

**THE DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ORDER TO ADOPT EMERGENCY RULE**

ORDER

The Wisconsin Department of Agriculture, Trade and Consumer Protection hereby adopts the following emergency rule *to create* ss. ATCP 52.08, 52.09, 52.10, 52.11, 52.12, 52.13, and 52.14, *relating to* creating a commercial nitrogen optimization pilot program.

The statement of scope for this rule, SS 040-22, was approved by the Governor on May 5, 2022, published in the Register No. 797A2 on May 9, 2022, and approved by the Department of Agriculture, Trade and Consumer Protection (department) on May 12, 2022. The emergency rule was approved by the Governor on June ___, 2022.

Exemption from Finding of Emergency

Per 2021 Wisconsin Act 223, the Department of Agriculture Trade and Consumer Protection shall, using the procedure under s. 227.24, Stats., promulgate rules to implement s. 92.14 (16), Stats., no later than the 90th day after the effective date. Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), Stats., the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

Analysis

This emergency rule implements the commercial nitrogen optimization pilot project program created under s. 92.14 (16). Under s. 92.14 (16), Stats., the department is authorized to make grants for commercial nitrogen optimization pilot projects conducted in collaboration with a University of Wisconsin System institute. The department submitted a s.13.10, Stats., request seeking \$0 funds for SFY 2021-22 and \$1.6 million in funds for the program for state fiscal year 2022-23.

Statutes Interpreted: s. 92.14 (16), Stats.

Statutory Authority: s. 92.14 (16), Stats.

Explanation of Agency Authority

Section 93.07 (1), Stats., directs the department to make such regulations as are necessary for the discharge of all the powers and duties of the department. While granting the authority to make

grants to agricultural producers and to the University of Wisconsin System (UWS) institutions as provided under this subsection, the budget language does not specify the bases for grant determinations. The agency considers it necessary to adopt rules to establish the bases for grant determinations in order to effectuate the purposes of s. 92.14 (16), Stats. This temporary emergency rule implements the commercial nitrogen optimization pilot program on an interim basis, pending the adoption of permanent rules.

Related Statutes and Rules

There are no directly related rules or statutes, other than those cited above. The department rules for the commercial nitrogen optimization pilot program will be created in ch. ATCP 52, Wis. Adm. Code (commercial nitrogen optimization pilot program).

Plain Language Analysis

The commercial nitrogen optimization pilot program is designed to encourage agricultural producers to develop innovative approaches to optimize the application of commercial nitrogen. Agricultural producers will implement a project, for at least two growing seasons, to optimize the application of commercial nitrogen. The producer must collaborate with a UWS institution, which will monitor the grant project on-site. The total grant award to a producer cannot exceed \$50,000. Of that amount, up to 20 percent may be awarded to the UWS institution.

Under 92.14 (16), Stats., grant recipients must meet all the following eligibility requirements to be considered for funding:

- Project must include at least two growing seasons.
- Agricultural producer will collaborate with an UWS institution for project monitoring.
- The UWS institution shall monitor the grant project on-site. No more than 20% of the grant award may be distributed to the UWS collaborator.
- Priority will be given to innovative projects not currently funded through state or federal programs.
- Priority will be given for longer-term projects.

In awarding grants, the department will consider the following parameters which include the funding priorities under s. 92.16 (16), Stats.:

- Collaboration between the agricultural producer and the UWS institution.
- Geography and geology of proposed study area, with priority to projects in areas of different soil types or geologic characteristics.
- Innovative projects not currently funded by other state or federal programs.
- Duration of project, with priority for longer-term projects.

Under 92.14 (16), Stats., the department may award no more than \$50,000 to any one agricultural producer.

Grant Purposes

Under this emergency rule, the department may award grants for projects that focus on commercial nitrogen optimization through:

- Reduction of nitrates in groundwater and surface water.
- Collection of data to ascertain the balance of providing the appropriate amount of nitrogen to a crop at the right time while reducing nitrogen loss to the atmosphere, groundwater or surface water.
- Installation of conservation practices to assist with nitrogen optimization coupled with monitoring runoff and testing soils.
- Optimization of commercial nitrogen use through a variety of agronomic methods and techniques.

Use of Grant Funds

Under this emergency rule, grant funds may be used to reimburse expenses that are determined by the department to be a reasonable and necessary part of the grant project. Applicants will not be required to provide any match for grant resources. Eligible expenses include, but are not limited to:

- Personnel for coordinator role, including expense for salaries and wages, contract and consulting services, and travel.
- Incentive or stipend payments for landowners who participate in full-scale commercial nitrogen optimization field study.
- Water quality monitoring and soil testing in collaboration with a UWS institution.
- Agronomy services, including custom application and nutrient management planning.
- Equipment rental for project implementation.
- Equipment purchases needed for project implementation. Equipment purchases over \$2,500 must receive pre-approval from the department.

Grant funds may not reimburse any of the following expenses:

- Real estate purchases.
- Repayment of loans or mortgages.
- Rent or contract payments for time periods extending beyond the term of the grant contract.
- Equipment purchases that exceed \$2,500, without department pre-approval.
- Administrative or overhead costs that are not direct costs of the grant project.

Grant Proposals

Under this emergency rule, the department must issue at least one request for grant proposals in each state fiscal biennium (the department may issue more frequent requests, if it chooses to do so). The request for proposals must describe the required form and content of the grant proposal and must specify a deadline for submitting grant proposals. Applicants must submit grant proposals to the department in the manner prescribed within the department's request for proposals.

Grant Awards

Under this emergency rule, the department must evaluate grant proposals and issue its grant awards within 45 days after closing of the grant proposal deadline. The department must clearly identify each award recipient, the amount of the award, the purposes for which the award is given, and what is to be included in the annual and project reports. The department may consider the following criteria when evaluating grant proposals and making grant awards:

- Direct impact of the project on commercial nitrogen optimization.

- Location of the project - geography and geology - to assure awards are distributed across the state.
- The length of the project.
- The innovative approaches to nitrogen optimization being studied in the project.
- Whether the proposed project meets the standards prescribed in this emergency rule.
- The viability of the proposed project.
- The management and technical qualifications of the grant recipient.
- The ability of the UWS institute to collaborate with the grant recipient.
- The adequacy of the project plan and budget.
- Whether the grant proposal and budget adequately identify the nature of project expenses to be reimbursed under the proposed grant.

Grant Contracts

Under this emergency rule, the department must enter into a contract with a legal entity before distributing funds. The contract must spell out grant terms and conditions, including performance requirements, reporting requirements and payment terms. Grant recipients will be required to file an annual report with the department and a final project report.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

Federal Programs

There are currently no similar federal programs.

If Held, Summary of Comments Received during Preliminary Comment Period and at Public Hearing on Statement of Scope

The Joint Committee for Review of Administrative Rules did not request a preliminary hearing on the scope, thus the department did not hold a preliminary hearing on the scope.

Comparison with Rules in Adjacent States

Illinois

There is no State sponsored nitrogen optimization programming (adjacent or direct) in Illinois.

Iowa

Iowa does not have a formal commercial nitrogen optimization program; however, it does make nitrogen optimization tools and strategies available to its producers. These tools and strategies include the Corn Nitrogen Rate Calculator, which is a tool to estimate potential N-nitrate loss by estimating optimal nitrogen based on fertilizer and corn prices.

Michigan

There is no State sponsored nitrogen optimization programming (adjacent or direct) in Michigan.

Minnesota

Minnesota has different nitrogen optimization programs available to producers, including a farmer educational outreach program focused on how nitrogen behaves in the environment. The Minnesota Nitrogen Fertilizer Management Plans include groundwater nitrate testing and evaluation, targeting sensitive areas in the state. This program includes voluntary testing private wells. Finally, the Minnesota Groundwater Protection rule minimizes potential sources of nitrate pollutions to the state's groundwater and protects drinking water by restricting application of nitrogen fertilizer in the fall and on frozen soils in areas vulnerable to contamination, and outlines steps to reduce the severity of the problem in areas where nitrate in public water supply wells is already elevated.

Summary of Factual Data and Analytical Methodologies

The department worked with a variety of stakeholders to invite their input on the emergency rule and to estimate farmer demand for this program. Feedback was collected from numerous stakeholders ranging from agribusiness organizations, conservation groups, county governments, university entities, the federal government, and other collaborators to develop standards for grant determinations contained in this emergency rule.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

The commercial nitrogen optimization pilot program is voluntary and thus imposes no costs on businesses. By providing grant funding up to \$50,000 to agricultural producers, the nitrogen optimization pilot program will benefit farms, other agriculture businesses and agriculture communities. Grant recipients will directly benefit, while others will benefit indirectly from the increased knowledge producer gain regarding nitrogen optimization for crop production.

Fiscal Impact and Economic Impact Analysis

This emergency rule will have a fiscal impact on department operations. Under this emergency rule, the department must issue at least one request for grant proposals in each state fiscal biennium. Department staff must review grant applications, recommend grant awards, administer grants, and ensure compliance with applicable requirements. Department staff will also provide technical assistance to grant applicants and recipients, as appropriate.

Program administration will occupy at least 0.25 FTE staff in the department's Division of Agricultural Resource Management (this does not include legal, managerial, DATCP central accounting, or other indirect staff support). The cost for the 0.25 FTE staff will be \$25,000 per year, including salary, fringe benefits and support costs (there will be a smaller proportionate cost for the remainder of the current fiscal year). The department will try to fill program staffing needs by shifting current staff from other programs. A complete Fiscal Estimate is attached.

Effect on Small Business

The commercial nitrogen optimization pilot project is voluntary and thus imposes no cost on businesses. Some small businesses may indirectly benefit as collaborators in the projects.

The Department's Regulatory Review Coordinator may be contacted by:
Email at Bradford.Steine1@wisconsin.gov
Telephone at (608) 224-5024

The Regulatory Flexibility Analysis is attached.

Department Contact Person

Susan Mockert
Division of Agriculture Resource Management
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
(608) 224-4648
Susan.mockert@wisconsin.gov

Place Where Comments are to Be Submitted and Deadline for Submission:

Comments must be received on or before August 22, 2022 to be included in the record of rule-making proceedings. Submit comments:

By mail to:

Susan Mockert
Division of Agriculture Resource Management
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911

By email to:

DATCPLandWater@wisconsin.gov

RULE TEXT

1 SECTION 1. ATCP 52.08, 52.09, 52.10, 52.11, 52.12, 52.13, 52.14 are created to read:

2 **Subchapter I – Commercial Nitrogen Optimization Pilot Program**

3 **ATCP 52.08 Purpose.** This subchapter implements the commercial nitrogen optimization pilot
4 program created under s. 92.14 (16), Stats.

5 **ATCP 52.09 Definitions.** In this subchapter:

6 (1) “Agricultural producer” means an individual farmer or a group of farmers each of who operates
7 an eligible farm, as defined in s. 91.86 (1), Stats. Agricultural producers may collaborate with a
8 legal entity for project management purposes, including completing the application.

9 (2) “Applicant” means a person or persons who submits an application.

10 (3) “Department” means the state of Wisconsin department of agriculture, trade and consumer
11 protection.

12 (4) “Nitrogen optimization” means a project with the potential to use nitrogen in a manner that
13 will sustain soil fertility and crop production while reducing nitrogen loss to the atmosphere,
14 groundwater and surface water.

15 (5) “Grant recipient” means any person(s) or their authorized agent who has been awarded a grant.

16 **ATCP 52.10 Application requirements and procedures.**

17 (1) REQUEST FOR PROPOSALS. The department shall issue at least one request for proposals in each
18 fiscal biennium for which funding is available. The request for proposals shall describe the
19 required form and content of grant proposals and shall specify a deadline for submitting grant
20 proposals. Applicants must submit grant proposals to the department in the manner prescribed by
21 the department’s request for proposals. The department shall publish the request for proposals on
22 its webpage. The department shall also issue a press release announcing its request for proposals
23 to news media likely to give notice to the public. The department shall announce grant awards
24 within 45 days of the deadline for submitting grant proposals.

25 (2) CRITERIA. The department shall consider any of the following when evaluating grant proposals
26 and making grant awards:

27 a. How the project will address commercial nitrogen optimization.

28 b. Location of the project to assure awards are distributed across the state.

- 29 c. The proposed length and scale of the project.
- 30 d. The innovative approaches to commercial nitrogen optimization being studied in the project.
- 31 e. Whether the proposal complies with the department's request for proposals.
- 32 f. Whether the proposed project meets the standards prescribed in this emergency rule.
- 33 g. The viability of the proposed project.
- 34 h. The management and technical qualifications of the grant recipient.
- 35 i. The ability of the University of Wisconsin System institution to collaborate with the grant
36 recipient.
- 37 j. The adequacy of the project plan and budget.
- 38 k. Whether the grant proposal and budget adequately identifies the nature of project expenses to
39 the reimbursed under the proposed grant.

40 **ATCP 52.11 Grant Activities.** The department may award grants for projects undertaken by
41 agricultural producers that are designed to do any of the following:

- 42 (1) Reduce nitrates in groundwater and surface water.
- 43 (2) Collect data to ascertain the balance the appropriate amount of nitrogen to a crop at the right
44 time while reducing nitrogen loss to the atmosphere, groundwater or surface water.
- 45 (3) Install conservation practices to assist with nitrogen optimization coupled with monitoring
46 runoff and testing soils.
- 47 (4) Optimize commercial nitrogen use via agronomic methods and techniques.

48 **ATCP 52.12 Permitted Use of Grant Funds.** Permitted uses for grant funds include the
49 following:

- 50 (1) Personnel for coordinator role, including expenses for salaries and wages, contract and
51 consulting services, travel.

- 52 (2) Incentive or stipend payments to agricultural producers who participate in nitrogen
53 optimization field study.
- 54 (3) Water quality monitoring
- 55 (4) Soil testing.
- 56 (5) Project monitoring support to University of Wisconsin System institutions.
- 57 (6) Rent payments for equipment necessary to implement practices.
- 58 (7) Equipment purchases necessary for project implementation. Equipment purchases over \$2,500
59 must have department pre-approval.
- 60 (8) Other materials and services required to implement practices, including, but not limited to,
61 agronomy services including custom application, nutrient management planning and cover crop
62 seed.

63 **ATCP 52.13 Project Monitoring Support.** The department shall enter into a contract with a
64 University of Wisconsin System institution, as defined in s. 118.55 (10) (a) 2., Stats., or institutions
65 for project monitoring support. The contract may not exceed twenty percent of the total grant
66 program appropriation.

67 **ATCP 52.14 Grant Contracts.**

- 68 (1) **CONTRACT REQUIRED.** A successful grant applicant shall enter into a contract with the
69 department before any grant money is distributed to the applicant. No funding commitment is final
70 until the contract is executed.
- 71 (2) **CONTRACT PROVISIONS.** A grant contract shall be reasonably designed to ensure that the grant
72 recipient carries out the recipient's obligations with respect to the grant. The contract shall be
73 signed by an authorized department official and by the applicant. The parties may amend the
74 contract by mutual written consent.

75 (3) BREACH OF CONTRACT. The department may void a contract and seek return of any funds
76 released under the contract for failure by the award recipient to perform the recipient's obligations
77 under the contract.

78 (4) REPORTING. Every contract shall set forth a schedule of progress reports and payments. A
79 grant recipient shall provide the department reports annual and a final report. The final report may
80 be substituted for the annual report in the final project year. Reimbursement payments shall be
81 conditioned upon the receipt of reimbursement requests, related documents and reports, as
82 provided in the contract.

83 SECTION 2. EFFECTIVE DATE. This rule takes effect upon publication in the state newspaper and
84 shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats., subject to extensions
85 under s. 227.24 (2), Stats.

(END OF RULE TEXT)

Dated this 29th day of June, 2022.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION



By: Randy Romanski, Secretary