



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 21-073

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. It appears that the agency has appropriately omitted content that it is required to omit because a temporary suspension of a related emergency rule remains in effect. [See s. 227.26 (2) (L), Stats.] As noted in the analysis, the Joint Committee for Administrative Rules (JCRAR) partially suspended a related emergency rule, EmR2045, on December 18, 2020. As required under s. 227.26 (2) (f), Stats., JCRAR then introduced legislation to support the suspension. That legislation, introduced as 2021 Assembly Bill 13 and 2021 Senate Bill 34, was referred to standing committees in the Assembly and Senate, and was later given a second reading and re-referred.

b. The second sentence in s. NR 159.02 (4) prohibits discharging foam to a storm or sanitary sewer or to the environment “unless the discharge meets the requirements of this chapter and the discharge is in accordance with all other applicable environmental regulations.” Although another provision of the rule indicates otherwise (see comment 5. a., below), the language in s. NR 159.02 (4) could be interpreted to allow the discharge of foam to a storm or sanitary sewer if the foam is treated as specified by the proposed rule. There is some question as to whether the agency has the authority to allow the discharge of foam into a storm or sanitary sewer, even after treatment. As mentioned in the agency’s analysis, 2019 Wisconsin Act 101 allows an exemption from its general prohibition for testing, if a testing facility has implemented appropriate containment, treatment, and disposal or storage measures to prevent discharges of the foam to the environment. The act further specifies that such “appropriate containment, treatment, and disposal or storage measures may not include flushing, draining, or otherwise discharging the foam into a storm or sanitary sewer.” [s. 299.48 (3) (b), Stats.] It is possible that a court would hold that the act does not allow the discharge of treated foam containing any PFAS, albeit in very small concentrations, to a storm or sanitary sewer. A counterargument is that, because the act directs the agency to determine appropriate measures for treatment, rather than only measures for containment, storage, or disposal, it appears to contemplate that treated foam could be treated to a degree that its discharge would no longer constitute a “discharge of foam to the environment,” as prohibited under the act.

If the agency is relying on the latter interpretation, that understanding could be addressed in the analysis.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Related to comment 1. b., regarding s. NR 159.02 (4), it is unclear how the second sentence in that provision would be interpreted in relation to s. NR 159.08 (2) (b), which requires treated foam to be disposed of in a licensed solid waste facility. If it is retained, the second sentence of s. NR 159.02 (4) could be clarified.

b. The first sentence in s. NR 159.08 (1) (b) 4. may cause some confusion. Does the phrase “the treatment system” refer to one of the types of alternative treatment systems authorized in par. (b), to both of them, or to any type of treatment authorized under the proposed rule? In addition, it is not clear how the relatively broad requirement to “minimize the level of PFAS substances in effluent” would operate in conjunction with other, more specific requirements throughout that paragraph and subsection. Those requirements could be clarified. Alternatively, if the first sentence is not necessary, it could be removed, and the title of the provision could be revised to refer only to the recordkeeping requirements provided in the second sentence.