analysis requirements. Consistent with the general intent of the current rule, the new rule confirms that a strategic analysis is required for review of significant policies, but for other policies or issues the strategic analysis may be used as a discretionary tool.

The list of minor actions, not requiring additional environmental analysis, has been expanded to include actions that originally were intended to be outlined in program guidance. The April 2014 version relied on reference to "routine and small-scale" permits or approvals as a catch-all category for minor actions that would be listed in guidance and reviewed by the public through the guidance review process. The proposed permanent rule clarifies by rule the list of activities that are minor actions.

ADMINISTRATIVE RULES

Fiscal Estimate & Economic Impact Analysis

The list of equivalent analysis actions, for which a detailed environmental analysis and public disclosure are already conducted as part of department programmatic procedures, has been expanded and amended to provide additional clarity on actions covered under this subsection.

10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

Businesses that may be affected by this rule revision include mainly those that are required to apply for WDNR permits for projects that exhibit the potential to have "significant effects upon the quality of the human environment" (due to major air emissions, wastewater discharges, water withdrawals, etc.). However, ch. NR 150 is primarily an administrative process rule that applies internally to WDNR, so impacts to businesses are minimal. In addition, most environmental review data is also required under permit review requirements, so in general little to no additional cost is imposed by the environmental impact review process.

In addition to a general public announcement on March 23, 2015 soliciting review comments on economic impacts, business sectors participating in the ch. NR 150 External Advisory Group during 2012 and 2013 were contacted on March 24 for comments as part of the process in promulgating this new permanent rule. This group included representatives of the housing, energy, dairy, engineering consultancy, legal, and general construction sectors of the state's economy. In addition, it included representatives of private organizations representing individuals with varied interests in natural resources management issues. DNR received no comments whatsoever on this EIA.

11. Identify the local governmental units that participated in the development of this EIA.

None. However, our External Advisory Group for the current (April 1, 2014) rule included an attorney who regularly represents municipalities on wastewater, water supply, stormwater and other environmental issues. This attorney also represents businesses and individuals on land use and development matters, including developments in and around shorelands, wetlands, and navigable waters. DNR invited this attorney to review the EIA along with the other members of the External Advisory Group.

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)

The permanent rule is substantially an internal procedure for the WDNR and will not have a significant economic impact on small businesses. 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 regarding "prior compliance" 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.

As noted in section 10, DNR received no comments on this ch. NR 150 FE/EIA for the new permanent rule.

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

DNR staff will have more clarity regarding both the implementation of ch. NR 150 and the required review process for promulgating administrative rules. DNR staff and the public will have more clarity regarding publication requirements and WEPA compliance determinations for various permits and plan approvals.

14. Long Range Implications of Implementing the Rule

The proposed amended rule is substantively similar to the existing rule that became effective in April, 2014. 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.

ADMINISTRATIVE RULES

Fiscal Estimate & Economic Impact Analysis

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 that are permitted or regulated by the state.

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,
RENUMBERING, RENUMBERING AND AMENDING, AMENDING, AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 150.10 (1m) (b), and 150.20 (3) (a) 4. and 5.; to **renumber** NR 150.20 (2) (a) 5.; to **renumber and amend** NR 150.20 (2) (a) 18. and 19.; to **amend** 150.03 (1), (10), (11), (15) (intro.), (19), (25) and (26), 150.10 (1) and (1m) (a), (c) (intro.) and (2) (a), 150.20 (1), (1m) (a), (b), (j), and (k), (2) (a) (intro.), 4., 7., 8., 10., 11., 12., 13., 14., 16., (3) (a) (intro.), 6., and 7., and (4) (b) (intro.), 150.30 (1) (g), (3) (c) 3., and (d), and 150.35; and to **create** NR 150.02 (Note), NR 150.03 (16m), (17m) and (Note), and (23m), 150.20 (1m) (ge), (gm), (gs), (jg), (jr), (m), (n), (nm), (o), (p), (pe), (pm), (ps), (q), (qm), (r), (s), (sb), (sf), (sk), (sp), (ss), (sw), (sy), (t), (u), (ug), (ur), (v), and (w), (2) (a) 2r., 3c., 3g., 3n., 7e., 7m., 7s., 18m., 19m., 20., 21., 22., 23., and (3) (a) 9. and 10., and 150.30 (3) (d) (Note) relating to the department's environmental analysis and review procedures under the Wisconsin Environmental Policy Act.

OE-20-14(E)

Analysis Prepared by the Department of Natural Resources

1. **Statute 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 statute or rule:** 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, 292 and 293.

Administrative Code chapters NR: 1, 2, 19, 44, 48, 52, 60, 103, 107, 108, 110, 113, 126, 128, 131, 132, 133, 134, 162, 166, 182, 191, 200, 243, 299, 300, 305, 310, 327, 345, 347, 406, 410, 489, 512, 670, 700-754, 820, and 852.

5. Plain language analysis:

Chapter NR 150 was revised and went into effect April 1, 2014. An emergency rule was approved by the Natural Resources Board in August 2014 and is set to expire May 27, 2015. A revised scope statement was approved by the Governor on December 11, 2014 and approved by the Natural Resources Board on February 25, 2015. The purpose of the proposed permanent rule is to clarify the procedures for the review and analysis of new administrative rules in order to assure that the intent of the ch. NR 150 revision is being met and potential procedural questions do not invalidate the years of work and public engagement on new rules packages, and for additional housekeeping changes to ensure that the intent of the recent ch. NR 150 rewrite is being met all in a manner that is consistent with past WEPA compliance approaches that have been upheld by the courts.

The proposed rule clarifies that emergency rules are “minor actions”, requiring no additional environmental analysis, and that the process for developing permanent rules is an “equivalent analysis action.” The April 2014 revision of the rule was not perfectly clear to this point.

Procedures for WEPA compliance determinations and publication requirements have been clarified.

This proposed permanent rule includes clarification changes regarding strategic analysis requirements. Consistent with the intent of the current rule, the rule clarifies that a strategic analysis is required for review of significant policies, but for other policies or issues the strategic analysis may be used as a discretionary tool.

The list of minor actions, not requiring additional environmental analysis, has been expanded to include actions that originally were intended to be outlined in program guidance. The April 2014 version relied on reference to "routine and small-scale" permits or approvals as a catch-all category for minor actions that would be listed in guidance and reviewed by the public through the guidance review process. The revision in this proposed permanent rule clarifies by rule the list of activities that are minor actions.

The list of equivalent analysis actions, for which a detailed environmental analysis and public disclosure are already conducted as part of department programmatic procedures, has been expanded and amended to provide additional clarity on actions covered under this subsection.

The list of prior compliance actions, for which one or more environmental analysis documents exist for similar prior actions, has been expanded to provide additional clarity on actions covered under this subsection.

6. Summary of, and comparison with, existing or proposed federal statutes and 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 and these clarifying provisions are 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 with similar rules in adjacent 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.

8. Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen: Department of Natural Resources staff obtained the input of an internal team of staff from several department programs, building on the prior review of relevant WEPA case law and federal CEQ regulations.

9. Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact report: 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 (initial regulatory flexibility analysis):

There will be no impact to small business as a result of this rule revision. This proposed permanent rule

will benefit small businesses to the extent that they clarify any ambiguity of the intent of the rule, as presented to the public and approved by the NRB.

11. Agency contact person:

Jim Pardee
Phone: (608) 266-0426 or (608) 316-0999

12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, fax or email to:

Jim Pardee (OB/7)
Department of Natural Resources
Bureau of Energy, Transportation and Environmental Analysis
101 S Webster St, Madison, WI 53703

E-mail: james.pardee@wisconsin.gov

Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

Hearing dates and the comment submission deadline are to be determined.

SECTION 1. NR 150.02 (Note) is created to read:

NR 150.02 (Note) There are several statutory exemptions from s. 1.11, Stats., including the following: s. 30.025, Stats. (construction of certain high voltage transmission lines); ss. 160.23 and 160.25, Stats. (responses to groundwater standards exceedances); s. 283.93, Stats. (WPDES permit actions, except for WPDES permit actions for new sources); s. 285.60(2g)(b) and (3)(b), Stats. (air registration permits and general permits); and ss. 295.44, 295.45, 295.65, and 295.645, Stats. (ferrous mining exploration licenses, bulk sampling approvals, successor operators, and responses to groundwater standards exceedances). The department may have previously conducted environmental analyses under s. 1.11 Stats., for actions that are exempt under s. 283.93, Stats., even though the department was not statutorily required to do so.

SECTION 2. NR 150.03 (1), (10), (11), and (15) (intro.) are amended to read:

NR 150.03 (1) "Action" means any final decision by the department to exercise the department's statutory or administrative rule authority that affects the quality of the human environment including those identified in s. NR 150.20 (1m) to (4), but does not include policies as defined in sub. (19).

NR 150.03 (10) "Equivalent analysis" means department programmatic procedures that include an environmental analysis that complies with s. 1.11 (2) (c), Stats., and provide for public disclosure and

comment.

(11) "Facility development or removal" ~~has the meaning in s. NR 44.03 (7)~~ means the construction or removal of infrastructure, including dams, buildings, roads, and trails for resource management, public use, or other purposes.

(15) (intro.) "Minor action" means a department action that does not need to comply with s. 1.11 (2) (c), Stats., because it is not in conflict with local, state or federal environmental policies and is not likely to do any of the following:

SECTION 3. NR 150.03 (16m) and (17m) and (Note) are created to read:

NR 150.03 **(16m)** "Natural resource management, timber management or environmental restoration" includes all actions associated with the management, economic production, protection and restoration of native and non-native fish, game, plants, trees, and timber, habitat protection, habitat management, habitat restoration, silvicultural practices, forest inventory, chemical and mechanical site preparation, timber harvesting, timber sales, timber transporting, tree planting, direct seeding, forest type conversions, invasive species control, timber stand improvement activities, forest nursery operations, prescribed burning, fire prevention, fire detection, fire suppression, rehabilitation of fire burned areas, environmental remediation, fish hatchery operations, state game farm operations, pesticide or herbicide applications and field surveys for environmental protection.

(17m) "New source" has the meaning given in s. 283.01(8), Stats.

Note: Section 283.01(8), Stats., defines "new source" to mean any point source the construction of which commenced after the effective date of applicable effluent limitations or standards of performance.

SECTION 4. NR 150.03 (19) is amended to read:

NR 150.03 **(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, but does not include actions as defined in sub. (1).

SECTION 5. NR 150.03 (23m) is created to read:

NR 150.03 **(23m)** "Publicly announce" or "public announcement" means publication on the department's internet web site, or other reasonable methods to provide public notice.

SECTION 6. NR 150.03 (25) and (26) are amended to read:

NR 150.03 (25) "Strategic analysis" means an environmental and alternatives analysis of ~~any an~~ 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 ~~between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin~~ concerning a ~~department~~ policy affecting the utilization of a substantial natural resources, between experts, policymakers of local, state, or tribal governments, or citizen interest groups in Wisconsin or physical resource where the utilization would be of sufficient magnitude that on a statewide or regional basis would have a considerable and important impact to the natural resources of the state. To be considered an unresolved conflict concerning alternative uses of available resources, the disagreeing parties must have identified a technically and economically feasible alternative use of the contested physical or natural resource, or both, and have the ability to reasonably implement that alternative.

SECTION 7. NR 150.10 (1) and (1m) (a) are amended to read:

NR 150.10 (1) ~~GENERAL REQUIREMENT PURPOSE.~~ Pursuant to This section establishes the procedures to fulfill the requirements of s. 1.11 (2) (e) and (h), 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.

(1m) (a) ~~Administrative rules and manual codes Policies.~~ The department shall conduct a strategic analysis for all new or revised administrative rules and manual codes policies if both of the following apply:

1. The rule or manual code policy 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 policy.

SECTION 8. NR 150.10 (1m) (b) is repealed.

SECTION 9. NR 150.10 (1m) (c) (intro.) and (2) (a) are amended to read:

NR 150.10 (1m) (c) *Other issues or policies.* (intro.) The While not required under this section, the department may conduct a use the strategic analysis processes in subs. (2) to (4) for any of the following issues or policies:

(2) (a) *General requirement.* The department shall determine the scope of ~~important issues to be~~

~~analyzed the analysis~~, 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.

SECTION 10. NR 150.20 (1) and (1m) (a) and (b) are amended to read:

NR 150.20 ~~(1) PROCEDURES ESTABLISHED PURPOSE~~. This section establishes ~~appropriate procedures for the environmental analysis that WEPA requires for all department actions except those specifically exempted by statute. Notwithstanding subs. (1m) to (3), the department may determine to follow the EIS procedures in s. NR 150.30 for any action~~ the procedures to fulfill the requirements of s. 1.11(2)(c), Stats.

(1m) (a) A real estate action, including property boundary establishment or modification, purchase, sale, easement, lease, ~~or designation, redesignation or dedication.~~

(b) Facility development or removal that follows protocols.

SECTION 11. NR 150.20 (1m) (ge), (gm), and (gs) are created to read:

NR 150.20 **(1m)** (ge) Educational activities.

(gm) Model ordinances developed to assist municipalities in the creation of ordinances.

(gs) Consultation offered to third parties.

SECTION 12. NR 150.20 (1m) (j) is amended to read:

NR 150.20 **(1m)** (j) Reissuance, modification, revocation and reissuance, or issuance of a routine or small-scale permit approval or action.

SECTION 13. NR 150.20 (1m) (jg) and (jr) are created to read:

NR 150.20 **(1m)** (jg) Routine variances from department rule requirements.

(jr) Denial, termination, revocation, or suspension of a grant, permit, license, approval, variance, land application site, or of any proposed activity.

SECTION 14. NR 150.20 (1m) (k) is amended to read:

NR 150.20 **(1m)** (k) ~~Issuance of a~~ A routine or small-scale approval or action, or an approval or action associated with a permit.

SECTION 15. NR 150.20 **(1m)** (m), (n), (nm), (o), (p), (pe), (pm), (ps), (q), (qm), (r), (s), (sb), (sf), (sk),

(sp), (ss), (sw), (sy), (t), (u), (ug), (ur), (v), and (w) are created to read:

NR 150.20 (1m) (m) Promulgation of emergency administrative rules under ch. 227, Stats.

(n) Any enforcement action.

(nm) Any emergency action that protects public health, safety, or welfare.

(o) Issuance of a minor source construction permit under ch. NR 406 or an operation permit renewal or revision under ss. 285.60, and 285.62, Stats., for air emission sources.

(p) Issuance of licenses for servicing septage, and approvals of county programs to regulate the disposal of septage under s. 281.48, Stats.

(pe) Issuance of operator certifications under s. 281.17 (3), Stats., and licenses or registrations for well drillers and pump installers.

(pm) Approvals of geothermal heat exchange projects.

(ps) Approvals of additives to wastewater or cooling water.

(q) Issuance of general permits established by administrative code under ch. 30, Stats.

(qm) Issuance of aquatic plant management permits under ch. NR 109.

(r) Listing and delisting of an impaired water as defined in s. NR 151.002 (16m).

(s) Review and approval of municipal ordinances or approval of changes to municipal floodplain or shoreland-wetland maps.

(sc) Temporary drawdowns of dams under s. 31.02, Stats.

(sg) Reconstruction and repairs of dams under s. 31.13, Stats.

(sl) Transfer of dam ownership under s. 31.14, Stats.

(sp) Dam inspections under s. 31.19, Stats.

(st) Approvals of emergency action plans, inspection, operation and maintenance plans, dam failure analysis, or stability analysis plans under ch. NR 333.

(sx) Review and approval of hydrologic and hydraulic studies for floodplain mapping under s. NR 116.07.

(t) Approval of construction plans and specifications under s. 281.41, Stats., for municipal, industrial and industrial pretreatment wastewater facilities, public water systems and CAFO reviewable structures.

(u) Decisions related to evaluations of existing reviewable facilities and systems for concentrated animal feeding operations under ch. NR 243.

(ug) Approvals of land application or nutrient management plans or modifications to the plans.

(ur) Approvals of land application sites.

(v) Issuance of natural heritage inventory permits, approvals, or licenses under ch. NR 29 except

for permits issued under s. NR 29.604 (6m).

(w) Issuance of an order or any action relating to the forest croplands or managed forest land programs under subch. I or VI of ch. NR 77.

SECTION 16. NR 150.20 (2) (a) (intro.) is amended to read:

NR 150.20 (2) EQUIVALENT ANALYSIS ACTIONS (a) (intro.) 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:

SECTION 17. NR 150.20 (2) (a) 2r., 3c., 3g., and 3n. are created to read:

NR 150.20 (2) (a) 2r. Cooperative state trail planning.

3c. Development of total maximum daily loads as defined in s. NR 151.002 (46m).

3g. Issuance, reissuance, revocation and reissuance, or modification of a WPDES permit that authorizes a new source discharge that is subject to antidegradation review under ch. NR 207.

3n. Approval of a variance from a water quality standard under ch. 283, Stats.

SECTION 18. NR 150.20 (2) (a) 4. is amended to read:

NR 150.20 (2) (a) 4. Issuance of a major source construction permit under ch. NR 405 or 408 or an initial 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 sources.

SECTION 19. NR 150.20 (2) (a) 5. is renumbered NR 150.20 (2) (a) 2g.

SECTION 20. NR 150.20 (2) (a) 7. is amended to read:

NR 150.20 (2) (a) 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, and 512, and 670.

SECTION 21. NR 150.20 (2) (a) 7e., 7m., and 7s. are created to read:

NR 150.20 (2) (a) 7e. Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700 to 754.

7m. Issuance of regulatory approvals, liability clarification letters, exemptions and technical assistance under ch. 292, Stats., and chs. NR 700 to 754.

7s. Except for facilities specified in s. 291.27, Stats., the approval of a feasibility and plan of operation report and issuance of a license for either a new or existing hazardous waste treatment, storage, or disposal facility or class 3 modification of an existing hazardous waste treatment, storage, or disposal facility under ch. NR 670 and s. 291.25, Stats.

SECTION 22. NR 150.20 (2) (a) 8., 10., 11., 12., 13., 14., and 16. are amended to read:

NR 150.20 (2) (a) 8. Issuance of an individual wetland permit or general permit under s. 281.36 (3m), Stats.

10. Issuance of findings of public interest under s. 30.11(5), Stats., for a proposed lease for modification of an existing shoreline under s. 30.11, Stats of the bed of a lake or lease of rights to fill in a bed of a lake or a navigable stream.

11. Issuance of an individual permit, general permit, certification, or contract for under subchapter II of ch. 30, Stats., including structures on the beds of navigable waters or to construct culverts and bridges across navigable waters under ss. 30.12 (3m) or 30.123 (8), Stats.

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

13. Issuance of an individual permit or general 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, general 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.

16. Issuance of a permit, ~~to construct, raise, enlarge or abandon order, or approval for water levels or flows, or for the regulation of 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 and ch. NR 333.~~

SECTION 23. NR 150.20 (2) (a) 18. is renumbered NR 150.20 (2) (a) 3r. and amended to read:

NR 150.20 (2) (a) 3r. An approval of a municipal wastewater facilities plan under s. NR 110.08, and approvals of municipal wastewater projects receiving federal grants or state financial assistance under ss. 281.58 and 281.59, Stats.

SECTION 24. NR 150.20 (2) (a) 18m. is created to read:

NR 150.20 (2) (a) 18m. Issuance of findings of public interest under s. 30.11(5), Stats., for a

proposed lease of the bed of a lake or lease of rights to fill in a bed of a lakes or a navigable stream.

SECTION 25. NR 150.20 (2) (a) 19 is renumbered NR 150.20 (2) (a) 3w. and amended to read:

NR 150.20 (2) (a) 3w. Issuance, reissuance, revocation and reissuance, or modification of an individual WPDES permit for ~~an~~ a concentrated animal feeding operation under ch. NR 243 that is a new source.

SECTION 26. NR 150.20 (2) (a) 19m., 20., 21., 22., and 23. are created to read:

NR 150.20 (2) (a) 19m. Issuance of a report under s. 13.097, Stats., that includes the required department findings under s. 13.097(4), Stats., and conclusions under s. 13.097(6), Stats., regarding whether legislation that proposes to convey lake bed or amend a prior conveyance of lake bed area is consistent with protecting and enhancing a public trust purpose.

20. Review of existing or proposed uses for an existing lakebed grant, existing lease of the bed of a lake, or existing lease of rights to fill in a bed of a lakes or a navigable stream to ensure the existing or proposed uses are consistent with the purposes and uses for which the grant or lease was issued.

21. Issuance of an aquatic plant management permit under s. NR 107.05 that meets the criteria under s. NR 107.04 (3).

22. Approvals of aquatic plant management plans under s. NR 109.09 and lake management plans under s. NR 191.45.

23. Promulgation of permanent administrative rules under ch. 227, Stats.

SECTION 27. NR 150.20 (3) (a) (intro.) is amended to read:

NR 150.20 (3) PRIOR COMPLIANCE ACTIONS. (a) (intro.)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:

SECTION 28. NR 150.20 (3) (a) 4. and 5. are repealed.

SECTION 29. NR 150.20 (3) (a) 6. and 7. are amended to read:

NR 150.20 (3) (a) 6. Approval of an extension of a wastewater collection system and other plan approvals under s. 281.41, Stats., that is are covered under an area wide water quality management plan under s. 283.83, Stats., and ch. NR 121.

7. Issuance ~~or~~, reissuance, revocation and reissuance, or modification of an individual WPDES permit under s. 283.31, Stats., from a facility that is covered under an area wide water quality management plan under s. 283.83, Stats., and ch. NR 121.

SECTION 30. NR 150.20 (3) (a) 9. and 10. are created to read:

NR 150.20 (3) (a) 9. Reissuance or modification of any general permit.

10. The approval of a feasibility and plan of operation report and issuance of a license for a class 1 or class 2 modification of an existing hazardous waste treatment, storage, or disposal facility under ch. NR 670 and s. 291.25, Stats.

SECTION 31. NR 150.20 (4) (b) (intro.) is amended to read:

NR 150.20 (4) (b) *EIS projects.* (intro.) ~~The~~ While not required under this section, 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:

SECTION 32. NR 150.30 (1) (g) and (3) (c) 3. and (d) are amended to read:

NR 150.30 (1) (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. Predictive models, bioassays, and other analysis that can be subject to reasonable scientific verification may be required. The instructions to the applicant may also require that certain laboratory tests be performed by a laboratory certified, registered, or approved under ch. NR 149.

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

~~(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. Pursuant to s. 1.11(2)(d), Stats., a public hearing shall be held on the draft EIS and proposed action. Holding a public hearing as required by another statute fulfills the hearing requirement. Any hearings hearing held pursuant to this chapter paragraph shall be publicly announced to the and public and held noticed in a manner consistent with s. 1.11 (2) (d), Stats.~~

SECTION 33. NR 150.30 (3) (d) (Note) is created to read:

NR 150.30 (3) (d) (Note) Pursuant to s. 1.11(2)(d), Stats.: “notice of the hearing shall be given by publishing a class 1 notice, under ch. 985, at least 15 days prior to the hearing in a newspaper covering the affected area. If the proposal has statewide significance, notice shall be published in the official state newspaper.”

SECTION 34. NR 150.35 is amended to read:

NR 150.35 **WEPA Compliance determination.** (1) Actions under ~~sections s.~~ NR 150.20 (2) ~~to (b), (3) (b), and (4)~~ cannot may not be taken until a determination is published publicly announced or noticed regarding compliance with this chapter unless statutory deadlines preclude compliance with the procedural requirements of this chapter. Actions under s. NR 150.20 (1m), (2) (a), and (3) (a) are compliant with WEPA and do not require a determination prior to the action being taken.

(1m) For all ~~EISs~~ any EIS under s. NR 150.20 (4) and ~~determinations~~ determination under s. NR 150.20 (2) (b) and (3) (b), the department shall publish publicly announce 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) ~~(b)~~ and (3) ~~(a) (b)~~, the department may ~~publish publicly announce~~ the WEPA determination as part of or provide notice in accordance with the public notification requirements for the proposed permit or approval document.

SECTION 35. FINDING OF EMERGENCY. Significant revisions to ch. NR 150 became effective on April 1, 2014. The changes proposed are needed to broaden the scope and add additional clarification and different rule language not contained in the prior August emergency rule while a new permanent rule is promulgated and to clarify procedures for the review and analysis of new administrative rules and other actions and policies to assure that the general intent of the recent revisions to ch. NR 150 is being met and potential procedural questions do not invalidate years of work and public engagement. Additionally, the changes will clarify the intent of the April 1, 2014 revisions for procedures for WEPA compliance determinations, publication requirements, and plan approvals for various actions and policies, to prevent any misunderstandings or resulting challenge or delay regarding that intent.

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary to allow timely processing and implementation of department rule proposals, actions and policies. Preservation of the public welfare

necessitates putting the forgoing rule into effect prior to the time that it would take if the Department complied with normal rule promulgation procedures.

This new emergency rule (Board Order OE-20-14(E)) is needed to broaden the scope and add additional clarification and different rule language not contained in the existing August emergency rule while a new permanent rule is promulgated. The companion new permanent rule (Board Order OE-21-14) similarly broadens the scope and adds additional clarification and different rule language not contained in the current permanent rule.

SECTION 36. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication of the affected Administrative Code Chapters in the Register.

SECTION 37. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

(SEAL)