

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WA-06-20 (E) and WA-07-20

Relating to: Creation of chapter NR 159 to promulgate rules relating to regulating fire fighting foam that contains certain contaminants.

Rule Type: Both Permanent and Emergency

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

2019 Wisconsin Act 101 (Act 101) directs the Department of Natural Resources (department) to promulgate an emergency rule under s. 299.48 (5), Wis. Stats.

Section 2(1) of Act 101 states that the department shall promulgate rules under s. 299.48 (5), Wis. Stats., no later than the first day of the 7th month beginning after the effective date of this subsection. Emergency rules promulgated under this subsection remain in effect until 3 years after the effective date, or the date on which permanent rules take effect. Notwithstanding s. 227.24 (1)(a) and (3), Wis. Stats., the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection. Section 2(1) of Act 101 took effect on the day after publication, which was February 6, 2020. Emergency rules must be promulgated no later than September 7, 2020.

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

The objective of the proposed rule(s) is to implement and administer s. 299.48, Wis. Stats., related to regulating fire fighting foam containing intentionally added poly- and per-fluoroalkyl substances (PFAS). PFAS are highly resistant to degradation and have been detected globally in water, soil, air, sediment, human blood serum, fish and wildlife. This persistence in the environment is of concern, as PFAS have documented health effects as animal and epidemiological studies have suggested probable links to several diseases and cancer. In Wisconsin, PFAS have been detected in drinking water, groundwater, surface water, soil, sediments, air, fish and wildlife near sources of industrial use, manufacturing, and known discharges of fire fighting foam to the environment. The primary objective of this rule is to limit the use or discharge of a Class B fire fighting foam that contains intentionally added PFAS in order to mitigate and prevent discharges of PFAS to the environment.

The development of these rules, within ch. NR 159 (new), Wis. Adm. Code, would address: the prohibition of discharges of these foams for training exercises; clarify recordkeeping; responsibilities for notifications of discharges to the environment; address the exemptions for emergency fire fighting or fire prevention operations; and what is considered appropriate containment, treatment, and disposal or storage measures for testing purposes of these foams.

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:

Existing or new policies relevant to the rule:

PFAS is an emerging contaminant, and as such, there is minimal existing policy specifically related to PFAS in Wisconsin. The DNR is aware of approximately 30 PFAS-contaminated sites in Wisconsin where the DNR is requiring the responsible parties to investigate and clean up contamination, the most common source of the PFAS contamination being PFAS fire fighting foam. At the request of the DNR, the Wisconsin Department of Health Services (DHS) reviewed scientific literature and recommended health-based groundwater enforcement standards of 20 ppt for PFOA and PFOS individually and combined. The DNR is currently undertaking rulemaking to promulgate these standards.

DNR was directed by the Wisconsin legislature to conduct a survey of fire departments in the 2019-21 biennial budget. DNR has been partnering with local fire departments, commercial airports, state fire associations, and educational institutions to share information and gather data for the survey. DNR is in the midst of the survey, and should have results in late spring to help the state understand how many fire departments may use fire fighting foam with PFAS and the quantity of foam they may have on hand that they would like to properly dispose of.

This rule would build upon existing regulations and assist with implementation of new policies proposed in Act 101, including to determine appropriate containment, treatment, and disposal or storage measures for class B fire fighting foam testing facilities.

Policy alternatives:

There are no identified policy alternatives. Act 101 directs the department to use the procedure under s. 227.24, Wis. Stats., to promulgate rules under s. 299.48 (5), Wis. Stats., both emergency and permanent.

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

The statutory authority for developing regulations for fire fighting foam containing PFAS is as follows: 2019 Wisconsin Act 101 created s. 299.48, Wis. Stats., to regulate fire fighting foam that contains certain contaminants and to grant rule-making authority to the department of Natural Resources. Specifically, s. 299.48 (5), Wis. Stats., states that the department shall promulgate rules to implement and administer this section, including to determine appropriate containment, treatment, and disposal or storage measures for testing facilities under sub. (3)(b).

Additional authority for pollution prevention activities is under s. 299.13, Wis. Stats.; authority to require department notification of fire fighting foam use is under s. 299.48(3m), Wis. Stats.; and clarifications to DNR authority to require notification of a discharge of a hazardous substance (including PFAS) is under s. 292.11, Wis. Stats.

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

The estimated staff time needed to develop the emergency and permanent rules is approximately 800 hours. This includes staff time needed to address the full public input process, develop the economic impact analysis, conduct outreach to stakeholders, and coordinate agency reviews for the permanent rules.

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

The proposed rule would apply to all entities involved with the manufacture, testing or use of the fire fighting foams, as outlined below:

Fire fighting entities: This rule would apply to fire fighting entities, public and private, which may include municipal fire departments, private businesses and commercial airports engaged in the use of emergency fire fighting or fire prevention operations that use class B (foam designed for use on

flammable liquid fires, and may include dual action Class A and Class B foam) fire fighting foam with intentionally added PFAS. These entities would be required to notify the department of all discharges (use) to the environment immediately or as soon as practicable without hindering operations. Training with the use of this foam will be prohibited under Act 101 seven months after the effective date of the law. These entities may consider replacing class B fire fighting foam containing PFAS with another product that does not contain PFAS.

Foam and foam equipment manufacturing, installation, and testing entities: These entities would be required to implement appropriate containment, treatment, and disposal or storage measures to prevent discharges of the foam to the environment during testing of the foam or its equipment.

Public and private facilities that have installed fixed foam systems or that store fire fighting foam to be used for fire suppression: These facilities would need to determine the type of fire fighting foam used in fire suppression systems and ensure only testing or use for emergency fire fighting is conducted if the system contains class B fire fighting foam with PFAS. Any other use, training, or testing would be prohibited. These facilities may consider replacing Class B fire fighting foam containing PFAS with another product that does not contain PFAS.

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 federal Defense Authorization Act of 2020 specifies in section 323 that PFAS fire fighting foam may only be released for purposes of an emergency response. A non-emergency release of PFAS foam may be made for the purposes of testing of equipment or training of personnel, if complete containment, capture, and proper disposal mechanisms are in place to ensure no foam is released into the environment. It also requires the military to develop a fluorine-free foam specification by January 31, 2023, and sets a deadline for banning the use on military bases in the future. The law establishes guidelines for the proper disposal of fire fighting foam at military sites, and directs the military to develop guidance to address these issues.

State definitions of "environmental pollution" and "discharge" of a "hazardous substance" are not the same as the definition of a hazardous substance in the federal Superfund law and in some other states' laws. When discharged to the environment, PFAS compounds meet the definitions of a hazardous substance and/or environmental pollution under state statutes ([s. 292.01, Wis. Stats.](#)). There is no comparative federal law that prohibits the use or discharge of class B fire fighting foam that contains intentionally added PFAS.

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

The anticipated economic impact of the emergency and permanent rules is moderate (less than \$5,000,000 per year) based on the following assumptions:

- Minimal cost and time required for a person who discharges fire fighting foam to the environment to use existing department notification systems.
- Although not required, many entities and facilities may choose to replace class B fire fighting foam with one that does not contain PFAS. Based on legislative hearing testimony provided by the Wisconsin Fire Chief's Association, the cost to collect and dispose of fire fighting foam and related wash waters from fire trucks and equipment was conservatively approximated to be \$50 per gallon, and the cost of replacement foam was approximated to be \$35 per gallon.
- The total amount of class B fire fighting foam containing PFAS in the state is currently unknown. However, the department will have an estimate of foam currently housed at fire departments from survey results expected in April 2020. A similar 2018 survey estimated over 36,000 gallons in Michigan. Because Michigan has a larger number of fire departments, the total quantity in Wisconsin is expected to be less.

The rule may have an economic impact on small businesses, as defined in s. 227.114 (1), Wis. Stats. The anticipated total economic impact of this rule (moderate impact) includes the estimated small business impact. The department will engage small business and business affiliated associations during the solicitation and development of the economic impact analysis period of this rule.

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

The department anticipates hosting informal public listening sessions to gather input throughout the rule drafting process for both the emergency and permanent rules, with opportunities for stakeholders around the state to submit comments in writing.

The department anticipates holding a public hearing for the emergency rule in the month of October 2020. The hearing will be conducted in Madison with opportunities for stakeholders around the state to connect to the Madison hearing via teleconference or video conference, and will allow for hearing comments to be submitted in writing.

The department will also hold a public hearing for the permanent rule in the month of December 2020. The hearing will be conducted in Madison with opportunities for stakeholders around the state to connect to the Madison hearing via teleconference or video conference, and will allow for hearing comments to be submitted in writing.

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