

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-20-23

Relating to: Repeal of chs. NR 107 and 109 and creation of ch. NR 107 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.

Rule Type: Permanent

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 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 improved our understanding on how herbicides work in northern temperate waters. 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, Stats. Chapter NR 193, Wis. Adm. Code, Surface Water Grants, was established in 2019 and provides funding for regulated aquatic plant control activities. Together, these codes establish the department's aquatic plant management (APM) program. Consequently, it is anticipated that some revisions to ch. NR 193 may be needed to establish consistency.

The objectives of the proposed rule are to bring the policies of the state's APM program into alignment with current state law, to remove obsolete language and update outdated sections of the rule, and finally, to expand the protection of native aquatic plants for the benefit of water quality, the public interest in navigable waters, and public health. This rule-making action is to repeal chs. NR 107 and 109, Wis. Adm. Code, to establish one comprehensive code, ch. NR 107, Wis. Adm. Code.

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 strategic

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 APM 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. 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:

In 2022, the department issued approximately 1,300 permits for private pond and stormwater management facilities. These permits account for 60% of all aquatic plant control permits. The majority are reapplied for each year for the same control activity. This is a large workload for department staff and permittees alike. The rule process will consider updated pond permitting processes including multi-year permits and expanded waivers.

The current rule allows the department to require a plan for mechanical control under ch. NR 109, Wis. Adm. Code. Chapter NR 107 does not clearly define plan requirements for projects that are not grant funded under ch. NR 193. The rule process will consider uniform plan requirements. Any updates would be considered for incorporation into department grant-funded projects under ch. NR 193 as well.

Chapters NR 107 and 109 include heightened protections through permit review for high value plant species and department designated Sensitive Areas. The rule process will consider expanded protections for important aquatic habitats.

Current rules allow waivers and exemptions of certain management activities, fees, and permit applications. Some of these have created confusion for customers and staff. The rule process will consider clarifying and expanding waivers. These potential waivers will reduce the number of permits needed by permittees.

The rule process will consider updated permit processes. The increasing number of waterbodies conducting APM, the complexity of permit applications and the rigidity of current code limit permittees and the department's ability to respond to situations in the field. Current public and riparian notification requirements are outdated and limit all stakeholders' ability to be informed of aquatic plant control activities.

The rule process will consider incorporating updated fee structures that adequately support the program's costs. Existing ch. NR 107 code calculates fees based on a \$20 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, which has a \$30 nonrefundable fee on all permit applications and

\$30 per acre up to \$300 on public waters. Chapter NR 109 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 the thresholds for large scale control. Existing rules define small-scale and large-scale treatments for chemical control. Large-scale treatments include 10 acres or 10% of the littoral area, while whole lake treatments are not addressed. Existing rules also limit treatment areas to within 150 feet of the shore under most conditions. The commercial pesticide applicator 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 specific regulations for the use of certain products currently regulated under chs. NR 107 and 109. The department will consider product-specific regulations for the use of dyes or other additives to suppress nutrients or act as aquatic plant growth inhibitors.

The rule process will consider updating the standards for permit issuance in order to create one set of standards consistent for all permitted activities. The language used for current standards for issuance is different between chs. NR 107 and 109.

Policy alternatives:

The alternative is no change to the APM codes. If no updates to the APM codes are made, the permit requirements and decision-making tools for APM stakeholders and department staff will continue to be outdated. The program will continue to be under funded and understaffed. The number of permits will increase annually, which will continually reduce the amount of time staff can dedicate to customer service, public meetings and other functions for individual permittees. Without additional customer service and outreach efforts, APM stakeholders have less understanding of the department's permit decisions. The last 25 years of APM 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 thousands of private ponds.

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

Section 23.24, Stats.

Section 23.22, Stats.

Section 281.17(2), Stats.

Section 281.01(18), Stats.

Section 227.11(2)(a), Stats.

Section 23.24(2)(a), Stats., 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 APM permits.

Section 23.24(2)(c), Stats., 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 APM activities and for disposing or using of aquatic plants, and plan requirements.

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

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

Section 23.24(4)(c), Stats., authorizes the department to promulgate a rule to waive permit requirements for certain APM activities.

Section 23.24(2)(b), Stats., requires the department to designate by rule which aquatic plants are invasive for the purposes of APM. 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.

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

Section 23.22(2)(c), Stats., requires the department to promulgate rules to establish a cost-sharing grant program for projects to control invasive species.

Section 281.17(2), Stats., 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), Stats.

Section 281.68(1m), Stats., requires the department to develop and administer a financial assistance program to provide lake management planning grants.

Section 281.68(3)(a), Stats., requires the department to promulgate rules for the administration of the lake management planning grant program.

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

Section 281.69(1m), Stats., requires the department to develop and administer a financial assistance program to provide grants for lake management and classification projects.

Section 281.69(3), Stats., requires the department to promulgate rules to administer and determine eligibility for grants for lake management projects.

Section 281.69(5)(a), Stats., requires the department to promulgate rules to administer and determine eligibility for grants for lake classification projects.

Section 281.70(2), Stats., requires the department to develop and administer a financial assistance program to provide grants for planning projects and management projects for river protection.

Section 281.70(4)(b), (5), and (6), Stats., requires the department to promulgate rules to establish qualifications for eligible recipients and designate eligible activities for river protection grants.

Section 227.11(2)(a), Stats., 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.

Section 227.11(2)(b), Stats., 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 3,500 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 the APM 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 the discharge of pollutants to waters of the United States, including by setting minimum water quality standards and regulating additives in waters as pollutants. According to the *Cotton Council* decision in federal court, 553 F.3d 927 (6th Cir. 2009), chemical and biological pesticides applied in, over or near Waters of the United States require National Pollutant Discharge Elimination System (NPDES) permits. In Wisconsin, the state is delegated CWA permitting responsibilities and the department issues WPDES permits in lieu of NPDES, thereby regulating the use at the state level rather than federal level. The department has issued four WPDES general permits for pest control, which contain specific requirements for how pesticides must be applied and for record-keeping. The proposed rule will seek to align APM permitting with existing WPDES requirements.

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 APM program will have a moderate economic impact after rule implementation. There will not be a significant economic impact on small businesses. Private property owners of wetlands, ponds and lake associations and districts will be responsible for the primary cost increases. The fee structure will increase to adequately fund program staff requirements. The planning process will be an increased cost for some permittees.

These stakeholders will also benefit from reduced costs in some cases. Electronic permitting and multiple year permitting will decrease the time to apply for a permit and reduce staff time to process permits. Additional waivers will reduce the amount of permits, thereby reducing the time and costs associated with permit drafting, fees and reporting.

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

The department anticipates holding one public hearing in the month of November 2025.

The department will hold the hearing virtually to allow for as many people to attend as possible. Comments may be provided by mail, phone and email as well as in-person.

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Date Submitted

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