

# STATEMENT OF SCOPE

## Department of Natural Resources

**Rule No.:** WY-29-19

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**Relating to:** Repeal of chs. NR 107 and 109 and creation of ch. NR 108 related to aquatic plant management, manual removal and mechanical control regulations, and aquatic habitat protection, and revision of ch. NR 193 related to surface water grants.

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**Rule Type:** Permanent

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### 1. Finding/nature of emergency (Emergency Rule only):

These are proposed as permanent rules.

### 2. Detailed description of the objective of the proposed rule:

Chapter NR 107, Wis. Adm. Code, regulates chemical (herbicide) control of aquatic plants and nuisance-producing organisms and was last updated in 1989. Since then, significant strides have been made in herbicide technology and understanding how herbicides work in northern temperate waters, and both federal and state laws have changed with respect to the regulation of herbicide use as well the protection of native plants and the control of aquatic invasive species. Chapter NR 109, Wis. Adm. Code, regulates mechanical, manual, biological and other control options as well as the planting of nonnative aquatic plants. It was created in 2003 following substantial changes to ss. 23.22 and 23.24, Wis. Stats. Through a separate board order (WY-18-15), ch. NR 198, Wis. Adm. Code related to Aquatic Invasive Species (AIS) Control and Prevention Grants is being repealed and recreated as a part of ch. NR 193, Surface Water Grants. Together, these codes establish the Department's aquatic plant management (APM) program. Consequently, it is anticipated that some revisions to NR 193 may be needed to establish consistency.

The objectives of the proposed rule are to bring the policies of the state's aquatic plant management program into alignment with current state and federal law and the scientific understanding of the control of aquatic invasive and nuisance-causing species, as well as the protection of native aquatic plants, aquatic habitats, water quality and public health. This rule-making action is to repeal chs. NR 107 and NR 109, Wis. Adm. Code, to establish one comprehensive code, ch. NR 108, Wis. Adm. Code. Most of the policy revision will focus on updating chemical control policies.

The new code will cross-reference invasive species identification, classification and control in ch. NR 40, Wis. Adm. Code, as well as ch. NR 193, Wis. Adm. Code, to enhance consistency. It

will incorporate integrated pest management (IPM) principles that emphasize the strategic use of multiple tools in management. IPM is widely recognized as the most effective process to improve nuisance and invasive species control, maintain recreational uses and protect water quality and fish and wildlife habitat. IPM is required for aquatic plant management activities since 2013 through a Wisconsin Pollutant Discharge Elimination System (WPDES) general permit implementing the Clean Water Act.

The new rule will seek to streamline the permitting process by eliminating redundancies and clarifying applicant responsibilities and application requirements. The use of electronic filing and notice will be incorporated to further enhance efficiencies for the applicant, industry and the Department. This rule will address input from citizens, industry, academia and other governmental units over program consistency, qualification of professionals, planning, and standard methodologies for project assessment. The rule will update citations, notes, and references to appropriate statutes and administrative codes, and will include other housekeeping changes. Additional rule changes reasonably related to those discussed here also may be pursued.

### **3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Modifications proposed for this rule package:

Reporting requirements in existing rules do not require an evaluation of the permitted aquatic plant management actions. As such there is no consistent procedure to measure the success of a control project. The rule process will consider an evaluation requirement and clarifying methods of evaluation in concert with ch. NR 193, Wis. Adm. Code. If the rule process finds a new evaluation method, it will allow the Department, AIS grant recipients, and the industry to better track the efficacy of treatments and their effects on the aquatic environment, and will improve management outcomes. This will allow for the modification of techniques to be based on uniform evaluation procedures so permitted management can evolve in concert with technological advances such as genetic testing for hybridity of aquatic species and best management practices, such as Integrated Pest Management (IPM).

The rule process will consider incorporating existing law and regulation pertaining to the management of invasive species classified as prohibited or restricted in order to provide consistency. This will ensure consistent and comprehensive treatment of invasive species throughout the (often grant funded) planning, control and permitting processes that accompany large-scale APM activities.

The current rule allows the Department to require a plan for mechanical control under ch. NR 109, Wis. Adm. Code. There is no provision for requiring a plan for chemical control. However, an approved plan is an eligibility requirement to receive grant funds for aquatic plant and AIS management. Approved plans are appropriate for large-scale projects where native plant or ecosystem impacts are possible, and where wild rice, Areas of Special Natural Resource Interest (ASNRI's) or rare plants exist. These plans can also be the basis for the issuance of multiple year permits, which are allowed for mechanical control but not for chemical control. The rule process will consider uniform minimum plan requirements across aquatic plant management

activities, incorporating adaptive management and integrated pest management principles. Uniform plan requirements would be incorporated in DNR grant-funded projects under NR 193.

The rule process will consider creating specific regulations for the use of certain products currently regulated under NR 107 and 109. The Department will consider product-specific regulations for the use of dyes, alum, bacteria or other additives to suppress nutrients or act as aquatic plant growth inhibitors.

Current aquatic plant management rules do not have independent requirements for training or qualification for individuals conducting aquatic plant management activities. Applicators are currently required to maintain certification and licensing with the Department of Agriculture, Trade and Consumer Protection. This rule process will consider creating minimum qualifications and training requirements for commercial applicators and aquatic plant management consultants working in public waterways to ensure the protection of health, safety and the public interest in waters, efficient and effective use of grant funding, sound ecological practices, and consistent data recording.

Current rules allow waivers and exemptions of certain management activities, fees and permit applications. Some of these have created confusion to customers and staff. The rule process will consider including a waiver and exemption section to clarify waivers and exemptions for all management of aquatic plants.

The rule process will consider clarifying public posting and notification requirements for when treatments are occurring and allow the use of electronic notification, which was not possible when the existing code was written. This will expedite the process for applicants and the industry, as well increase the awareness of treatments for riparian owners.

The rule process will evaluate changes to the determination of the scope and scale of treatments, which controls the applicable requirements for the treatment. Existing rules define small scale and large-scale treatments. Large-scale treatments include 10 acres or 10% of the littoral area, whereas whole lake treatments are not addressed. Existing rules also limit treatment areas to within 150 feet of shore under most conditions. The industry and the Department have worked collaboratively to gain a better understanding of chemical dosages based on water volume, rather than surface acreage. The industry has addressed this by changing language in product labels. The rule process will consider creating definitions and corresponding scale-appropriate policies for small, large and whole lake treatments reflective of the new knowledge and changes in management practice.

The rule process will consider incorporating one fee structure that adequately supports the program's costs. Existing ch. NR 107 code calculates fees based on a \$20.00 nonrefundable fee on all permit applications, and a \$25 per acre fee up to 50 acres for public waters. This differs from the fee schedule in ch. NR 109, Wis. Adm. Code, that has a \$30 nonrefundable fee on all permit applications and \$30 per acre up to \$300 on public waters. Chapter NR 109, Wis. Adm. Code, also allows for annual renewal for a fee of one half the original fee but not less than \$30 and allows multiple year permits up to five years.

The rule process will consider updating timelines for permit processing and incorporating permit amendment procedures. The current rule requires a 10-15-day permit processing window and

does contain specific procedure for permit amendments. Fluctuating situations in the field between permit approval and treatment often necessitate changes to the permit parameters. The Department will evaluate permit processing timelines to ensure the appropriate level of review taking in to account different waterbody types, purposes of management, and treatment scales, information needs, and pre-treatment interaction with permittees.

The Department issued approximately 1,160 NR 107 permits in 2019 for small private ponds and stormwater management facilities. The majority are reapplied for each year for the same control activity. The rule process will consider a streamlined pond permitting process by allowing for multiple year permits of private ponds when control activities follow an approved plan.

The rule process will consider establishing a section pertaining directly to aquatic plant management in wetlands. Existing requirements in chs. NR 107 and 109, Wis. Adm. Code, are not reflective of current best management practices in wetland management, particularly for invasive species. The rule process will consider permitting requirements including: conditions, treatment timing and reporting for wetland management.

Policy alternatives:

The alternative is no change to the aquatic plant management codes. If updates to the aquatic plant management codes are not made, waterbodies will continue be managed with outdated methods, leading to reduced efficacy of management. The last 25 years of aquatic plant management science will not be incorporated to guide management activities including grant programs. Customers and the commercial applicator industry will continue to be frustrated by adherence to outdated methods and annual permitting for hundreds of private ponds.

#### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

Section 23.24, Wis. Stats.

Section 23.22, Wis. Stats.

Section 281.17 (2)

Section 281.01(1)

Section 227.11 (2)(a)

s. 23.24(2)(a) requires the Department to implement efforts to protect and develop diverse and stable communities of native aquatic plants, regulate how aquatic plants are managed, and administer and establish by rule procedures and requirements for the issuing of aquatic plant management permits. .

s. 23.24(2)(c) authorizes the promulgation of permit requirements specifying the quantity and species of aquatic plants that may be managed, the areas and times in which aquatic plants may be managed, the methods used for aquatic plant management activities and for disposing or using of aquatic plants, and plan requirements.

s. 23.24(3)(b) authorizes the Department to require that an application for an aquatic plant management permit contain a plan for the Department's approval as to how the aquatic plants will be managed,

s. 23.24(3)(c) authorizes the Department to promulgate a rule to establish fees for aquatic plant management permits. Under the rule, the Department may establish a different fee for an aquatic plant management permit to manage aquatic plants that are in a body of water that is entirely confined on the property of one property owner.

s. 23.24(4)(c) authorizes the Department to promulgate a rule to waive permit requirements for certain aquatic plant management activities.

s. 23.24(2)(b) requires the Department to designate by rule which aquatic plants are invasive for the purposes of aquatic plant management. The Department is required to designate Eurasian Watermilfoil, Curly-Leaf Pondweed and Purple Loosestrife as invasive species and may designate any other aquatic plant as an invasive if it has the ability to cause significant adverse change to desirable aquatic habitat, to significantly displace desirable aquatic vegetation, or to reduce the yield of products produced by aquaculture.

s. 23.22(2)(b) directs the Department to create and administer a statewide management plan to control invasive species and to administer the program in s. 23.24, Wis. Stats., as it relates to invasive aquatic plants.

s. 23.22(2)(c) requires the Department to promulgate rules to establish a cost-sharing grant program for projects to control invasive species.

s. 281.17(2), requires the Department to supervise chemical treatment of waters for the suppression of nuisance-producing organisms that are not specifically regulated under s. 23.24 (2), Wis. Stats.

s. 281.68(1m) requires the Department to develop and administer a financial assistance program to provide lake management planning grants.

s. 281.68(3)(a) requires the Department to promulgate rules for the administration of the lake management planning grant program.

s. 281.68(3)(bg) requires the Department to promulgate rules for the administration of the lake monitoring and protection contracts program,

s. 281.69(1m) requires the Department to develop and administer a financial assistance program to provide grants for lake management and classification projects.

s. 281.69(3) requires the Department to promulgate rules to administer and determine eligibility for grants for lake management projects.

s. 281.69(5)(a) requires the Department to promulgate rules to administer and determine eligibility for grants for lake classification projects.

s. 281.70(2) requires the Department to develop and administer a financial assistance program to provide grants for planning projects and management projects for river protection.

ss. 281.70(4)(b), (5), and (6) require the Department to promulgate rules to establish qualifications for eligible recipients and designate eligible activities for river protection grants.

s. 227.11(2)(a) authorizes the Department to promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute.

s. 227.11(2)(b) authorizes the Department as an agency authorized to exercise discretion in deciding individual cases to formalize general policies evolving from its decisions by promulgating the policies as rules.

#### **5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

The Department estimates that approximately 3500 hours of staff time will be required to complete the proposed rule.

#### **6. List with description of all entities that may be affected by the proposed rule:**

Public: Any lake association, district or unit of local government managing aquatic plants or aquatic invasive species and any lake, wetland or river user in Wisconsin where control activities take place.

Business/Industry: A large array of contractors, including: commercial pesticide applicators, pesticide manufacturers, mechanical harvesting contractors, mechanical harvesting manufacturers, SCUBA diver assisting manual removal, environmental consultants and manual removal tool manufacturers.

State Government: Department of Agriculture Trade and Consumer Protection (DATCP) serves as a partner with pesticide use, aquatic nursery growers and fish farms. The Department will work with DATCP to avoid duplicative processes to increase efficiencies.

Permit applicants: Any person, association, district or unit of local government managing aquatic plants or aquatic invasive species. The Department issued approximately 1,975 APM permits in 2019.

#### **7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

The proposed changes for aquatic plant management program are in accordance with federal regulations:

- Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The EPA approves pesticide products for use, classifies according to toxicity and evaluates safety. These rules apply to everyone. The proposed rule revision clarifies the use of these products in waters of the state.
- The Clean Water Act (CWA) regulates waters in the United States, including setting minimum water quality standards, and regulates additives in waters as pollutants. According to the Cotton Council Decision in Federal Court (need case citation), additives, including pesticides, are required to have a National Pollutant Discharge Elimination System (NPDES). In Wisconsin, the Department issues WPDES in lieu of NPDES, thereby regulating the use at the state level rather than federal level.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):**

The proposed changes for the aquatic plant management program will have a moderate economic impact after rule implementation. There will not be a significant economic impact on small businesses. The fee structure will increase to adequately fund program staff requirements. The Department anticipates that the cost to comply with minimum qualifications for applicators will consist of less than a day to study and take a free exam. Any specialized training required by the new rule would also be provided free, requiring only the individual's time and possibly travel. Electronic permitting and multiple year permitting will decrease the time to apply for a permit and reduce staff time to process permits.

**9. Anticipated number, month and locations of public hearings:**

The Department anticipates holding one public hearing in the month of September 2021. Anticipated locations for this hearing is Madison in person, with a telepresence in Rhinelander, Green Bay, Milwaukee, Eau Claire and Superior. The Department will hold these hearings in these locations to provide convenient access for interested parties around the state, as well as the infrastructure to host real-time communications.

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Preston D. Cole, Secretary

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Date Submitted