

Comments and DNR Responses Natural Resources Board Order WY-29-19

April 13, 2022

This document presents a summary of public comments received on proposed rules affecting chs. NR 1, 107, 109, 150, 193, 329 and 345, related to aquatic plant management, manual removal and mechanical control regulations, aquatic habitat protection, and surface water grants.

OVERVIEW

The proposed recreated ch. NR 107, Wis. Adm. Code, unifies all control activities under a consistent set of procedures and policies that align with current state and federal law, improving administrative consistency and efficiency as well as customer service. The proposed rule also updates the program to employ contemporary management practices such as integrated pest management to control aquatic invasive species. The rule also modernizes public notification procedures, and reduces regulations for small waterbodies.

Several updates are proposed to ch. NR 193, Wis. Adm. Code, the administrative rule governing the Surface Water Grant Program, that bring the rule into greater alignment with the recreated ch. NR 107, Wis. Adm. Code. Aquatic plant management and protection plans outlined under the proposed s. NR 107.05, Wis. Adm. Code, are included as eligible projects for surface water planning grants.

Public Outreach and Input Opportunities

Preparation of Scope Statement

- 2016-2019 the department completed a Strategic Analysis of the Aquatic Plant Management Program. The process included stakeholder surveys and a public comment period.
- In 2019, the department created a Study Group of external partners to consult on the Strategic Analysis and eventual scope statement for administrative rule drafting. The Study Group was comprised of aquatic plant management (APM) industry representatives, lake association members, Wisconsin Lakes, a Conservation Congress representative and external field experts.

Rule Drafting

- Summer 2020
 - The department met with Wisconsin Manufacturers and Commerce and APM chemical industry representatives to discuss their perspective on rule development and solicited feedback.
- Fall of 2020 and Spring of 2021
 - The department drafted 10 policy white papers based on the Study Group report.
 - Four public informational meetings were held.
 - Two public comment periods were opened. 38 individuals and organizations provided written comments and questions. Over 450 relevant comments and questions were received. The department responded to all comments. A summary of the comments received during rule drafting can be found here:
<https://dnr.wisconsin.gov/topic/lakes/plants/rules>
 - The department drafted the first version of ch. NR 107, Wis. Adm. Code, based on the feedback during the white paper process.
- Spring 2021

- The department presented the policy proposals and encouraged public participation in the rule process to lake association and district members during Wisconsin Lakes and Rivers Convention 2021.
- The department presented the policy proposals to the Voight Intertribal Task Force and Great Lakes Indian Fish and Wildlife Commission and solicited feedback.
- The department coordinated with Wisconsin Wetland Association to assemble a work group of field and industry experts to discuss wetland management within the draft rule.
- The department met with Hamilton Group and United Phosphorous Limited LLC to discuss their perspectives on rule development and solicited feedback.
- Fall 2021
 - A public comment period on the draft economic impact analysis (EIA) occurred from September 27 to November 10, 2021. The department received comments from 55 individuals and entities representing lake associations and districts, APM chemical applicators, APM consultants, conservation groups, lake and wetland representatives and industry representatives on the EIA during this period.
- Winter 2021-2022
 - The department provided a briefing on the draft rule to the Wisconsin Tribal Conservation Advisory Council.
 - The department provided an information session on the draft rule and encouraged participation in the public hearing process to Wisconsin Lakes members.
 - The department published an article in Lake Tides highlighting the primary changes in the draft rule and provided information on the public hearing and comment period.
 - The department met with Wisconsin Wetland Association and the wetland work group to discuss wetland management within the draft rule.
 - The department met with Dane County to discuss the economic impact and policy feasibility of draft rule as it relates to mechanical harvesting operations.
 - A public hearing on the draft rule was held February 22, 2022, 75 individuals attended.
 - A public comment period for the proposed rule was held from January 10 through March 1, 2022. 49 individuals and entities representing lake associations and districts, APM chemical applicators, APM consultants, lake and wetland representatives, conservation groups and industry representatives provided written comments.
- Spring 2022
 - The department provided an update on the administrative rule process during the Wisconsin Lakes and Rivers Convention in April.
 - The department provided an informational item to the Natural Resources Board April meeting on the program to date and included information on Integrated Pest Management.
 - The department provided an update on the proposed rules for harvesting at the Weed Harvester Safety and Maintenance Seminar held by Aquarius Systems.
 - The department updated its website with current information on the proposed rule package.

ECONOMIC IMPACT ANALYSIS

A public comment period on the draft economic impact analysis (EIA) occurred from September 27 to November 10, 2021. The department received comments from 55 individuals and organizations on the EIA during this period. Of those, 38 were individuals who supplied a form letter from their lake association and chemical applicator, representing three lake associations. Three additional lake associations and districts provided comments.

The comments can be summarized into these categories:

- EIA is a fair and accurate representation of the likely impacts of the rule change.
- EIA should increase cost estimates for planning and monitoring.
- EIA should account for impacts to lakefront property values.

Department Response

The department made several revisions to the EIA as a result of input from entities and individuals during both the EIA solicitation period and the public comment period for the draft rule. From the draft EIA released for the economic solicitation period to the updated EIA based on public comments of the draft rule, the department has increased the total estimate of implementation and compliance costs by \$877,477. These cost increases were derived from suggested costs from lake associations and districts, chemical applicators, industry representatives and wetland practitioners regarding the costs of planning, monitoring and public notification. The department also removed projected cost reductions from the total gross cost estimate.

The department found that the draft EIA had an incomplete number of existing management plans after a complete inventory of all plans was done. As a result, the number of existing aquatic plant management plans was increased after the EIA solicitation period ended from 250-280 to 345 existing plans. The median cost of a baseline point intercept lake survey was increased from \$2,908 to \$3,500. Newspaper notification costs were increased by \$10. Analysis and plan writing were split from one cost of \$100-\$400 in the draft EIA to a \$0-\$5,700 range in the updated EIA. The total average cost increase of planning from draft EIA to updated EIA is \$158,104.

Multiple entities commented during the draft rule comment period that the monitoring costs associated with mechanical harvesting operations were high relative to the ecological benefit of the surveys themselves. The department adjusted the requirements in the proposed rule, and the total cost of monitoring for large scale mechanical harvesting operations was reduced by \$10,582 as a result from draft EIA to updated EIA.

An error in the fee revenue section was pointed out by an entity. The original EIA estimate only included one year of revenue, and did not add in the revenues for years 2 through 5. This was corrected prior to the public comment period for the draft rule.

One entity commented that cost reductions should not be included in the total gross cost estimate. The department has removed these reductions from the gross estimate but kept those reductions in the EIA document as part of the record for public consideration. The proposed rule provides new waivers and efficiencies, which will reduce time, cost and effort for entities seeking aquatic plant management permits. These cost reductions were calculated using historical permit data, standard hourly rates of labor and anticipated reductions based on proposed rule.

The department's updated EIA is a complete assessment of the likely impacts of the rule change. The department used aquatic plant management permit data, Surface Water Grant funding data, and cost estimates provided by entities and individuals during the EIA solicitation and public comment periods to present an accurate assessment of the likely cost range.

The cost estimates provided by some entities regarding planning and monitoring were likely drawn from experience developing comprehensive lake management plans, which are not what is proposed in this rule. The department proposes plan templates based on the plan elements in the proposed rule, as a

fillable form, to assist permittees to comply with the planning requirements. This will reduce the length and complexity of these targeted aquatic plant control plans. The cost to complete these plans will be less than what has been the norm as a result.

Monitoring costs were identified by using the median acreage of APM permitted waters, and overlying Surface Water Grant monitoring cost containment measures. The department acknowledges these costs are a range. Every waterbody's specific planning and monitoring cost will vary based on waterbody size. It is also understood certain parts of the state have fewer consumer choices currently for these services, which can impact prices as well.

Multiple entities and individuals cited the potential negative impact the draft rule will have to the economy and lakefront property values based on the assumption management will largely be curtailed under the proposed rule. The department agrees there are direct and indirect economic benefits of aquatic plant management as documented in the Strategic Analysis for the Aquatic Plant Management Program. The department believes these conclusions drawn by the commenters are erroneous and speculative. The proposed rule was created to ensure long-term, effective aquatic plant management control programs will continue in Wisconsin. Many lake organizations across the state are already conducting integrated aquatic plant management activities that would comply under the proposed rule. Individual property owners, lake districts and associations, sanitary districts and county governments will continue to have many options to conduct voluntary aquatic plant management activities under the proposed rule. 90% of the permits issued annually are for the chemical control of aquatic plants, the department expects this to continue after rule implementation.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

The Legislative Council Rules Clearinghouse submitted comments on form, style and placement; 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 PROPOSED RULE

A public comment period for the proposed rule was held from January 10 through March 1, 2022, with a public hearing on February 22, 2022. 75 individuals attended the public hearing: 3 registered 'in support' and 5 registered 'in opposition.' 49 individuals and entities provided written comments. Of those, 27 of the individuals submitted one form letter along with their chemical applicator.

The following is a summary of written comments and the department's response.

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General

Comment Wisconsin Lakes, Green Lake Association, Onterra and one member of the public expressed general support for the department’s move toward an integrated pest management framework, which incorporates planning and monitoring in some scenarios. Wisconsin Lakes stated implementing IPM in Wisconsin will lead to more efficient and cost-effective aquatic plant management in the long term for Wisconsin’s lakes and their managers.

Department Response: The department agrees with the commentors.

Comment: One member of the public commented that hand wicking should be changed to hand picking in the waiver section.

Department Response: Hand wicking is control strategy to chemically control emergent vegetation. It is defined in s. NR 107.03 (15) as pouring or spraying a pesticide directly onto a wicking glove and applying the pesticide using only the thumb, fingers, and palm of the wicking glove directly to the target species. It is not a typo.

Comment: One member of the public commented that lake districts should be included in the proposed rule wherever lake associations are.

Department Response: The department made this suggested change.

Comment: One member of the public suggested a language clarification for s. NR 107.06 (2) (m), to say “For chemical control, the name...”

Department Response: The department made this suggested change.

Comment: One member of the public suggested both s. NR 107.07 (11) (a) and (16) (c) be amended to read, “Mechanical and Manual Control.”

Department Response: The department made the suggested change.

Comment: One member of the public suggested s. NR 107.41 (1) be modified to say “Large Scale Mechanical, Manual and Physical Control”

Department Response: The department made the suggested change.

Comment: Wisconsin Lake and Pond Resource commented that the water use impairment definition is subjective and open to interpretation.

Department Response: The department believes the definitions in the proposed rule clearly define the parameters of a water use impairment. The department defines water use impairment in

proposed rule as a condition of aquatic plant growth that creates a water use obstruction or causes adverse impacts to the ecosystem. A water use obstruction is defined as a condition of over-abundant aquatic plant growth that creates a material obstruction that limits a person's ability to reasonably conduct beneficial water use activities and there are no reasonable alternatives. Adverse impacts are also clearly defined in proposed rule. Current chs. NR 107 and 109 do not define these terms. The department believes these definitions add clarity and continuity for statewide interpretation.

Comment: Wisconsin Lake and Pond Resource commented that the definition of aquatic plants is broad, stating any plant growing in seasonably saturated soils would require all applicators under DATCP to be certified in category 5 and would require an APM permit.

Department Response: The department understands why the commentor may have interpreted the definition in that manner. However, the purpose and applicability sections of the proposed rule clearly define the authority of ch. NR 107 is related to waters of the state as defined in ss. 281.01 and 23.24, Stats. The definition of aquatic plants, particularly the inclusion of seasonably saturated soils, is a direct referral to ephemeral wetlands, which are a water of the state. A seasonal backyard wet spot would not be considered a water of the state under ch. NR 107.

Comment Wisconsin Lake and Pond Resource, Marine Biochemists, United Phosphorous Limited, Wisconsin Builders Association, Wisconsin Manufacturers and Commerce, and multiple members of the public stated general concerns that the costs associated with planning, monitoring and permit fees will discourage the level of management, particularly for chemical control.

Department Response: Around 90% of permits the department issues annually are for the chemical control of aquatic plants and the department expects this to continue after rule implementation. In fact, the purpose of the rule is to create more effective aquatic plant management programs, particularly for the management of aquatic invasive species. Effective management requires planning and evaluation (monitoring) to guide decision making and make the best use of all the available control tools. This approach is in line with Best Management Practices outlined by the EPA and APM industry. Fees have remained the same for 30 years for chemical and 20 years for mechanical. Proposed fees are comparable to fees charged in neighboring states and required to support permit staffing.

Comment Wisconsin Lake and Pond Resource, Marine Biochemists, United Phosphorous Limited, Wisconsin Manufacturers and Commerce, and multiple members of the public cited the potential negative impact the proposed rule will have to the economy and lakefront property values based on the assumption management will largely be curtailed under the proposed rule.

Department Response: The department agrees there are direct and indirect economic benefits of aquatic plant management. The department believes these conclusions drawn by the commentors are erroneous and speculative. Lakefront property values are impacted by a wide variety of factors including water quality, lake type, shoreline development policies, aquatic invasive species, the real estate market, the broader economy and a host of other factors. The proposed rule was created to ensure long-term, effective aquatic plant management control programs will continue across the state. A large number of lake organizations across the state are already conducting integrated aquatic plant management activities that would comply under the proposed rule. Individual property owners, lake districts and associations, sanitary districts and county governments will continue to have many options to conduct aquatic plant management activities under the proposed rule.

Comment: Wisconsin Manufacturers and Commerce cited 42 provisions in draft rule they interpreted as broad grants of authority which should be removed. They also stated the rule grants broad authority to deny permit approvals based on subjective criteria.

Department Response: Proposed ch. NR 107 as currently written is within the department’s rulemaking authority under ss. 23.24 and 227.11(2), Stats. All criteria for permit review are within the department’s authority. Many of these cited provisions are carried over from existing rules.

Comment: Two members of the public suggested the department modify the draft rule to enable their lake organization to manage nuisance-causing duckweed.

Department Response: The department has no provisions in proposed rule specific to any invasive or native aquatic plant species. Broad provisions for any one species in proposed rule would limit the flexibility of a waterbody organization to conduct aquatic plant management based on their specific waterbody conditions. The control of nuisance native plants is still a permissible activity under proposed rule, as long as the criteria of ch. NR 107 are met.

Permit Waivers

Comment: One member of the public suggested the waiver in draft s. NR 107.04 (4) b 3., allowing the hand removal of invasive aquatic plants, be extended to contractors and/or agents on behalf of riparian owners, not exclusively riparian owners.

Department Response: The department agrees with this suggestion and made changes to proposed rule to allow hand pulling of invasive aquatic plants to be done by both riparian owners and their contractors, without a permit.

Comment: Wisconsin Lake and Pond Resource suggested the permit waiver cited in draft s. NR 107.04 (3) (b) 6., “Privately accessible ponds that are less than 0.1 acres in size and are lined, with no groundwater connection to waters of the state,” be amended as follows: “Privately accessible and/or shared ponds of any size which are lined, do not have a history of being a lake or stream or of being part of a lake or stream, and are not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events.”

Department Response: The department agrees the permit waiver for ponds should be expanded to incorporate more waterbodies on private land that are exempt from the permitting process. The department has expanded the waiver, incorporating components of the commentors’ suggested language: “Privately accessible ponds¹ less than .5 acres in size, which have a synthetic, artificial liner, do not have a history of being a lake or stream or of being part of a lake or stream, and are not hydrologically connected to a water of the state and that does not discharge into a water of the state.” The original provision of .1 acre privately accessible ponds in draft rule waived up to 41 previously permitted small waterbodies. The change to the waiver in the proposed rule greatly expands the number of waterbodies which may be waived from permitting.

Comment: Wisconsin Wetland Association suggested the acreage limitation be removed from the permit waiver cited in draft s. NR 107.04 (4) (a), in which no permit is required for mechanical or manual removal of aquatic plants on a body of water less than 10 acres in size if confined to one owner’s property.

¹ In draft NR 107.03 (30): a privately accessible pond is a body of water 10 acres or less, on the land of one owner, with no surface water discharge or a discharge that can be controlled to prevent chemical loss and no public access.

Department Response: The department agrees with this suggestion as it related to manual or mechanical control on privately owned wetlands and made changes to proposed rule to accommodate this. The provision for less than 10 acres is still proposed for lakes or ponds, and is consistent with current rule.

Comment: Multiple individuals commented that the waivers section, as written, was confusing. They stated it was unclear whether a waiver meant an individual needed to apply for the waiver prior to conducting control or if it meant the activity was exempted entirely.

Department Response: The department agrees, and the waiver section was clarified. The department rearranged the waiver section to clarify: fee waivers; waivers specific to types of control activities; and waivers specific to riparian owners and private landowners. The department intends to issue a communication document which outlines the waivers in plain language to assist the public upon rule promulgation.

Comment: One member of the public suggested the waiver in draft s. NR 107.04 (4) (b) 2., include a specified length in addition to the 30 foot width riparian easement.

Department Response: A length is not specified because the length of a riparian access lane to open water is individual to each property. Placing a length restriction would likely create scenarios where a riparian owner or their agent may need to acquire a permit to manually create an access lane to open water.

Permit processes, decision-making and reporting

Comment: Multiple members of the public and Marine Biochemists commented that herbicide control was likely to be denied in most cases, citing the provision in draft s. NR 107.07 (7), which says the department shall deny issuance of a permit if the department determines the proposed control activity is not consistent with the department approved plan for the waterbody or the aquatic plants are not causing a water use impairment to beneficial water use activities.

Department Response: The department has modified draft ch. NR 107 to instead say, “the department may deny” for those two provisions. It was not the department’s intention to imply that aquatic plant control can only occur to address a water use impairment. The majority of aquatic plant control in the state is done to address water use impairments or manage aquatic invasive species populations. Moreover, the department acknowledges there may be instances where a plan may not have captured a specific scenario, but there may still be a clear need for aquatic plant control. If a permit application states the goal of control is to manage an invasive aquatic plant population, and if all other criteria of s. NR 107.07 (7) were met, the permit would be approved.

Comment: One member of the public suggested the language in s. NR 107.07 (11) (d) be clarified so that multi-year permit expiration dates are clear.

Department Response: The department clarified the language to say the permit shall expire on October 15th of the year the permit expires.

Comment: Wisconsin Wetland Association commented the department should streamline reporting requirements to reduce landowner financial burdens and administrative costs.

Department Response: The department agrees private landowners conducting aquatic plant control should be given consideration to reduce compliance costs. Chemical control reports were changed in draft rule so the permit holder conducting wetland control submits a monthly summary of the control activities under the permit. Current administrative rule requires a control report after every individual chemical control event. Private landowners conducting mechanical and manual control on wetlands are waived from permitting entirely. The department also added a waiver in the planning section stating the department may waive private landowners conducting control on their properties from the planning process as long as there was no surface water discharge from the property, which would reduce requirements for wetlands as well.

Comment: One member of the public suggested reports for chemical control on lakes be done every 30 days and mechanical and manual control be done within 60 days to compile all the data.

Department Response: The department agrees mechanical harvesting reports do not need to come in as frequently. The department changed the reporting provision to state mechanical harvesting operations shall submit an annual report to the department summarizing all control efforts for the year. Chemical control reports for lakes and ponds have 30 days to submit the control report after the control has occurred, the department did not make any changes to this provision.

Comment: One member of the public suggested the expiration dates for mechanical harvesting be extended to October 31st, instead of October 15th.

Department Response: No change. In northern temperate waters, most aquatic plants senesce by mid to late fall, generally the middle of October. There is no reason to mechanically harvest submerged aquatic plants beyond that time, as the plants are no longer growing to cause water use obstructions.

Comment: Wisconsin Lake and Pond Resource suggested that expiration dates for small waterbodies less than 10 acres be extended to December 31st, particularly for artificial waterways. They commented that the October 1st expiration date is arbitrary and does not align with the recognized end of growing season dates across the state used by USDA and wetland professionals, which is usually mid-October. They stated the expiration of October 1st strongly restricts compliance with stormwater maintenance agreements set by many municipalities.

Department Response: Subchapter V – Pond Management, already has an expiration date set for November 1. The department agrees aquatic plants usually senesce by mid-October.

Fees

Comment: One member of the public commented that it is unfair to place the burden of fee increases on lake residents. They stated lake residents should not be solely responsible for paying for aquatic invasive species (AIS) control and containment. They commented boat license fees should be raised instead to make all boaters responsible for preventing the spread of AIS. Particularly, fees graduated by boat size, or boats with live wells or bladders because they can carry AIS.

Department Response: No change. The department agrees lake residents are not solely responsible for the control and containment of AIS throughout Wisconsin. Preventing the spread of AIS is a shared responsibility among all Wisconsin water users. State cost-sharing grants are available to lake residents for AIS control and containment. The \$4 million annual appropriation comes from an excise tax on gasoline estimated to be used by motorboats using Wisconsin waters. The proposed fee increase is to help cover the department's costs of reviewing and processing permits for all aquatic plant management

permitting, not just AIS. Fees have not changed in 20 years for mechanical and 30 years for chemical permits while administrative costs have risen. The amount of fees to license boats is controlled by the legislature and could not be addressed in this administrative rule.

Comment: Multiple members of the public noted that the increase to mechanical harvesting fees was greater than the 50% as stated in the rule drafting objectives. One individual suggested fees for mechanical harvesting operations be reduced in years 2-5 to 25% of the year one permit cost, or a minimum cost of \$250.

Department Response: Fees have not changed since 1989 for chemical permits and 2003 for mechanical. The fees for multiple year permits help pay for staff time to supervise control, review control reports, and communicate with permit holders. Staff engage with permit holders on an annual basis regardless of whether an annual or multi-year permit is issued. Fee amounts for mechanical harvesting are considerably less than for chemical in the current rule. One objective of the proposed rule was to establish the same fee for all types of control since review and processing times are essentially the same. Also, proposed fees were roughly doubled to account for general inflation and the increased costs of program administration. The proposed fee increases are based on a doubling of the current rule's chemical fees. Consequently, fees for harvesting increased by more than 50%. Even at the higher levels, fees account for just a small fraction of the overall costs of control. As an offset, the 50% renewal fee for 5 year mechanical harvesting permits is considerably less than chemical fees which must apply each year at 100%. The department did not adjust fees based on comments.

Comment: Wisconsin Wetland Association made two suggestions to modify the fees for wetland management. The first, to eliminate the per acre fee for chemical control in wetlands. Second, to eliminate the year two through five fees for multi-year permits.

Department Response: The fees for multiple year permits help pay for staff time to supervise control, review control reports, and communicate with permit holders. Staff engage with permit holders on an annual basis regardless of whether an annual or multi-year permit is issued. Larger permits with more control acreage require more staff time to review and follow up on. The permit fees are 50% less in years two through five for wetland control. In addition, a goal of the proposed rule was to establish consistent fees for all management activities. Eliminating the acreage fees and annual renewal fees for wetlands would create a significant inconsistency compared to lake management and pond activities.

Comment: One member of the public commented about the fee increase's impact on an individual's ability to seek a permit for aquatic plant control.

Department Response: Any control conducted over an area greater than 1 acre will be required to supply an acreage fee. Acreage fees are rounded up to the next acre. A single individual conducting APM activities adjacent to or on their property will likely involve less than an acre of control. The proposed base fee of \$75 was not changed.

Planning and Integrated Pest Management

Comment: Wisconsin Lakes Association commented favorably towards the firm deadlines for plan review and approval. They stated the reasonable timelines were an improvement.

Comment: Wisconsin Lakes Association commented favorably towards the provision allowing for plans to be extended an additional five years under specific criteria.

Department Response: The department further clarified plan review and approval deadlines based on other public comments. The department agrees the plan update provisions will allow for more flexibility and reduced costs for applicants.

Comment: One member of the public commented the plan templates should be available for public review before the rule is implemented.

Department Response: The department agrees the draft templates should be available for public review before the rule is implemented. The department will provide a public input period on the planning templates when they are completed.

Comment: Multiple members of the public stated general concerns regarding the timing of the planning process. Individuals stated various ranges of time it may take to draft a plan, and were concerned permits would be delayed as a result. One member of the public specifically mentioned the added time the 30 day notification period added prior to beginning the planning process.

Department Response: The department understands the concerns stated and made several changes to proposed rule to clarify and reduce timelines, when appropriate. The department removed a total of 45 days from the planning process in proposed rule. The department removed the provision requiring a pre-notification 30 days in advance of the planning process starting. The department further clarified the plan review timelines to state the department shall review and deny or approve a complete plan all or in part within 45 days. The department shortened the minimum deadline to submit a plan to the department before a permit from 60 days to 45 days. However, the department strongly encourages applicants to submit plan applications as early as they can. There is no reason to wait until 45 days before submitting a permit application.

Comment: Multiple entities and members of the public stated the number of plans required in draft rule was too extensive and expensive to implement. Commentors also noted the draft rule's description of when a plan was and was not required was unclear.

Department Response: The department made several changes clarifying when a plan shall or may be required. Instead of saying applicants shall submit a plan for almost all aquatic plant management activities, with a few noted waivers, the department clearly states in proposed rule under what situation a plan shall be required. The proposed rule now states an applicant shall submit a plan if they are: conducting large scale control, which means the aquatic plant control will impact a significant portion or the entirety of a waterbody; conducting invasive species population control; or applying for a multi-year permit for mechanical harvesting or wetlands. In addition, the department notes two situations where a plan may be required. These are if the permitted control may impact a department designated protection area such as a Sensitive Area, or previously approved control activities have caused cumulative adverse impacts to water quality, fish and wildlife habitat or native aquatic plants. Both of these scenarios outline instances where a permit may be denied without a plan in place prior to control due to impacts to the aquatic ecosystem.

Integrated Aquatic Plant Management Planning is a necessary and beneficial process to ensure community support, clearly defined goals and objectives for aquatic plant control activities, and adequate resource protection. Integrated Pest Planning is nationally recognized as a necessary component of any aquatic invasive species management strategy. Aquatic Ecosystem Restoration Foundation develops a Best Management Practices Manual, which provides a national framework for aquatic plant control

activities. An entire chapter is dedicated to the importance and benefits of planning². The department agrees with their approach to planning, and will use their resources to assist with the plan template designs.

In addition, there are three proposed planning waivers in the proposed rule, to allow flexibility and reduced requirements in specific cases. Particularly, for the control of pioneering prohibited invasive species and control occurring on waterbodies contained on privately owned land.

Comment: Wisconsin Wetland Association suggested plan requirements should be waived or significantly adapted for wetland control projects on private lands to reduce burdens for private property owners.

Department: The department agrees consideration should be given to private property owners and individuals who lack the capacity of lake organizations conducting plant management activities. The department added a planning waiver stating the department may waive planning requirements for waterbodies entirely contained on the property of one owner with no discharge or a controlled discharge. This provision applies to wetlands and may capture other waterbodies which are greater than 10 acres including some lakes if entirely owned by one person.

Comment: Wisconsin Manufacturers and Commerce suggested the plan requirements should be optional, stating the “applicant may” submit a plan to the department.

Department Response: Section 23.24 (3) (b), Stats., states, “The department may require that an application for an aquatic plant management permit contain a plan for the department’s approval as to how the aquatic plants will be introduced, removed, or controlled.” Making planning optional would compromise the consistency of decision-making and long term evaluation of control activities the rule is seeking to establish.

Comment: Wisconsin Manufacturers and Commerce suggested existing aquatic plant management plans be grandfathered into the draft rule upon promulgation.

Department: A provision was added in proposed rule to clearly state the department’s intention to allow existing, department approved, aquatic plant management plans to be considered as complete and whole plans under repealed and revised ch. NR 107 until they expire.

Comment: One member of the public requested a clarification of language in s. NR 107.05 (1) to say, “Plan elements for New and Revised Plans.”

Department Response: The department made this change.

Comment: One member of the public requested clarification in draft rule for newspaper public notice of a planning public comment period. They wanted to know if the department meant a Class 1, 2, or 3 notice.

Department Response: The department clarified the language to mean the plan applicant should post a newspaper notification a minimum of one time, to let the public know of the 21 day comment period on the draft plan.

Comment: Wisconsin Lake and Pond Resource suggested the definition of Integrated Pest Management (IPM) should incorporate the economics of control, specifically adopting the EPA’s definition.

² <http://aquatics.org/bmpchapters/3.2%20Developing%20a%20Lake%20Management%20Plan.pdf>

Wisconsin Manufacturers and Commerce suggested the definition of IPM should be consistent with federal law.

Department Response: The department incorporated economics into the IPM definition in proposed rule. The department agrees the economics of control are an important part of IPM. According to the EPA, the economics of control consider the short term and long term costs of entire management strategies to ensure efficient and environmentally conscious decisions are made.

Monitoring

Comment: Wisconsin Manufacturers and Commerce commented that the rule limits large-scale chemical control to every other year, which limits herbicide use to treat aquatic invasive species.

Department Response: The department modified the language in proposed rule to state that large scale control of any kind, not just chemical control, cannot occur prior to conducting a post treatment aquatic plant survey. The department also modified the language to say that back to back large scale control could occur if it was part of an approved in a plan. This management strategy could be appropriate in some cases, and the department would approve of that control in a plan. It must also be noted that the language is not an outright ban on any control the year after large scale control. Small scale chemical control, mechanical harvesting, hand pulling, and diver assisted suction harvesting are examples of control techniques which could still occur in the year following large scale chemical control. This is in line with integrated pest management principles.

Comment: One member of the public and Dane County commented the monitoring requirements for mechanical harvesting operations are too stringent. They both stated an understanding of why a pre and post control survey was necessary for chemical control, but did not see the same value from a pre and post control survey for large scale mechanical harvesting operations. Plant community shifts from harvesting operations are much more subtle than with chemical treatments.

Department Response: The department agrees monitoring requirements should be modified for exclusive mechanical harvesting operations. The department changed proposed rule to say large scale mechanical harvesting operations shall conduct a monitoring survey every five years with the plan.

Comment: Wisconsin Lake and Pond Resource commented the definition of what constitutes large scale effects is ambiguous and may allow for too much latitude for the department to interpret what is large scale.

Department Response: The department believes this comment is in relation to large scale chemical control. The proposed policy states that any permit proposal to treat more than 5% of the lake surface area will calculate the hypothetical lake wide concentration rate following dissipation and movement off targeted treatment sites. Specific herbicide rates which may be capable of lake wide impacts to plants will be based upon laboratory concentration exposure time (CET) studies, operational field studies, and herbicide product labels. This approach is consistent with the most current understandings of how herbicides interact with water, and allows for new research and new herbicides to be incorporated into the policy over time in a way a hard threshold cannot.

Determining whether a treatment may reach herbicide concentrations levels capable of having large-scale impacts can generally be calculated by dividing the volume of water being treated by the volume of water within the lake. In deeper lakes which thermally stratify, the volume of water above the thermocline should be used rather than the volume of the whole lake.

The intent of the calculation is to allow for each individual treatment scenario to be evaluated for its potential whole lake effects, instead of a hard threshold in rule as is used currently. Treating >5% of the lake surface area may or may not result in a lake wide concentration high enough to affect plants. Whether such a treatment results in lake wide effects depends on the active ingredient, application rate, and lake surface area to volume ratio. If the calculation determines the proposed treatment will not have whole lake effects, then the proposed treatment would not be required to conduct associated regulatory requirements for large scale control, whether that control was in an area was greater than 5% surface area or not.

The commentor is correct that department staff would review the calculation on the permit application and make the final determination. As stated above, specific herbicide rates which may be capable of lake wide impacts to plants will be identified from laboratory concentration exposure time (CET) studies, operational field studies, and herbicide product labels. The department agrees some form of reference guide which summarizes the current science for commonly used herbicides which is updated as new studies and data become available will be necessary. This document would also be publicly available to ensure clear communication and understanding.

Finally, the department does not believe all control exceeding 5% surface area will have whole lake effects, or that all treatments under 5% surface area will not have whole lake effects. The department ran several hypothetical scenarios with multiple lake sizes, depths, treatment sizes and herbicides to determine whether the 5% threshold captured most treatments which would have whole lake effects. In fact, the department found that the 5% surface area threshold is not protective in all situations, particularly in small lakes. However, no threshold for large scale control will be able to capture every scenario due to the variability of lake size and herbicide type in the state.

Notification

Comment: One member of the public commented the notification process is not conducive to physical control methods, particularly hand harvesting. Specifically, the necessity to post control dates and locations at public access points.

Department Response: Hand pulling of invasive species is waived from the permit process entirely, so a lake organization who was conducting hand pulling would not be required to do any notification processes under repealed and revised ch. NR 107. Hand pulling of native aquatic plants in the 30 foot riparian access zone is also waived from permitting.

Comment: One member of the public suggested the rule should include the ability to notify riparian owners of a permit submission via their monthly bill, not just a postcard.

Department Response: The department agrees flexibility is important to ensure the riparian notification requirements are simple and easy to comply with for lake associations. The department modified the policy to say either the permit application itself, or a link to access the permit application electronically, should be sent to all riparian owners either through paper or electronic means. Under these modifications, the commentor could submit their permit application shortly before sending their monthly bill statement to lake district members, and the bill statement could include a link to the department's permitting webpage with information about how to access the permit documents.

Comment: Wisconsin Lakes and multiple members of the public commented that notifying all riparian property owners on a waterbody may be challenging depending on lake size, the resources of the lake

association or district, and the time constraints for this notification in draft rule. Wisconsin Lakes suggested the department create tools to help organizations meet these requirements. They also suggested a clarification in language to make it clear the department intended for the riparian notice to be sent within 5 days, not that the permit application had to get into the hands of riparian owners within 5 days.

Department Response: The department made several modifications to proposed rule based on these comments. The department clarified in proposed rule that the permit application information should be “sent” to all riparian property owners, instead of “provided.” The department modified the timeline from 5 days to 7 days after a permit is submitted. The department modified the policy to say either the permit application itself, or a link to access the permit application electronically, should be sent to all riparian owners either through paper or electronic means, to allow for more flexibility. In addition, the department added a provision so applicants submitting permits that were not large scale on lakes over 2,000 acres and control on rivers and wetlands could propose a shortened list of riparian owners that will be impacted by the control to the department prior to sending out their notices. The department would review the request considering the area of impact of the control and riparian owner’s rights. This is a common sense “out” allowing for some flexibility for large systems.

Comment: Multiple members of the public commented on the posting of approved permits at all public access points. One member of the public suggested the details on the signs should be flexible for mechanical harvesting operations. Multiple members of the public and Wisconsin Lake and Pond Resource commented the provision to post at public access points within 5 days after a permit was approved was overburdensome, particularly because the uncertainty of a specific control date until much closer to the control. One member of the public commented that posting at all public access points may not make sense in all situations, depending on the type of access point.

Department Response: The department made several modifications to proposed rule based on these comments. The department changed the requirement to say notification signs should be posted at all public access points a minimum of 7 days before the estimated control date. This should allow for permit holders to plan their control and post signs once a rough date of control is set. The provisions still allow for a one-week control period to be posted on the notification, until a set date is determined. A provision was added stating mechanical harvesting operations may state a general narrative of the frequency of control over the entire growing season, instead of specific dates. Finally, a provision was added stating the permit applicant may request a public access point be excluded from posting requirements as part of the permit application. The department would consider that request by looking at the size of the control impact area relative to the size of the body of water, and the proximity of a public access point relative to the area impacted by control. This provision is another common sense “out” for large waterbodies in the state.

Comment: Wisconsin Manufacturers and Commerce commented public notice and meeting requirements lack explicit statutory authority, and should be removed entirely.

Department Response: The department has authority under s. 227.11 (2) (b). Stats., to prescribe procedures to administer s. 23.24, Stats., that are necessary to effectuate the purpose of the statute. The department has further authority under s. 23.24 (2) (a) 4., Stats., to establish by rule procedures and requirements for issuing APM permits. Public notification on the department’s website at no cost to the applicant, the department’s acceptance of public comments, and a public informational hearing in the event of sufficient interest from the public are clearly procedures for the issuance of APM permits within the department’s rulemaking authority.

Comment: One member of the public stated concerns about the supervision requirements in draft rule, particularly for hand harvesting operations.

Department Response: Hand harvesting of invasive aquatic plants is exempt from ch. NR 107. The supervision requirements in proposed rule are the same provisions that exist in current ch. NR 107, they were not modified.

Comment: One member of the public commented that the provision in s. NR 107.07 (2) (d) 4., should only apply to lake districts because they are required under ADA to accommodate people with disabilities. They stated ADA requirements cannot be imposed on non-governmental organizations.

Department Response: There are no ADA requirements being imposed in this provision. The department is committed to facilitating accessibility to a process that is relevant to its permit decisions for individuals that need it.

Comment: One member of the public said it was unclear if s. NR 107.07 (15), relating to public access posting was only for chemical control or also for mechanical control.

Department Response: Public access posting in draft ch. NR 107 is a requirement under the general provisions section, and is a requirement for all waterbodies and all permitted control activities except waterbodies under 10 acres in size that do not have public access

Wetlands

Comment: One member commented that the applicability section of Subchapter III, of ch. NR 107, relating to wetland management, was confusing. Specifically, “non-riparian lacustrine and riverine wetlands.”

Department Response: A riparian owner means a landowner abutting a navigable waterway. The department modified the language to say, “control of aquatic plants on non-riparian wetlands.” The department specified non-riparian wetlands because many lake systems in the state have wetland, marsh, or bog areas around the perimeter of a lake, and the department would consider those situations as part of the broader lake management strategy.

Comment: One member of the public questioned why wetland permit expiration dates were set to December 31st unlike lake permits, which have an October 15th expiration date.

Department Response: Certain wetland control activities take place over the winter time, so an expiration of October 15th would limit those control options. In addition, allowing for multi-year wetland permits will mean permit applicants will not have to apply for another annual permit while in the middle of control work during the winter. All other APM permits run annually during the growing season, and permits are generally sent to the department at the beginning of the calendar year up through May.

Small waterbodies

Comment: One member of the public commented with concerns regarding the relaxed requirements for permitting small waterbodies. They stated the elimination of public notice for small waterbodies is rash, because water does not stay in one place and may impact groundwater quality and soil quality. They

stated the public should be informed on what happens on small waterbodies. They also noted the relaxed reporting requirements will reduce the ability of the department to evaluate the effects of the waste.

Department Response: The department recognizes the concerns stated above. The department believes the proposed rule allows for sufficient regulatory flexibility, while also maintaining adequate resource protection of threatened and endangered resources as well as public rights and interests. Permit applications for waterbodies with public access or a surface water discharge will be required to be posted on the department's webpage for public notification for 14 days. Permit applications for waterbodies with multiple owners will be required to share the permit application with the other homeowners around the waterbody. Permit applications for waterbodies entirely confined on the land of one owner, with no public access or surface water discharge have the fewest permitting requirements.

Comment: Wisconsin Lake and Pond Resource suggested the permit waiver cited in draft s. NR 107.04 (3) (b) 6., "Privately accessible ponds that are less than 0.1 acres in size and are lined, with no groundwater connection to waters of the state," be amended as follows: "Privately accessible and/or shared ponds of any size which are lined, do not have a history of being a lake or stream or of being part of a lake or stream, and are not hydrologically connected to a natural navigable waterway and that does not discharge into a natural navigable waterway except as a result of storm events."

Department Response: The department agrees the permit waiver for ponds should be expanded to incorporate more waterbodies on private land that are exempt from the permitting process. The department has expanded the waiver, incorporating components of the commentors' suggested language: "Privately accessible ponds³ less than .5 acres in size, which have a synthetic, artificial liner, do not have a history of being a lake or stream or of being part of a lake or stream, and are not hydrologically connected to a water of the state and that does not discharge into a water of the state." The original provision of .1 acre privately accessible ponds in the draft rule waived up to 41 previously permitted small waterbodies. The change to the waiver greatly expands the number of waterbodies which may be waived from permitting.

Comment: Wisconsin Lake and Pond Resource questioned why the department continues to require aquatic plant control permits for private, artificial waters, stating this is inconsistent with s. 30, Stats. They also commented that public trust doctrine and past case law have shown that public trust does not apply to artificial navigable lakes or ponds.

Department Response: Chapter NR 107 regulates waters of the state as defined in ss. 23.24 (1) (k) and 281.01 (18), Stats. This includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction. The scope of ch. 30, Stats., is limited to navigable public waters only.

Comment: Wisconsin Lake and Pond Resource commented saying the 10 acre threshold for the three small waterbody classifications should be removed so there is no maximum size threshold for pond or private water.

³ In draft NR 107.03 (30): a privately accessible pond is a body of water 10 acres or less, on the land of one owner, with no surface water discharge or a discharge that can be controlled to prevent chemical loss and no public access.

Department Response: The 10 acre size threshold was determined by using current ch. NR 107's threshold for large scale control. A size threshold was set to create a clear delineation for planning requirements. Waterbodies less than 10 acres in size are exempt from planning requirements in ch. NR 107, even if they are conducting large scale control or AIS population control.

Comment: Wisconsin Lake and Pond Resource, The Pond People and Wisconsin Manufacturers and Commerce commented the three different categories of small waterbodies were confusing.

Department Response: The department modified the language of each of the three small waterbody classifications to reduce confusion. The department reinstated existing language specifying surface water "discharges, or a discharge which may be controlled." This language has been used since 1989 and may reduce some of the confusion upon rule implementation. In addition, the department removed the provision stating a business open to the public with a waterbody on their property could not be considered a sole owner of a privately accessible pond. By removing this provision, golf courses, campgrounds and other businesses who are the sole owner around a body of water, without a surface water discharge or public access easement may be considered a privately accessible pond. Finally, the department removed the provision which stated a public pond would need to resubmit for public notice every year that the permit was issued for, which will reduce administrative costs for permit applicants.

These provisions were not modified. Permit applications for waterbodies with public access or a surface water discharge will be required to be posted on the department's webpage for public notification for 14 days. Permit applications for waterbodies with multiple owners will be required to share the permit application with the other homeowners around the waterbody. Permit applications for waterbodies entirely confined on the land of one owner, with no public access or surface water discharge have the fewest permitting requirements. All of these waterbodies under 10 acres are eligible for a 5 year permit.

The department will release a plain language communication document walking permit applicants through the proposed permit process to facilitate a smooth transition.

Comment: Wisconsin Manufacturers and Commerce suggested the department adopt pending legislation provisions in place of what is in draft rule.

Department Response: The proposed rule recognizes and incorporates some of the intended goals in the vetoed bill for more streamlined regulations for small waterbodies. The proposed rule creates three distinct categories to focus public oversight where there is public interest. Also, where there is a need to protect sensitive, threatened, and endangered species, many of which thrive in small waterbodies. The department is opposed to the vetoed changes to s. 23.24, Stats. The bill would have removed social and ecological safeguards for waters under 10 acres without public access and surface water discharge. These waters range from small backyard ponds to natural navigable waters, and many of these are named public inland lakes. A minimum of 45,000 waters of the state would have been removed from the department's protective oversight. In addition, the permitting process ensures the state's ability to meet its legal obligations to the Ojibwe Bands and the Clean Water Act.

Comment: Wisconsin Builders Association commented that the changes will affect the development process when water retention ponds are established in a new subdivision, which will increase costs.

Department Response: There are no provisions in ch. NR 107 which dictate how water retention ponds should be built. Chapter NR 107 regulates the control of aquatic plants. Furthermore, the proposed provisions in proposed rule provide reduced regulation for aquatic plant control on stormwater retention ponds. Under the proposed rule, control of emergent vegetation in and around stormwater

management structures is waived from permitting. In addition, stormwater retention ponds with multiple homeowners around them, with no surface water discharge or a controlled discharge, will no longer be required to conduct public notice of the proposed control.

Comment: One member of the public asked for clarification on why small waterbodies have a permit expiration date of November 1st, unlike October 15th for waterbodies over 10 acres in size.

Department Response: The expiration date set for waterbodies greater than 10 acres in size is extended two weeks beyond what is in current ch. NR 107, to account for climate change impacts in the state. The rationale behind management of certain types of small waterbodies, including ponds and stormwater retention ponds, are different than lake management. Management can occur later into the fall for these waterbodies.

Comment: Wisconsin Lake and Pond Resource suggested the privately accessible pond name be shortened to “private pond” and should include those waters with multiple landowners.

Department Response: The term “privately accessible pond” was chosen because while the land surround the waterbody may be privately owned and only accessed by that owner, the body of water itself is a water of the state. These waters have the least number of permit requirements associated with them. Waterbodies with multiple homeowners surrounding them are named “shared ponds” because multiple individuals have access to that waterbody. These waterbodies are required to share an electronic or paper copy of the permit application with each neighbor so everyone around the waterbody is informed of what happens on the shared water.

Comment: The Pond People commented that the use of dyes would not be allowed on public ponds in draft rule.

Department Response: The pesticidal use of dyes is allowed for privately accessible and shared ponds.

Best Management Practices

Comment: Wisconsin Wetland Association commented in support of the incorporation of Best Management Practices (BMPs) into the planning and permitting process. They supplied suggestions for ways to develop BMPs for wetland management, and indicated they would work with the department and wetland consultants to develop BMPs.

Department Response: The department agrees BMPs may be a useful tool to encourage implementation of beneficial standards and provide customer service to those who seek services for aquatic plant control. The department also agrees collaboration with technical experts will be necessary for the creation of BMPs.

Comment: United Phosphorous Limited suggested the department create a matrix to identify under what criteria a BMP would be used, with site specific parameters including financial metrics to remove human bias regarding which tool should be selected.

Department Response: The department agrees best management practices will need to incorporate site specific parameters, and sees the value in a matrix as described. BMPs will be designed to capture the available or appropriate management options for specific scenarios.

Comment: Wisconsin Manufacturers and Commerce commented that BMPs should not be in guidance, but must be in draft rule.

Department Response: BMPs are intentional actions taken as part of a control effort to avoid or minimize adverse impacts of the treatment. BMPs are not required under the rule and are not statements of general policy. The proposed rule is structured such that the use of BMPs provides an optional pathway to reduced regulatory requirements. The department is not seeking to mandate or impose BMPs in any particular situation. Accordingly, no rule is required for the creation of BMPs. Furthermore, codified BMPs would be less flexible to change and modify as better information and technology emerges.

Surface Water Grants

Comment: One member of the public commented that having two separate processes for plans under surface water grants and aquatic plant management would be difficult for the general public to understand. They suggested the surface water grant planning program be terminated to make the rules the same for each. They stated grants will be necessary to assist lake groups with conducting aquatic plant management protocols under the proposed rule.

Department Response: Planning projects conducted under ch. NR 193 are applicable to a range of surface water management challenges, including aquatic plant management. Rather than terminating the ch. NR 193 planning process, the proposed revisions ensure planning supported under ch. NR 193 and planning under ch. NR 107 are aligned and cross-compatible. As stated under proposed s. NR 107.05 (6), aquatic plant management and protection plans written under s. NR 193.32 (1) (f) and consistent with s. NR 193.33 may be approved to satisfy the conditions of s. NR 107.05 (1). Additional revisions to s. NR 193.32 (1) (f) clarify that aquatic plant management and protection plans pursuant to permitting under ch. NR 107 may be eligible for ch. NR 193 cost sharing. Finally, activities to support planning, like aquatic plant community assessments and monitoring, remain eligible under ss. NR 193.32 (1) and 193.63.

Comment: One member of the public suggested an insertion to ch. NR 107 stating: “NR107.06(7) Permit Fee Waived – The permit fee shall be waived when control is performed as part of a DNR Surface Water Grant covering control activities on the lake.” They commented if this was not possible that permit fees be included as an expense under the grant, and noted that reimbursement is possible in ch. NR 107.

Department Response: The department made no changes to NR 107 based on this comment. Permit fees are eligible expenses under a surface water grant. As stipulated under s. NR 193.06 (1) (b) 4., the department may reimburse fees necessary for federal, state or local permits required for the implementation of a project supported by ch. NR 193.

Comment: Wisconsin Wetland Association commented that it is important to offer funding options for those who will need an APM plan. They noted concern that more applicants to the planning grant funds may shift allocation of limited resources towards APM at the expense of other types of wetland, lake and river restoration planning and management. They stated the surface water grant program should manage this added pressure so restoration projects are not lost.

Department Response: The department proposes additional text to s. NR 19.32 (1) (f) that clarifies the program’s continued support of comprehensive management planning for surface water protection and restoration. The department moved material formerly presented in a note to two substantive subsections. We distinguished between comprehensive management plans that take a holistic

approach to planning for ecosystem protection and restoration and “focused” management plans that are written to address a specific management challenge like aquatic plant management. While we anticipate increased draw for Surface Water Planning projects to help fund Aquatic Plant Management and Protection Plans, the surface water grant program will also continue to support the Comprehensive Management Planning program outlined under s. NR 193.05, and now under s. NR 193.32 (1) (f) 1.