

Report From Agency

REPORT TO LEGISLATURE

NR 159, Wis. Adm. Code

Board Order No. WA-07-20
Clearinghouse Rule No. 21-073

Basis and Purpose of the Proposed Rule

The department is proposing the creation of ch. NR 159, Wis. Adm. Code. The purpose of this rulemaking is to implement the non-statutory provisions under 2019 Wisconsin Act 101 (“Act 101”), which created s. 299.48, Wis. Stats.

Perfluoroalkyl and polyfluoroalkyl substances (PFAS) are a group of synthetic chemicals used in industry and consumer products worldwide since the 1950s. They do not break down in the environment for extremely long periods of time and they accumulate in the human body. Exposure to certain PFAS may cause adverse health effects. Some firefighting foams currently used to extinguish flammable liquid fires, including Class B and Class A/B foams, include intentionally added PFAS, meaning PFAS is a constituent of the foam.

Section 299.48(1), Wis. Stats., prohibits the use of Class B firefighting foams with intentionally added PFAS, including for training exercises. Section 299.48(2), Wis. Stats., provides the use of foam is allowed for emergency firefighting, fire prevention operations, and testing purposes so long as certain requirements are met. These prohibitions and requirements are included in the proposed permanent rule and apply to foam that is in concentrate or that is mixed with water, liquids or other substances. Section 299.48(3)(a), Wis. Stats., creates an exemption from the prohibition on use as part of a emergency fire fighting or fire prevention operation. Section 299.48(3)(b), Wis. Stats., creates an exemption from the prohibition on use for testing facilities, so long as the testing facility has implemented appropriate containment, treatment, and disposal or storage measures to prevent discharges of the foam to the environment. Appropriate containment, treatment, and disposal or storage measures may not include flushing, draining, or otherwise discharging the foam into a storm or sanitary sewer. The proposed permanent rule provides appropriate containment, treatment, disposal, and storage measures.

Summary of Public Comments

The public comment period for the draft rule occurred from September 27 to November 11, 2021. Nine written comments were received during the public comment period. A public hearing on the draft rule was held on November 4, 2021. Approximately 42 members of the public attended the hearing. Two additional verbal comments were received during the public hearing. See attached “Comments and DNR Responses Natural Resources Board Order WA-07-20.”

Modifications Made

As a result of the comments from the public and the Legislative Council Rules Clearinhouse (LCRC), the department made the following clarifications to the board order and/or proposed rule:

- Clarified in the board order that the department was prohibited from incorporating language into the proposed permanent rule that was suspended by JCRAR, per s. 227.26(2)(L), Wis. Stats.
- Clarified in the board order and in s. NR 159.08, Wis. Adm. Code that appropriate treatment measures render wastewater containing foam to no longer be subject to the prohibition on discharge to storm or sanitary sewer.
- Eliminated the words “in Wisconsin” from proposed ss. NR 159.02(3) and 159.08, Wis. Adm. Code, for the sake of consistency and eliminating confusion. While the department cannot regulate activities that occur out-of-state, it is not customary or necessary for each rule to explicitly state this.

- Clarified in proposed s. NR 159.02(4), Wis. Adm. Code, that discharges of foam to a storm or sanitary sewer are prohibited unless the discharge meets the treatment requirements of the chapter (added the word “treatment”).
- Clarified in proposed s. NR 159.06, Wis. Adm. Code, that the storage requirements apply to a person that stores foam for testing purposes (added “for testing purposes”).
- Added a note to s. NR 159.08(1), Wis. Adm. Code that any discharge of treated foam to a sanitary sewer requires the approval of the publicly owned treatment work and any discharge of treated foam to waters of the state require Wisconsin pollutant discharge elimination system permit coverage.
- Clarified in proposed s. NR 159.08(1)(b)4., Wis. Adm. Code, that any treatment system subject to this paragraph (changed “the” to “any” and added “subject to this paragraph”) shall be operated to minimize the level of PFAS substances in the effluent.
- Clarified in proposed s. NR 159.08(2)(b), Wis. Adm. Code, that “sludges or solids generated as a result of treatment and solidified” (instead of “foam treated”) shall be disposed of at a licensed solid waste facility.

Appearances at the Public Hearing

Based upon registrations, approximately 42 people attended the public hearing, including 37 non-department personnel. Some additional people may have called in without registering. Registered affiliations included:

- AECOM Technical Services/Water Resources Engineering JV
- Clean Wisconsin
- League of Wisconsin Municipalities
- Milwaukee County Fire Dept.
- Milwaukee Journal Sentinel
- OC San
- Sierra Club of Wisconsin
- Wisconsin Conservation Voters
- WisconsinEye
- Wisconsin’s Green Fire

Changes to Rule Analysis and Fiscal Estimate

As a result of public comments for the rule, the department made the following changes to the board order:

- Clarified that the department was prohibited from incorporating language into the proposed permanent rule that was suspended by JCRAR; and
- Clarified that wastewater would no longer be considered foam if treated in accordance with the rule and could therefore be potentially discharged to a storm or sanitary sewer.
- As a result of the public comments for the EIA, the department made three changes to the EIA in Section 15:
 - Added information about potential healthcare costs related to PFAS;
 - Added information about potential recreation value lost due to PFAS; and
 - Revised the EPA reference that describes adverse health effects of PFOA and PFAS.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on statutory authority and clarity, grammar, punctuation and use of plain language.

Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse.

Final Regulatory Flexibility Analysis

The department does not know how many of the potentially impacted entities meet the statutory definition of small business. Without actual data on how many of these entities are small businesses, the department cannot estimate the actual cost to these entities as a share of the total compliance cost of this proposed permanent rule. However, in an effort to develop a conservative estimate, the department assumed a majority are small businesses. Based on this assumption, the department reasonably expects that the impact on small businesses will be less than the average compliance cost to all businesses (\$2,300,000 per year with \$4,000,000 per year as the higher end of the range for all businesses impacted).

Small businesses impacted by this proposed permanent rule include various facilities that use Class B firefighting foam in their fixed fire suppression systems. These would be facilities that have a need for suppression of possible liquid (gasoline, oil) fires. Small businesses would also be entities using foam for testing, including foam and foam equipment testing facilities that test firefighting foam effectiveness or test a firefighting foam delivery system or equipment; and entities that contain, treat, and dispose or store foam from a testing facility or generated as a result of testing foam.

Containment, treatment and disposal: moderate economic impact is expected. It is estimated that there are approximately 150 to 200 fixed fire suppression systems within public and private facilities that utilize Class B firefighting foam. A limited survey of facilities with fixed foam systems indicated that these fixed systems are primarily in areas with existing containment, resulting in minimal to no economic impact. Industry experts estimated that system testing and resultant foam disposal costs will increase for these facilities, and cost approximately \$3,000 to \$20,000 per facility. Assuming 200 facilities in the state, the statutory and rule requirements would range in impact from approximately \$600,000 to \$4,000,000 per year, with the midpoint estimate of \$2,300,000. This is a high cost estimate because some of these costs would already be incurred as a result of s. 299.48, Wis. Stats., which prohibits discharging foam into a storm or sanitary sewer. Costs are also expected to lessen over time with adoption of alternative methods such as surrogate and water equivalency testing and using replacement foams that do not contain PFAS.

Additionally, some manufacturers with foam testing operations in Wisconsin have been phasing out the use of PFAS in foam products and testing, which may increase as alternatives become more readily available. Any current system tests that generate Class B foam with intentionally added PFAS must use appropriate containment, treatment, and disposal or storage methods. Although they are not small businesses, the department is aware of only a few foam manufacturing facilities in Wisconsin that would conduct testing. One manufacturer is developing its own treatment facility and others may be using contractors to collect and manage foam generated from testing.

This proposed permanent rule is self-implementing and allows entities to choose containment, storage, treatment, and disposal methods that fit best with their facility designs and needs, while at the same time providing standards that will prevent discharge of foam to the environment. Entities may also elect to treat and dispose of PFAS foams outside the state. The provided standards and methods for the prevention of discharge of foam to the environment can help businesses avoid more costly cleanup procedures. The reporting and recordkeeping requirements provided in the rule impact all entities and increased associated costs are estimated to be minimal.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.