Form 1100-001
(R 2/11)

NATURAL RESOURCES BOARD AGENDA ITEM

Item No. 3B6

SUBJECT: Approval on Economic Impact Solicitation Process

FOR: JANUARY 2012 **BOARD MEETING**

TO BE PRESENTED BY / TITLE: Tim Andryk, Chief Legal Counsel

SUMMARY:

Pursuant to 2011 Wisconsin Act 21, there are new rulemaking requirements for the Department and all other state agencies. One of the more significant changes is the requirement for the Department to solicit, consult, and coordinate on the newly required "Economic Impact Analysis" (EIA). (Wis. Stat. s. 227.137). This agenda item pertains to what Board approval is required for the Department to take the proposed rule language out for public solicitation, consultation, and coordination on none, all, or some EIAs, which must occur prior to the Board approving a public hearing on the proposed rule language. There are 3 different "Levels" of EIAs for proposed rules.

Level III EIA - For proposed rules with minimal or no economic impact. Level II EIA - For proposed rules with moderate economic impact. Level I EIA - For proposed rules with significant economic impact locally or statewide, which have been interpreted to be those proposed rules anticipated to have over $20 million in economic impacts.

Option 1 - No requirement for Board approval for the Department to be able to publically release proposed rule language to solicit, consult and coordinate for an EIA (Levels I, II and III).
Option 2 - Require Board approval for all proposed rules prior to publically releasing proposed rule language to solicit, consult, and coordinate on an EIA (Levels I, II and III).
Option 3 - Require Board approval for soliciation, consultation, on coordination on proposed rules with Level I and II EIAs, but not Level III EIAs.
Option 4 - No Board approval to solicit, consult, and coordinate on the EIAs of Level III rules and Board approval as directed by the Board on Level I and II EIAs when approving the scope statement.

RECOMMENDATION: Approve Option 1 or Option 4: No NRB approval to solicit, consult, and coordinate on EIA of proposed rules or approval as directed by the Board at scope statement approval.

LIST OF ATTACHED MATERIALS:

No	☑	Fiscal Estimate Required	Yes	☐	Attached
No	☑	Environmental Assessment or Impact Statement Required	Yes	☐	Attached
No	☐	Background Memo	Yes	☑	Attached

APPROVED:

Tim Andryk — 1-18-11
Bureau Director, Tim Andryk — Date

Administrator, n/a — Date

Matt Mowry — 1-18-12
Secretary, Cathy Stepp — Date

cc: NRB Liaison
DNR Rules Coordinator

Quinn Williams, LS/8
Robin Nyffeler, LS/8

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: January 17, 2012

TO: Natural Resources Board Members

FROM: Secretary Cathy Stepp

SUBJECT: Process on the Economic Impact Analysis Solicitation Authorization Process for Rules post 2011 Wisconsin Act 21

Background

Pursuant to 2011 Wisconsin Act 21 there are new rulemaking requirements for the Department and all other state agencies. One of the more significant changes is the requirement for the Department to solicit comments and consult, and coordinate in the development of the newly required "Economic Impact Analysis" (EIA). (Wis. Stat. s. 227.137)

Prior to the Department submitting a proposed rule to the Legislative Council Rules Clearinghouse for review, an EIA must be completed. The EIA must include information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. In preparing the analysis, the Department must solicit information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule and must prepare the analysis in coordination with local governmental units that may be affected by the proposed rule. In order to solicit, consult, and coordinate on the EIA, the language of the proposed rule must be shared publically. The purpose of the comments on the solicitation, consultation, and coordination for the EIA should only be related to the potential economic impacts of a proposed rule, although part of the process can involve proposed changes to the proposed rule language to reduce those impacts. Prior to Act 21, the proposed rule language would not be shared with the public until after the green sheet request to go to public hearing was submitted to the Board.

The decision before the Board is whether or not to require Board approval for the Department to take the proposed rule language out for public solicitation, consultation, and coordination on none, all, or some EIAs, which must occur prior to the Board approving a public hearing on the proposed rule language.

Discussion

Longer periods for solicitation of comments on the economic impact of proposed rules are required with greater levels of economic impact anticipated. Under the Governor's Executive Order 50, Section II, paragraph 2., scope statements include statements on whether the Department anticipates that the proposed rule; will have minimal or no economic impact, may have a moderate economic impact or, is likely to have a significant economic impact locally or statewide. These are:

> **Level III EIA** – For proposed rules with minimal or no economic impact. Rule language for proposed rules under this level are usually very short and simple, with readily identifiable stakeholders. Examples of these types of proposed rules might include housekeeping cleanup rules, minor changes in bag limits, size limits, season hours, etc. DNR waterfowl rules required by federal law changes, and other changes to rules required by statutory changes. Solicitation of

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comments on the economic impact is required to be at least 14 days according to the Governor's Executive Order 50.

Level II EIA – For proposed rules with moderate economic impact. Rule language for proposed rules under this level can vary, as can the scope of complexity, and the range of stakeholders can vary as well. Examples of these types of proposed rules might include commercial fishing rule changes or changes to rules for grant programs affecting eligibility. Solicitation of comments on the economic impact is required to be at least 30 days, according to the Governor's Executive Order.

Level I EIA – For proposed rules with significant economic impact locally or statewide, which has been interpreted to be those proposed rules anticipated to have over $20 million in economic impacts. Examples of these types of proposed rules might include recent phosphorus rule changes, shore land zoning rules, and mercury air rules. Solicitation of comments on the economic impact is required to be at least 60 days.

Approval by the Board for the Department to publically share proposed rule language to solicit, consult, and coordinate on an EIA is not required by the Act, Executive Order 50, Department of Administration, or the newly created Office of Regulatory Compliance. However, the Department recognizes that the Board has, in the past, not authorized the release of the proposed rule language until after the Board has approved the request to go to hearing (except for rules that were drafted with assistance from a technical advisory committee).

Prior to Act 21, the Board generally approved the rule twice, once to go to hearing and once at adoption, if no subsequent changes were later requested by the Legislature. After Act 21, the Board could be approving the rule proposal four times: (1) approval of the scope statement, (2) approval to solicit comments on the economic impact, (3) approval of request to go to hearing, and (4) adoption of final rule.

There are four options available to the Board in determining when or whether to require Board approval to solicit, consult, and comment for an EIA:

Option 1 - Have no requirement that the Department request Board approval for all proposed rules prior to publically releasing proposed rule language to solicit, consult, and coordinate in the development of an EIA (Levels I, II and III).

Pros

- Allows for faster rule promulgation by eliminating a formal yellow sheet/green sheet decision item for the Board to take action on, which will help speed up the rule process.
- Could still require that the Board receive the proposed rule language and draft EIA prior to public release and solicitation, consultation, and coordination, giving the Board a "heads up" on the specifics of the proposed rule and draft EIA.

Cons

- The Board would not have the opportunity to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public.

Option 2 - Require that the Department request Board approval for all proposed rules prior to publically releasing proposed rule language to solicit, consult, and coordinate on development of an EIA (Levels I, II and III).

Pros

- The Board would have the opportunity to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public.
- The Board would have the opportunity to direct the Department to include or identify additional stakeholders as part of the EIA solicitation, consultation, and coordination process, although the Board could do so at the scope statement stage as well.

Cons

- Would add time to the rule promulgation process for all rules, requiring formal yellow sheet/green sheet decision item for the Board to take action on, irrespective of the complexity or scale of the proposed rule.

Option 3 - Require that the Department request Board approval only for proposed rules for which a Level I EIA or Level II EIA is needed prior to publically releasing proposed rule language to solicit, consult, and coordinate for an EIA , and have no requirement that the Department request formal Board approval for proposed rules for which a Level III EIA is needed prior to publically releasing proposed rule language to solicit, consult, and coordinate for an EIA.

Pros

- The Board would have the opportunity to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public for proposed rules that will likely have moderate or significant economic impacts (Level I and II EIAs).
- The Board would have the opportunity to direct the Department to include or identify additional stakeholders as part of the EIA solicitation, consultation, and coordination process for proposed rules that will likely have moderate or significant economic impacts (Level I and II EIAs).
- Allows for faster rule promulgation by eliminating a formal yellow sheet/green sheet decision item for the Board to take action on, which will help speed up the process for proposed rules that will likely have little or no economic impacts (Level III EIAs).
- Could still require that the Board receive the proposed rule language and draft EIA prior to public release and solicitation, consultation, and coordination, giving the Board a "heads up" on the specifics of the proposed rule and draft EIA for proposed rules that will likely have little or no economic impacts (Level III EIAs).

Cons

- Will add time to the rule promulgation process for proposed rules that will likely have moderate or significant economic impacts (Level I and II EIAs).
- The Board would not have the opportunity to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public for proposed rules that will likely have little or no economic impacts (Level III EIAs).

- The Board would not have the opportunity to direct the Department to include or identify additional stakeholders as part of the EIA solicitation, consultation, and coordination process for proposed rules that will likely have little or no economic impacts (Level III EIAs).

<u>Option 4</u> - <u>Require</u> no Board approval to solicit, consult, and coordinate on the EIA for proposed rules with no or little economic impact (Level III) but Board approval for development of EIAs for other rules would be determined by the Board when they approve the scope statement.

<u>Pros</u>

- The Board would have the opportunity, at their discretion, to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public for proposed rules that will likely have moderate or significant economic impacts (Level I and II EIAs).
- The Board would have the opportunity, at their discretion, to direct the Department to include or identify additional stakeholders as part of the EIA solicitation, consultation, and coordination process for proposed rules that will likely have moderate or significant economic impacts (Level I and II EIAs).
- Allows for faster rule promulgation by eliminating a formal yellow sheet/green sheet decision item for the Board to take action on, which will help speed up the process for proposed rules that will likely have little or no economic impacts (all Level III EIAs and those Level I and II EIAs that the Board does want to see prior to solicitation, consultation, coordination).
- Could still require that the Board receive the proposed rule language and draft EIA prior to public release and solicitation, consultation, and coordination, giving the Board a "heads up" on the specifics of the proposed rule and draft EIA for proposed rules that will likely have little or no economic impacts (all Level III EIAs and those Level I and II EIAs that the Board does want to see prior to solicitation, consultation, coordination).

<u>Cons</u>

- The Board would not have the opportunity to comment or require changes to proposed rule language or draft EIA prior to the proposed rule language being shared with the public for proposed rules that will likely have little or no economic impacts (all Level III EIAs and those Level I and II EIAs that the Board does want to see prior to solicitation, consultation, coordination).
- The Board would not have the opportunity to direct the Department to include or identify additional stakeholders as part of the EIA solicitation, consultation, and coordination process for proposed rules that will likely have little or no economic impacts (all Level III EIAs and those Level I and II EIAs that the Board does want to see prior to solicitation, consultation, coordination).

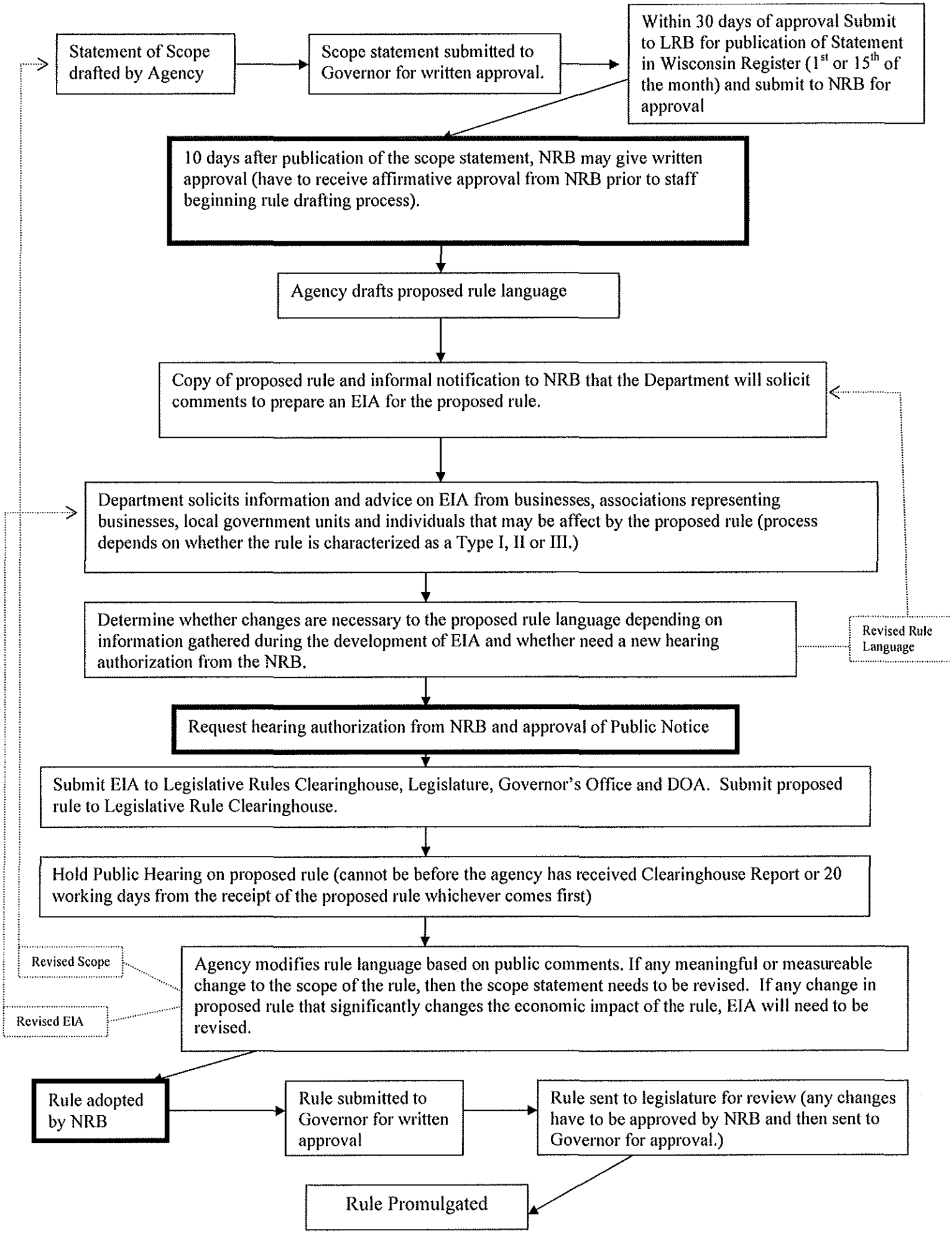
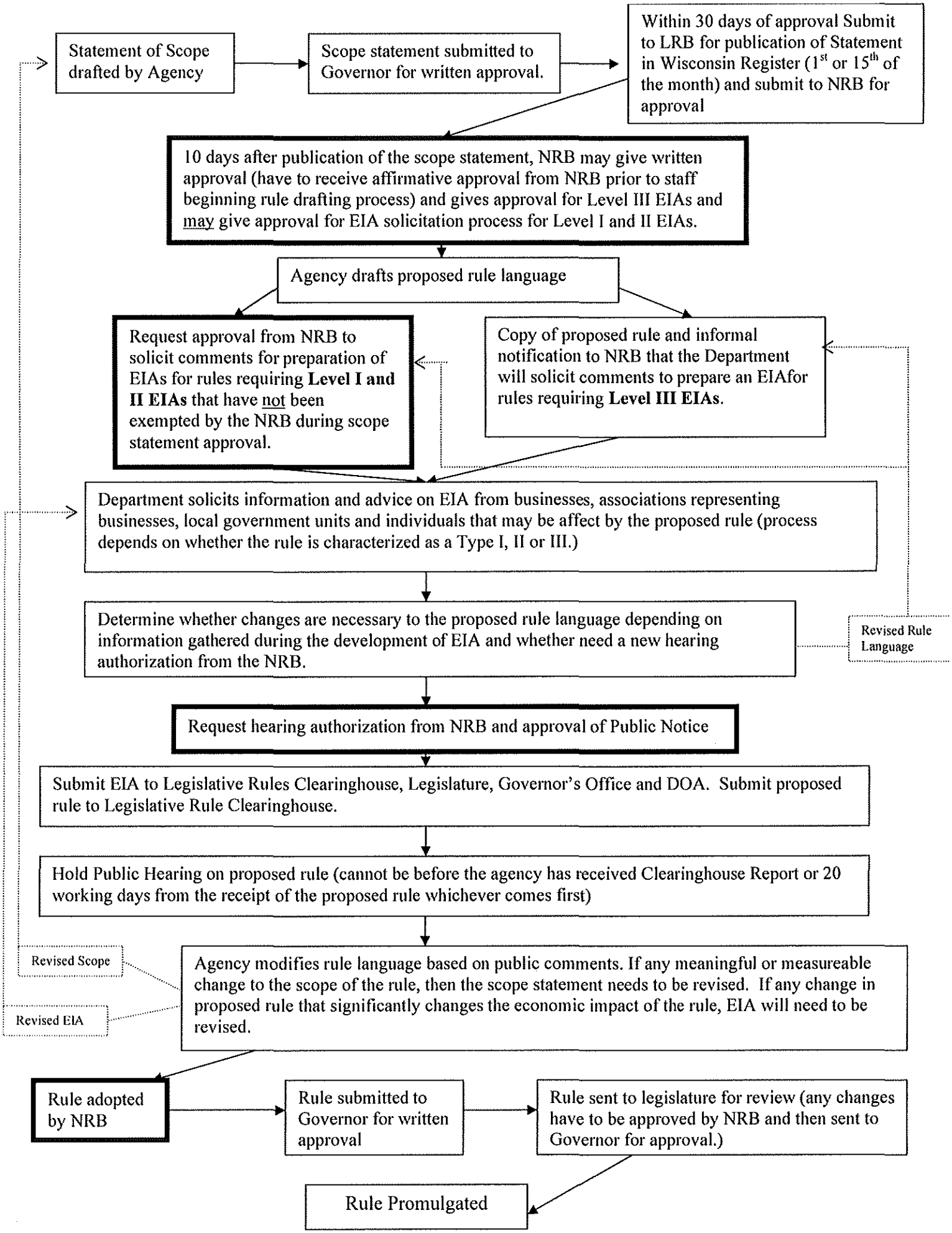
Department Recommendation – Option 1, or Option 4

The new rule process requires more Board involvement than in the past, with up front Board approval of the scope statement. It is the Departments preference that an additional step not be added to require Board approval to solicit, consult and coordinate on the development of the EIA for the proposed rule. If the Board desires, they can direct the Department to add the additional approval step when they act on the scope statement. Otherwise, the Department can proceed with soliciting comments on the economic

impact of a proposed rule once the proposed rule language has been drafted, but still provide the Board a copy of the proposed rule language that is being shared. The Board would then act on or approve the proposed rule language later when they approve the request for hearings. This process would provide greater flexibility for the Department to respond to timeliness issues and save staff time in preparing items for Board approval.

The Board could revisit this approved process after one year to evaluate whether more changes could be made to make it more efficient yet still accountable to the Board.

RULE PROCESS WITH ACTS 21 REVISIONS – OPTION 1



RULE PROCESS WITH ACTS 21 REVISIONS – OPTION 4