



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: March 8, 2016

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary
John Petty, Administrator, Agricultural Resource Management Division

SUBJECT: Livestock Facility Siting; Rulemaking Scope Statement

TO BE PRESENTED BY: Chris Clayton and Richard Castelnovo, Division of Agricultural Resource Management

REQUESTED ACTION:

At its March 22, 2016, meeting, the Department of Agriculture, Trade and Consumer Protection (“Department”) will ask the Agriculture, Trade and Consumer Protection Board (“Board”) to approve a Statement of Scope (copy attached) for a rulemaking proceeding to amend ch. ATCP 51, Wis. Adm. Code (Livestock Facility Siting). The current siting rule implements § 93.90 Stats., Wisconsin’s Livestock Facility Siting Law (“Siting Law”).

This rulemaking proceeding may modify the current siting rule, as necessary, consistent with the Siting Law, including updates of technical standards, modification of siting standards and procedures, and improvements in state-mandated forms and worksheets.

Background

In 2006, the Department adopted ch. ATCP 51, Wis. Adm. Code, to implement the Siting Law. The final rule was the product of extensive study and negotiations. Ch. ATCP 51 details the standards for local approval of livestock facilities, including standards related to livestock structures, location on property, setbacks, odor and air emissions, nutrient management, waste storage facilities, and runoff management. It also lays out the procedures that a local government must follow when issuing a license or permit for a new or expanded livestock facility.

Under the Siting Law, the Department must review the standards in ch. ATCP 51 at least once every 4 years (see § 93.90(2) (c), Stats.) Since 2006, when ch. ATCP 51 was adopted, the Department has conducted two of these reviews, with the most recent review initiated in 2014. As part of the 2014 review, the Department conducted listening sessions with environmental, farm, and government stakeholder groups. As required by the Siting Law, the Department’s Secretary also appointed a committee of technical experts to advise the Department regarding possible changes to the siting standards. In September 2015, the expert committee provided its report to the Secretary, who shared the report with the Board at its November 18, 2015, meeting.

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The Department may consider the technical recommendations in this report in making any changes to ch. ATCP 51.

Rulemaking Procedures

A scope statement spells out the general purpose and scope of a proposed rule. The Department may not begin drafting a proposed rule (including a proposal to amend an existing rule) until the Governor approves a scope statement for the proposed rule and the Board approves the scope statement.

In accordance with s.227.135(2), Stats., the Governor approved this scope statement for permanent rule changes on January 26, 2016, thereby allowing the Department to submit this scope statement for publication and to seek approval of the scope statement by the Board.

The Department must publish a draft scope statement in the Wisconsin Administrative Register, and file a copy with the Department of Administration ("DOA"), at least 10 days before the Board approves the scope statement. The Department filed the attached statement of scope with the Legislative Reference Bureau for publication in the February 8, 2016, issue of the Wisconsin Administrative Register (No. 722A2). The Department also filed a copy with DOA.

If the Board approves the scope statement, the Department will begin work to draft the permanent rule. Approval of a scope statement is the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rule. The Board must approve a hearing draft rule before the Department may hold public hearings on the rule proposal. The Board must also approve the final draft rule before the Department may adopt the rule. The permanent rule will be effective when the final draft has been approved by the Board, approved by the Governor, completed the legislative review process, and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No.: Chapter ATCP 51, Wis. Adm. Code (existing).

Relating to: Livestock Facility Siting

Rule Type: Permanent

1. Description of the objective of the rule:

This proposed rule would revise standards and procedures for local approval of new or expanded livestock facilities, within limits prescribed by Wisconsin's livestock facility siting law, s. 93.90, Stats.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and background. Wisconsin's Livestock Facility Siting Law ("siting law"), s. 93.90, Stats., was enacted to provide a clear, predictable, and more uniform framework for the local permitting of livestock facilities in this state. Under the siting law, local governments *may* by ordinance require a zoning or licensing permit ("siting permit") for new or expanded livestock facilities with 500 or more "animal units." With limited exceptions, the law prohibits local governments from requiring siting permits for smaller livestock facilities.

If a siting permit is required by local ordinance, a local government must grant or deny the permit based on standards and procedures adopted by the Department through rulemaking. Local governments have some authority to adopt additional standards but only if those standards, adopted by ordinance, are based on scientific evidence and are necessary to protect public health or safety.

In 2006, the Department adopted rules in ch. ATCP 51, Wis. Adm. Code ("siting rule") to implement the siting law. The rules spell out detailed requirements for permitting livestock facilities related to:

- Livestock Structures
- Setbacks and Property Location Requirements
- Odor and Air Emissions
- Nutrient Management
- Waste Storage Facilities
- Runoff Management.

The siting rule spells out procedures and timetables for local approval or disapproval of permit applications, consistent with the siting law. It also mandates the use of state-approved permit application forms, which are designed to elicit information needed to show compliance with applicable siting standards.

Under the siting law, the Department must review the standards in the siting rule at least once every 4 years. Since 2006 when the siting rule was adopted, the Department has conducted 2 of these reviews, with the most recent review initiated in 2014. As part of the 2014 review, the Department conducted listening sessions with environmental, farm and government stakeholder groups. The Department's Secretary also appointed a committee of technical experts to advise the Department on possible changes to the siting standards. The expert committee provided its report to the Secretary in September, 2015.

Proposed policies. This proposed rule may modify the siting rule by:

- Ensuring that Natural Resources Conservation Service ("NRCS") technical standards in the siting rule are consistent with NR 151 and ATCP 50. The Department may consider whether its adoption of certain standards will require livestock facilities permitted under the siting rule to comply with greater requirements than those permitted under ch. NR 243, Wis. Adm. Code.
- Modifying siting standards (subch. II of ATCP 51) consistent with the requirements in s. 93.90(2), Stats. The Department may consider the technical recommendations of the 2014 expert committee in making any changes. If the Department changes any siting standards, it will include provisions to accommodate existing operations.
- Modifying the procedures (subchs. I and III of ATCP 51) that local governments must follow in issuing a siting permit under a zoning or licensing ordinance. The rule may address local procedures used to determinate siting application completeness, siting permit modifications to ensure compliance with the law, the use of checklists to monitor facility compliance, and the fees local governments charge for siting permit applications and permit modifications.
- Modifying local permit application forms and worksheets to ensure that they are clear, complete, and elicit information which documents compliance with applicable siting standards.
- Making other changes, clarifications and updates as necessary to improve implementation of the siting rule, consistent with the requirements in s. 93.90(2), Stats.

Policy Alternatives and Justification. If the Department takes no action on ATCP 51, current rules will remain in effect. By proceeding with rulemaking, the Department may address the following:

- Some current standards and rule requirements are not consistent with requirements in related administrative rules, NR 151 and ATCP 50.
- Some current rule provisions, including technical standards, are outdated and may not reflect the best available science.
- The current rule does not account for the technical recommendations of the expert committee.
- Some current siting standards or procedures need modification to address implementation challenges, to better meet the needs of environmental, farm and government stakeholders.
- Some current rule provisions may hinder future coordination of federal, state and local conservation programs.

3. Statutory authority for the rule (including the statutory citation and language): Sections 93.07 (1) and 93.90(2) and (7), Stats.,

93.07 Department duties. It shall be the duty of the department:

(1) REGULATIONS. To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93 to 100, which regulations shall have the force of law.

93.90(2) Department duties.

(a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. In promulgating the rules, the department may incorporate by cross-reference provisions contained in rules promulgated under ss. 92.05 (3) (c) and (k), 92.14 (8), 92.16, and 281.16 (3) and ch. 283. The department may not promulgate rules under this paragraph that conflict with rules promulgated under s. 92.05 (3) (c) or (k), 92.14 (8), 92.16, or 281.16 (3) or ch. 283.

(b) In promulgating rules under par. (a), the department shall consider whether the proposed standards, other than those incorporated by cross-reference, are all of the following:

1. Protective of public health or safety.
- 1m. Practical and workable.
2. Cost-effective.
3. Objective.
4. Based on available scientific information that has been subjected to peer review.
5. Designed to promote the growth and viability of animal agriculture in this state.
6. Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.
7. Usable by officials of political subdivisions.

(c) The department shall review rules promulgated under par. (a) at least once every 4 years.

(d) The secretary shall appoint a committee of experts to advise the department on the promulgation of the rules under par. (a) and on the review of rules under par. (c).

(e) In addition to the rules under par. (a), the department shall promulgate rules that do all of the following:

1. Specify the information and documentation that must be provided in an application for approval in order to demonstrate that a livestock facility siting or expansion complies with applicable state standards under sub. (2) (a).
2. Specify the information and documentation that must be included in a record of decision making under sub. (4) (b).

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

The Department estimates that it will use approximately 1.0 FTE staff to develop this rule. This includes planning and preliminary activities, evaluation of recommendations of technical expert committee meetings, drafting rules and related documents, holding public hearings, analyzing and responding to hearing comments, presenting proposed rules to the ATCP Board and other government entities, and communication with stakeholders. The Department will use existing staff to develop this rule. The estimated staff time reflects the complex and sensitive subject matter of the rule, the intensity of interest among stakeholders, and the complex interaction with state and local regulatory programs.

5. Description of all entities that may be impacted by the rule:

This rule primarily affects the following entities:

- Counties, towns and municipalities that require local approval for the siting of livestock facilities. As of February 2014, the date of the last formal siting report to the ATCP Board, 24 counties, 61 towns, two cities (Berlin and Fitchburg), and two villages (Germantown and Richfield) have adopted siting ordinances.
- Livestock operators who propose to construct new or expanded livestock facilities that exceed applicable minimum size thresholds (typically 500 animal units) in counties, towns or municipalities that have adopted livestock facility siting ordinances. As of the February 2014 report, 113 livestock facilities received local permits. Nearly half of those facilities exceeded 1,000 animal units, and were therefore required to obtain a Wisconsin Pollution Discharge Elimination System (“WPDES”) permit from the Wisconsin Department of Natural Resources (“DNR”), in addition to a local siting permit.

This rule may have lesser impact on providers of products and services to livestock facilities, such as agricultural engineers and practitioners, crop consultants, construction contractors, farm supply businesses and manure haulers. This rule may increase demand for some products and services, and may require product and service providers to adapt to potential rule changes.

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

Nearly half of livestock operations currently affected by this rule are also subject to regulation under the federal Clean Water Act. Under delegated authority from U.S. Environmental Protection Agency (EPA), DNR adopted ch. NR 243, Wis. Adm. Code, to regulate water pollution discharges from livestock facilities. Under NR 243, livestock facilities with over 1,000 animal units must obtain a DNR WPDES permit. Permit holders must meet standards designed to ensure that the proposed livestock facility will not pollute surface water or groundwater. Livestock facilities that have a WPDES permit are deemed to comply with some of the Department’s standards for the issuance of local siting permits, including standards for nutrient management, waste storage facilities and runoff management (the standards parallel WPDES permit standards, and have a similar purpose, although WPDES standards are stricter in some respects). To qualify for a siting permit, a WPDES permit holder must also demonstrate compliance with Department standards for livestock structures, location on property, and odor management, which are not covered by WPDES permit.

Federal law establishes reporting and other requirements for livestock facilities related to air emissions. For example, large operations must report certain types of releases to local and state agencies, as directed by the Emergency Planning and Community Right-to-Know Act (EPCRA). EPA also has authority to respond to citizen complaints or requests for assistance from state or local government agencies to investigate releases of hazardous substances from farms. Federal law does not directly cover odor management on livestock facilities.

Federal programs may provide incentive payments to help livestock producers implement conservation practices, including practices that may help livestock producers meet livestock facility siting standards under this rule. The following relevant programs are administered by the U.S. Department of Agriculture:

- Environmental Quality Incentives Program (EQIP)
- Conservation Reserve Program (CRP)
- Conservation Reserve Enhancement Program (CREP)
- Conservation Stewardship Program (CSP)
- Agricultural Conservation Easement Program (ACEP).

7. Anticipated economic impact

The Department expects the proposed rule to have minimal economic impact statewide and locally, with moderate impacts for some of the livestock facilities regulated under siting permits. Many farmers affected by this rule qualify as “small businesses.”

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Ben Brancel

Secretary

Department of Agriculture, Trade and Consumer Protection

12.17.15

Date Signed