

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: DG-17-22

Relating to: Amendments to ch. NR 140 to set numerical standards to minimize the concentration of polluting substances for certain Per- and Polyfluoroalkyl Substances (PFAS) in groundwater

Rule Type: Permanent

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

The rule will be proposed as a permanent rule.

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

The proposed rule will amend ch. NR 140, Wis. Adm. Code, to add new public health related groundwater standards for certain Per- and Polyfluoroalkyl Substances (PFAS). The proposed rule will add public health groundwater standards for the four PFAS for which the United States Environmental Protection Agency (EPA) released drinking water health advisories (HAs) on June 15, 2022 in light of newly available science and in accordance with EPA's responsibility to protect public health. EPA issued interim HAs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). EPA issued final HAs for perfluorobutane sulfonic acid and its potassium salt (PFBS) and hexafluoropropylene oxide (HFPO-DA) dimer acid and its ammonium salt ("GenX" chemicals).

The objective of the proposed rule is to protect public health, given that groundwater is the primary source of drinking water throughout the state. PFAS breaks down very slowly and can accumulate in people. PFAS may cause reproductive effects such as decreased fertility and pregnancy-induced hypertension, developmental effects or delays in children including birth defects and low birth weight, increased risk of some cancers including prostate, kidney, and testicular cancers, decreased antibody response to vaccines, and increased cholesterol. Specific health effects for PFAS are collected in the DHS recommendations for groundwater standards, available here: <https://www.dhs.wisconsin.gov/publications/p02807.pdf> and <https://www.dhs.wisconsin.gov/water/gws-cycle10.htm>

Chapter 160, Wis. Stats., and ch. NR 140, Wis. Adm. Code, provide the process for setting numerical standards for consistent use in state regulatory programs to minimize the concentration of polluting substances detected in, or having a reasonable probability of entering, the groundwater resources of the state. Chapter 160, Wis. Stats., requires the department to develop numerical groundwater quality standards, consisting of enforcement standards and preventive action limits. Chapter NR 140, Wis. Adm. Code, establishes these Wisconsin state groundwater

quality standards. The proposed rule will add the numeric standard in ch. NR 140, Wis. Adm. Code, but will not amend the regulatory programs in other parts of state statute and code that use groundwater standards in carrying out their regulatory authority.

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:

Chapter NR 140, Wis. Adm. Code, was adopted by the Natural Resources Board in 1985 to comply with ch. 160, Wis. Stats. Chapter 160, Wis. Stats., created as part of the 1983 Wisconsin Act 410 (The Groundwater Bill), requires the Wisconsin Department of Natural Resources (department) to develop groundwater quality standards for substances detected in, or having a reasonable probability of entering, the groundwater resources of the state. The Natural Resources Board has approved amendments to ch. NR 140, effective in 1988, 1990, 1992, 1994, 1995, 1999, 2000, 2004, 2006, 2008 and 2011, to revise existing standards, establish new standards, and clarify rule language. There are now groundwater quality standards in ch. NR 140 for 138 substances of public health concern, 8 substances of public welfare concern, and 15 indicator parameters.

Chapter NR 140, Wis. Adm. Code, establishes numeric groundwater quality standards for substances of public health and welfare concern. The numerical standards, upon adoption, become the criteria for the protection of public health and welfare, to be achieved in groundwater regulatory programs. New and revised groundwater quality standards for substances of public health concern are based on recommendations developed by DHS using peer reviewed science and statutorily prescribed guidelines in ch. 160, Wis. Stats.

Substances of public health concern are regulated using groundwater quality standards at two levels: preventive action limit (PAL) and enforcement standard (ES). In accordance with ch. 160, Wis. Stats., ES groundwater quality standards for substances of public health concern are established based on recommendations received from DHS. PAL groundwater quality standards for substances of public health concern are set at either 20% of the concentration of the established ES, or at 10% of the concentration of the established ES if the substance has carcinogenic, mutagenic or teratogenic properties or interactive effects.

The department previously initiated the rulemaking process for all substances contained in the Cycle 10 DHS recommendations (as relevant here, PFOA and PFOS) under a single scope statement, DG-15-19. The Natural Resources Board did not approve the proposed DG-15-19, and the scope statement for that rulemaking expired on March 3, 2022.

Since that rulemaking effort, the department has successfully promulgated rules setting standards for PFAS in drinking water and surface water, which went into effect in on August 1, 2022. Additionally, on June 15, 2022, the EPA announced a new interim HA for PFOA and PFOS and a final HA for PFBS and GenX. Additionally, EPA has announced it will release a draft PFAS National Drinking Water Regulation by the end of 2022. The department will consider these important EPA benchmarks in this rulemaking effort to ensure that the proposed standards are based on the most current and accurate peer-reviewed science available.

This proposed rule will add individual and combined ESs and PALs to s. NR 140.10, Table 1, Wis. Adm. Code, for certain PFAS. These standards will be based on existing DHS

recommendations. The department may request that DHS revise its recommended ESs pursuant to s. 160.07(6), Wis. Stats., in light of new and changed federal numbers for certain PFAS.

Policy alternatives

Section 160.07(5), Wis. Stats., directs the department to propose rules establishing DHS recommendations for ES for substances of public health concern. During the rulemaking process, the department may adopt or modify the proposed standards, based on consideration of EPA recommendations and public input on the proposed standards. One alternative would be to not promulgate groundwater standards for these substances of public health concern. Without numerical health-based standards, groundwater regulatory programs will not protect the public health of Wisconsin residents.

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

Chapter 160, Wis. Stats., establishes an administrative process for developing numerical state groundwater quality standards to be used as criteria for the protection of public health and welfare by all state groundwater regulatory programs. Chapter 160, Wis. Stats., directs the department to use this administrative process to establish numeric groundwater quality standards for substances of public health or welfare concern, found in, or having a reasonable probability of being detected in, the groundwater resources of the state. The department is required to engage in rulemaking for all substances of public health concern for which DHS develops enforcement standard recommendations under s. 160.07(5), Wis. Stats. The department is also required to establish by rule preventative action limits for all substances with enforcement standards under s. 160.15(1), Wis. Stats.

Section 160.07(6), Wis. Stats., gives the department authority to, upon request, determine whether an enforcement standard needs revision if a federal number is established or changed for a substance after an enforcement standard is recommended by DHS.

After the department promulgates groundwater standards, s. 160.19, Wis. Stats., requires regulatory agencies to review existing rules that regulate activities, practices, and facilities to ensure compliance with new groundwater standards.

Section 281.15, Wis. Stats., states that the department shall promulgate rules setting standards of water quality, applicable to the waters of the state, that protect the public interest, including the protection of public health and welfare, and the present and prospective future use of such waters for public and private water systems. Section 281.19(1), Wis. Stats., grants the department the authority to issue general orders and adopt rules applicable throughout the state for the construction, installation, use and operation of practicable and available systems, methods and means for preventing and abating pollution of the waters of the state.

In accordance with ch. 160, Wis. Stats., the reliability of sampling data is to be considered when determining the range of responses that a regulatory agency may take, or require, to address attainment or exceedance of a state groundwater quality standard at an applicable “point of standards application.” Section 299.11, Wis. Stats., authorizes the department, in conjunction with the Department of Agriculture Trade and Consumer Protection (DATCP), to establish uniform minimum criteria for laboratories certified to conduct water analysis testing, and to

establish accepted methodologies to be followed in conducting tests and sampling protocols and documentation procedures to be followed when collecting water samples for testing.

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 these amendments to ch.NR 140, Wis. Adm. Code, is approximately 1600 hours (over an anticipated 30 month period).

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

The proposed groundwater standards would apply through other regulatory programs outside of ch. NR 140, Wis. Adm. Code, that regulate facilities, practices and activities which may impact groundwater quality.

Once adopted, numerical groundwater standards become the criteria for protecting public health, and are used in the regulation of:

- Solid and hazardous wastes
- Spills and remediation sites
- Wastewater and water quality
- Septic tanks
- Salt storage
- Fertilizer and pesticides, etc.

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:

There are no federal groundwater standards, and there is no parallel process for regulating groundwater contaminants at the 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 department will examine the economic impact of the proposed rule when the rule is developed. Additional review and modification of regulatory program rules that rely on ch. NR 140 groundwater standards may impact the estimated cost of implementation and compliance. The economic impact to small businesses is indeterminate until the rule is drafted.

State groundwater quality standards protect both public health and welfare. There may be cost savings in reducing the exposure to these known substances of public health concern. Human health impacts and drinking water treatment system costs to remove contamination may be avoided when groundwater pollution is reduced or eliminated. Adoption of groundwater quality rules and regulations by state regulatory programs minimizes the concentrations of polluting substances in groundwater, minimizes water treatment system costs and health care costs, while safeguarding public health and welfare.

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

The department anticipates holding one public hearing in the month of July 2024. The hearing will be held by videoconference. The department will hold the hearing to gather stakeholder input on a rule package that is used statewide.

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