TO: Natural Resources Board Members

FROM: Wisconsin Manufacturers & Commerce
Wisconsin Paper Council
Midwest Food Products Association
Wisconsin Civil Justice Council
Wisconsin Water Alliance

DATE: August 7, 2020

RE: Emergency Rule WA-06-20(E) – Relating to Firefighting Foam Regulation

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We write to inform you of our concerns with respect to Emergency Rule WA-06-20(E), relating to firefighting foam that contains PFAS, which is on the August 12, 2020 agenda of the Natural Resources Board for a vote. We respectively ask that you make the following changes to the proposed rule to ensure it remains within the statutory authority granted by 2019 Act 101 (Act 101), and fully complies with Chapter 227 rulemaking requirements.

Our organizations collectively represent thousands of small, medium, and large employers located throughout all corners of the state, in every sector of our economy. We support clean water and environmental stewardship that is based upon fair, consistent, transparent, and lawful regulation.

We believe the draft rule exceeds the statutory authority conferred upon the DNR by 2019 Wisconsin Act 101, and we are similarly concerned that the latest revisions to the draft rule take the rule well beyond the limits of the rule's original statement of scope, and is therefore in violation of Chapter 227 rulemaking procedural requirements. Finally, we are deeply troubled that the proposed effluent limits for fourteen different PFAS compounds are not based on science, have not been reviewed by the Department of Health Services (DHS), have not been discussed with the general public, and would place Wisconsin in the position of being a regulatory outlier.

I. ACT 101 PROVIDES NO EXPLICIT AUTHORITY TO ESTABLISH NUMERIC EFFLUENT LIMITATIONS FOR FOURTEEN PFAS COMPOUNDS

Agencies are required to promulgate as rules their interpretations of statutes they administer or enforce, but those rules are not valid if "the rule exceeds the bounds of correct interpretation."[1]

[1] See s. 227.11(2)(a)

In addition, it is important to note that agencies no longer have "implied" authority to regulate as they wish. Instead, agency regulatory authority must be explicit per 2011 Wisconsin Act 21. The Wisconsin Supreme Court recently affirmed these restrictions on agency authority in the case *Legislature v. Palm*, stating "under 2011 Wis. Act 21, the Legislature significantly altered our administrative law jurisprudence by imposing an 'explicit authority requirement' on our interpretations of agency powers." The Court went on to say that the "explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies."

If the Legislature intended to authorize the Department to establish effluent limits for fourteen different PFAS compounds, it would have explicitly said as much in the text of Act 101. It did not. In the absence of such an explicit statutory directive, the Department does not have the requisite legal authority to create the effluent limits proposed in Table 1 of this rule.

Tellingly, the Legislature specifically rejected the stringent regulation of PFOS and PFOA when enacting Act 101. Senate Substitute Amendment 2 to Senate Bill 310 proposed to require that any PFAS groundwater standards recommended by DHS be treated as enforceable standards on an interim basis for purposes of groundwater and drinking water quality. The Senate rejected this amendment on a vote of 19-14.[2] If adopted, this amendment would have had the effect of regulating PFOS and PFOA to a 20 ppt standard – a much more lenient standard than the effluent standards proposed in the emergency rule (1.3 ppt and 2.1 ppt respectively). It defies logic that the Legislature specifically rejected a 20 ppt regulatory standard for PFOS and PFOA in Act 101, but somehow gave the DNR the authority to regulate these compounds much more stringently, and authorized standards for twelve other PFAS compounds that were never discussed by the Legislature. There is simply no reasonable or rational argument that the Legislature gave the Department explicit authority for these effluent standards. Consequently, these effluent limits must be removed from the emergency rule.

II. INCLUSION OF SURFACE WATER CRITERIA FOR PFAS CHEMICALS CIRCUMVENTS CURRENT RULEMAKING APPROVED BY THE NATURAL RESOURCES BOARD TO DEVELOP SURFACE WATER CRITERIA FOR PFAS, AND WAS DONE WITH NO PUBLIC INPUT

The Natural Resources Board approved a scope statement for the establishment surface water criteria with "the primary objective of the rule" being to create human health surface water criteria for PFOS and PFOA, "as well as any other PFAS which the department determines may by harmful to human health…."[3] Moreover, the Department has held several stakeholder meetings regarding this effort. An additional meeting is scheduled for August 27, 2020. The department has estimated public hearings on the proposed rule will be held in the Summer of 2021, with the rules becoming effective in the Summer of 2022. Thus, the WY-23-19 rulemaking effort purports to allow for substantial public involvement as this matter is considered.

Unfortunately, DNR has now usurped and short-circuited that stakeholder process by inserting last-minute effluent standards for treatment of PFOS and PFOA, and to 12 other PFAS substances in WA-06-20(E). This significantly undermines stakeholder involvement, and raises questions regarding whether the department has already concluded what PFAS chemicals it plans to establish standards for, and what the standards should be. We are very concerned that by proposing these extremely stringent standards,

[2] https://docs.legis.wisconsin.gov/2019/related/votes/senate/sv0102

[3] *See* Statement of Scope, Rule No. WY-23-19.

they will become the de-facto statewide standards in WY-23-19, rather than working through a deliberative rulemaking process that considers sound science and input from the general public.

We object to the department "jumping to the finish line" by including these effluent standards in the firefighting foam emergency rule. It is important for the Natural Resources Board to be aware that these effluent standards were developed with absolutely no public input. The department did not provide any opportunity for comment on these standards because they were added at the eleventh-hour, after the conclusion of the public comment period. Consequently, the regulated community was not given the opportunity to provide input.

Given the significance of the PFAS issue, we are very concerned that these standards were developed in a vacuum. Some of these concerns include, for example, how the standards were developed, whether the standards can be met, whether the standards are set at the appropriate level from a health perspective, and what are that costs associated with compliance. Furthermore, we do not even know why these specific PFAS chemicals were selected for the development of standards. Some of these compounds are not typically found in firefighting foam that is the subject of regulation under Act 101.

We believe that sound public policy, due process and common-sense dictate that the Natural Resources Board, as well as stakeholders know the answer to these questions prior to adopting and emergency rule, which under 2019 Act 101, may be in place for three years.

III. THE EFFLUENT LIMITS IN THE PROPOSED RULE ARE NOT BASED ON SCIENCE

The proposed effluent limits listed in Table 1 are not based on science, and have not been peer-reviewed. In fact, these effluent limits involve substances that DHS has not even completed a review for health impacts. Equally troubling, toxicologists and epidemiologists at DHS have not made any formal recommendations with respect to appropriate effluent limits for any of the fourteen compounds in the proposed emergency rule. On the contrary, the Department's own environmental toxicologist presented information at a stakeholder group meeting for the PFAS water quality rule that suggested a water quality standard of 34-45 ppt for PFOA.[4] That is a much more lenient standard for PFOA than the 2.1 ppt standard proposed in this rule.

Unlike Wisconsin, the State of Michigan has already promulgated water quality standards for PFOS and PFOA – standards which are far more reasonable than what DNR has proposed in this rule. The Michigan standards for PFOS are 12 ppt for waters not used for drinking water, and 11 ppt for waters used for drinking water.[5] The DNR's emergency rule, inexplicably, proposes a 1.3 ppt standard – far more stringent that either Michigan standard.

Similarly, Michigan has a water quality standard for PFOA that is 12,000 ppt for waters not used for drinking water, and 420 ppt for waters used for drinking water. The DNR's proposed standard is 2.1 ppt. There is no explanation or scientific basis to explain why Michigan regulates PFOA at either 12,000 ppt or 420 ppt,[6] while the DNR has proposed 2.1 ppt. Regulating at these levels is unscientific, arbitrary, capricious, and would make Wisconsin a regulatory outlier in the United States, if not the world. Notably, Michigan does not have effluent standards for the other twelve PFAS compounds proposed in

[4] See "Bioaccumulation Factors" PowerPoint Presentation, Meghan Williams, WI DNR, March 23, 2020
[5] https://www.michigan.gov/pfasresponse/0,9038,7-365-86510_88079-476131--,00.html
[6] ibid

Table 1, providing further evidence that the proposed emergency rule is out-of-step with the regulatory approach of other states.

IV. THE INCLUSION OF EFFLUENT LIMITS IN THE PROPOSED RULE VIOLATES CHAPTER 227 RULEMAKING REQUIREMENTS

State law requires agencies to follow a specific process for promulgating rules, including emergency rules, to ensure the general public has advance notice of what agencies intend to do, and to provide opportunities to participate in their government's policymaking process. One such requirement is the preparation of a "statement of scope" under s. 227.135. Scope statements are intended to prevent regulatory ambush by placing the public on notice of what and how an agency proposes to regulate. This is done at the very beginning for the rulemaking process. Importantly, scope statements also prevent a regulatory bait-and-switch by requiring agencies to prepare and seek approval of a new scope statement if the proposed rule diverges from the original scope.

Specifically, s. 227.135(4) states, in relevant part:

> "If at any time after a statement of the scope of a proposed rule is approved under sub. (2) the agency changes the scope of the proposed rule ***in any meaningful or measurable way***, including changing the scope of the proposed rule ***so as to include in the scope any activity, business, material, or product that is not specifically included in the original scope of the proposed rule***, the agency shall prepare and obtain approval of a revised statement of the scope of the proposed rule…" (emphasis added)

There is no question that the proposed emergency rule violates s. 227.135(4), and thereby triggers the need for a new statement of scope. The statement of scope for this emergency rule makes absolutely no mention of effluent standards, nor does it specifically mention any of the fourteen PFAS compounds referenced in Table 1. Each of these fourteen substances are a "material" that was not "specifically included in the original scope of the proposed rule" and therefore the proposed emergency rule as written has triggered the requirement to prepare a new statement of scope and obtain approval for the same.

It is worth noting that per s. 227.40(4)(a), the exclusive remedy for an agency's failure to comply with statutory rulemaking procedures, including the requirements of s. 227.135, is invalidation of the rule.

V. ACT 101 DOES NOT EXPLICITLY REQUIRE TREATMENT TO A NON-DETECT STANDARD

Although Act 101 generally prohibits the use or discharge of class B firefighting foam containing PFAS, there is an exemption in s. 299.48(3)(b) for testing if done in a facility has implemented, among other things, "appropriate" treatment. An appropriate level of treatment is not the same as treatment to a level on non-detection. Had the Legislature intended to require treatment to a non-detectable level, it would have placed that requirement in the statutes. It did not.

As noted above, since enactment of 2011 Act 21, agencies need explicit authority to regulate, and can no longer rely upon implied authority. Last month the Wisconsin Supreme Court further interpreted the significant restrictions Act 21 placed on agency authority in the case *Kathleen Papa v. DHS*. In that case, the Court overturned a Department of Health Services (DHS) Medicaid recoupment policy on the

grounds that DHS lacked explicit authority for its policy. Although the Court found that DHS had explicit authority to recoup Medicaid payments, it did not have explicit authority to recoup payment based upon a standard of perfect recordkeeping. The Act 21 restrictions on agency authority articulated by the Supreme Court in that case are equally applicable to this draft emergency rule. That is, the Department clearly has explicit authority to condition the exemption for firefighting foam testing on "appropriate treatment." However, nowhere in that statute is there a requirement that the treatment be done to a non-detectable standard, as Act 21 would require.

There are serious concerns with the technical feasibility and costs associated with the treatment requirements in the emergency rule for testing facilities, to the point that they likely conflict with s. 299.48(4), which states "Nothing in this section shall be construed as prohibiting the manufacture, sale, or distribution of a class B fire fighting foam that contains intentionally added PFAS." There can be no foam manufacturing without testing. Yet the costly and burdensome treatment requirements for testing will likely serve as a de-facto prohibition against manufacturing class B firefighting foam because of the onerous nature of the proposed regulations.

To comply with the Legislature's directive to require "appropriate" treatment, the rule should require treatment to a level consistent with a promulgated drinking water standard for PFAS, or in the absence of a promulgated standard, a health advisory issued by the United States EPA. There is simply no rational basis to interpret the "appropriate" treatment required by Act 101 as authorizing the Department to require a concentration that is cleaner than safe drinking water.

VI. TREATMENT TO A NON-DETECT STANDARD DEPARTS FROM STATE REGULATORY POLICY, AND IS ARBITRARY AND CAPRICIOUS

Wisconsin's environmental statutes and administrative rules are often regarded as being among the most protective in the country. Yet these regulations almost uniformly contemplate that the discharge of some amount of harmful, toxic, or even carcinogenic chemicals is acceptable in appropriately low concentrations. For example, our drinking water standards in Wisconsin allow detectable levels of lead, mercury, arsenic, and cyanide – each of which are incredibly harmful to human health. Yet the Department has determined that public health can be protected even with detectable levels of these chemicals in our drinking water. Inexplicably, this rule proposes a discharge standard for PFAS in firefighting foam that is far more stringent than that which is imposed to regulate any of these harmful substances in our drinking water. The proposed rule is therefore far more stringent than necessary to protect public health, or meet the Legislature's statutory directive of "appropriate treatment."

This departure from current regulatory practice is further underscored by its contrast to Wisconsin's Spill Law (Chapter 292 and the NR 700-series of the Wisconsin Administrative Code). For example, "treatment" under the Spill Law is defined as "any method, technique or process, including thermal destruction, which changes the physical, chemical or biological character or composition of a hazardous substance or environmental pollution so as to render the contamination less hazardous."[7] In this context, treatment contemplates making a hazardous substance "less hazardous." It does not require, as the proposed emergency rule does, the complete elimination of all traces of a substance.

The Spill Law also regulates the discharge of pollutants to a "residual contaminant level," which is defined in NR 700 to mean "that some contamination remains after a cleanup is completed and

[7] See s. NR 700.03(63)

approved."[8] In other words, the Spill Law itself contemplates that adequate protection of public health and welfare can be achieved while allowing some amount of residual pollution to remain – it is not necessary (nor often feasible) to clean to non-detectable levels of a pollutant as the proposed emergency rule does.

In a similar departure from current regulatory practice, the pre-treatment standards that industrial sources are required to meet before discharging their effluent to a municipal sewerage treatment plant requires treatment that will not "cause or significantly contribute to a violation of the (treatment plant's) WPDES permit."[9] It is not necessary to impose a prohibition on effluent containing any detectable PFAS to meet the Department's own pre-treatment requirements, yet DNR has chosen to do so in this proposed rule. The rule would essentially impose a de-facto ban on discharging effluent with any amount of PFAS from testing facilities, despite the fact that DNR currently reserves such prohibitions for pollutants that would cause an explosive hazard or that would cause corrosive structural damage to the treatment plant.[10]

The fact that the non-detect standard is misaligned with the Legislature's intent with respect to Act 101 is further illustrated by amendments to the legislation that were rejected. For example, Senate Substitute Amendment 2 to Senate Bill 310 proposed to require that any PFAS groundwater standards recommended by DHS be treated as enforceable standards on an interim basis for purposes of groundwater and drinking water quality. The Senate rejected this amendment on a vote of 19-14.[11] If adopted, this amendment would have had the effect of regulating PFOS and PFOA to a 20 ppt standard under Act 101 – a much more lenient standard than proposed in the emergency rule. It defies logic that the Legislature specifically rejected a 20 ppt regulatory standard for PFAS in Act 101, but somehow intended the Department to interpret "appropriate" treatment to mean a draconian level of treatment to a non-detectable standard.

Under Wisconsin Supreme Court jurisprudence, an agency's actions are arbitrary and capricious if they are "so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." We believe the Department's interpretation of "appropriate" treatment under Act 101 to be a non-detect standard is arbitrary and capricious because such an interpretation would stand contrary to virtually every other aspect of environmental regulation in Wisconsin. Our environmental laws establish allowable levels of pollutant discharges or emissions that are of a concentration low enough to protect public health – not a complete elimination of them. There is therefore no rational basis to hold effluent containing PFAS from firefighting foam to a standard that is, for example, more stringent than acceptable levels in drinking water as determined by public health regulators. As such, the Department should replace the non-detect standard with treatment to a level consistent with a promulgated drinking water standard for PFAS, or in the absence of a promulgated standard, a health advisory issued by the United States EPA.

VII. THE PROPOSED DEFINITION OF "FOAM" CONFLICTS WITH STATE LAW

Act 101 defines "Class B fire fighting foam" to mean "a foam designed for use on a flammable liquid fire, and may include a dual Action Class A and B foam."[12] All regulatory requirements imposed under Act 101 reference this very specific and well-considered statutory definition. Yet the draft emergency rule

[8] See s. NR 700.03(49r)
[9] See s. NR 211.10(1)
[10] See s. NR 211.10(2)(a)-(b)
[11] https://docs.legis.wisconsin.gov/2019/related/votes/senate/sv0102
[12] See s. 299.48(1)(a)

purports to redefine this legislatively prescribed definition, and thereby rewrite the regulatory burdens imposed on businesses and local governments. The rule does this by defining "foam" to include, among other items, treated effluent.

It is well understood that agency rules cannot supersede state laws, nor can agencies promulgate rules that conflict with state law.[13] Yet that is precisely what the Department is attempting to do by shifting the nexus of regulatory application away from "Class B fire fighting foam" under Act 101, to its contrived and expansive definition of "foam" under the proposed rule. The consequence of this unlawful conflation of definitions is a selective rewrite of Act 101 in furtherance of the Department's desire to expand its own authority beyond that which the Legislature conferred under Act 101. In addition to subverting the Legislature's intent, it is plainly illegal. The draft emergency rule's definition of "foam" must be deleted, or revised to align with the statutory definition at s. 299.48(1)(a).

VIII. OTHER CONSIDERATIONS

We support the regulation of PFOS and PFOA in a manner that is fair, cost effective, and grounded in sound, peer-reviewed science. We also supported passage of Senate Bill 310, the legislation that led to the enactment of Act 101, because we viewed this legislation as a means to implement best practices to improve water quality. Unfortunately, this proposed emergency rule would likely inhibit the goal of clean water. If unchanged, the draft rules will discourage Wisconsin manufacturers from developing clean water solutions because regulatory overreach like this disincentivizes companies from pursuing emerging technologies and water solutions.

More broadly, the Department's regulatory and statutory overreach in the draft emergency rule creates an unfriendly and uncompetitive business environment in our state by imposing unnecessary and costly burdens on Wisconsin employers that their competitors in other state do not face. The fact that restrictions like the non-detect standard and the ultra-stringent effluent limits are not grounded in supported science, are not grounded in the law, and are not necessary to protect public health only compound the regulated community's frustration with the approach taken in this rule.

IX. CONCLUSION

The proposed emergency rule is fundamentally flawed because many of the proposed regulatory requirements exceed the statutory authority conferred on the Department by Act 101. What was enacted as a simple, cost-effective, and straightforward bill to improve water quality has morphed into a complicated, prescriptive and costly regulatory scheme grounded in a command-and-control approach to regulation that will stifle innovation. In addition, the breadth of the proposed rule now exceeds the original statement of scope for the rule, and accordingly, must go through the scope statement drafting and approval process. We respectfully urge the Natural Resources Board to revise the draft emergency rule by making the changes referenced above, and thereby align the rules with the regulatory approach and legal framework enacted by the Legislature in Act 101 and Chapter 227. We would be happy to work with DNR staff toward that end.

[13] See s. 227.10(2)