State of Wisconsin
Governor Scott Walker

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

DATE: February 3, 2014

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary

John Petty, Administrator
Division of Agricultural Resource Management

SUBJECT: Four Year Evaluation Report for Livestock Facility Siting

PRESENTED BY: Richard Castelnuovo and Steve Struss

RECOMMENDATION:

The department requests that the Board accept this report the Livestock Facility Siting Law ("siting law"), and consider this report as part of the actions necessary to complete the four year review required by the siting law, s. 93.90, Stats.

SUMMARY / BACKGROUND:

Submitted as part of the four year review of ch. ATCP 51, Wis. Admin. Code, the attached report provides an update on local implementation of the law, and describes the requirements for conducting a four year review.

Under s. 93.90 (2) (c), Stats, DATCP must review the livestock facility siting standards in ch. ATCP 51 at least once every 4 years, and as part of its review, appoint a committee of experts to provide advice.

This is the second four year review conducted by DATCP since the adoption of the siting rule, ch. ATCP 51, in 2006.

In 2010, DATCP initiated its first four year review of the rule and siting standards. As part of its review, the department prepared a report, *Four Year Evaluation Report on Implementation of the Livestock Facility Siting Rule ch. ATCP 51 Wis. Admin. Code* (2010 Four Year Report), available at http://datcp.wi.gov/uploads/Environment/pdf/LivestockSitingRuleFourYearReviewFullReport.pdf.

It also utilized a technical expert committee whose contributions are documented on this website, http://datcp.wi.gov/Environment/ Livestock_Siting/Technical_Expert_Committee/index.aspx.

ATTACHMENTS:

Four Year Evaluation Report on Implementation of the Livestock Facility Siting Rule, ch. ATCP 51 Wis. Admin. Code

Four Year Evaluation Report on Implementation of the Livestock Facility Siting Rule ch. ATCP 51 Wis. Admin. Code

The Department of Agriculture Trade, and Consumer Protection (DATCP) has prepared this report to fulfill its responsibility under s. 93.90(2)(c), Stats., to review the livestock facility siting standards under ch. ATCP 51, Wis. Administrative Code, at least once every four years. This is the second four year review conducted by DATCP since the adoption of the siting rule, ch. ATCP 51, in 2006. This report provides an update on local implementation of the law, and describes the requirements for conducting a four year review.

I. Implementation Activities

A. State Framework

The siting legislation was the product of a compromise intended to balance local control, community oversight, environmental protection and the need for a predictable permitting process. When enacted in 2004, s. 93.90 established a statewide framework for local regulation of livestock facilities, including limitations on the exclusion of livestock facilities in agricultural zones and requirements for issuing conditional use or other permits for siting livestock facilities. It also created the Livestock Facility Siting Review Board (LFSRB) to hear appeals concerning local permit decisions.

Implementation of the law was delayed until DATCP developed rules. The new rule, ch. ATCP 51 became effective on May 1, 2006.

The 2004 statute and 2006 rule have not been revised since their adoption. A revision of the rule was initiated in 2010 but was placed on hold pending the revision of ch. ATCP 50, the department's rule relating to the soil and water resource management program.

B. Local Ordinance Adoption and Administration

Under the siting law, local governments are not required to adopt an ordinance to regulate the siting of livestock facilities; however, if a local government elects to require a permit, they must follow the requirements of the siting rule for approving new or expanding livestock facilities. Local ordinances can require either a zoning or licensing permit.

Historically, local governments relied on zoning tools such as a conditional use permit to regulate the siting of livestock facilities. As defined by s. ATCP 51.01(21), local approval of new or expanded livestock facility includes the option of issuing a license in addition to a conditional use permit or special exception. By recognizing licensing, the rule allows permitting of livestock facilities in unzoned areas.

Since 2006, 24 counties, 61 towns, two cities (Berlin and Fitchburg), and two villages (Germantown and Richfield) have adopted siting ordinances. See Appendix A for the list of local ordinances organized by county. Of the 89 ordinances, 55 are zoning ordinances requiring conditional use permits and 34 are licensing ordinances.

Most local ordinances require permits for facilities that exceed 500 animal units (AUs) of cattle, swine, poultry, sheep or goats. Seventeen local governments have ordinances with lower permit

thresholds. The siting law provided a limited window in 2006 for local governments to grandfather permit thresholds below 500 AUs into their ordinances. Three local ordinances have set a threshold higher than 500 AUs for issuing permits. In one county, licenses are required for new or expanding livestock facilities that will have between 500 and 999 AUs.

Many local governments approved siting ordinances within two years after ATCP 51 became effective. In the case of counties, nearly all the ordinances were enacted during this time period. Based on the lack of ordinance adoption in recent years, it is unlikely that many more counties will join those regulating livestock facility siting. In contrast, towns have been steadily passing ordinances from 2006 forward, with about one-third of the ordinances adopted between 2010 and 2013. Towns remain active adopters of ordinances for several reasons, including the revision of zoning ordinances to gain recertification under the Farmland Preservation Program. Overall, local adoption has slowed considerably since the period between 2006 and 2007 when 55 ordinances were adopted.

A range of factors influence a local decision to adopt a siting ordinance. Siting ordinances offer communities a well-defined process for the orderly and timely resolution of contentious issues, scientifically based standards intended to protect public health and safety, and the authority to monitor livestock operations for compliance. Siting ordinances also require financial and staff resources to support administration, limit local discretion to make permitting decisions, and add a layer of regulation that may be viewed as unneeded given the regulatory alternatives (WPDES permits for operations over 1000 AUs). These factors not only play a role in the future adoption of ordinances but have persuaded a few jurisdictions to modify or repeal their ordinances.

Special Challenges Facing Towns

In an article featured in the December 2013 edition of the Wisconsin Towns Association Newsletter, DATCP shared insights into the challenges facing towns that implement siting ordinances.

There are a number of ways town officials can get themselves into a bind. In revising their zoning ordinances, they may take the simplest route available, and add nothing more than the following to their list of conditional uses in agricultural zoning districts:

> Livestock facilities housing more than 500 animal units of cattle, poultry, swine, sheep, or goats or any other animal confinement facilities housing other types of animals (e.g. mink).

Because ordinances written in this abbreviated manner do not spell out all of the extensive procedures under the siting law, town officials in the future may be operating in the dark and skip steps necessary to properly approve a permit.

In other cases, towns may revise their zoning ordinances without making the changes legally required to regulate livestock siting under state law. Ordinances may carry forward conditional use permit (CUP) requirements adopted before the siting law became effective. For example, town ordinances may require a CUP for livestock raising over 1500 hogs or sheep or poultry operations raising over 10,000 birds. When an ordinance requires a permit for operations under 500 AUs, it cannot be enforced unless the town followed specific steps to grandfather this lower threshold for permits.

A recent incident illustrated one of the most unfortunate outcomes a town might face. In 2006, a town revised its zoning ordinance to incorporate the new siting rule, including the use of the state mandated permit application. A number of years after the ordinance revision, the town was approached by a livestock operator interested in an expansion involving more than 500 AUs. Instead of requiring that the operator complete the standard application form, the town used its normal permit application form that did not collect the necessary information to approve the permit under state law. After the permit was issued, town officials were forced to rescind the permit once they learned of the mistake.

Whether a local government administers a licensing or zoning ordinance, it must follow state-prescribed requirements to issue permits for new and expanding livestock facilities. Every local government must apply the ATCP 51 standards when deciding a permit application. In addition, a local government may only apply a more stringent standard if its ordinance includes scientifically defensible findings of fact demonstrating that the more stringent standard is necessary to protect public health and safety. State approval is not required unless the requirement is more stringent than state water quality standards. See, s. 92.15(3), Stats. For example, state approval is required for a provision in a siting ordinance that imposes manure spreading restrictions beyond those required by the 2005 version of NRCS technical standard 590. Six local ordinances have more stringent standards including distinct requirements for facilities to maintain separation distances to residences, municipal boundaries and wells.

Local governments are required by state law to follow procedures and specific timelines for making permit decisions. Every local government must use a state-approved application designed to document a proposed operation's compliance with technical standards. Farmers must demonstrate the compliance of their proposed facility with state standards related to property line and road setbacks, odor management, waste and nutrient management, manure storage facilities and runoff management. Facilities permitted by DNR may use their WPDES permit in lieu of submitting certain worksheets required under the siting law. A little less than half of the permitted facilities over 1,000 AUs relied on their DNR permits to apply for their siting permits.

Once an application is submitted, a local government must make a determination that the application is complete. Once an application is determined to be complete, there is a presumption that the application complies with the state standards for permit approval. A compliance determination also activates notice requirements, and necessitates that a local government to make its final decision on the permit application with a specified period.

C. Local Permitting

Through December 2013, local governments reported 113 active permits. As a point of comparison, DATCP in its 2010 report listed 55 siting permits. To date, counties have issued over 80 percent of the 112 permits, with Jefferson, Manitowoc, Shawano, Trempealeau, and Walworth counties as the primary issuers of permits. Nearly 90 percent of the permitted facilities are dairy operations. Of the non-dairy operations permitted under local ordinances, 9 are predominately poultry operations, 4 are predominately swine, and 3 are predominately beef.

Table 1. Permitted facilities by size category

Animal units kept at facility	Number of facilities
Less than 499	8
500 to 899	29
900 to 999	28
1000 to 2499	25
2500 to 3999	8
4000 to 5499	8
Over 5500	7

Based on a review of 70 percent of the permits issued, local governments have averaged less than 80 days to approve permits from the receipt of an application to the issuance of a final decision. The turnaround on permit applications is well within the timeframe established under the siting law, which affords local governments 45 days to make a completeness determination after an application has been received, and another 90 days to make a final decision.

D. Livestock Facility Siting Review Board (LFSRB) activities

The LFSRB is a seven member group authorized by s. 93.90(5) to review appeals of local permit decisions involving new and expanded livestock facilities. The Board has heard seven appeals concerning five facilities as more fully described in Appendix B. One of the LFSRB decisions was appealed and eventually heard by the Wisconsin Supreme Court. In *Adams v. Wisconsin LFSRB*, 2012 WI 85 (2012), available at, http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=84725, our state's highest court affirmed the LFSRB's decision invalidating permit conditions imposed by the Town of Magnolia on a Rock County dairy farm. This case upheld the state legal framework for regulation of livestock facilities and established precedent for the LFSRB to carry out its role in reviewing cases.

E. DATCP's Role

DATCP has oversight responsibilities under the siting law. First and foremost, DATCP is responsible for maintaining and revising the standards in ch. ATCP 51 used by local governments in issuing permits. As part of this responsibility, DATCP must review siting standards in ATCP 51 every four years based on criteria set forth in s. 93.90 (2)(b). To make any changes in the state siting standards, DATCP must initiate rulemaking and formally adopt changes as part of the standards in ch. ATCP 51.

In addition, DATCP's oversight duties include providing technical assistance to farmers and local governments to help implement the siting law, tracking local ordinance adoption and permitting activities, and reporting to the Board of Agriculture, Trade and Consumer Protection (ATCP Board). DATCP is not authorized to issue siting permits to individual facilities or enforce permits issued by local governments.

During the first few years of siting rule's implementation, DATCP focused considerable effort on assisting local governments and farmers in making the transition to the new permitting system by offering general outreach, training and technical assistance on compliance with the rule. DATCP worked with the Wisconsin Towns Association and other local government associations to develop model ordinances, available at http://datcp.wi.gov/Environment/Livestock_Siting/Local_Implementation/index.aspx. Over time, DATCP's focus shifted to providing individual assistance to help farmers properly complete applications and local governments correctly apply the siting law. Reduced staff also limited DATCP's capacity to provide assistance and other support services.

Also, during early years of the siting rule, DATCP intensively tracked and reported the adoption of siting ordinances and permit decisions. Under ss. ATCP 51.10(4) and 51.34(5)(b), DATCP must receive a copy of any siting ordinance within 30 days of local adoption and any permit issued under a siting ordinance within 30 days of issuance. DATCP actively reached out to local governments to ensure that these entities met their reporting responsibilities. This outreach yielded more accurate information about regulatory activity at the local level.

These efforts enabled DATCP to meet extensive reporting requirements imposed under siting law. For the first year of implementation beginning in 2006, DATCP was required to submit monthly reports to the ATCP Board regarding implementation of the siting law. DATCP also provided the ATCP Board annual reports, available at

http://datcp.wi.gov/Environment/Livestock_Siting/Program_Reports/index.aspx, during the first three years of siting law's implementation before preparing its first four year review.

In 2010, DATCP initiated its first four year review of the rule and siting standards. The department conducted statewide listening sessions designed to provide the public an open-ended opportunity to comment on a broad scope of implementation issues beyond the technical standards. The results of these listening sessions and other matters were summarized in DATCP's first four year report, *Four Year Evaluation Report on Implementation of the Livestock Facility Siting Rule ch. ATCP 51 Wis. Admin. Code* (2010 Four Year Report), available at http://datcp.wi.gov/uploads/Environment/pdf/LivestockSitingRuleFourYearReviewFullReport.pdf.

The overriding focus of the four year review, however, involved the technical review of the state siting standards by a technical expert committee. Materials related to the work of expert committee, including recommendations of committee members, are available at, http://datcp.wi.gov/Environment/ Livestock_Siting/Technical_Expert_Committee/index.aspx.

Based on the four year review, DATCP prepared a scope statement for ATCP 51, which was approved by the ATCP Board in October, 2010. In December 2010, DATCP presented a memorandum to the ATCP Board to clarify the intended scope of rulemaking. Regarding maximum permit fees, DATCP pointed to the constructive negotiations between agricultural and local government leaders that might lead to a consensus on this issue. With respect to the issue of financial responsibility requirements for permitted facilities, DATCP determined that there were too many challenges to be resolved through rulemaking, and in the end, this matter was best addressed outside of rulemaking, e.g., by enactment of changes in the law.

In 2011, DATCP informed the ATCP Board that it intended to place ATCP 51 rulemaking on hold, pending the revision of ch. ATCP 50. On January 14, 2014, following legislative review of the revised ATCP 50, the DATCP Secretary signed the final draft rule. The revised ATCP 50 should be effective on May 1, 2014.

Since then, DATCP staff extensively evaluated the information in its possession regarding ordinances and permits, and took a series of actions intended to secure more reliable information including a review of ordinances published on the Internet, direct communication with local authorities to confirm activities, and publication of an article in the December 2013 Wisconsin Towns Association Newsletter (see sidebar on page 2). These efforts resulted in a more accurate depiction of local activity related to ordinances and permits.

In the eight years since adoption of the siting rule, DATCP has gained considerable experience, knowledge and understanding of the issues surrounding local implementation. To ensure effective evaluation, DATCP developed systems to track local regulatory activities and made use of tools to evaluate implementation of the rule. DATCP gathered a wide range of implementation information in the course of performing its responsibilities related to education, outreach and technical assistance. In addition to contacts with stakeholders, and tracking of ordinances and permit applications, DATCP has used targeted surveys of stakeholders and public listening sessions to expand its understanding of the issues.

DATCP has shared its experience, knowledge and insights regarding program implementation in reports to the ATCP Board. Throughout the implementation of ch. ATCP 51, DATCP has consistently maintained that the siting standards and process have produced a uniform and

predictable framework for permitting new and expanding livestock facilities in jurisdictions that have adopted siting ordinances. For local officials, there is more certainty in responding to proposed new or expanding livestock operations. Local officials have a clear road map for making permit decisions and the knowledge that all applicants will be held to the same standards designed to protect water quality and control odors. Likewise, farmers can move forward with construction and expansion plans secure in the knowledge that they can reach their business goals if they meet attainable technical standards for a permit.

II. Four-Year Review Requirements and Standards

Sec. 93.90 (2) (c) requires that DATCP review the standards under the siting rule at least once every four years. To fulfill this responsibility, Sec. 93.90(2)(d) requires that DATCP appoint a committee of experts to provide advice regarding the department's review of rules under par. (c).

DATCP is guided by the statute's overall purpose as defined in sec. 93.90(1); namely, "an enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities." Furthermore, sec. 93.90(2)(b) provides specific benchmarks for evaluating standards adopted under the rule. According to this section in the statute, siting standards should be:

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

Following its review of the rule, DATCP may take actions based on the findings and recommendations generated by the review. DATCP has the option of proceeding to rulemaking, although it is not obligated to pursue this option.

Appendix A
Local Ordinances by County

County	Regulatory Authority	Type of Permit	Ordinance Effective Date
Adams			
	Adams County	CUP	9/20/2006
Barron			
	Barron County	CUP	10/16/2006
	Prairie Lake	Licensing	4/1/2009
Burnett			
	Burnett County	Licensing	7/21/2007
Calumet			
	Town of Rantoul Zoning Ordinance	CUP	11/28/2011
Chippewa			
	Chippewa County	CUP	2/12/2008
Columbia			
	Town of Arlington	Licensing	10/4/2006
	Town of Lowville	Licensing	7/13/2006
Crawford			
	Crawford County Land Conservation, P&Z Committee	Licensing	8/21/2006
Dane			
	City of Fitchburg	CUP	4/24/2012
	Town of Cottage Grove	Licensing	1/25/2007
	Town of Vienna	Licensing	7/19/2010
Dodge			
	Dodge County Zoning Department	CUP	8/1/2006
	Town of Elba	CUP	2/16/2011
	Town of Fox Lake	CUP	6/9/2007
	Town of Herman	CUP	5/29/2012
	Town of Portland	CUP	10/26/2006
	Town of Theresa	CUP	5/1/2010
Door			
	Town of Gardner	Licensing	3/13/2013
Douglas			
	Douglas County	Licensing	12/21/2006
Eau Claire			
	Eau Claire County	CUP	12/19/2006
Florence			
	Florence County	Licensing	10/17/2006
Fond du Lac			
	Town of Byron	CUP	10/10/2006
	Town of Calumet	Licensing	10/13/2006
	Town of Eden	CUP	8/11/2011
	Town of Empire	CUP	Under revision
	Town of Lamartine	CUP	12/21/2010

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County	Regulatory Authority	Type of Permit	Effective Date
	Town of Marshfield	CUP	10/13/2006
	Town of Metomen	CUP	11/1/2006
	Town of Oakfield	CUP	2/7/2011
	Town of Ripon	CUP	Under revision
	Town of Rosendale	Licensing	3/11/2008
	Town of Springvale	Licensing	10/30/2006
	Town of Taycheedah	CUP	3/7/2013
	Town of Waupun	Licensing	8/13/2007
Green			
	Green County	CUP	11/14/2006
	Town of Monroe	CUP	5/1/2012
Green Lake			
	City of Berlin	CUP	11/23/2007
Iowa			
	Brigham	Licensing	4/8/2013
	Town of Wyoming	Licensing	4/19/2007
Jackson			
	Jackson County	Licensing	9/11/2006
Jefferson			
	Jefferson County Zoning Department	CUP	9/11/2006
Juneau			
	Town of Armenia	CUP	5/5/2006
Kewaunee			
	Town of Ahnapee	Licensing	6/13/2007
	Town of Carlton	Licensing	4/20/2007
	Town of Casco	Licensing	7/23/2007
	Town of Franklin	Licensing	8/1/2007
	Town of Luxemburg	Licensing	7/7/2007
	Town of Pierce	Licensing	9/17/2007
La Crosse			
	La Crosse County	CUP	7/1/2013
	Town of Burns	CUP	1/8/2013
Lincoln			
	Lincoln County	CUP	11/14/2006
Manitowoc			
	Manitowoc County Soil and Water Conservation Dept.	Licensing	1/1/2007
Marathon			
	Marathon County CPZ Department	Licensing	10/17/2007
Marquette			
	Town of Buffalo	Licensing	12/15/2006
	Town of Packwaukee	Licensing	8/1/2007

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County	Regulatory Authority	Type of Permit	Effective Date
Pepin			
	Town of Frankfort	CUP	7/31/2013
Pierce			
	Town of River Falls	Licensing	9/2/2008
Racine			
	Racine County	CUP	10/26/2006
Richland			
	Richland County	Licensing	7/30/2009
Rock			
	Town of Bradford	CUP	10/18/2006
	Town of Clinton	CUP	10/30/2006
	Town of Harmony	CUP	10/2/2006
	Town of Johnstown	CUP	8/1/2007
	Town of Magnolia	CUP	5/24/2006
	Town of Plymouth	CUP	10/25/2006
	Town of Porter	CUP	8/7/2007
	Town of Rock	CUP	10/2/2006
	Town of Spring Valley	CUP	8/14/2006
	Town of Turtle	CUP	10/20/2006
	Town of Union	CUP	4/17/2007
Sauk			
	Town of Spring Green	Licensing	4/7/2009
Sawyer			
	Town of Edgewater	Licensing	1/13/2009
Shawano			
	Shawano County ZA	CUP	10/25/2006
Sheboygan			
	Town of Rhine	CUP	11/1/2006
St. Croix			
	St. Croix County	CUP	10/31/2006
Taylor			
	Town of Little Black	Licensing	7/6/2008
	Town of Medford	Licensing	12/18/08
	Town of Taft	Licensing	5/13/2013
Trempealeau			
	Trempealeau County	CUP	10/25/2006
Vernon			
	Vernon County	Licensing	8/7/2007
Walworth			
	Walworth County	CUP	9/22/2006

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County	Regulatory Authority	Type of Permit	Ordinance Effective Date
Washington			
	Town of Addison	CUP	10/21/2010
	Town of Wayne	CUP	4/21/2010
	Village of Germantown	CUP	1/1/2007
	Village of Richfield	CUP	5/16/2013
Waupaca			
	Waupaca County	CUP	6/3/2010
Winnebago			
	Town of Clayton	Licensing	3/20/2013
	Town of Nepeuskun	CUP	12/21/2010

Appendix B
Livestock Facility Siting Board Decisions

Docket No.	Name	Decision	Appeal
07-L-01	RE: Larson Acres v. Town of Magnolia	**Aug 27, 2007**– Upheld the challenge by affirming permit and certain conditions, and reversing multiple conditions imposed by the Town	Supreme Court affirmed LFSRB decision in 2012 (See page
07-L-02	RE: Mark and Jane Brothen and Eugene and Jeanne Dubord v. Vernon County	**January 18, 2008**– Denied request for review on the grounds that the LFSRB lacked jurisdiction since the county elected to not require an application and approval for the proposed facility.	None
08-L-01	RE: Stadler v. Crawford County	**April 18, 2008** – Initially upheld the challenge to the permit on the grounds that the nutrient management plan as part of the application was not complete, credible and internally consistent. **June 3, 2008** – Upon reconsideration, denied the challenge on the grounds that the applicant had properly calculated the amount of land available to spread the manure volumes calculated based on the maximum number of animals, as established by additional submissions, and had accordingly met the standards for nutrient management in ch. ATCP 51, Wis.Adm. Code.	None
08-L-02	RE: Audrey Van Dyke v. Racine County	**August 18, 2008** – Upheld the challenge and invalidated the permit on the grounds that the nutrient management plan included as part of the application did not reflect that the amount of land available to spread the manure volumes calculated to be generated by the maximum number of animal units, meets the standard for nutrient management.	None
09-L-01	RE: Audrey Van Dyke v. Racine County	**May 18, 2009** – Denied the challenge and affirmed the permit on grounds that the inconsistencies in the plan did not overcome the presumption of compliance created by the checklist.	None
10-L-01	RE: Larson Acres v. Town of Magnolia	**June 7, 2011-** Upheld the challenge by affirming permit for expansion and certain conditions, and reversing multiple conditions imposed by the Town.	See above regarding the appeal, stayed in circuit court.
13-L-01	RE: Gavin v. Town of Spring Valley	**November 22, 2013**– Dismissed appeal based on a lack of jurisdiction after the after the town decided to rescind the siting permit at a special meeting of November 25, 2013.	None