



State of Wisconsin  
Governor Tony Evers

**Department of Agriculture, Trade and Consumer Protection**  
Secretary Randy Romanski

## **Wisconsin Administrative Code Chapter ATCP 51 Technical Expert Committee Agenda**

**05/17/2023**

The Livestock Facility Siting Technical Expert Committee (TEC) will meet on May 17, 2023. The TEC will hold its official business at 9:00am via Zoom and at 2811 Agriculture Drive, Madison WI, 53718. To attend the meeting remotely, you must use the following Zoom hyperlink  
<https://www.zoomgov.com/j/1619405263?pwd=RHIXYWFHY1U5ZXFkeGErQzRYRHFGUT09> meeting ID 161 940 5263, passcode 900244. The agenda for the meeting is shown below.

### **AGENDA ITEMS AND TENTATIVE SCHEDULE:**

1. Call the Meeting to Order – DATCP staff
  - a. Roll Call
  - b. Open meeting notice
  - c. Introductions
  - d. Review Minutes of April 11 TEC Meeting
2. Review ATCP 51 general standards
  - a. Background on standards - DATCP Staff
  - b. Previous recommendations - DATCP Staff
  - c. Discuss current standards and formulate recommendations
3. Review and finalize all TEC recommendations
4. Planning for next TEC meeting - DATCP Staff  
*Review and edit final report*
5. Adjourn

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**MINUTES  
LIVESTOCK FACILITY SITING TECHNICAL EXPERT COMMITTEE**

**April 11, 2023  
2811 Agriculture Drive and  
ZoomGov Meeting**

**Item #1      Call to Order—Roll Call, Open Meeting Notice, Introductions**

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**Call to Order**

The Livestock Facility Siting Technical Expert Committee (Committee) met in person and via videoconference on **April 11, 2023**. The meeting was preceded by public notice as required by Wis. Stat. § 19.84. The meeting was called to order at **1:00 pm**.

**Members Present**

**Members:** Scott Frank, Nikki Wagner, Travis Drier, Emily Micolichek, AV Roth, Jay Heeg, Curtis Hedman, Mike Koles, Matt Zangl and Gaylord Olson were present.

**Staff:** Tim Jackson, Tim Anderson, Lisa Trumble, Alex Elias, and Katy Smith of DATCP were present.

The Committee reviewed the minutes of the March 6 & 13, 2023 meetings of the Committee and offered no revisions.

**Item #2      Review ATCP 51 standards for Setbacks and Odor and Air Emissions**

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Tim Jackson, DATCP, reviewed [ATCP 51.12, Wis. Admin Rule](#), and [ATCP 51.14, Wis. Admin Rule](#) with the Committee. Jackson also delivered a presentation on the intent of the setbacks and odor standards. The [presentation](#) is available on the Livestock Facility Siting Technical Expert Committee's [webpage](#).

Jackson reviewed historical recommendations of previously convened Technical Expert Committees and facilitated a discussion on the livestock facility siting setbacks and odor standards. The Committee discussion guide is available within the [April 11th Meeting Materials](#) which are accessible on the Committee's [webpage](#).

The Committee and Livestock Facility Siting Program Staff discussed the following:

- 1. Are the current standards for setbacks and odor working to be;?**
  - a. Protective of public health or safety.**
  - b. Practical and workable.**
  - c. Cost-effective.**
  - d. Objective.**
  - e. Based on available scientific information that has been subjected to peer review.**
  - f. Designed to promote the growth and viability of animal agriculture in this state.**
  - g. Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.**
  - h. Usable by officials of political subdivisions.**

The Committee discussed that the odor score has varying degrees of success depending on the location and size of the facility using it. Facilities in more rural areas without close residential neighbors have few conflicts, while facilities sited with proximity to more residential neighbors have had more conflicts. The premise of the odor score, predicting and measuring odor, is difficult to execute as odor can be a subjective experience. The Committee identified that odor is a common cause of complaints, although these are concentrated during a siting/expansion and less prevalent afterwards. Odor control practices can be very costly, but facility operators do appreciate having proof of compliance for odor concerns, as demonstrated by the odor score and worksheet. The Committee expressed that the current odor score is working to act as a middle ground between producers and landowners. The Committee asked if there has been any growth in the research used to create the odor score. Jackson was not aware of anything since 2005. Some members of the Committee expressed interest in reviewing the odor score if newer research was available.

The Committee also noted that moving to a setbacks-focused alternative to the odor score, similar to what was proposed after the 2018/19 Committee, could restrict operating existing livestock facilities.

**2. Should the maximum setbacks in 51.12 be adjusted?**

The Committee discussed the logistics of setting different setback standards for facilities below and above 1,000 AU. Sometimes a facility will site or expand below 1,000 AU, then expand again to above that threshold with those structures now closer than the setback requirement. Consistency between setbacks for facilities above and below 1,000 AU may be easier for local administration. However, requiring facilities requesting approval below 1,000 AU to site structures up to 200 feet from a property line or up to 150 feet from a public road right-of way (as opposed to a max of 100 feet under ATCP 51.12(1)(a), Wis. Admin. Code) may negatively affect those facilities.

**3. Should additional setbacks beyond property lines and roads be required?**

The Committee discussed requiring setbacks to affected neighbors (residences and high-use buildings), but asked what would be gained from doing so. The odor score is intended to deal with odor to those structures already. There may be added value in requiring “reverse” setbacks for both structures from each other to avoid conflicts, but if the odor score works as intended it may not be necessary. The Committee also identified that a good portion of perceived odor comes from spreading manure, as opposed to manure storage and animal housing. As such, it would be difficult to neutralize odor further by using additional setbacks.

**4. Should the department review the current odor score system for efficacy in predicting odor?**

- a. Does an approval for an odor score afford facilities and their affected neighbors adequate protections from land use conflicts, as intended?**
- b. Do values for odor sources and control practices need to be reviewed based on newer scientific evidence or models?**
- c. Should the department review the odor score system for effect, beyond odor, on adjacent properties?**

The Committee discussed that updates to the odor score model may be appropriate if newer research is available, such as for control practices or new odor sources. Odor has been the main driver behind complaints of facilities, but the current model does address odor concerns to some effect. The Committee also discussed what other health concerns may be addressed by the odor score, but heard that public health concerns are primarily for facilities’ employees. The odor score may not be an appropriate vehicle for addressing other airborne concerns.

**5. Are the required plans for incident response and employee training adequate in their current requirements? What about the optional odor management plan?**

**a. Are the credits given towards the odor score correlated to these plan's effect on a facility's predicted odor?**

The Committee identified that currently there is minimal content required for these plans. A well-written incident response and employee training plan can provide great value for the producer, although there may be significant cost in preparing these. Guidance for how to write these plans can be found elsewhere from stakeholder groups, but none exists from the department. The Committee discussed that improving the detail required in these plans can have broader effects on the overall operation of the facility and may address concerns from adjacent landowners without adjusting other standards. If more detail is given, the associated odor score credits would be more appropriate. The Committee discussed that the odor score credits given for the required incident response and employee training plans may need to be better balanced with the optional odor management plan for their affect on odor.

The Committee also discussed that WPDES permitted facilities are required to provide similar plans, and that continuity between the two programs' requirements would be beneficial.

The Committee offered the following recommendations:

Part of The Committee recommends the tiered maximum setbacks for facilities above or below 1,000 AU required under ATCP 51.12 be removed.

Part of The Committee recommends that the department review the odor score model using the newest available research for efficacy in predicting odor.

The Committee, as a consensus, recommends the department gather the newest available research on predictive odor models for use in the next Committee review.

The Committee, as a consensus, recommends that DATCP produce templates for the required incident response and employee training plans, as well as the optional odor management plans and review the odor score credits awarded for each.

**Item #3      Planning for the next TEC meeting**

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Jackson informed The Committee that the next meeting will focus on general standards in ATCP 51 and finalizing The Committee's recommendations. The Committee should expect a survey of their availability for the week of May 8<sup>th</sup> during the next few days. A packet of materials for The Committee to prepare, including an agenda and discussion guide, will be sent at least one week in advance of the next scheduled meeting.

The meeting was adjourned at 3:48 pm.

(9) **DEVIATION FROM DESIGN SPECIFICATIONS.** Local approval of a livestock facility does not authorize an operator to populate that approved livestock facility if the construction or alteration of an animal lot or feed storage structure deviates materially, and without express authorization from the political subdivision, from design specifications included in the application for local approval.

**Note:** A political subdivision may inspect animal lots or feed storage structures to verify that they are constructed according to specifications included in the application for local approval. This section *does not require or prohibit* local inspection. A deviation under sub. (9) does not invalidate a local approval, but does prevent the livestock operator from populating the approved livestock facility until the deviation is rectified or approved.

(10) **EXEMPTION.** This section does not apply if all of the following apply:

(a) The operator holds a WPDES permit for the same proposed livestock facility, and that permit is based on housing for a number of animal units that is equal to or greater than the number for which the operator seeks local approval.

(b) The operator includes a copy of the WPDES permit with the operator's application for local approval.

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

### Subchapter III — Application and Approval

**ATCP 51.30 Application.** (1) **GENERAL.** If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(2) **LOCAL MODIFICATIONS.** A political subdivision may not alter the application form shown in *Appendix A* and attached *worksheets*, or require any additional information, except that a political subdivision may require information needed to determine compliance with local ordinance standards authorized under s. ATCP 51.10 (3) or 51.12 (1).

(3) **ADDITIONAL COPIES.** A political subdivision may require an applicant to submit up to 4 duplicate copies of the original application under sub. (1). Each duplicate copy shall include all of the *worksheets*, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

**Note:** A political subdivision must file one duplicate copy of the final application and attachments with the department, within 30 days after the political subdivision grants or denies that application. *See* s. ATCP 51.34 (5). If the political subdivision approves the application, the political subdivision must give the applicant a copy of the approved application, marked "approved." *See* s. ATCP 51.34 (3) (b). The applicant may wish to record this documentation with the register of deeds, and convey the documentation to any subsequent purchaser of the livestock facility. Among other things, documentation establishes "odor score" reference points for future expansions. *See* s. ATCP 51.14 (6).

(4) **LOCAL FEES.** (a) A political subdivision may charge an application fee established by local ordinance, not to exceed \$1,000, to offset the political subdivision's costs to review and process an application under sub. (1).

**Note:** Under s. 66.0628, Stats., any fee imposed by a political subdivision must bear a reasonable relationship to the service for which the fee is imposed.

(b) A political subdivision may not require an applicant to pay any fee, or post any bond or security with the political subdivision, except as provided in par. (a).

**Note:** If a waste storage facility is abandoned or not properly closed, a political subdivision may seek redress under s. 66.0627 or 254.59, Stats., and other law as appropriate. However, a political subdivision may not require an applicant for local approval to post any bond or security with the application.

(5) **COMPLETE APPLICATION.** Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is

needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

**Note:** *See* s. 93.90 (4) (a), Stats.

(6) **NOTICE TO ADJACENT PROPERTY OWNERS.** Within 14 days after a political subdivision issues a notice under sub. (5), the political subdivision shall mail a completed written copy of the notice in *Appendix C* to the recorded owner of each parcel of land that is adjacent to the proposed livestock facility. The political subdivision shall mail the notice by first class mail. A political subdivision may recover from the livestock facility operator, under sub. (4) (a), its reasonable cost to prepare and mail notices under this subsection. The sum of the costs charged to the livestock operator under this subsection and sub. (4) (a) may not exceed the maximum amount specified in sub. (4) (a). Failure to comply with the notice requirement under this subsection does not invalidate a political subdivision's approval of a proposed livestock facility, or create a cause of action by a property owner against the political subdivision.

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

**ATCP 51.32 Timely action on application.** (1) **GENERAL.** Except as provided in sub. (2), a political subdivision shall grant or deny an application under s. ATCP 51.30 (1) within 90 days after the political subdivision gives notice under s. ATCP 51.30 (5) that the application is complete.

(2) **TIME EXTENSION.** (a) A political subdivision may extend the time limit in sub. (1) for good cause, including any of the following:

1. The political subdivision needs additional information to act on the application.

2. The applicant materially modifies the application or agrees to an extension.

(b) A political subdivision shall give an applicant written notice of any extension under par. (a). The notice shall state the reason for the extension, and shall specify the extended deadline date by which the political subdivision will act on the application.

**Note:** *See* s. 93.90(4) (d) and (e), Stats.

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

**ATCP 51.34 Granting or denying an application.** (1) **GRANTING AN APPLICATION.** Except as provided in sub. (2), a political subdivision shall grant an application under s. ATCP 51.30 (1) if all of the following apply:

(a) The application complies with s. ATCP 51.30.

(b) The application contains sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility meets or is exempt from the standards in subch. II. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

**Note:** *See* s. 93.90 (4) (d), Stats.

(2) **DENYING AN APPLICATION.** A political subdivision may deny an application under s. ATCP 51.30 if any of the following apply:

(a) The application fails to meet the standard for approval under sub. (1).

(b) The political subdivision finds, based on other clear and convincing information in the record under s. ATCP 51.36, that the proposed livestock facility fails to comply with an applicable standard under subch. II.

(3) **WRITTEN DECISION.** (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

**Note:** The Wisconsin Livestock Facility Siting Law, s. 93.90, Stats., provides a new option for “aggrieved persons” to appeal a local livestock facility siting decision. The law does not limit any existing right that any person may have to challenge a local decision in court.

Under the Livestock Facility Siting Law, an “aggrieved person” may appeal a local decision to the state Livestock Facility Siting Review Board (“Board”). An “aggrieved person” means an applicant for local approval, or a person who resides or owns land within 2 miles of the proposed livestock facility.

An “aggrieved person” may appeal a political subdivision’s decision within 30 days after the political subdivision issues the decision (or, if the “aggrieved person” pursues a local administrative appeal process, within 30 days after that process is complete). The “aggrieved person” may challenge the local decision on the grounds that it incorrectly applied livestock facility siting standards under this chapter, or violated the Livestock Facility Siting Law.

When an appeal is filed, the Board must notify the political subdivision. Within 30 days after the political subdivision receives this notice, it must file a certified copy of its decision making record under s. ATCP 51.36 with the Board. The Board must review the local decision based on the evidence in the local record (the Board will not hold a new hearing or accept new evidence). The Board must make its decision within 60 days after it receives the certified local record (it may extend the deadline for good cause).

If the Board determines that the challenge is valid, it must reverse the decision of the political subdivision. The Board’s decision is binding on the political subdivision (once any court appeal of the decision is completed, or the appeal time lapses). If the political subdivision fails to comply with the Board’s decision, an “aggrieved person” may bring a court action to enforce the Board’s decision.

An “aggrieved person” or the political subdivision may appeal the Board’s decision to circuit court. The circuit court must review the Board’s decision based on the evidence in the local record.

(b) If a political subdivision grants an application for local approval, the political subdivision shall issue the local approval to the applicant in writing. The local approval shall include a duplicate copy of the approved application, marked “approved.” The duplicate copy shall include all of the worksheets, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

**Note:** A successful applicant may wish to record the approval documentation under par. (b) with the register of deeds, and convey the documentation to any subsequent purchaser of the livestock facility. Among other things, the documentation establishes “odor score” reference points for future expansions. See s. ATCP 51.14 (6).

(4) **TERMS OF APPROVAL.** An approval under sub. (1) is conditioned on the operator’s compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision’s authority to do any of the following:

(a) Monitor compliance.

(b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:

1. The operator materially misrepresented relevant information in the application for local approval.

2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.

3. The livestock facility fails to comply with applicable standards in subch. II.

**Note:** A political subdivision should exercise sound judgment in deciding whether to take compliance action under sub. (4) (b). The political subdivision may consider extenuating circumstances, such as adverse weather conditions, that may affect an operator’s ability to comply. A political subdivision may also consider the nature and seriousness of the violation, whether the violation was intentional or accidental, the operator’s compliance history, consistency of enforcement, and whether the problem can be resolved without formal enforcement. Before taking compliance action, a political subdivision should give the operator notice and a reasonable opportunity to demonstrate compliance.

(5) **NOTICE TO DEPARTMENT.** (a) Within 30 days after a political subdivision grants or denies an application under this section,

or withdraws an approval under sub. (4) (b) or s. ATCP 51.08 (2), the political subdivision shall do all of the following:

1. Give the department written notice of its action.

2. File with the department a copy of the final application granted or denied, if the political subdivision has granted or denied an application under this section. The copy shall include all of the worksheets, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

3. File with the department a copy of the political subdivision’s final notice or order withdrawing a local approval under sub. (4) (b) or s. ATCP 51.08 (2), if the political subdivision has withdrawn a local approval.

(b) A political subdivision shall submit the information required under pars. (a) and (b), by mail or e-mail, to the following address:

Wisconsin Department of Agriculture, Trade  
and Consumer Protection  
Agricultural Resource Management Division  
Bureau of Land and Water Resources  
P.O. Box 8911  
Madison, WI 53708-8911  
E-mail: [livestocksiting@wisconsin.gov](mailto:livestocksiting@wisconsin.gov)

(c) Failure to comply with par. (a) or (b) does not invalidate a political subdivision’s decision to grant or deny an application for local approval, or to withdraw a local approval.

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06; correction in (5) (b) made under ss. 13.92 (4) (b) 6. and 35.17, Stats., Register May 2020 No. 773.

**ATCP 51.36 Record of decision-making.** A political subdivision shall keep a complete written record of its decision-making related to an application under s. ATCP 51.30. The political subdivision shall keep the record for at least 7 years following its decision. The record shall include all of the following:

(1) The application under s. ATCP 51.30 (1), and all subsequent additions or amendments to the application.

(2) A copy of any notice under s. ATCP 51.30 (5), and copies of any other notices or correspondence that the political subdivision issues in relation to the application.

(3) A record of any public hearing related to the application. The record may be in the form of an electronic recording, a transcript prepared from an electronic recording, or a direct transcript prepared by a court reporter or stenographer. The record shall also include any documents or evidence submitted by hearing participants.

**Note:** Municipal law normally determines whether a hearing is required. See, generally, ch. 68, Stats.

(4) Copies of any correspondence or evidentiary material that the political subdivision considered in relation to the application.

(5) Minutes of any board or committee meeting held to consider or act on the application.

(6) The written decision required under s. ATCP 51.34 (3).

(7) Other documents that the political subdivision prepared to document its decision or decision-making process.

(8) A copy of any local ordinance cited in the decision.

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ordinance may incorporate the standards and application requirements by reference, without reproducing them in full.

**Note:** The livestock facility siting law, s. 93.90, Stats., limits the reasons for which a political subdivision may deny local approval. For the first 6 months after the effective date of this chapter, from May 1, 2006 to November 1, 2006, a political subdivision may deny local approval based on standards in this chapter without incorporating those standards by local ordinance. See sub. (1). Sub. (2) applies beginning on November 1, 2006.

**(3) MORE STRINGENT LOCAL STANDARDS.** A political subdivision may not apply local standards that are more stringent than the standards in this subchapter unless all of the following apply:

(a) The political subdivision is authorized to adopt the local standards under other applicable law.

(b) The political subdivision enacted the standards by local ordinance, before the livestock facility operator filed the application for local approval.

(c) The political subdivision enacted the standards based on reasonable and scientifically defensible findings of fact adopted by the political subdivision's governing authority.

(d) The findings of fact under par. (c) clearly show that the standards are needed to protect public health or safety.

**Note:** See s. 93.90 (3) (ar), Stats.

**(4) ORDINANCE PROVISIONS FILED WITH DEPARTMENT.** Within 30 days after a political subdivision enacts an ordinance provision under sub. (2) or (3), the political subdivision shall file a copy of the ordinance provision with the department. Failure to file the ordinance provision with the department does not invalidate the ordinance provision. The political subdivision shall file the ordinance provision, by mail or e-mail, at the following applicable address:

Wisconsin Department of Agriculture,  
Trade and Consumer Protection  
Agricultural Resource Management Division  
Bureau of Land and Water Resources  
P.O. Box 8911  
Madison, WI 53708-8911  
E-mail: [livestocksiting@wisconsin.gov](mailto:livestocksiting@wisconsin.gov)

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06; correction in (4) made under ss. 13.92 (4) (b) 6. and s. 35.17, Stats., Register May 2020 No. 773.

**ATCP 51.12 Livestock structures; location on property.** (1) **PROPERTY LINE AND ROAD SETBACKS; GENERAL.** Livestock structures shall comply with local ordinance requirements related to setbacks from property lines and public roads, except that no local setback requirement may do any of the following:

(a) Require a livestock structure to be set back more than 100 feet from any property line or public road right-of-way, except as provided in sub. (2), if the livestock facility will have fewer than 1,000 animal units.

(b) Require a livestock structure to be set back more than 200 feet from any property line, or more than 150 feet from any public road right-of-way, except as provided in sub. (2), if the livestock facility will have 1,000 animal units or more.

(c) Prevent the use of a livestock structure that was located within the setback area prior to the effective date of the setback requirement.

(d) Prevent the expansion of a livestock structure that was located within the setback area prior to the effective date of the setback requirement, other than an expansion toward the property line or public road to which the local setback applies.

**Note:** Many local jurisdictions have established basic property line and road setback requirements by ordinance. Setbacks vary depending on local circumstances, and often reflect years of local experience. Subsection (1) honors local setback requirements, provided that the setbacks do not exceed the limits specified in sub. (1).

**(2) MANURE STORAGE STRUCTURE; SETBACK.** A waste storage structure may not be located within 350 feet of any property line, or within 350 feet of the nearest point of any public road right-of-way, unless one of the following applies:

(a) The location of the waste storage structure complies with a local ordinance that specifies a shorter setback that is specific to waste storage facilities or waste storage structures.

(b) The waste storage structure existed prior to May 1, 2006. This paragraph does not authorize an expansion, toward a property line or public road right-of-way, of a waste storage structure that is located within 350 feet of that property line or public road right-of-way.

(c) The waste storage structure is a single new waste storage structure constructed no closer to the relevant property line or public road than a waste storage structure that existed on the same tax parcel prior to May 1, 2006, provided that the new structure is no larger than the existing structure and is located within 50 feet of the existing structure.

**Note:** See definition of "waste storage structure" in s. ATCP 51.01 (44).

**(3) NAVIGABLE WATERS AND WETLANDS.** A livestock facility shall comply with an applicable shoreland or wetland zoning ordinance that is enacted within the scope of authority granted under s. 59.692, 61.351 or 62.231, Stats.

**Note:** Essentially all navigable waters are now protected by ordinances that require building setbacks of 75 feet or more (depending on the ordinance). Zoning restrictions, if any, typically apply to *new or enlarged structures*. A zoning ordinance applies for purposes of sub. (3) if it is enacted within the scope of statutory authority under s. 59.692, 61.351 or 62.231, Stats., even if it is also enacted under other authority.

**(4) FLOODPLAIN.** A livestock facility shall comply with an applicable floodplain zoning ordinance that is enacted within the scope of statutory authority under s. 87.30, Stats.

**Note:** County or local zoning ordinances currently apply to many, but not all, waterways (not all waterways have mapped floodplains). Zoning restrictions, if any, typically apply to *new or enlarged structures*. A zoning ordinance applies for purposes of sub. (4) if it is enacted within the scope of statutory authority under s. 87.30, Stats., even if it is also enacted under other authority.

**(5) WELLS.** (a) Wells in a livestock facility shall comply with chs. NR 811 and 812.

(b) Except as provided in par. (c), new or substantially altered livestock structures shall be separated from existing wells by the distances required in chs. NR 811 and 812, regardless of whether the livestock facility operator owns the land on which the wells are located.

(c) Paragraph (b) does not prohibit the alteration of a livestock structure that existed on May 1, 2006, unless that alteration reduces the distance between the livestock structure and an existing well.

**Note:** DNR rules under chs. NR 811 and 812 spell out well construction and well location standards to protect water supplies. Violation of well setback requirements in ch. NR 811 or 812 may prevent use of a well. DNR may grant appropriate variances, as provided in chs. NR 811 and 812.

**(6) PRESUMPTION.** For purposes of local approval, a livestock facility is presumed to comply with this section if the application for local approval complies with s. ATCP 51.30.

**Note:** Under s. ATCP 51.30, an application must be complete, credible and internally consistent. The application must include an area map, a site map, and a certification that the livestock facility complies with this section (see *Appendix A*). A local approval is conditioned upon compliance in fact (see s. ATCP 51.34 (4)). The presumption in sub. (6) may be rebutted by clear and convincing evidence in the record (see s. ATCP 51.34 and 51.36).

**History:** CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

**ATCP 51.14 Odor and air emissions.** (1) **ODOR STANDARD.** Except as provided in subs. (2) to (4), a livestock facility shall have an odor score of at least 500. The operator shall calculate the odor score according to *Appendix A, worksheet 2*, or by using the equivalent spreadsheet provided on the department's website. An application for local approval shall include *worksheet 2* or the spreadsheet output.

**Note:** The spreadsheet equivalent of *Appendix A, worksheet 2* is available on the department's website at <http://livestocksiting.wi.gov/>.

*Odor score* is based on *predicted odor generation* (based on size and type of livestock facility), odor practices, and the proximity and density of "affected neighbors." See *Appendix A, worksheet 2*.

An *odor score* is a predictive estimate. The standard in sub. (1) applies only for purposes of local livestock facility siting decisions under this chapter. Failure to com-



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**Department of Agriculture, Trade and Consumer Protection**  
Secretary-designee Randy Romanski

TO: Senator Stephen Nass and Representative Adam Neylon, JCRAR Co-Chairs

FROM: Randy Romanski, Secretary-designee

DATE: March 31, 2021

SUBJECT: Biennial Report Reviewing Administrative Rules

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As required under Wis. Stat. s. 227.29(1), the Department of Agriculture, Trade and Consumer Protection (Department) has reviewed the administrative rules promulgated or administered by the Agency for rules that are: unauthorized; restricted in promulgation authority; obsolete or have been rendered unnecessary by, duplicative of, superseded by, or in conflict with another rule, state statute, federal statute or regulations, or a ruling of a court of competent jurisdiction; and economically burdensome. This memorandum lists those rules the agency has determined fall under each category, along with an explanation of the agency's determination and a description of the agency's actions, if any, to address each rule listed.

**Rules Reportable Under Wis. Stat. s. 227.29(1)(a)—Unauthorized Rules**

Sections ATCP 48.01(8), 48.24, 48.01(14), 48.08(3)(a), 48.12(2), 48.14(1)(b), 48.20(1)(a)3, 48.21(2)(a)2., (2)(b)1., (4)(a)1., and (Note), 48.22(5) and (Note), 48.28(Note), and 48.60 are unauthorized due to 2007 Wisconsin Act 20 and 2017 Wisconsin Act 115. Sections 189 and 2258 of 2007 Wisconsin Act 20 repealed Wis. Stat. ss. 20.115(7)(d) and 88.15, which authorized and appropriated funds for grants to county drainage boards and directed the Department to make grants to county drainage boards to aid compliance. 2017 Wisconsin Act 115 made additional changes to Wis. Stat. ch. 88, relating to drainage districts and regulating the removal of material from certain drainage ditches. This rule was identified in the Department's March 29, 2019 report. The Department intends to submit a petition for repeal of the unauthorized rule provisions.

Chapter ATCP 163 is unauthorized due to 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the dairy manufacturing facility investment credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. The Department intends to submit a petition for repeal of this rule.

Chapter ATCP 164 is unauthorized due to 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the meat processing tax credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. The Department intends to submit a petition for repeal of this rule.

Chapter ATCP 165 is unauthorized due to the passage of 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the food processing plant and food warehouse investment credit. The Act repealed several obsolete

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refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. The Department intends to submit a petition for repeal of this rule.

Chapter ATCP 166 is unauthorized due to the passage of 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the woody biomass harvesting and processing credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. The Department intends to submit a petition for repeal of this rule.

### **Rules Reportable Under Wis. Stat. s. 227.29(1)(b)—Rules for Which Authority to Promulgate Restricted**

Sections ATCP 72.145(7) and 73.145(7) are restricted by 2017 Wisconsin Act 330. The Act repealed Wis. Stat. s. 97.625(1)(am), (“[R]ules may not require the Department to inspect sealed combustion units during the period in which the sealed combustion units are covered by a manufacturer's warranty against defects.”) The repeal became effective November 1, 2019. This was identified in the Department’s, March 29, 2019 report. The Department plans to undertake a rulemaking to align the rule with statute.

### **Rules Reportable Under Wis. Stat. s. 227.29(1)(c)—Obsolete or Unnecessary Rules**

Section ATCP 72.145(3)(a) is reportable as obsolete due to the enactment of 2017 Wisconsin Act 330 on April 16, 2018. The Act created changes to the required placement of carbon monoxide detectors in Wis. Stat. s. 101.149(2) and (3). The rule cites to Wis. Stat. s. 101.149(2), and Wis. Admin. Code s. SPS 321.097 or 362.0915 but does not reflect the changed requirements. The Department plans to undertake rulemaking to align the rule with the statute.

Chapter ATCP 82 is reportable as obsolete by 2019 Wisconsin Act 152. With the creation of Wis. Stat. s. 98.146(1), bulk milk weigher and sampler licenses will no longer be required for persons who are licensed by an equivalent regulatory agency in another state. The Department plans to undertake rulemaking to align the rule with the statute.

Section ATCP 21.12 is no longer necessary, as the entire state was added to the federal pine shoot beetle quarantine in 2006; s. ATCP 21.17 is no longer necessary, as the entire state was added to the federal emerald ash borer quarantine in 2018. These rules were identified in the Department’s March 29, 2019 report. Chapter ATCP 21 is currently in rule revision.

Section ATCP 21.13 contains portions that are reportable as obsolete. Specifically s. ATCP 21.13(2)(c)1. and 2. refer to outdated methods to certify that honeybees are European honeybees. The outdated methods are the Fast Africanized Bee Identification System (FABIS) and morphometric methods. Section ATCP 21.13(3) is outdated because it requires a Varroa mite certification that hives are free of this pest. That certification is no longer realistic due to the ubiquitous presence and established Varroa mites throughout honeybee hives in Wisconsin and across the country. This rule is promulgated under Wis. Stat. s. 94.76(1), which allows the Department to issue such rules or orders or adopt such control measures which in its judgment may be necessary to prevent, suppress or control the introduction, spread or dissemination of honeybee diseases and pests in this state. The Department intends to update the rule.

Section ATCP 29.10(3)(c)2 is unnecessary as it requires pesticide manufacturers and labelers applying for a license to include with an application a report that states the gross revenue, for the preceding year, the application

derived from its sale or distribution of each pesticide product for use in this state. 2017 Wisconsin Act 59 removed this requirement from Wis. Stat. s. 94.68(2)(bm). This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake a rulemaking to update the rule.

Section ATCP 149.10 is unnecessary as 1991 Wisconsin Act 39 repealed the Potato Industry Act, Wis. Stat. s. 100.39, (establishing operations applicable to the potato industry and allowing the Potato Industry Board, with consent of the Department Secretary, to suspend those operations under the Potato Industry Act when in the public interest). This rule was identified in the Department's March 29, 2019 report. Chapter ATCP 149 is currently in rule revision.

Section ATCP 160.92(6) is unnecessary as it requires a fair organization to submit to the Department a copy of its annual financial report as published in a newspaper. 2015 Wisconsin Act 207 repealed the requirement that a fair organization publish in a newspaper its annual financial statement. This rule was identified in the Department's March 29, 2019 report. Chapter ATCP 160 is currently in rule revision.

### **Rules Reportable Under Wis. Stat. s. 227.29(1)(d)—Duplicative, Superseded, or Conflicting Rules**

Chapter ATCP 57 is reportable as conflicting with Wis. Stat. s. 95.72(2)(b) specifying exemptions from licensing for grease processors. Section ATCP 57.01(1)(g) exempts an operator that is solely engaged in the production of biofuels and does not produce either grease or other products for human or animal consumption. The statute does not include that same exemption. Chapter ATCP 57 is currently in rule revision.

Section ATCP 93.110(1) is reportable as conflicting with Wis. Stat. s. 168.25(1) requiring that the Department shall enforce this subchapter [storage of dangerous substances]. The rule provides for an agent to exercise jurisdiction over certain provisions of the rule without statutory authority to make that delegation. The rule also provides for a chief elected municipal officer to approve certain delegations of Department jurisdiction without statutory authority. The Department intends to undertake rulemaking to align the rule with statute.

Section ATCP 93.240(11) is reportable as conflicting with Wis. Stat. s. 93.06(7). The administrative rule provision sets forth a specific list of actions that may lead to a licensure action. Those actions conflict with the Department's statutory authority to deny, suspend or revoke a license in Wis. Stat. s. 93.06(7) where the rule sets forth a different set of factors. The rulemaking authority for storage of dangerous substances in Wis. Stat. s. 168.23(3) provides that [the rule] shall authorize the revocation or suspension of the certification or registration. But it does not authorize any specific licensure action triggers that justify a conflict between the rule and Wis. Stat. s. 93.06(7). The Department intends to undertake rulemaking to align the rule with statute.

Section ATCP 94.310(1)(a) conflicts with 2017 Wisconsin Act 59, s. 1680M. That Act created Wis. Stat. s. 168.04(4)(c) providing that any gasoline-ethanol fuel blend rule must be delayed until at least July 1, 2019. Additionally, Wis. Stat. s. 168.05(1) provides that no petroleum product imported into and received in this state or received from a manufacturer or refiner or from a marine or pipeline terminal within this state may be unloaded from its original container except as provided under sub. (5), sold, offered for sale or used until a true sample of not less than 8 ounces is taken as provided in this subchapter. This subsection does not apply if the Department has previously inspected the petroleum product at the refinery, marine or pipeline terminal. Each person importing or receiving a petroleum product which has not been previously inspected shall notify the inspector in the person's district of the receipt thereof, and the inspector shall take a sample of the petroleum product. That conflicts with s. ATCP 94.310(1)(a), which provides that [a]ll petroleum and other liquid fuel products imported into and

received in this state shall be subject to sampling by the Department prior to being unloaded, sold, offered for sale, or used. Historically, due to a lack of resources, the Department tests samples and does not test all products. This rule was identified in the Department's March 29, 2019 report. Chapter ATPCP 94 is currently in rule revision.

Section ATPCP 1.06(3)(a) conflicts with Wis. Stat. s. 227.42(2) as it requires the Secretary to grant or deny a contested case hearing request within 30 days after a complete request is filed. Wis. Stat. s. 227.42(2) deems a request denied if an agency does not enter an order disposing of the request for hearing within 20 days from the date of filing. This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake rulemaking to update the rule.

Section ATPCP 10.80(2)(a) conflicts with Wis. Stat. s. 95.21(2)(a) regarding rabies vaccination of dogs. The rule requires a rabies vaccination of dogs prior to import. The statute allows for rabies vaccination of dogs within 30 days after import. The statute applies to cats and dogs, but does not conflict with the rule requirement as it applies to vaccination of cats, but only to dogs. The Department plans to pursue a statutory change or rulemaking to align the statute and rule.

Sections ATPCP 29.11, 29.15(4), 29.20(6), 29.25(5), and 29.25(5)2. conflict with Wis. Stat. ss. 94.681, 94.685(3)(a)2., 94.703(3)(a)2., and 94.704(3)(a)2. due to changes in license fees by 2017 Wisconsin Act 59. Additionally, ch. ATPCP 29 may conflict with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and thus may require changes to the rule to maintain the Department's federal grant of authority to administer FIFRA in Wisconsin. This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake rulemaking to update the rule.

Section ATPCP 35.22 conflicts with Wis. Stat. s. 94.73(6)(b) and (c) as 2017 Wisconsin Act 59 increased the maximum eligible reimbursement costs for eligible sites under the Agricultural Chemical Cleanup Program. The Department has fully implemented these changes, but not yet updated the rule. This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake a rulemaking to update the rule.

Chapter ATPCP 50 conflicts with s. NR 151.075 (setting Silurian bedrock performance standards, including the technical standard for depth to bedrock). Chapter ATPCP 50 also conflicts with Wis. Stat. s. 281.16(3)(e) which requires that farmers be provided adequate cost-sharing if required to comply with ch. NR 151 performance standards. This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake rulemaking to align the rule with statute.

Chapter ATPCP 51 standards for nutrient management, waste facility storage, and process wastewater are in conflict, and not consistent with similar provisions in chs. ATPCP 50 and NR 151. Section 93.90(2)(a), of the statutes requires that siting standards in ch. ATPCP 51 not conflict with "rules promulgated under s. 92.05(3)(c) or (k), 92.14(8), 92.16, or 281.16(3) or ch. 283." This rule was identified in the Department's March 29, 2019 report. The Department plans to undertake a rulemaking to align the rule with statute.

Section ATPCP 51.30(4)(a) provides that a political subdivision may charge an application fee established by local ordinance, not to exceed \$1,000 to offset the political subdivision's costs to review and process [a livestock siting permit] application under sub. (1). A note in that section provides: Under s. 66.0628, Stats, any fee imposed by a political subdivision must bear a reasonable relationship to the service for which the fee is imposed. The rule is promulgated under s. 93.90(2)(a) and (b), Stats. Neither that rulemaking statute nor any other statute provides authority for the Department to set a maximum fee that a political subdivision may charge to review and process a livestock siting application. The Department plans to undertake a rulemaking to align the rule with statute.

Section ATCP 51.30(4)(b) states that a political subdivision may not require an applicant to pay any fee or post any bond or security with the political subdivision except as provided in par. (a). A note in that section provides: If a waste storage facility is abandoned or not properly closed, a political subdivision may seek redress under Wis. Stat. s. 66.0627 or 254.59 and other law as appropriate. However, a political subdivision may not require an applicant for local approval to post any bond or security with the application. The rule is promulgated under Wis. Stat. s. 93.90(2)(a) and (b). No statute authorizes the Department to prohibit a political subdivision from requiring a livestock siting permit applicant to pay any fee or post any bond or security with the political subdivision. The Department plans to undertake rulemaking to align the rule with the statute.

As of the Department's March 29, 2019 report, ss. ATCP 70.19 and 70.21 conflicted with the Federal Model Ordinance for marine shellfish, 21 C.F.R. Pt. 123. Chapter ATCP 70 conflicted with Wis. Stat. s. 97.01(9m), (99).30(3s), and (4)(b) which creates a new regulatory mechanism for micromarkets that was not reflected in the rule. The Department has undertaken rulemaking to update ch. ATCP 70. The new rule became effective February 1, 2020.

As of the Department's March 29, 2019 report, ss. ATCP 77.01(4m), 77.02(1), 77.22(2)(a), (3)(c) and (7), and 77.24(5)(a)1. and (c) conflicted with uniform requirements for milk testing in the *Pasteurized Milk Ordinance*, United States Public Health Service, US Food and Drug Administration. Sections ATCP 77.02, 77.10(2)(b), 77.14(1)(b) and (c), 77.34(5)(a) and (b) conflicted with updates of 40 CFR 141 (National Primary Drinking Water Regulations), which are federal requirements adopted in Wisconsin through ch. NR 809 and required to be followed by the Department for water testing lab certification pursuant to Wis. Stat. s. 93.12(9). The Department updated all of these administrative code provisions in a rulemaking for ch. ATCP 77 that became effective June 1, 2020.

Chapters ATCP 70 and 75 are reportable as potentially in conflict with a ruling of a court of competent jurisdiction based on a ruling that the law is unconstitutional as applied to the plaintiffs. Specifically, *Lisa Kivirist et al. v. DATCP*, No. 16-CV-06 (Wis. Cir. Ct. Lafayette County Sept. 29, 2017), held in part:

The Court declares that Wisconsin's food processing plant and retail food establishment licensing requirements set forth in Wis. Stat. s. 97.29(2)(a), Wis. Stat. s. 97.30(2)(a), Wis. Admin Code s. ATCP 70.03(1), and Wis. Admin Code s. ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. s. 97.29, Wis. Stat. s. 97.30, Wis. Admin Code ch. ATCP 70, and Wis. Admin Code s. 75 (sic) are unconstitutional as applied to Plaintiffs and all other similarly situated individuals.

Previously, in applying the court's order, the Department considered that Wis. Stat. ss. 97.29(2)(a) and 97.30(2)(a) set forth to whom the license requirement applies. While the rules articulate exemptions to the licensing requirements, those exemptions are first set forth in statute. In other words, the statute governs the exemptions; the rules do not. For that reason, rulemaking by the Department cannot reconcile a statute held unconstitutional in its application. Because rulemaking is not an effective tool to reconcile the court order with the statute, the Department did not previously initiate a rulemaking in response to the order, nor did it identify rulemaking as a proposed solution in its March 29, 2019 report. As of February 2021, the Department now faces additional filings in Lafayette County circuit court, including a motion to show cause for the Department's failure to reconcile the court order with Wisconsin law. While chapter 227 does not provide direction for a Department to address this particular situation, the Department believes the rules are reportable under Wis. Stat. s. 227.29(1)(d) unless and until the conflict between the statute's application and court order are resolved.

Sections ATCP 93.020(6)(b), 93.050(1), 93.400(1)(c) and (7)(b)2. regulate above ground storage tanks greater than 110 gallons and thus conflict with Wis. Stat. s. 168.22(3) (“This subchapter does not apply to storage tanks which are installed above ground level and which are less than 5,000 gallons in capacity.”). The Department identified this rule in its March 29, 2019 report and has sought a statutory change to align the rule with the statute. Neither the Department nor its agents have enforced ch. ATCP 93 for tanks less than 5,000 gallons since October 2019. The Department plans to undertake rulemaking to align the rule with the statute.

Section ATCP 134.05(4)(a) permits a landlord to require the prospective tenant to pay the landlord’s actual cost, up to \$20, of obtaining a consumer credit report and thus conflicts with Wis. Stat. s. 704.085(1)(a) created by 2017 Wisconsin Act 317 (allowing a landlord to require a prospective tenant to pay landlord’s actual costs up to \$25). The Department has nearly finalized its rulemaking process and expects to promulgate the change in early 2021.

As of the March 29, 2019 report, ch. ATCP 99 conflicted with Wis. Stat. s. 126.88(1) as 2017 Wisconsin Act 155 modified the statute to combine grain dealers and warehouse keepers’ minimum and maximum fund balances. The Department has undertaken rulemaking to align the rule with the statute. The new rule became effective March 1, 2020.

#### **Rules Reportable Under Wis. Stat. s. 227.29(1)(e)—Economically Burdensome Rules**

As identified in the Department’s March 29, 2019 report, s. ATCP 83.02(7)(c)3. was economically burdensome by requiring a person claiming that a dairy product is rBST-free substantiate that claim with an annual affidavit from the milk producers supplying the dairy certifying the milk producer does not use synthetic bovine somatotropin. The Department removed the annual re-certification requirement through rulemaking, with a final rule effective August 1, 2020.

**Discussion Guide – General Standards  
Livestock Facility Siting Technical Expert Committee**

**Scope of Discussion**

The committee's fourth discussion covers items related to general standards and procedure.

*Records of Decisions:* ATCP 51.34(3) states that a political subdivision shall issue its decision to grant or deny an application in writing based on findings of fact supported by evidence in the record under ATCP 51.36. This decision is required to be sent to the department under 51.34(5).

*Permit Modifications:* Approved facilities may wish to modify their permits/licenses to construct new or alter existing structures without exceeding the maximum amount of animal units.

*Monitoring for Compliance:* ATCP 51.34(4)(a) states that this chapter does not limit a political subdivision's authority to monitor for compliance with the standards for approval.

*More Stringent Local Standards:* S. 93.90(3)(a)9 and (3)(ar), Wis. Stats. authorize the use of standards that are more stringent than those in ATCP 51 to disapprove or prohibit an application, or to apply conditions to an approval. ATCP 51.10(3) further clarifies this authority.

During the meeting, DATCP staff will present on 2017 Wisconsin Act 108 items, more stringent local standards in ATCP 51 and related recommendations made by past committees. The committee will address the items, below, and determine if recommendations need to be made for changes to the department's rule.

Notes will be prepared by DATCP staff reflecting the committee's discussions and recommendations.

**Background**

*Records of Decisions:* Decisions to approve or deny applications issued under ATCP 51.34(3) shall:

- Be based on written findings of fact included in the decision, which may cite the presumptions of compliance created by a sufficient and credible application
- Be supported by evidence in the record under 51.36
- Be given to the department as part of its notice under ATCP 51.34(5)

*Permit Modifications:* Modifications made to the operation of an approved livestock facility without exceeding the maximum animal units in the prior approval must continue to comply with the standards for approval, as stated in the ATCP 51.35(4) terms of approval. Although this process is not clarified in rule, some political subdivisions have codified a process to do this.

*Monitoring for Compliance:* The presumption of compliance with the standards required for approval under ATCP 51.34(1) should be maintained for the duration of the approval. Regular local monitoring of the facility's operation may be necessary for the nutrient management standard, runoff management standard etc. ATCP 51.34(4)(a) states that it does not limit the ability for political subdivisions to monitor for compliance but does not clarify how to do so. Some political subdivisions have codified a process to monitor for compliance.

*More Stringent Local Standards:* More stringent local standards are authorized in statute and further clarified in rule if political subdivisions:

- Are authorized to adopt the standard under other applicable law
- Enacted the standard by ordinance before the facility filed an application for approval
- Enacted the standard based on reasonable and scientifically defensible findings of fact
- The findings of fact clearly show that the standards are needed to protect public health or safety

In 2010, the technical expert committee reviewed general standards and procedures and offered the following:

*Permit Modifications:*

- DATCP should provide guidance on how to respond to changes (in operation) at permitted facilities

*Monitoring for Compliance:*

- DATCP should clarify the intent of ATCP 51.34(4), as well as provide more guidance to local authorities on compliance monitoring

In 2014-2015, the technical expert committee reviewed general standards and procedures and offered the following (\*indicates a repeat from a previous TEC\*):

*Permit Modifications:*

- ATCP 51 should simplify the permit modification process to enable permitted facilities to secure streamlined approval of nutrient management plans if adding animals without changes to Worksheets 4 and 5

*Monitoring for Compliance:*

- \*DATCP should clarify the intent of ATCP 51.34(4), as well as provide more guidance to local authorities on compliance monitoring\*

In 2018-19, the technical expert committee reviewed general standards and procedures and offered the following (\*indicates a repeat from a previous TEC\*):

*Permit Modifications:*

- \*Approvals for adding animal units without changes to Worksheets 4 and 5 should be a streamlined process, consisting mainly of updates to Worksheet 3 (nutrient management)\*
- ATCP 50.30(6) should require notice to adjacent property owners for permit modifications
- Permit modifications should be allowed to increase animal units beyond the previous approved maximum number by less than 20%

*Monitoring for Compliance*

- ATCP 51 should require political subdivisions to monitor permitted facilities using an approved DATCP checklist. This checklist should cover key aspects of compliance with standards in ATCP 51

**Items for consideration**

*Records of Decisions:*

The requirements for content in a record of decision, and what to do with it, are stated in ATCP 51. However, some political subdivisions have expressed that the content language in rule is not clear enough. A thorough record of decision is a benefit to both the political subdivisions and the department, as a record of the local

review process. These records are especially valuable in the event of an appeal. What can be done to ensure consistent records of decisions and improve ease-of-use for local governments?

*Permit Modifications:*

The review process for modifications to the operation of approved facilities is not clarified in ATCP 51. Permit modification is a normative process. Several political subdivisions around the state already have adopted their own language in ordinance to establish this process. Is consistency in administering permit modifications a concern?

*Monitoring for Compliance:*

The ability for a political subdivision to monitor approved facilities for compliance with the standards for approval is not limited in ATCP 51. However, ATCP 51 lacks definitive guidance for methods and authorities to monitor for compliance. Previous TEC reviews have identified the absence of guidance and recommended that there be more clarity in rule, as well as material guidance such as a checklist for consistent monitoring of approved facilities. Is more clarity needed for consistent monitoring of approved facilities and should the department provide guidance materials for monitoring?

*More Stringent Local Standards:*

The authority for more stringent local standards is given in statute and clarified in rule. However, some political subdivisions feel the qualifying criteria to adopt and administer these standards is too vague. This has led to very few political subdivisions utilizing this authority, and those that do may be inconsistent with how they administer it. Should ATCP 51 further clarify this authority and how to consistently utilize it where appropriate?

**Questions for the Technical Expert Committee:**

1. Does the language for records of decision in ATCP 51.34(3), 51.34(5) and 51.36 clearly lay out how local permitting authorities should construct their record of decision?
  - a. Could a template provided by DATCP upon request, or as an appendix to ATCP 51, help keep a consistent expectation for this record?
2. How can ATCP 51 clarify the use and procedure for permit modifications?
3. Is the language in ATCP 51.34(4)(a) sufficient for supporting the monitoring efforts of local permitting authorities?
  - a. Should DATCP provide a monitoring checklist upon request, or as an appendix to ATCP 51, to give consistency to monitoring efforts?
4. Should ATCP 51 further clarify the procedure for adopting more stringent local standards under ATCP 51.10(3)?
  - a. If yes, what can ATCP 51 achieve while maintaining the intent of statute?
5. Do members of the TEC have any other general standards that they would like to discuss?



## 2022/2023 Livestock Facility Siting Technical Expert Committee (Committee) ATCP 51 Review Recommendations, January – April 2023

### ***January 27, 2023 Meeting on the Nutrient Management Standard***

The Committee, as a consensus, recommends updating 51.16 to require compliance with the 2015 version of the NRCS 590 technical standard for nutrient management.

Part of The Committee recommends that ATCP 51.16 reference another state administrative rule, such as ATCP 50, to keep livestock facility siting requirements for nutrient management consistent with other state rules.

The Committee, as a consensus, recommends adding a requirement to include the WPDES factsheet with a copy of the WPDES permit if an applicant is using the exemption afforded in ATCP 51.16(4) for Worksheet 3 of the application.

The Committee, as a consensus, recommends that livestock operators be allowed to prepare their own nutrient management plans and answer their own checklists in Worksheet 3 of the application if they meet the criteria for qualification under ATCP 50.48(2).

### ***March 6 and 13, 2023 Meetings on the Waste Storage and Runoff Management Standards***

The Committee, as a consensus, recommends that DATCP review the definition for “substantially altered” under ATCP 51.01(40) to determine if it properly applies in all scenarios.

The Committee, as a consensus, recommends updating 51.18 to incorporate the newest conservation practice standards for new and substantially altered waste storage facilities. DATCP should consider what the best vehicle for achieving that recommendation is, whether that be through cross-referencing another state rule, such as ATCP 50, or directly referencing dated versions of those conservation practice standards.

The Committee, as a consensus, recommends adding a requirement to include the WPDES factsheet with a copy of the WPDES permit if an applicant is using the exemption afforded in ATCP 51.18(7) for Worksheet 4 of the application.

The Committee, as a consensus, recommends that DATCP review the criteria for evaluating existing waste storage facilities under ATCP 51.18(2), specifically criteria (c).

Part of the Committee recommends that the nutrient management standard should remain the focus of waste management, rather than a size-based or time-based waste storage capacity requirement. Updating the NRCS 590 standards for nutrient management plans would address that.

The Committee, as a consensus, recommends that DATCP consider the WPDES permit timeline and aim for better consistency between it and local siting approval, specifically the requirement for submission of engineering designs.

The Committee, as a consensus, recommends updating 51.20 to incorporate the newest conservation practice standards for new and substantially altered animal lots and feed storage structures. DATCP should consider what the best vehicle for achieving that recommendation is, whether that be through cross-referencing another state rule, such as ATCP 50, or directly referencing dated versions of those conservation practice standards.

The Committee, as a consensus, recommends that existing feed storage structures should be required to be evaluated for risk of discharge or leaching.

Part of the Committee recommends that DATCP review the 70% moisture threshold for feed storage runoff management standards to determine if it is still the appropriate number.

***April 11, 2023 Meeting on the Odor and Setbacks Standards***

Part of The Committee recommends the tiered maximum setbacks for facilities above or below 1,000 AU required under ATCP 51.12 be removed.

Part of The Committee recommends that the department review the odor score model using the newest available research for efficacy in predicting odor.

The Committee, as a consensus, recommends the department gather the newest available research on predictive odor models for use in the next Committee review.

The Committee, as a consensus, recommends that DATCP produce templates for the required incident response and employee training plans, as well as the optional odor management plans and review the odor score credits awarded for each.