

**Wisconsin Department of Natural Resources  
Natural Resources Board Agenda Item**

**SUBJECT:** Request that the board approve the statement of scope for Board Orders FH-07-18(E) and FH-08-18 and conditionally approve the public hearing notice for FH-08-18 and notice of submittal of proposed rules to the legislative council rules clearinghouse proposed rules affecting Ch's. NR 1, 19, 20 and 40 related to aquaculture and fish farms.

**FOR:** May 2018 Board meeting

**TO BE PRESENTED BY:** Todd Kalish, Fisheries Bureau Deputy Director

**SUMMARY:**

These rules will make various changes to policies related to stocking fish, management of viral hemorrhagic septicemia, invasive fish, and any other changes needed to maintain consistency with the provisions of 2017 Act 21.

These rules will define the role and extent that genetics is involved in the department's fish stocking strategies. The proposal will standardize the department's procedures for accepting donations of fish to be stocked in waters of the state.

This proposal may revise current regulations which have been established to control viral hemorrhagic septimcemia which is a disease that has been identified in a number of Wisconsin waters.

The department will evaluate the current classification of certain bait and forage fish under Ch. NR 40 Wis. Admin. Code. These rules may result in a reclassification of certain species.

Additional modifications will be made as necessary to assure that provisions of administrative code related to environmental protection and to fish, game, and enforcement, forestry and recreation are consistent with the provisions of 2017 Act 21. These rules may make any other changes which are identified following consultation with interested parties including fishing groups and the aquaculture industry.

**RECOMMENDATION:** That the board approve the statement of scope for Board Orders FH-07-18(E) and FH-08-18 and conditionally approve the public hearing notice for FH-08-18 and notice of submittal of proposed rules to the legislative council rules clearinghouse proposed rules affecting Ch's. NR 1, 19, 20 and 40 related to aquaculture and fish farms.

**LIST OF ATTACHED MATERIALS (check all that are applicable):**

- Background memo
- Scope Statement
- Governor's letters of approval
- Authorizing legislation

Approved by	Signature	Date
Justine Hasz, Fisheries Management Bureau Director	<i>for Todd Kalish</i>	5-9-2018
Sanjay Olson, Fish, Wildlife & Parks Division Administrator	<i>[Signature]</i>	5/9/18
Daniel L. Meyer, Secretary	<i>[Signature]</i>	5/9/18

by Ed Eberle

# STATEMENT OF SCOPE

## Department of Natural Resources

**Rule No.:** Board Orders FH-07-18(E) and FH-08-18

**Relating to:** Aquaculture and fish farms, re: ch. NR 20

**Rule Type:** This will be a permanent rule with a companion emergency version

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

Nonstatutory provisions of 2017 Act 21 establish that the department may enact these rules using the process for emergency rules without finding that the rule is necessary for preservation of public peace, health, safety, or welfare.

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

The department is required to promulgate these rules under provisions of 2017 Act 21.

These rules will define the role and extent that genetics is involved in the department's fish stocking strategies. The proposal will standardize the department's procedures for accepting donations of fish to be stocked in waters of the state.

This proposal may revise current regulations which have been established to control viral hemorrhagic septicemia which is a disease that has been identified in a number of Wisconsin waters.

The department will evaluate the current classification of certain bait and forage fish under Ch. NR 40 Wis. Admin. Code. These rules may result in a reclassification of certain species.

Additional modifications will be made as necessary to assure that provisions of administrative code related to environmental protection and to fish, game, and enforcement, forestry and recreation are consistent with the provisions of 2017 Act 21. These rules may make any other changes which are identified following consultation with interested parties including fishing groups and the aquaculture industry.

### 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:

The department's current strategy for stocking fish considers genetic factors of both fish being stocked and of fish already present in a waterbody. The strategy assures that a stock selected for transfer does not put unique genetic resources at risk or that fish are not placed in a geographic area to which they are not suited. Walleye, muskellunge, and lake sturgeon are species for which genetics are significant considerations. A challenge of these policies is that private aquaculture may not have fish with genetics that the department has determined are the most appropriate for a region. New policies will make it possible to work cooperatively with private aquaculture so that they have access to genetically appropriate fish as well as to establish predictable stocking policies.

It is the policy of the Department of Natural Resources Board to accept gifts and bequests for the promotion of activities beneficial to the preservation, wise use and scientific management of Wisconsin's natural resources. Gifts may be declined if they are designated for a purpose not consistent with program objectives or if they could appear to be offered in an attempt to influence the Department in its

enforcement or regulatory functions. Significant donations are accepted at monthly meetings of the board and this process may not be responsive enough to utilize gifts of live fish or eggs for stocking into waters of the state. Surplus fish have been offered in the past. These rules will establish a more timely process for accepting donations of fish or eggs.

Viral Hemorrhagic Septicemia (VHS) is a deadly fish virus first discovered in Lake Winnebago in 2006. Current rules and guidance are designed to prevent the spread of VHS and help keep Wisconsin's waters healthy. Movement of live fish or eggs is the primary regulated activity. Wisconsin now has ten years of experience with VHS. Through this process the department will evaluate if there are alternatives to current regulations or guidance that would provide more flexibility in the movement of fish and eggs and still constitute a low risk of disease spread.

The Act requires the department to evaluate the current classification of certain bait and forage fish under Ch. NR 40 Wis. Admin. Code. For instance, mosquito fish are a restricted invasive fish and a concern to some in the aquaculture industry because the species may be possessed incidentally to possession of wild baitfish. These rules may result in a reclassification of certain species or may result in modifications or clarification of guidance for possession of those species.

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

The department is required to promulgate these rules under provisions of 2017 Act 21. In s. 29.707 the department is directed to establish rules related to the role of genetics in fish stocking policies and to standardize procedures for the donation of fish. This provision also establishes that the department may revise rules related to viral hemorrhagic septicemia, the hatchery classification system, and the status of bait and forage fish under rules related to invasives species management.

Under 29.014 (1), Stats. the department is directed to establish and maintain conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing.

The department is authorized to regulate fishing on and in all interstate boundary waters and outlying waters by 29.041, Stats.

Provisions of 29.053 (2), Stats. provide that the department may establish conditions governing the taking of fish for the state as a whole, for counties or parts of counties, or for waterbodies or parts of waterbodies. It also allows the department to establish a fishing season on specified bodies of water in certain urban areas to allow fishing only by persons who are under 16 years old or who are disabled, as specified in s. 29.193 (3) (a), (b), or (c), Stats.

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

Approximately 520 hours of department staff time will be needed to develop the proposal and to promulgate the rules.

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

A primary group that would be affected by the proposed rule are people involved in the private aquaculture, fish farming industry. Policies on the stocking fish in waters of the state impacts private aquaculture when they are supplying fish to entities such as lake associations and clubs and organizations who purchase fish for stocking as authorized by department issued stocking permits. Department policies on the movement of fish out of areas affected by viral hemorrhagic septicemia can also impact private aquaculture.



The angling public is also impacted by these rules. Members of the public may be concerned about stocking genetically appropriate fish, the availability of fish, and fish health in general.

In promulgating these rules the department will consider economic factors, healthy fish populations, and fishing opportunities. The department has been in extensive consultation with interested parties, including fishing groups and the aquaculture industry.

**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:**

No federal regulations apply to activities that occur entirely within the state. States possess inherent authority to manage the fishery and wildlife resources located within their boundaries, except insofar as preempted by federal treaties and laws, including regulations established in the Federal Register.

For activities involving movement of fish or eggs between the states, a violation of state law constitutes a violation of federal law under the Lacey Act. Violations would be enforceable by agents of the United States Fish & Wildlife Service.

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service lifted the Viral Hemorrhagic Septicemia Federal Order that was first issued in 2006. By removing the Federal Order, which had become duplicative with state regulations, the service still has a goal to protect the health of farmed and wild fish while also supporting the interstate movement needs of the aquaculture industry. Interstate movement of VHS-susceptible species of live fish from VHS-affected or at-risk states, including: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin is no longer federally restricted. Salmonid importation requirements under title 50 of the Code of Federal Regulations are still in effect.

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

These revisions to regulations that impact the aquaculture industry are likely to result in economic benefits to the industry, and the state economy. The rule may have a moderate economic impact on the aquaculture industry, but an exact amount of impact is unknown at this time. Any impact should be beneficial. The department has met with the representatives of the aquaculture industry state-licensed commercial fishing representatives and held public meetings to consider policies and regulations on a variety of issues.

Beneficial impacts would be a result of additional opportunities for businesses in the aquaculture industry. For instance, unique wild genetics may be made available, public and private partnerships to produce fish may be created, and various regulations on the movement or possession of fish could be modified as a result of this rulemaking process.

The rule is not likely to impose new compliance or reporting requirements or operational standards. Requirements such as when to test fish for viral hemorrhagic septicemia will be considered as the department and interested parties conduct the evaluations required by 2017 Act 21. However, the department can require testing under current rules and that is not likely to be a topic of the resulting rule proposal.

The department will develop a preliminary economic impact analysis and hold a comment period pursuant to Governor's Executive Order 50, Section IV, in summer 2018. Fiscal impacts on the department will also be summarized in this analysis.

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

The Department anticipates holding two public hearings in the month of September 2018. The Department will hold these hearings in the Madison and Wausau areas.

**Contact Person:** Scott Loomans, Fisheries Program and Policy Analyst.  
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(608) 266-5206



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Department Head or Authorized Signature

3-14-18

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Date Submitted



**SCOTT WALKER**  
**OFFICE OF THE GOVERNOR**  
**STATE OF WISCONSIN**

P.O. Box 7863  
MADISON, WI 53707

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May 2, 2018

Daniel Meyer  
Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
P.O. Box 7921  
Madison, WI 53707

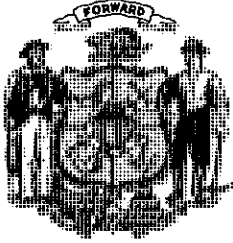
**RE: Scope Statement for Emergency Rule creating NR 20 (FH-07-18(E)) relating to aquaculture and fish farms**

Dear Secretary Meyer,

I hereby approve the statement of scope submitted on March 19, 2018 to SBO, pursuant to Wisconsin Statutes § 227.135, in regards to an emergency rule creating Chapter NR 20 (FH—07-18(E)) of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.24(1)(e)1d.

Sincerely,

Scott Walker  
Governor



**SCOTT WALKER**  
**OFFICE OF THE GOVERNOR**  
**STATE OF WISCONSIN**

P.O. Box 7863  
MADISON, WI 53707

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May 2, 2018

Daniel Meyer  
Secretary  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
P.O. Box 7921  
Madison, WI 53707

**RE: Scope Statement for NR 20 (FH-08-18) relating to aquaculture and fish farms**

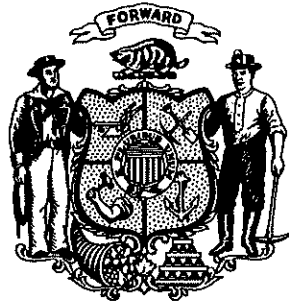
Dear Secretary Meyer,

I hereby approve the statement of scope submitted on March 19, 2018 to SBO, pursuant to Wisconsin Statutes § 227.135, in regards to a proposed rule modifying Chapter NR 20 (FH-08-18) of the Wisconsin Administrative Code. You may send the scope statement to the Legislative Reference Bureau for publication pursuant to Wisconsin Statutes § 227.135(3).

Sincerely,

Scott Walker  
Governor

# State of Wisconsin



2017 Assembly Bill 160

Date of enactment: **June 23, 2017**  
Date of publication\*: **June 24, 2017**

## 2017 WISCONSIN ACT 21

**AN ACT** to renumber 29.733 (1); to renumber and amend 29.733 (3); to amend 29.705 (2) (a), 29.733 (2) (a), 29.733 (2) (b), 29.733 (2) (e), 30.40 (1), 234.91 (1) (a), 234.91 (2) (b), 281.36 (3g) (a) 7., 281.36 (3n) (a) 1. b., 281.36 (4) (e) (intro.), 283.31 (3) (intro.), 283.31 (4) (intro.), 283.31 (5m) and 348.27 (18) (c); and to create 29.707, 29.733 (1d), 29.733 (1h) (c) 4., 29.733 (3) (b), 30.19 (1m) (bm), 31.34 (3) (am), 281.346 (2) (bm), 281.36 (4) (am), 283.15 (4m) and 348.27 (18) (a) 1. e. of the statutes; relating to: regulation of aquaculture and fish farms, providing an exemption from emergency rule procedures, and granting rule-making authority.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 29.705 (2) (a) of the statutes is amended to read:

29.705 (2) (a) The department may not furnish fish or fish eggs from state hatcheries to private ponds, private clubs, corporations, or preserves unless the private pond, private club, corporation, or preserve is located in this state and has entered into an agreement with the department and the fish or the fish grown from the fish eggs will ultimately be stocked, into waters of the state where the general public is allowed, according to any applicable permits and certificates, and, if the private pond, private club, corporation, or preserve is a fish farm, the fish farm is registered with the department of agriculture, trade and consumer protection. If the private pond, private club, corporation, or preserve creates more fish from fish eggs provided under this paragraph than are required under its agreement with the department, the excess fish are not required to ultimately be stocked into waters of the state where the general public is allowed.

**SECTION 2.** 29.707 of the statutes is created to read:  
**29.707 Propagation of fish; department rules.** (1)

The department shall promulgate rules that do all of the following:

(a) Define the role and extent that genetics is involved in the department's fish stocking strategies.

(b) Standardize the department's fish donation procedures.

(2) The department and the department of agriculture, trade and consumer protection shall review the departments' rules relating to viral hemorrhagic septicemia, and shall promulgate new rules as the departments determine are necessary.

(3) The department, with the department of agriculture, trade and consumer protection, shall assess the efficiency and utility of the fish hatchery classification system under rules promulgated by the department of agriculture, trade and consumer protection, and the department of agriculture, trade and consumer protection shall promulgate new rules as it determines are necessary.

\* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."



(4) The department shall assess the viability and use of bait fish and forage fish and of the continued classification of bait fish and forage fish as established nonnative fish species, and shall promulgate new rules as it determines are necessary.

(5) The department shall consider economic factors, healthy fish populations, and fishing opportunities, and shall consult with interested parties, including fishing groups and the aquaculture industry, when promulgating rules under this section.

(6) The final draft of a proposed rule under this section shall be submitted under s. 227.19 (2) no later than June 28, 2019.

**SECTION 3.** 29.733 (1) of the statutes is renumbered 29.733 (1h).

**SECTION 4.** 29.733 (1d) of the statutes is created to read:

29.733 (1d) In this section:

(a) "Artificial water body" has the meaning given in s. 30.19 (1b) (a).

(b) "Natural body of water" means a spring, stream, pond, lake, or wetland that was historically present in a natural state but may have been physically altered over time.

**SECTION 5.** 29.733 (1h) (c) 4. of the statutes is created to read:

29.733 (1h) (c) 4. An artificial water body that is used as a fish farm that is registered with the department of agriculture, trade and consumer protection on the effective date of this subdivision .... [LRB inserts date], or as part of a fish farm that is registered with the department of agriculture, trade and consumer protection on the effective date of this subdivision .... [LRB inserts date], regardless of its water source, including an artificial water body that is fed by a spring.

**SECTION 6.** 29.733 (2) (a) of the statutes is amended to read:

29.733 (2) (a) The department, subject to s. 29.024 (2g) and (2r), shall issue a permit under this subsection for a natural body of water specified under sub. (1) (1h) (c) 1. if the department determines that no substantial public interest exists in the body of water and that no public or private rights in the body of water will be damaged.

**SECTION 7.** 29.733 (2) (b) of the statutes is amended to read:

29.733 (2) (b) Notwithstanding par. (a), for a freeze-out pond that is licensed as a private fish hatchery, or as part of a private fish hatchery, under s. 29.52, 1995 stats., on January 1, 1998, or for a natural body of water as described under sub. (1) (1h) (c) 2., the department shall issue an initial permit without making the determination under par. (a).

**SECTION 8.** 29.733 (2) (e) of the statutes is amended to read:

29.733 (2) (e) The department may suspend a permit for a body of water specified in sub. (1) (1h) (c) 2. for 90 days if the department finds that the permit holder has failed to adequately maintain the fish barriers and may revoke the permit if the department determines that the failure to adequately maintain the barriers has not been corrected within the 90-day period.

**SECTION 9.** 29.733 (3) of the statutes is renumbered 29.733 (3) (intro.) and amended to read:

29.733 (3) (intro.) This section does not apply to any of the following:

(a) A person who places a net pen in a natural body of water for the purpose of holding or rearing fish in accordance with a general permit issued under s. 30.12 (3) (b).

**SECTION 10.** 29.733 (3) (b) of the statutes is created to read:

29.733 (3) (b) A person who holds a permit under sub. (2) and who takes no action in the natural body of water other than maintaining the fish farm facility, including maintaining ponds, raceways, ditches, canals, berms, swales, drains, pipes, and other structures, drainage areas, and flowage controls within the facility.

**SECTION 11.** 30.19 (1m) (bm) of the statutes is created to read:

30.19 (1m) (hm) The maintenance or repair of an artificial water body or fish farm that is registered with the department of agriculture, trade and consumer protection, except that this exemption does not apply to the requirement under sub. (1g) (c).

**SECTION 12.** 30.40 (1) of the statutes is amended to read:

30.40 (1) "Agricultural use" means aquaculture; beekeeping; dairying; egg production; feedlots; grazing; floriculture; raising of livestock; raising of poultry; raising of fruits, nuts and berries; raising of grains, grass, mint and seed crops; raising of vegetables; and sod farming.

**SECTION 13.** 31.34 (3) (am) of the statutes is created to read:

31.34 (3) (am) A dam, in existence on the effective date of this paragraph .... [LRB inserts date], in a commercial fish farm, in existence and registered with the department of agriculture, trade and consumer protection on the effective date of this paragraph .... [LRB inserts date], and located in Langlade County, where the water is returned to the navigable stream.

**SECTION 14.** 234.91 (1) (a) of the statutes is amended to read:

234.91 (1) (a) "Agricultural assets" means machinery, equipment, facilities, land or livestock used in agriculture or aquaculture.

**SECTION 15.** 234.91 (2) (b) of the statutes is amended to read:

234.91 (2) (b) The loan is made to finance the acquisition of agricultural assets or the cost of improvements to facilities or land. The agricultural assets must be acquired, and the improvements must be made, for agricultural or aquacultural purposes.

**SECTION 16.** 281.346 (2) (bm) of the statutes is created to read:

281.346 (2) (bm) *Subsequent withdrawals for aquacultural purposes.* If a fish farm withdraws water and places it in an aquacultural pond that is registered with the department of agriculture, trade and consumer protection, any subsequent use of that water from that pond is not a withdrawal for the purposes of this section, if the subsequent use is not, and does not result in, a diversion or an intrabasin transfer.

**SECTION 17.** 281.36 (3g) (a) 7. of the statutes is amended to read:

281.36 (3g) (a) 7. A discharge that is part of a development for agricultural or aquacultural purposes, if the discharge does not affect more than 10,000 square feet of wetland.

**SECTION 18.** 281.36 (3n) (a) 1. b. of the statutes is amended to read:

281.36 (3n) (a) 1. b. That the proposed project is necessary for the expansion of an existing industrial, commercial, or agricultural, or aquacultural facility that is in existence at the time the application is submitted.

**SECTION 19.** 281.36 (4) (am) of the statutes is created to read:

281.36 (4) (am) Normal aquaculture activities, if the discharge is to a wetland created for aquacultural purposes in an area without any prior wetland history. In this paragraph, "normal aquaculture activities" includes all of the following:

1. Construction, maintenance, or repair of ponds, raceways, or other similar retention structures used in fish farms.

2. The filling in or drawing down of ponds, raceways, or other similar retention structures used in fish farms.

3. Maintenance or improvement of swales or other drainage areas into or out of ponds used in fish farms.

4. Maintenance, repair, or replacement of drains, pipes, or other flowage controls used in fish farms.

**SECTION 20.** 281.36 (4) (e) (intro.) of the statutes is amended to read:

281.36 (4) (e) (intro.) Construction or maintenance of farm roads, roads used in fish farms, forest roads, or temporary mining roads that is performed in accordance with best management practices, as determined by the department, to ensure all of the following:

**SECTION 21.** 283.15 (4m) of the statutes is created to read:

283.15 (4m) **VARIANCES FOR FISH FARMS.** In deciding whether to grant an application for a variance for a fish farm, the secretary shall rely on the same guidance documents and other information that would be used by the

federal environmental protection agency to review and approve or disapprove the variance as required under [40 CFR 131.14](#).

**SECTION 22.** 283.31 (3) (intro.) of the statutes is amended to read:

283.31 (3) (intro.) The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, other than those prohibited under sub. (2), upon condition that such discharges will meet all the following, whenever applicable, subject to sub. (5m):

**SECTION 23.** 283.31 (4) (intro.) of the statutes is amended to read:

283.31 (4) (intro.) The department shall prescribe conditions for permits issued under this section to assure compliance with the requirements of sub. (3). Such additional conditions shall include at least the following, subject to sub. (5m):

**SECTION 24.** 283.31 (5m) of the statutes is amended to read:

283.31 (5m) ~~PERMITS FOR CERTAIN CONCENTRATED AQUATIC ANIMAL PRODUCTION FACILITIES.~~ The department shall include the requirements of 40 CFR 451.11 in permits issued under this section for concentrated aquatic animal production facilities described in [40 CFR 451.10](#) ~~requirements that are based on, and are not more stringent than, the requirements in 40 CFR 451.11.~~ The department may not include additional conditions in a permit for a fish farm except as necessary for the farm to meet the applicable limitations, standards, and other provisions described in sub. (3) (a) to (f). Any conditions included in a permit issued under this section for a fish farm shall be limited to site-specific best management practices to the greatest extent allowed under federal law.

**SECTION 25.** 348.27 (18) (a) 1. e. of the statutes is created to read:

348.27 (18) (a) 1. e. Fish or minnows.

**SECTION 26.** 348.27 (18) (c) of the statutes is amended to read:

348.27 (18) (c) A permit under this subsection is valid only for the transportation of agricultural products to a farm or from a field or farm to a storage facility on the grower's farmer's owned or leased land, a facility for initial storage that is not on the grower's farmer's owned or leased land, or a facility for initial processing.

**SECTION 27. Nonstatutory provisions.**

(1) **EMERGENCY RULES CONCERNING FISH PROPAGATION.** The department of natural resources and the department of agriculture, trade and consumer protection may promulgate emergency rules under section 227.24 of the statutes implementing section 29.707 of the statutes. Notwithstanding section 227.24 (1) (c) and (2) of the statutes, emergency rules promulgated under this subsection remain in effect until June 28, 2019, or the date on which permanent rules take effect, whichever is sooner. Notwithstanding section 227.24 (1) (a) and (3) of the

**2017 Wisconsin Act 21**

**2017 Assembly Bill 160**

statutes, those departments are not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of

the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

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