

**Public Comments and DNR Responses  
Natural Resources Board Order WA-07-20**

**December 8, 2021**

This document presents a summary of public comments received on proposed rules creating chapter NR 159 related to regulating fire fighting foam that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS).

**OVERVIEW**

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 an emergency firefighting 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.

The DNR held two public comment periods associated with the proposed rule. The public comment period to solicit information on the economic impacts occurred from July 22 to August 21, 2021 and the public comment period on the rule occurred from September 27 to November 11, 2021.

Associated outreach included public notices for both public comment periods, updates to the department’s proposed administrative rules web page and hearings and meetings calendar, a public hearing on November 4, 2021, and notification emails at the beginning of both public comment periods to known stakeholders and subscribers to PFAS-associated GovDelivery lists (Hazardous Waste Decoded, PFAS Contamination in Wisconsin, PFAS Contamination in the Marinette and Peshtigo Area, PFAS External Advisory Group, PFAS Technical Group (only for the later public comment period), Remediation & Redevelopment Newsletter, Solid Waste News and Wisconsin PFAS Action Council (WisPAC).

In addition, the department met with the Wisconsin State Fire Chiefs Association (WSFCA) on October 27 and November 11, 2021.

## **ECONOMIC IMPACT ANALYSIS**

A 30-day public comment period on the draft EIA occurred from July 22 to August 21, 2021. The department received comments from nine individuals and organizations on the EIA during this period. These included the following excerpts (only select or representative language is provided for longer comments):

### **A) One comment indicating that the rule should include treatment indicator parameters;**

“I think rules controlling PFAS and acceptable limits of them should be adopted. I resent Wi. Manufacturer's and Commerce opposing health safety rules on this issue.”

**DNR RESPONSE:** Under s. 227.26(2)(L), Wis. Stats., if JCRAR suspends an emergency rule, the department may not submit to the legislature the substance of the emergency rule as a proposed permanent rule during the time the emergency rule is suspended.

### **B) Six comments mostly related to information about costs resulting from PFAS pollution such as impacts on health, property values, tourism, agriculture, and/or recreation. One of these commenters also indicated a need to obtain additional information regarding the cost to fire departments:**

1. 2. and 3. (generally identical): “... we (or I) urge the Department to include an estimation and analysis of the adverse effects to human health and the link to economic impacts in Wisconsin AND the economic BENEFITS of preventing exposures to PFAS, including populations at risk such as firefighters, first responders, persons with suppressed immune response, expectant and nursing mothers, infants and many others.”

4. “Economic analyses from other states with PFAS regulations indicate a net benefit”; “Two studies have quantified health care costs associated with PFAS exposure”; “Diseases linked to PFAS have a large economic cost in the US”; “PFAS contamination affects home values”; “PFAS groundwater contamination can affect agricultural product quality”; “Fish consumption advisories negatively affect the recreational fishing industry”; “PFAS contamination disproportionately affects disadvantaged and minority communities”

5. “I am very disappointed at the lack of Health Concerns to people and that medical costs will continue to increase from exposure to PFAS compounds. It seems there is a heavily weighted concern over economic impact of the PFAS polluters. The cancer caused by PFAS compounds and loss of property values will dwarf any polluter economic impact.”

6. “DNR adds, however, that the estimated \$2,300,000 is not the total compliance cost since the cost to fire departments will need to be added when the data from these entities is received. It appears therefore that the estimate of the cost of implementing the rule is incomplete.”; “The benefit portion of the draft EIA is even more incomplete. Several benefits are mentioned but no estimates of their value are provided. Any economic impact analysis should at least attempt a serious discussion of the benefits.”; “Lastly, the economic benefits from supporting Wisconsin’s tourism and recreation industries by protecting fish and game, as well as the health benefits for residents for whom fish are an important source of food should be recognized.”

**DNR RESPONSE:** The department added language in Section 15 of the EIA regarding potential healthcare costs and recreation value lost due to PFAS impacts. The department did conduct additional, targeted outreach to the Wisconsin State Fire Chiefs Association (WSFCA) regarding costs specific to firefighters. However, the WSFCA indicated that the rule would have a limited impact on the firefighting community and did not provide cost-related data.

**C) One comment indicating that a manufacturer would have to consider using a less effective firefighting foam as a result of the rule:**

“The proposed rule puts American Packaging Corporation in an uncomfortable position of having to make a choice regarding a less effective means of protection life and property by using a non PFAS-containing foam that would not be suitable for alcohols. Please advise.”

**DNR RESPONSE:** The rule does not prohibit the use of PFAS foam in emergency situations.

**D) One comment indicating that the EIA improperly generalized all PFAS, inaccurately characterized the health effects of PFOA and PFOS, and should consider the cost and feasibility of out of state treatment and disposal:**

**DNR RESPONSE:** The department revised the EPA reference to one that describes adverse health effects of PFAS in general instead of PFOA and PFOS specifically. The EIA already incorporates the cost and feasibility of out of state treatment and disposal since most if not all waste concentrated PFAS firefighting foams and treatment media were already disposed of out-of-state prior to implementation of the emergency rule.

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE**

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.

**PUBLIC COMMENTS ON DRAFT RULE**

A public comment period for the draft rule occurred from September 27, 2021 to November 11, 2021 with a public hearing on November 4, 2021. The public hearing included 42 attendees. The department received a total of 11 (written and/or verbal) comments during the public comment period. These included the following (only select or representative language is provided for longer comments):

**A) Two comments indicating that PFAS in firefighting foam should be banned;**

1. “I believe that PFAS in fire-fighting foam should be banned by the Wisconsin DNR and enforced by public fire inspectors for all public buildings and private companies that require periodic fire inspections. All fire extinguishers used in Wisconsin need to be required to have labeling certified by the manufacturer or refilling company that that fire foam contents are free of PFAS type chemicals. Public buildings and private companies requiring periodic fire inspections should be cited for failure to obtain new PFAS-free fire extinguishing foam.”

2. “Outlawing the manufacturing and the use of the product should be done. The damage that has been done is not worth the benefits the product has.”

**DNR RESPONSE:** The scope of the proposed permanent rule is implementation of s. 299.48, Wis. Stats., including determining appropriate containment, treatment, and disposal or storage measures for testing facilities.

**B) Seven comments in support of stronger and/or additional regulations. Some of these comments also included general support for the rule:**

1. “This rule for PFAS-containing firefighting foam is the very least we could be doing right now.”; “Wisconsinites are demanding that our decision makers take PFAS seriously, but the Wisconsin legislature continues to undermine progress. In this 2021-2022 legislative session, only three PFAS-related bills have been introduced – two of which work against the progress needed to address this challenge.”; “Until the Wisconsin legislature takes meaningful action to address PFAS, it is more important than ever for the DNR to adopt these administrative rules. We applaud the DNR for working on this rule as an important first step and appreciate you doing everything you can to meet the moment by promulgating substantive surface, ground, and drinking water standards for PFAS. At the moment, fighting for these rules is the best chance we have to protect Wisconsinites from these dangerous forever chemicals.”

2. Verbal comment at November 4 public hearing: Commenter expressed disappointed that legislature "watered down" the emergency rule and hopes that there will be future opportunities to strengthen regulations, if necessary. The rule is a minimal, but still an important end product.

3. Verbal comment at November 4 public hearing: Commenter indicated that this work is crucial, PFAS are a threat to human health, and regulations are lacking in WI. Comment would like DNR to put language back into the rule that JCRAR suspended.

4. and 5. (generally identical): “Doing this work to regulate PFAS is crucial...”; “Regulations in Wisconsin are severely lacking, and it’s putting drinking water, safety and health at risk.”; “Last December, the JCRAR struck out some of the strongest language in this rule. The legislature is not made up of scientists, and we should not be relying on them to make science-based decisions like this. Wisconsin residents, who are being harmed daily because of our lack of PFAS regulation, should be centered and prioritized in the rulemaking process, not the business groups who are polluting and who our legislature is protecting. So I ask that you incorporate strong PFAS regulations that will protect Wisconsinites into this rule.”

6. “This rule is an important first step in the process of addressing source control associated with the use of firefighting foam which intentionally added PFAS.”; “While we would prefer that the final rule incorporate the provisions contained in the proposed initial emergency rule we understand the need to adopt a rule acceptable to JCRAR and the legislature. We support WA-07-02 as proposed.

7. “JCRAR weakened the rule based on a questionable statutory analysis and has to a certain extent frustrated these legislative purposes by preventing the Wisconsin Department of Natural Resources (“DNR”) from including monitoring provisions designed to ensure appropriate treatment based on scientifically based and technically feasible indicator parameters.”; “Act 101 requires and explicitly authorizes DNR, through a permanent administrative rulemaking, to “determine appropriate containment, treatment, and disposal or storage measures for testing facilities.” Wis. Stat. § 299.48(5).”; “...JCRAR removed the monitoring parameters for 14 PFAS contained in Table 1 of the Emergency Rule that would gauge the appropriateness of treatment measures for the purposes of Wis. Stat. § 299.48(3)(b).”; “JCRAR’s suspension created a broad compliance and enforcement loophole that frustrates the purpose and function of §299.48, allowing the exception to swallow the rule.”; “...without the suspended parts of EmR2045, regulated facilities are not required to measure and monitor the effectiveness and appropriateness of employed treatment technologies.”; “...without monitoring standards providing data to “gauge appropriate treatment effectiveness,” § 299.48 cannot be duly administered and implemented. JCRAR’s suspension based on a questionable statutory analysis ultimately handicaps the statutory directive of 2019 Wisconsin Act 101: “prevent or try to minimize new discharges of PFAS-containing fire-fighting foams from negatively impacting communities, business and citizens in the future.”

**DNR RESPONSE:** The department clarified in the board order under s. 227.26(2)(L), Wis. Stats., if JCRAR suspends an emergency rule, the department may not submit to the legislature the substance of the emergency rule as a proposed permanent rule during the time the emergency rule is suspended.

**C) One comment suggesting the following changes:**

- In s. NR 159.06, revise the term “a person that stores foam” to “a person that stores foam at a facility that tests foam” to make the requirement consistent with the scope of Act 101.
- Clarify that only wastewater residuals generated from the treatment of *foam disposed of within Wisconsin* must be treated with cementitious materials by the generator or at the solid waste facility prior to placement at a Wisconsin licensed solid waste facility; that such residuals may be disposed of at a licensed facility out of state without being mixed with cement before shipment; and that other PFAS leachate management measures may be approved by the department on a case-by-case basis.
- Eliminate the requirement to use only granular activated carbon sourced from bituminous coal so entities may source bio-mass granulated activated carbon, for example, and allow for additional technologies to be to be determined to be BAT.
- Create a new s. NR 159.08(1)b.2, specifying that treatment of used foam may include shipment out of state to a licensed deep-well injection facility, and renumber “alternative treatment technology” to s. NR 159.08(1)b.3.

**DNR RESPONSE:** The department clarified in proposed s. NR 159.06, Wis. Adm. Code, that the storage provisions are specifically for testing facilities and eliminated the words “in Wisconsin” from 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 that Wisconsin Administrative Code applies to activities within Wisconsin. The department did not include bio-mass granular activated carbon in the default treatment system specified in proposed s. NR 159.08(1)(b)1.c., Wis. Adm. Code, because the bio-mass granular activated carbons have not been thoroughly demonstrated to be as effective as the granular activated carbons sourced from bituminous coals. However, bio-mass granular activated carbons may still be allowed as an alternative treatment technology under proposed s. NR 159.08(1)(b)2., Wis. Adm. Code, if the applicant can demonstrate that it will achieve treatment equivalent to the default treatment system.

**D) One comment requesting the prescriptive design not be assumed to be the best available technology:**

“Design of effective treatment systems for treatment and removal of PFAS from AFFF is a continually developing science. Care should be taken not to assume that the prescriptive design that is written into the rule is the current state of the art or “Best available technology”. Clear and concise requirements for demonstrating the effectiveness of a filtration system should be included in the rule for ALL proposed systems. This would prevent a situation where development of newer and more effective technologies are stigmatized and held to a higher burden of proof.”

**DNR RESPONSE:** The default treatment system specified in proposed s. NR 159.08(1)(b)1., Wis. Adm. Code, provides minimal specification for a treatment system. However, proposed s. NR 159.08(1)(b)3., Wis. Adm. Code, indicates that both the prescribed and alternative treatment systems require plan review and approval prior to commencement of construction.