



# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 21-083

#### 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.]**

#### 2. Form, Style and Placement in Administrative Code

a. Although they may include duplicative information, the first three sections of the analysis should be addressed separately, each under its own heading, to aid the Legislature in its oversight role. [See s. 1.01 (2) (a), Manual.]

b. As noted in the analysis, the federal Clean Water Act and s. 281.15, Stats., authorize the department to establish narrative or numeric surface water quality criteria, or both, for waterbodies in the state, subject to certain limitations. In various guidance materials, the federal Environmental Protection Agency (EPA) expresses a preference that both types of criteria are utilized, when possible. Although this rule appears to satisfy EPA’s preference by creating numeric criteria for PFOA and PFOS and also applying existing narrative criteria to those substances, both the analysis and various provisions throughout the rule arguably create confusion on that point. Specifically, the analysis explains the rule as “interpreting Wisconsin’s existing narrative criteria with numeric thresholds”. In turn, various provisions throughout the rule refer to the criteria created in SECTION 2 of the rule as being “narrative”. Would it be more accurate to describe the rule as adopting both narrative and numeric surface water quality criteria for PFOA and PFOS?

Further, SECTION 2, which creates a provision that is cross-referenced throughout the rule, could be revised to adopt existing narrative criteria and new numeric criteria for PFOA and PFOS in a more straightforward manner, without duplicating existing, generally applicable narrative criteria. Specifically, proposed s. NR 102.04 (1m) (intro.) imposes a requirement that appears to duplicate the generally applicable requirement under existing s. NR 102.04 (1) (intro.). In addition, proposed s. NR 102.04 (1m) (a) and (b) appear to incorporate general narrative criteria under existing s. NR 102.04 (1) (d), but with added numeric thresholds. Instead, the new, numeric standards for PFOA and PFOS could be added throughout existing subsections of s. NR 102.04, where applicable, similar to the manner in which numeric criteria are provided for dissolved oxygen and pH in that section.

c. Also in SECTION 2, the placement of proposed s. NR 102.04 (8) (d) seems a bit awkward. Would it make sense to create a new, separate section in ch. NR 102 to address criteria for designating waters as impaired? The department could revise such a section over time to provide additional listing criteria.

d. In SECTION 4, “new discharger” is defined as any building, structure, facility, or installation that meets various criteria. For clarity, this definition could be reorganized by placing the criteria into separate paragraphs. The format of the definition would then generally parallel the definition of “new discharger” established in 40 C.F.R. s. 122.2.

e. Section NR 106.98 (4) (b), created in SECTION 4, refers to a “limit of detection under s. NR 106.03 (8)”. The cross-reference should be omitted as the definition in s. NR 106.03 (8) is applicable to the entire chapter.

f. Section NR 106.985, created in SECTION 4, notes that the term “PFAS” is used for minimization plans because efforts to reduce discharges of PFOS and PFOA are “expected to have the added benefit of reducing discharge of other PFAS components”. The description of why the term PFAS is used for minimization plans is generally beneficial. However, it seems unusual for a note to discuss the “added benefit” of reducing the discharge of other PFAS compounds when the discharge of these other compounds is generally not regulated. Additionally, should the note refer to PFAS “compounds” or the like, rather than PFAS “components?”

g. In SECTION 4, the cross-references to the definition of “bioaccumulative chemical of concern” should be removed in s. NR 106.985 (2) (d) 1. and 2., because the definition under s. NR 106.03 (1r) is already applicable.

h. SECTION 7 creates a note under s. NR 219.04 Table F. This information could be provided as a footnote to Table F, rather than a note.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

Section NR 106.99 (2) (c), created in SECTION 4, notes that permittees may refer to the Michigan Department of Environmental Quality’s “Wastewater PFAS Sampling Guidance” for recommended sampling protocols and cross-contamination prevention measures. Should this reference be amended to refer to the Michigan Department of Environment, Great Lakes, and Energy, given MDEQ’s name change? Alternatively, the existing reference may be appropriate, given that the referenced guidance is currently published under the agency’s former name.

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

a. In SECTION 3, it appears that the descriptions of the substances mirror the definitions created in SECTION 1 of the rule. If so, the defined terms “PFOA” and “PFOS” should be used in place of the fuller descriptions. [See s. 1.07 (1) (b), Manual.] Similarly, in SECTION 4, the defined terms “PFOA” and “PFOS” could be used in the title of proposed subch. VIII of ch. NR 106.

b. SECTION 3 provides that the presence of PFOA and PFOS “shall be deemed to have adverse effects on public health and welfare if these substances exceed the public health significance levels in s. NR 102.04 (4m)”. The purpose of this amendment to ch. NR 105 is somewhat unclear. Is this amendment to ch. NR 105 necessary, given that the proposed rule specifies numeric standards for PFOA and PFOS in ch. NR 102? The analysis explains that numeric criteria for toxic substances are typically established in ch. NR 105, but that the criteria

for PFOA and PFOS are in this case created in ch. 102 because ch. NR 102 offered a more appropriate methodology for criteria development in this case. Thus, although the analysis describes the new numeric criteria as “thresholds” for purposes of ch. NR 102, it appears that the rule effectively creates numeric criteria for PFOA and PFOS in ch. NR 102. If so, it is unclear why those criteria would need to be incorporated in ch. NR 105.

c. In the definition of “new discharger” within SECTION 4, the phrase “which has never received a finally effective WPDES permit for discharges at that site” could be modified for better clarity. For example, the phrase could be replaced with “for which no current or prior WPDES permit has taken effect”. Also, within that definition, the “and” preceding “that did not” should be removed.

d. SECTION 4, in part, establishes a definition of “PFAS”. This definition should be modified to provide that PFAS means a perfluoroalkyl or polyfluoroalkyl substance, rather than a perfluoroalkyl and polyfluoroalkyl substance. Additionally, the molecular formula provided at the end of the definition should be modified to read “ $C_nF_{2n+1}$ ”, rather than “ $C_nF_{2+1}$ ”.

e. Section NR 106.98 (2) (c), created in SECTION 4, refers to “major municipal dischargers” and “minor municipal treatment works or systems”. However, the terms “major” and “minor” are not defined for the purposes of this section. This could be remedied by inserting definitions (either for the section or for the chapter as a whole) that cross-reference the definitions of “major municipal discharge” and “minor municipal discharge” in s. NR 200.02 (7) and (8). This change may make the note provided after s. NR 106.98 (2) (c) superfluous.

Additionally, to make more consistent use of terminology, s. NR 106.98 (2) (c) could be modified to refer to “the treatment works or system of a minor municipal discharger”, rather than a “minor municipal treatment works or system”.

f. Section NR 106.98 (2) (e), created in SECTION 4, refers to a discharge that contains PFOS or PFOA at levels that will likely “exceed the narrative standard under s. NR 102.04 (1m)”. Should this instead refer to a discharge that will likely “cause or contribute to an exceedance of the narrative standard under s. NR 102.04 (1m)” (see proposed s. NR 106.996)?

g. Section NR 106.985 (2) (b) 1., created in SECTION 4, provides that a municipal discharger’s annual PFAS minimization plan report should include “an analysis of how influent and effluent concentrations vary with time and with significant loading of PFAS”. Should this instead refer to significant loading of PFOA and PFOS, rather than the more general term PFAS?

h. Section NR 106.985 (2) (d) 1. and 2., created in SECTION 4, establish generally parallel requirements relating to PFOS and PFOA. As such, these subdivisions could be rewritten to make more effective use of parallel language. The note created under s. NR 106.99 (2) (a) could be amended to read “... (b) Landfills that have accepted waste from metal finishers using hexavalent chromium or other industries associated with PFAS use, ~~for example including~~ including tanneries, fabric or leather treaters,...”. [Emphasis added only to highlight changes.]

i. In s. NR 106.99 (5), created in SECTION 4, “department” should not be capitalized. [See s. 1.01 (4), Manual.]

j. Section NR 106.995, created in SECTION 4, includes a note that instructs a permittee using a composite sampler to contact the department prior to sample collection to discuss sampling protocol. If this is intended to be a requirement, consider incorporating the language within the substantive text of s. NR 106.995, rather than providing the direction in a note.

k. The amendment to NR 219.04 Table F specifies that PFAS samples must be in HDPE or PP containers. While footnote #1 of Table F currently defines various container material acronyms, PP and HDPE are not defined. This footnote should be amended to define these acronyms.

l. Related to comment 2. b., above, the rule is not entirely consistent with respect to references to the new PFOA and PFOS standards in ch. NR 102 as “narrative” or “numeric”. Most provisions refer to the proposed new criteria as “narrative”, but at least one provision refers to the criteria as “numeric.” (Contrast proposed s. NR 106.98 (1) with proposed s. NR 106.985 (2) (d) 1.)