

SECTION 2

2.10 GUIDANCE REGARDING NOTICES OF CONTINUING COMPLIANCE

This document provides guidance on the mandatory and optional use of notices of continuing compliance, the key elements that counties must include in a notice, and follow-up options to address compliance issues.

A. Mandatory and optional use of a notice

Mandatory

Since 2006, DATCP has imposed the following requirement related to cost-sharing nutrient management plans: Counties must provide DATCP cost-sharing for four years and landowners must agree to remain in compliance with the nutrient management performance standard (NR 151.07) after the end of their four-year cost-share contracts. By accepting these terms, landowner are agreeing to continuing compliance responsibilities that require them and future owners of the land to update and follow a nutrient management plan for as long as the affected land is farmed. Nutrient management plans must be updated in accordance with ATCP 50.04.

In 2015, DATCP adopted a policy to allow a county to spend no more than 25% of a county's annual SEG allocation to cost-share cover crop and other soft practices needed to implement a nutrient management plan, whether or not these soft practices are included in the same DATCP cost-share contract for the nutrient management plan. While soft practices may be cost-shared separately from the related nutrient management plan, they remain linked with nutrient management plan. Landowners must agree to remain in compliance with nutrient management standard, as well as control soil erosion standard, on all fields that receive DATCP cost-sharing for a soft practice. If additional cost-share payments are provided for land previously covered by notice of continuing compliance, the county will need to decide if the existing notice is adequate or a new notice must be prepared.

Optional

Before 2002, a DATCP cost-share contract established the full extent of a landowner's responsibilities to install and maintain a cost-shared practice. With the advent of the state agricultural performance standards in NR 151, landowners received state cost-sharing to install a conservation practice could take on continuing obligations to maintain the practice without receiving further cost-sharing. Sec. ATCP 50.08(5) identifies the exemptions to state cost-share requirements that enable a county to require a landowner to maintain a conservation practice without further cost-sharing so long as the conservation practice was adequately cost-shared.

While DATCP elected to require continuing compliance in the cost-share settings discussed above, counties may require continuing compliance with other cost-shared practices if the requirements of ATCP 50.08 have been satisfied. Counties may use notices of continuing compliance where the county provides DATCP bond funds to cost-share a practice that secures compliance with a performance standard. For example, cost-sharing for a newly-constructed manure storage facility may give rise to a continuing obligation to comply with the performance standard after the 10-year maintenance period. A notice is appropriate for cost-shared practices such as grassed waterways and riparian buffers only if the practice achieves compliance with a

current state performance standard. For example, a notice would be appropriate if a grassed waterway was required to control nutrient runoff and achieve compliance with the NR 151 standard related to nutrient management. NR 151 may impose independent requirements for compliance, and counties may wish to include these in any notice they issue. For example, landowners who construct manure storage facilities after 2002 may be required to close facilities without cost-sharing if the facilities are unused.

B. Guidance for providing notice of continuing compliance

Counties must develop notices consistent with the following guidance. Counties may use notices developed by other counties as models. Counties must provide notices when using DATCP SEG funds to cost-share nutrient management plans and related practices such as cover crops. Counties should seek advice from their corporation counsel regarding the legal sufficiency of their customized notices to ensure that the notices are effective in securing compliance at a later date.

Content of a notice

At a minimum, the notice should identify the practices being installed, the amounts paid for the practices, the sources of cost-share payments, the performance standard(s) that must be followed based on the cost-share payment, and a statement of the landowner's continuing compliance responsibility. The full extent of the notice will depend on the practices being cost-shared and the amount of cost-sharing provided. Further guidance is provided below.

Procedures for providing and documenting notice

Whenever a notice must be provided, the county should have all the parties acknowledge receipt of the notice by placing their initials on the cost-share contract at section 2.A.9. For example, when counties provide the maximum flat rate for four years (moving from \$28 to \$40 per acre) for a nutrient management plan and no cost-sharing for soft practice, counties must notify landowners of their continuing responsibility to meet the nutrient management performance standard, and have them acknowledge this responsibility by correctly initially the cost-share contract.

In the following cases, there are additional documentation responsibilities regarding a notice. If less than the maximum flat rate is provided for a nutrient management plan (for example, \$6 per acre for four years), the county must have the landowner sign a separate notice acknowledging continuing compliance with the nutrient management standard. When a soft practice is cost-shared to implement a nutrient management plan, for example, the landowner must agree to comply with the soil erosion control standard, as well as the nutrient management standard, for as long as the field is farmed. The landowner must sign a written acknowledgement to this effect, which must be submitted to DATCP with the county's reimbursement request.

Elements of a full notice

In constructing your notice, you will need to select from the following based on the nature and extent of the cost-sharing provided.

1. You are being offered ____ dollars in cost-share funds to [have and follow a nutrient management plan for x acres] [or list other appropriate practices as provided in the contract]

(strike all that do not apply not apply) located in _____. The specific funds and their sources are: xxxx dollars from DATCP, xxxx dollars from NRCS, xxxx dollars from DNR (strike as appropriate).

2. If a soft practice other than a nutrient management plan is cost-shared, the soft practice is needed to achieve compliance with the soil erosion requirements in a farm's nutrient management plan.
3. The conservation practices installed under this cost-share contract will result in compliance with the following performance standards: [NR 151.02 Sheet, rill and wind erosion] [NR 151.05 Manure storage facilities] [NR 151.03 Tillage setback] [NR 151.04 Phosphorus index] [NR 151.055 Process wastewater handling][NR 151.06 Clean water diversions] [NR 151.07 Nutrient management] [NR 151.08 Manure management prohibitions] (Strike all that do not apply).
4. If you voluntarily agree to accept this cost-share offer, you will be required to sign a cost-share contract, and acknowledge receipt of a notice that defines your rights and responsibilities. If you are not the landowner, the landowner will also be required to sign the contract to ensure that continuing compliance responsibilities are met.
5. The cost-share contract specifies a maintenance period for each cost-shared practice. The maintenance period for practices such as manure storage is 10 years. "Soft" practices such as nutrient management have shorter maintenance periods; specifically, they must be maintained for each year cost-share funds are provided, as specified in Section 3 of the cost-share contract. Cost-sharing for nutrient management cannot exceed four years.

Skip paragraph 6 and 7 if no nutrient management plan is cost-shared.

6. You will be required to maintain your nutrient management plan beyond the term specified in the contract because: (Strike all that do not apply)
 - a. You received DATCP cost-sharing for a nutrient management plan required under ATCP 50.08 by accepting four years of payments at the flat rates identified in the ATCP 50.42(2), or a higher cost-share payment under ATCP 50.42(1) if this is applicable. The 4-years of cost-sharing meets the requirements of ATCP 50.08, and obligates you and subsequent landowners to maintain a nutrient management plan beyond the term of the contract, without further cost-sharing, to meet the performance standard identified in 3 above.
 - b. You received DATCP cost-sharing for a nutrient management plan, combined with cost-share payments from other sources, equal to the amount required under ATCP 50.08; namely, four years of payments at the flat rates identified in the ATCP 50.42(2), or a higher cost-share payment under ATCP 50.42(1) if this is applicable. The combined cost-sharing is equal to the amounts required under ATCP 50.08, and obligates you and subsequent landowners to maintain a nutrient management plan beyond the term of the contract, without further cost-sharing, to meet the performance standard identified in 3 above.
 - i. For example, if a landowner receives DATCP cost-sharing of \$21 per acre for nutrient management, the landowner would have a continuing obligation to meet the state

nutrient management standard if the landowner also received a separate payment of \$7 per acre from the county, increasing the total payment under the contract to at least \$28 per acre (\$7 per acre for four years). Counties may need to have landowners waive confidentiality rights to identify non-DATCP cost-sharing.

- c. You knowingly and voluntarily accepted less than the maximum rate authorized under ATCP 50.42(2) to install and maintain a nutrient management plan for a four-year period. The 4-years of cost-sharing negotiated for the nutrient management plan (regardless of the rates provided) meets the requirements of ATCP 50.08, and obligates you and subsequent landowners to maintain a nutrient management plan beyond the term of the contract, without further cost-sharing, to meet the performance standard identified in 3 above.
7. To remain in compliance with the performance standard, you must update your nutrient management plan in accordance with ATCP 50.04, a DATCP practice standard that may change over time.

Skip paragraph 8 if no “soft” practice other than nutrient management is cost-shared.

8. You will be required to control soil erosion and implement your nutrient management plan beyond the term specified in the contract because: (Strike all that do not apply)
 - a. You knowingly and voluntarily agreed to receive a separate DATCP cost-sharing to install a soft practice to implement a nutrient management, also cost-shared with DATCP funds. This agreement (regardless of the practices cost-shared and rates provided) meets the requirements of ATCP 50.08, and obligates you and subsequent landowners to control soil erosion and maintain a nutrient management plan beyond the term of any cost-share contract, without further cost-sharing, to meet the performance standard identified in 3 above. This continuing compliance obligation remains in effect as long as the land is farmed.
 - b. You knowingly and voluntarily agreed to receive separate DATCP cost-sharing for a soft practice to implement a pre-existing nutrient management plan. You are making this agreement even though you may not have received separate cost-sharing for the nutrient management plan. This agreement (regardless of the practices cost-shared and rates provided) meets the requirements of ATCP 50.08, and obligates you and subsequent landowners to control soil erosion and maintain the nutrient management plan beyond the term of any cost-share contract, without further cost-sharing, to meet the performance standard identified in 3 above. This continuing compliance obligation remains in effect as long as the land is farmed.

Skip paragraph 9 if no “hard” practices are cost-shared.

9. You will be required to maintain the “hard ” practice noted above, beyond the 10-year term specified in the contract because: (Strike all that do not apply)
 - a. You received DATCP cost-share funds to install and maintain a practice for 10 years at the maximum level authorized under ATCP 50.42. This meets the requirements under ATCP 50.08.
 - b. You received DATCP cost-share funds combined with cost-share payments from other sources to install and maintain the practice for 10 years, and the combined payments

equal the maximum level authorized under ATCP 50.42. This meets the requirements under ATCP 50.08.

- c. You knowingly and voluntarily accepted cost-share payments less than the maximum amount authorized under ATCP 50.42 to install and maintain the practice for a 10-year period. The 10 years of cost-sharing negotiated for the practices listed above (regardless of the amounts provided) meets the requirements of ATCP 50.08, and obligates a landowner to maintain the practice beyond the term of the contract, without further cost-sharing, to meet the performance standard identified in 3 above.
10. You will be required to sign the cost-share contract to acknowledge that you have read and understand the obligations to maintain [nutrient management][other listed practice] (strike the one that does not apply) during and after the term of the cost-share contract.
 - a. (Add the following only if it applies) You also will be required to sign the notice of continuing compliance to acknowledge that you have read and understand the obligations to maintain compliance with the cost-shared practice.
 11. As a part of your continuing compliance responsibilities, you may be asked to provide the county verification that you remain in compliance including the submission of an annual checklist documenting the updating your nutrient management plan.

C. Follow-up actions

Counties should be prepared to take steps to maintain compliance among landowners who have been provided notices of continuing compliance. Counties may face different circumstances that may warrant a response including landowners who (1) are reluctant to follow the newest technical standards necessary to remain in compliance, (2) have discontinued their annual updates of their nutrient management plans, and (3) have sold their farms to new operators without sharing information about continuing compliance responsibilities that run with the land. While counties need to respond to maintain the integrity of continuing compliance responsibilities, they may pursue a range of options that may include:

- Contacting landowners informally.
- Issuing formal letters to landowners.
- Enrolling landowners in farmer training classes.
- Providing additional financial or technical assistance
- Developing schedules of compliance for Farmland Preservation Program participants.
- Issuing formal notices of non-compliance or violation.
- Pursuing enforcement options authorized by a local ordinance.

In evaluating their options, counties should consider the least severe option to bring landowners into compliance. However, counties may end up moving through the range of options before they achieve the desired results. In the end, counties are responsible for developing a course of action to bring landowners back into compliance, and should consider the following before pursuing specific actions:

1. The nature of the landowner's non-compliance. For example, a landowner may fall out of technical compliance with a nutrient management performance standard if the landowner is not following a new ATCP 50 practice standard for developing a nutrient management plan.

On the other hand, a landowner's non-compliance may be the result of a deliberate violation of a requirement in a local ordinance.

2. The landowner's level of cooperation. Farmer training is reasonable option for a landowner who acknowledges a problem and commits to correcting the situation.
3. The extent to which the language in the notice of continuing compliance includes specific commitments and establishes clear directions on what actions are required of the landowner. Even if the language in a notice establishes barriers to future offers of cost-sharing, a landowner may be eligible to receive payment for cover crops since the landowner's notice of continuing compliance is limited to complying with the nutrient management performance standard.
4. The impact of subsequent changes in technical or legal requirements adopted since the issuance of the notice of continuing compliance. For example, NRCS updated the nutrient management 590 standard in 2015, adding new restrictions and winter spreading plan. However, it should be noted that incorporation of the new 590 standard into ATCP 50 does not create a legal obligation to make additional payments to landowners and operators who already are required by virtue of cost-share payments to comply with NR 151.07 or ATCP 50.04(3).
5. The implications of providing additional cost-sharing for a county's conservation programming. Additional cost-sharing may provide a necessary incentive but may compromise a county's efforts to secure compliance by sending contradictory message about continuing compliance, or limit a county's progress in installing new conservation practices by siphoning off cost-share funds to make additional payments.
6. The regulatory focus within a county based on the requirements established in local ordinances and county's history of seeking compliance with the ordinance. Fairness may require that a county pursue a fine for violation if it has track record of enforcing its ordinances in similar manner.