

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

Item No. **Tuesday  
2 . D .**

**SUBJECT:**

Request that the Board approve the Statement of Scope for Board Order WT-19-19 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse, for proposed rules affecting chapters NR 151 and NR 243, Wis. Adm. Code, related to targeted performance standards and prohibitions to abate pollution of groundwater by nitrate in sensitive areas.

**FOR: December 2019 Board meeting**

**PRESENTER'S NAME AND TITLE:** Brian Weigel - Deputy Director, Watershed Bureau; Ann Kipper - Deputy Administrator, External Services Division

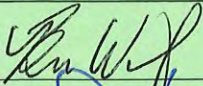
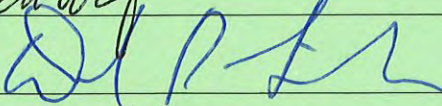

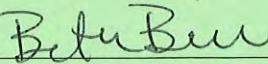
**SUMMARY:**

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

**RECOMMENDATION:** That the Board approve the statement of scope for Board Order WT-19-19 and conditionally approve the public hearing notice for Board Order WT-19-19 and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse.

**LIST OF ATTACHED MATERIALS:**

- Statement of scope
- Governor approval of statement of scope

Approved by	Signature	Date
Brian Weigel, Deputy Director		11/22/19
Dave Siebert, Division Administrator		11/22/19
 Preston D. Cole, Secretary		12/3/19

cc: Board Liaison - AD/8  
Department Tribal Liaison - AD/8

Program attorney - LS/8

Department rule officer - LS/8

by Beth Bier

DATE: December 3, 2019

TO: Natural Resources Board Members

FROM: Preston D. Cole, Secretary

SUBJECT: Summary of preliminary public hearings and comments received on the statement of scope for Board Order WT-19-19, relating to targeted performance standards to abate nitrate in groundwater

On August 27, 2019, the co-chairperson of the Joint Committee for the Review of Administrative Rules (JCRAR) requested that the department hold a preliminary public hearing and comment period on the scope statement for Board Order WT-19-19, pursuant to s. 227.136(1), Wis. Stats. The statement of scope contemplates rulemaking to revise chs. NR 151 and NR 243 relating to the development of targeted performance standards to abate pollution of groundwater by nitrate. This memo summarizes the comments received at the public hearings and during the period for written public comments.

#### Public Hearings

The department held preliminary public hearings at Hancock Research Station on November 4, 2019, Blackhawk College on November 6, 2019, and Fond du Lac on November 7, 2019. Appearance slips submitted by members of the public included 32 at Hancock, 14 at Janesville, and 23 at Fond du Lac. Not all attendees offered comments. Oral testimony was recorded.

#### Written Public Comment

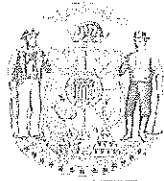
The department received 93 individual submittals prior to the public comment period ending on November 8, 2019. The department and Natural Resources Board has received additional comments for consideration outside of the official comment period.

#### General Summary of Comments

- Nitrate contamination is widespread in Wisconsin, affecting tens of thousands of wells.
- Something must be done about nitrate contamination.
- Nitrate groundwater contamination is significant in the central sand region.
- Other areas of the state also have high nitrate concentrations in groundwater and should also be considered as sensitive, particularly the southwestern portion of the state.
- The department should look at both areas of high levels of nitrates in groundwater and areas with highly susceptible soils.

- The department has not identified the specific waterbody or area that the proposed rule would apply to.
- Existing rules are not working in some geologic areas.
- The department has not documented substantial implementation of existing rules to justify the need for a targeted standard.
- Many producers are following nutrient management plans and other cropland conservation practices.
- The scope statement was developed without input from the agriculture industry.
- Nitrate pollution is linked to significant health issues.
- Consider a broader range of factors affecting nitrates in groundwater than just soil permeability.
- Wisconsin citizens should have clean drinking water.

Drafter: Brian Weigel and Ann Kipper



# Tony Evers

Office of the Governor | State of Wisconsin

---

August 9, 2019

By Electronic Mail Only

Dear Secretaries and Agency Heads:

On this day, I approved the following statements of scope pursuant to Wis. Stat. § 227.135(2):

- A statement of scope by the Chiropractic Examining Board, dated June 27, 2019, relating to courses of study for and delegation to chiropractic technicians and chiropractic radiological technicians (Wis. Admin. Code ch. Chir 10); and
- A statement of scope by the Optometry Examining Board, dated May 30, 2019, relating to unprofessional conduct (Wis. Admin. Code ch. Opt 5); and
- A statement of scope by the Department of Safety and Professional Services, dated May 9, 2019, relating to tattooing and body piercing (Wis. Admin. Code ch. SPS 221); and
- A statement of scope by the Department of Administration, dated April 22, 2019, relating to updating standards to implement the Uniform Real Property Electronic Recording Act (Wis. Admin. Code ch. Adm 70); and
- A statement of scope by the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors, dated April 23, 2019, relating to general procedures (Wis. Admin. Code ch. A-E 2); and
- A statement of scope by the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors, dated April 23, 2019, relating to professional conduct (Wis. Admin. Code ch. A-E 8); and
- A statement of scope by the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers, and Professional Land Surveyors, dated April 23, 2019, relating to architect registration examinations (Wis. Admin. Code ch. A-E 3); and
- A statement of scope by the Department of Public Instruction, dated July 16, 2019, for an emergency and permanent rule relating to clarifying high cost special education aid (Wis. Admin. Code ch. PI 30); and
- A statement of scope by the Department of Natural Resources dated July 15, 2019, relating to targeted performance standards and prohibitions to abate pollution of groundwater by nitrate sensitive areas (Wis. Admin. Code chs. NR 151 and 243).

On this day, I approved the following proposed administrative rules pursuant to Wis. Stat. § 227.185:

- A proposed rule by the Optometry Examining Board, submitted on June 12, 2019, relating to licensure by endorsement (Wis. Admin. Code ch. Opt 4); and
- A proposed rule by the Optometry Examining Board, submitted on July 18, 2019, relating to diagnostic and therapeutic pharmaceutical agents (Wis. Admin. Code ch. Opt 6); and
- A proposed rule by the Chiropractic Examining Board, submitted on July 3, 2019, relating to delegation of services to health care professionals (Wis. Admin. Code chs. Chir 1, 4, 10 and 11); and
- A proposed rule by the Accounting Board, submitted on June 11, 2019, relating to continuing professional education (Wis. Admin. Code chs. Accy 2 and 7); and
- A proposed rule by the Department of Health Services, submitted on July 8, 2019, relating to a uniform fee system (Wis. Admin. Code ch. DHS 1); and
- A proposed rule by the Office of the Commissioner of Insurance dated July 3, 2019, relating to Medicare supplement insurance (Wis. Admin. Code ch. INS 3).

Please direct any questions about this letter to my policy director, Jenni Dye.

Sincerely,



Tony Evers  
Governor

Cc: Ryan Nilsestuen, chief legal counsel ([ryan.nilsestuen1@wisconsin.gov](mailto:ryan.nilsestuen1@wisconsin.gov))  
Jenni Dye, policy director ([jenni.dye@wisconsin.gov](mailto:jenni.dye@wisconsin.gov))  
DOA State Budget Office ([SBOAdminRules@spmail.enterprise.wistate.us](mailto:SBOAdminRules@spmail.enterprise.wistate.us)).  
DSPA ([DSPAAdminRules@wisconsin.gov](mailto:DSPAAdminRules@wisconsin.gov))  
Davis Ciotola, DHS ([Davis.Ciotola@dhs.wisconsin.gov](mailto:Davis.Ciotola@dhs.wisconsin.gov)).  
Daniela Branco, DNR ([DanielaH.Branco@wisconsin.gov](mailto:DanielaH.Branco@wisconsin.gov))  
Brian Vigue, DOA ([brian.vigue@wisconsin.gov](mailto:brian.vigue@wisconsin.gov))  
Carl Bryan, DPI ([carl.bryan@dpi.wi.gov](mailto:carl.bryan@dpi.wi.gov))  
DOC ([DOCAdministrativeRulesCommittee@wisconsin.gov](mailto:DOCAdministrativeRulesCommittee@wisconsin.gov))  
Nathan Houdek, OCI ([nathan.houdek@wisconsin.gov](mailto:nathan.houdek@wisconsin.gov))

# STATEMENT OF SCOPE

## Department of Natural Resources

**Rule No.:** WT-19-19

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

**Rule Type:** Permanent

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

The rules will be proposed as permanent rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

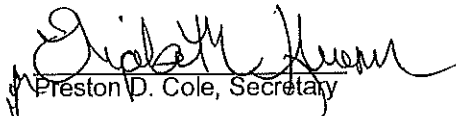
**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

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

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

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

**Contact Person:** Brian Weigel, (608) 225-4964

  
Preston D. Cole, Secretary

7/15/19  
Date Submitted