STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 JEFFERSON COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN NATURAL RESOURCES BOARD, and PRESTON COLE, in his official capacity as Secretary of the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants.

AMENDED ORDER

Case No. 21CV111

For the reasons set forth in the Amended Memorandum Decision (attached), each party is entitled to Summary Judgment as indicated and each is denied Summary Judgment as indicated.

The (Amended) Memorandum Decision corrects paragraph 4 of page 35 to accurately reflect Defendants are GRANTED Summary Judgment as to Wis. Stat. §283.55(1)(e).

In addition, the words "permit access to their facilities" are added to page 34, first full paragraph, third sentence, second line and page 34, second full paragraph, second sentence, the word "facilities" is replaced by the word "facilitates."

Dated this 27th day of January, 2022.

BY THE COURT:

William F. Hue
Circuit Court Judge, Branch 2

ec: Counsel

THIS IS A FINAL ORDER FOR PURPOSE OF APPEAL.

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Defendants.

AMENDED MEMORANDUM DECISION SUMMARY JUDGMENT

Case No. 21CV111

INTRODUCTION

The parties have filed cross-motions for Summary Judgment. The Court has previously issued limited pre-trial injunctive relief in part and declined to issue pre-trial injunctive relief in part. The parties have had an opportunity to brief (re-brief) the issues of declaratory judgment/injunctive relief in this matter.

This Memorandum Decision concludes this litigation on its merits.

LEGAL STANDARD
SUMMARY JUDGMENT

Summary Judgment is appropriate where there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. §802.08(2). "When the facts are undisputed," interpretation and application of the relevant law to the undisputed

facts presents a question of law appropriate for Summary Judgment. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 9, 281 Wis. 2d 300, 697 N.W.2d 417.

Summary Judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. §802.08(2). There is a two-part test. "Under the first step, this court asks if the plaintiff stated a claim for relief. Under the second step, this court applies the summary judgment statute and asks if any factual issues exist that preclude a grant of summary judgment." *In re Garza,* 2017 WI 35, ¶ 21, 374 Wis. 2d 555.

Cross-motions for Summary Judgment sometimes imply a stipulation as to the facts of the case, as in *Powalka v. State Mut. Life Assurance Co.*, 53 Wis. 2d 513 (1972), but not always. A "movant may be correct in stating that the facts relevant to his theory of the case are not in dispute, yet contest the relevant issues of fact under his opponent's theory." *Hiram Walker & Sons., Inc. v. Kirk Line*, 877 F.2d 1508, 1513 n.4 (11th Cir. 1989). Additionally, both parties might erroneously conclude from the existence of cross-motions that no factual dispute exists, when in fact, one does. Courts therefore follow the standard Summary Judgment methodology. *Stone v. Seeber,* 155 Wis. 2d 275 (Ct. App. 1990).

Here, on the record, both parties asserted that no material facts are at issue and that neither party requests an opportunity to further develop facts through trial opposing the other parties' Motion for Summary Judgment. The Court has also determined, independently, that there are no material facts that require resolution through trial procedure on either parties' Motion for Summary Judgment. Thus, the Court will proceed and follow standard Summary Judgment methodology required by Wisconsin law and resolve the matter on the merits.

PARTIES

Plaintiff Wisconsin Manufacturers and Commerce, Inc. ("WMC") is a membership-based trade association with member businesses of all sizes located throughout Wisconsin. It maintains its principal place of business at 501 East Washington Avenue in the City of Madison, Wisconsin. WMC as an organization is a Wisconsin taxpayer. WMC also has members who are taxpayers.

Defendants are all agencies of the state of Wisconsin as that term is defined by Wis. Stat. §227.01(1). Defendant Wisconsin Department of Natural Resources ("DNR") is a department in the state government, created by Wis. Stat. §15.34. Defendant Wisconsin Natural Resources Board is a board in the state government, created by Ch. 75 of the Laws of 1967, §25, with its membership established by Wis. Stat. §15.34(2). Defendant Preston Cole is Secretary of the Wisconsin Department of Natural Resources, an officer in the state government nominated by the Governor and with the advice and consent of the Senate appointed to serve at the pleasure of the Governor. Wis. Stat. §15.05(1)(c).

CASE PROCEDURE

WMC has requested declaratory relief in this lawsuit. It has asked the Court to:

1. Declare that Defendants' sampling program exceeds the scope of Defendants' statutory authority and is unlawful;
2. In the alternative, or in addition to, declare that Defendants' sampling program violates §227.10(2m) and is unlawful; and
3. Enjoin Defendants from further implementing the sampling program and from releasing any information regarding the samples unlawfully taken thereunder.

On March 29, 2021, WMC filed a motion for a temporary restraining order and a temporary injunction asking the Court to enjoin the DNR's sampling program while this litigation proceeded. (Dkt. 7-8.) The Court issued a temporary restraining order on March 30, 2021, halting the sampling program and prohibiting the release of any results. (Dkt. 14.) After a hearing on April 1, 2021, the Court revised the temporary restraining order, allowing the DNR to continue with its sampling program but maintaining the temporary prohibition of any public release of results. (Dkt. 22.) On April 6, 2021, the Court replaced the temporary restraining order with a temporary injunction (which remains in place). This order allows the DNR to continue its sampling program but prohibits the DNR from disclosing results in a manner that would connect individual results to individual facilities. (Dkt. 25.) The temporary injunction expressly allowed the DNR to publicly disclose anonymized test results, including in an economic impact analysis. (Dkt. 25.)

FACTS AND APPLICABLE LAW
THE PFAS ISSUE

The relevant facts in this matter are undisputed. Plaintiff brought this action on behalf of itself and its members to challenge the validity of a sampling program being conducted by Defendants.

There are multiple ongoing rulemaking efforts to establish standards for poly- and perfluoroalkyl compounds (also known as PFAS). Compl. ¶ 22, Ans. ¶ 22.

PFAS and its components have emerged as a toxic pollutant of concern over the past decade, not only in Wisconsin but worldwide.

PFAS are human-made chemicals. They have been used in industry and consumer products throughout the world since the 1950s. PFAS do not occur naturally but are now widespread in the environment and they don't break down easily there. PFAS have been found

in people, wildlife, and fish. Some PFAS compounds may stay in human bodies for a significant amount of time. People may come into contact with PFAS by eating food (like fish), drinking water, or breathing air contaminated with PFAS. (Williams Aff. ¶ 3.)

Scientific research indicates that high levels of certain PFAS compounds in the human body can cause adverse health effects, including:

- Increased cholesterol;
- Decreased vaccine response;
- Increased risk of thyroid disease;
- Decreased fertility in women;
- Increased risk of high blood pressure or pre-eclampsia in pregnant women; and
- Lower infant birth weights.

(Williams Aff. ¶ 4.) PFAS compounds are therefore toxic and are harmful to humans when they enter the body in significant amounts. (Williams Aff. ¶ 5.)

Two particular PFAS compounds are perfluorooctane sulfonate (PFOS) and perfluoroocanoic acid (PFOA). PFOS is toxic and is harmful to humans that, more than once per month over the course of a lifetime, ingest fish taken from waters that contain significant amounts of that compound. (Williams Aff. ¶ 7.) PFOA is toxic and is harmful to humans that over the course of their life ingest water containing significant amounts of PFOA.

PFAS have been detected in Wisconsin's drinking and surface water near sources of industrial and manufacturing use, as well as near chemical spill locations. As a result, the DNR is working to update various administrative rules to address PFAS discharges. In particular, the DNR has announced its intention to revise several chapters in Wisconsin's Administrative Code

by, among other things, creating new surface water criteria (through the Statutory Rulemaking Process) for PFOA and PFOS compound (Stocks Aff. ¶ 7.)

RULEMAKING

Wisconsin law requires each state agency to "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. §227.10(1). Further, as noted *supra*, state law requires effluent limitations to be promulgated by rule. Wis. Stat. §283.11(1).

The typical process to promulgate a rule under Wis. Stat. Ch. 227 requires the agency to publish an approved statement of scope, prepare a draft of the rule, prepare an Economic Impact Analysis document outlining the anticipated costs of that rule, hold a public hearing, and then submit the final proposed rule to the Legislature for their review before the rule may be published and take effect. *See generally,* Wis. Stat. Ch. 227. Additionally, "if preservation of the public peace, health, safety, or welfare necessitates" it, an agency may "promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements" under Chapter 227. Wis. Stat. §227.24(1)(a).

"Chapter 227 of the Wisconsin Statutes governs agency rule-making and legislative review of agency rules, among other things." *Wisconsin Realtors Ass'n v. Pub. Serv. Comm'n of Wisconsin,* 2015 WI 63, ¶ 97, 363 Wis. 2d 430, 867 N.W.2d 364. Rules can either be permanent, which have no expiration, or emergency, which are valid for an initial period of only 150 days. Wis. Stat. §227.24(1)(a) and (c).

State agencies cannot enforce rules that have not been adopted. Wisconsin state law requires Courts to declare invalid any rule which is adopted without compliance with statutory rulemaking procedures. Wis. Stat. §227.40(4)(a).

ECONOMIC IMPACT ANALYSIS

Publishing an "economic impact analysis" of proposed rules is a key part of the administrative rulemaking process. Wis. Stat. §227.137. That analysis generally contains "information on the economic effect of the proposed rule on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole." Wis. Stat. §227.137(3). A specific component of the "economic impact analysis" is "[a]n analysis and detailed quantification of the economic impact of the proposed rule, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, local governmental units, and individuals that may be affected by the proposed rule." Wis. Stat. §227.137(3)(b).

To satisfy the statutory requirements, the DNR published a draft economic impact analysis, relevant here, on July 19, 2021. This EIA draft is a part of the ongoing rulemaking processes to establish specific surface water quality standards for several PFAS compounds. *See* Aff. Stock (Dkt. 52) Ex. B. According to that EIA, adopting those new standards is estimated to impose a cost of just over $2 million per year. *Id.*

The DNR is soliciting public comment on that draft. The draft analysis contains estimates of the compliance costs regulated facilities will incur as a result of the proposed PFAS administrative rule revisions. (Stocks Aff. ¶ 8, Ex. B.)

The DNR's draft "economic impact analysis" cost estimates relied significantly on sampling obtained from current individual Wisconsin Pollution Discharge Elimination System (WPDES)-permitted facilities. Test results were derived from effluent samples that the DNR collected, primarily from publicly-owned treatment works and privately-owned industrial facilities, including metal finishers, paper manufacturers, centralized waste treaters, chemical

manufacturers, and power plants. (Stocks Aff. ¶ 8.) The DNR tested the effluent samples it collected in an effort to determine whether PFAS were present and then estimated how many facilities in Wisconsin would likely incur compliance costs as a result of the proposed PFAS-related rule revisions. (Stocks Aff. ¶ 9.)

Having published the draft EIA in this matter, Defendants assert that their current sampling program allows them to determine which "facilities are discharging PFAS at levels that are harmful to public health and potentially in violation of the narrative toxic standard." Def. Br. (Dkt. 51) p. 22, fn 3. If PFAS compounds are toxic substances and harmful, there is an issue as to whether the law permits the DNR to regulate those substances (including requiring facilities to participate in their sampling program) independent of promulgating standards for them through rulemaking.

If the law otherwise allows the DNR to sample for PFAS on an independent basis, the DNR claims the ability to have used such information in the preparation of the EIA, but that aspect of the case appears to be moot though, now that the EIA has actually been prepared and published. Still, the parties appear to want some resolution of this issue from the Court.

Rulemaking has not yet been completed and this Court is asked to resolve the issues as to whether Wisconsin law permits the DNR to, upon independent bases, sample for PFAS substances, permits the DNR to enforce "standards" prior to or in lieu of statutory rulemaking and allow the DNR to use information gathered on an independent (non-EIA statute) basis in preparation of the EIA.

THE SAMPLING PROGRAM

The sampling program at issue here is both a component of the DNR's rulemaking effort and is also alleged to be an independent process permitted by statute and rule. In either event,

the data collected from the aforementioned sampling provides the DNR with useful information regarding levels of PFAS that are discharged into the state's waters where public health may be impacted.

The DNR's sampling program has proceeded in a specific way. First, in each category of possible PFAS-dischargers, the DNR selected representative facilities currently holding WPDES permits from which to collect effluent samples. Next, after notifying these facilities that they had been selected for effluent sampling collection, the DNR required these WPDES permittees to allow its staff to enter the permittee's facilities to obtain said samples (Compl. ¶ 34, Ans. ¶ 34.) The DNR sent its representatives to these facilities and collected samples from effluent sources regulated by the facilities' WPDES permits. Next, the DNR sent the samples it collected to the state laboratory to be analyzed for PFAS compounds presence and concentration. Finally, the DNR used the test results to estimate the number of statewide facilities that likely would be affected by the proposed PFOS- and PFOA-related rule revisions and the costs associated thereupon, as required by Wis. Stat. §227.137 (Stocks Aff. ¶ 10.)

The DNR collected samples from 116 total facilities. As the DNR was engaging in this sampling program, WMC filed this lawsuit. (Compl. ¶ 2.) The DNR asserts that it intended to collect samples from 7 more facilities but those facilities declined to allow DNR representatives to enter their premises, based on the same or similar legal arguments asserted by WMC, here. (Stocks Aff. ¶ 14.)

On August 16, 2021, the same day Summary Judgment Motion was filed with this Court, Defendants also sent several "Notice of Noncompliance" letters to various facilities in Wisconsin. Aff. Vebber, ¶¶ 3-4, and Ex. SJV-1. Those letters went out to facilities that had not agreed to participate in the sampling program. In those letters Defendants asserted that refusing

to allow access to collect a wastewater sample "is a violation of Wis. Stat. §283.55 and Wis. Admin. Code NR §205.07(1)(d)) . . ." Aff. Vebber, Ex. SJV-1, page 1. Further, in that letter, Defendants identify PFAS as a "toxic substance" which they argue is regulated under Wis. Admin. Code NR §102.04(1)(d). *Id.* page 2.

Defendants' sampling program in the context of this lawsuit has thus significantly evolved from whether the DNR, in preparation of an EIA as part of the process of rulemaking, may gather information for that document through its sampling program. As Plaintiff notes, this case has taken on added importance and urgency because Defendants are now also actively beginning the administrative process to take enforcement action against facilities not complying with the DNR's sampling program premised upon its assertion of independent bases to sample.

Finally, as Plaintiff also notes, on August 25, 2021, the Attorney General and the Governor announced that they had retained a law firm to "assist the state in its investigation and litigation of potential claims arising from PFAS contamination." Aff. Vebber. Ex. SJV-2. Based on that additional development, it may be that any facility participating in the sampling program may be subject to that kind of enforcement action.

Consequently, it is necessary for this Court to either grant Summary Judgment to Plaintiff and make declarations that the sampling program(s) is (are) illegal and/or issue (not issue) Injunction(s) to enforce the Court's rulings or grant Summary Judgment in Defendants' favor, in essence finding as a matter of law that all currently claimed sampling programs are lawful and enforceable.

WPDES PROGRAM

It is illegal for anyone in Wisconsin to discharge pollutants into the state's waters without complying with a DNR-issued permit to do so. Wis. Stat. §283.31(1) provides:

> The discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge . . . is done under a permit issued by the department under this section or s. 283.33.

The term "pollutant" is defined in Wis. Stat. §283.01(13). It provides:

> "[A]ny dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water."

Permits referred to by §283.31(1) stats. have been issued through the DNR's Wisconsin Pollution Discharge Elimination System (WPDES) program. The DNR is also in the process of revising and updating the WPDES program to include the new PFAS criteria that is in the process of being developed through rulemaking. The WPDES program allows permittees to discharge pollutants into waters of the state of Wisconsin upon compliance with various permit restrictions, in these categories:

(a) Effluent limitations.
(b) Standards of performance for new sources.
(c) Effluent standards, effluents prohibitions and pretreatment standards.
(d) Any more stringent limitations, including those:
    1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
    2. Necessary to comply with any applicable federal law or regulation; or
    3. Necessary to avoid exceeding total daily loads established pursuant to a continuing planning process developed under s. 283.83
(e) Any more stringent legally applicable requirement necessary to comply with an approved areawide waste treatment management plan.
(f) Groundwater protection standards established under ch. 160. Wis. Stat. §283.31(3).

WPDES permit effluent limitations are "restrictions on the amount of pollutant a point source may release into bodies of water." *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources,* 2021 WI 71, ¶ 29, 961 N.W.2d 346. The Legislature has "explicitly directed" that effluent limitations "must be promulgated by rule." *Maple Leaf Farms, Inc. v. State, Dept of Natural Resources,* 2001 WI App 170, ¶ 30, 247 Wis. 2d 96. See also Wis. Stat. §283.11(1) ("The department *shall promulgate by rule effluent limitations* . . .") (emphasis added).

The term "effluent" itself is not expressly defined in Chapter 283, but its meaning is embedded in the definition of the term "effluent limitation": a "discharge" of "chemical, physical, biological, [or] other constituents . . . from point sources into waters of this state." Wis. Stat. §283.01(6).

The term "point source" is defined in Wis. Stat. §283.01(12)(a). That statute provides:

> "A discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants may be discharged either into the waters of the state or into a publicly owned treatment works except for a conveyance that conveys only storm water. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."

When issued, WPDES permits are valid for a five-year term and contain certain monitoring, reporting, and compliance schedules to ensure that the permittee is abiding by the water quality standards promulgated by Defendants.

"NARRATIVE TOXIC STANDARD"

An important condition subject to this Court's focus in Summary Judgment relating to WPDES permits is a so called "narrative toxic standard" relating to water quality standards

present in all WPDES permits permitting any discharge of toxic substances. This so-called "narrative toxic standard" derives its basis from Wis. Admin. Code NR §102.04(1)(d). That rule provides:

> Practices attributable to municipal, industrial, commercial, domestic, agricultural, land development or other activities shall be controlled so that all surface waters including the mixing zone meet the following conditions at all times and under all flow and water level conditions:
> . . .
> Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance. . .

Many kinds of compliance-related conditions must be set forth in WPDES permits to ensure that facilities comply with Wisconsin's substantive discharge regulations. Wisconsin Statutes require permitted facilities to permit DNR representatives to enter the permittee's premises for certain purposes, including monitoring:

> [T]he permittee shall permit authorized representatives of the department upon the presentation of their credentials to enter upon any premises in which an effluent source is located or in which any records are required to be kept for the purpose of administering s. 283.55. Wis. Stat. §283.31(4)(c).

The purposes specified in Wis. Stat. §283.55 focus on monitoring and reporting. In part, that statute requires:

- Permittees must "[i]nstall, use and maintain such monitoring equipment or methods . . . to determine the volume of effluent discharged and to identify and determine the amount of each pollutant discharged from each point source . . . ." Wis. Stat. §283.55(1)(c);
- Permittees must "[s]ample the effluents discharged from each point source under the owner's or operator's ownership or control in accordance with such methods, at such

locations and in such manner as the department shall by rule prescribe," Wis. Stat. §283.55(1)(d); and

- Permittees must "[p]rovide such other information as the department finds is necessary to identify the type and quantity of any pollutants discharged from the point source," Wis. Stat. §283.55(1)(e).

Wis. Stat. §283.55(2)(a) gives the DNR the "right" to enter a facility's premises to "sample any effluents" that the owner must itself sample:

> Any duly authorized officer, employee or representative of the department [of natural resources] shall have right to enter . . . any premises in which an effluent source that is required to be covered by a permit issued under s. 283.31 is located . . ., and may at reasonable times . . . sample any effluents which the owner or operator of such source is required to sample under this section.

Wis. Admin. Code NR §205.07(1)(d), provides WPDES-permitted facilities "shall allow an authorized representative" of the DNR to "[e]nter upon the permittee's premises" and "[s]ample or monitor at reasonable times, for the purposes of assuring permit compliance, any substances or parameters at any location." Wis. Admin. Code NR §§205.07(1)(d)1., 4. This code provision is also included in every WPDES permit.

PLAINTIFF'S SUMMARY JUDGMENT ARGUMENT
AGENCY POWERS ARE LIMITED TO THOSE EXPLICITLY GRANTED BY THE LEGISLATURE

Plaintiff's brief establishes that, in Wisconsin, State agencies only have those powers explicitly given to them in state law and Defendants lack any explicit grant of power supporting a sampling program as part of preparation of an EIA.

Courts in Wisconsin have "long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature." *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687 (1992).

The DNR is an "agency" as that term is defined in Wis. Stat. §227.01(1). 2011 Wisconsin Act 21 ("Act 21") requires explicit grants of authority for agencies to act. "The explicit authority requirement is codified as Wis. Stat. §227.10(2m)." *Palm,* 391 Wis. 2d 497, ¶ 52.

Act 21 created Wis. Stat. §§227.11(2)(a)1.-3. That statute provides:

> (2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. . .

Defendants do not dispute the foregoing, which then establishes the framework under Wisconsin law for this Court's analysis.

THE DNR HAS NOT BEEN GRANTED EXPLICIT AUTHORITY BY THE LEGISLATURE TO REQUIRE BUSINESS TO GRANT IT ACCESS TO SAMPLE FOR THE PURPOSE OF PREPARING AN EIA DOCUMENT AS PART OF THE RULEMAKING PROCESS.

Initially, Plaintiff asserted that the DNR claimed it had explicit authority to sample in order to prepare a required EIA document as part of the rulemaking process. The Court granted an initial temporary restraining order upon that assertion, concluding that the DNR did not have explicit authority under Wisconsin Law to force entry to a facility to sample effluent for the preparation of an EIA as part of the rulemaking process.

To the extent this Court's analysis is premised upon that focused circumstance, the Court continues to concur with the Plaintiff's position. Defendants do not seem to contest this proposition, calling it a red herring and asserting a number of other independent bases to enter Plaintiff's facilities to sample effluent, initially and throughout this ongoing process.

Additionally, Defendants assert that if they have an independent authority to sample, they also have/had the authority to use said sampling results to prepare an EIA in the process of PFAS discharge permit rulemaking.

The Court first concludes that the EIA statute (Wis. Stat. §227.137) does not confer explicit authority for agencies to establish and enforce a sampling program in conjunction with the preparation of an EIA. That is not likely controversial.

An agency is required to prepare an EIA for a proposed rule. Wis. Stat. §227.137(2). The requirements for an EIA are set forth in Wis. Stat. §227.137(3). When preparing an economic impact analysis state law recognizes that the agency may benefit from talking with regulated entities and so it provides that the agency "*shall solicit information and advice from businesses*, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule." Wis. Stat. §227.137(3) (emphasis added).

Under Wisconsin law, the agency "*may also request information that is reasonably necessary* for the preparation of an economic impact analysis from other businesses, associations, local governmental units, and individuals and from other agencies." *Id.* (emphasis added).

By its clear language, Wis. Stat. §227.137(3) does not authorize Defendants, nor any other state agency, to compel businesses to allow the agency access to their facilities or to otherwise force businesses to participate in the EIA development process.

In its analysis, the Court has considered the terms "solicit" and "request". These terms are not defined in Chapter 227, "but under statutory interpretation rules, [courts] may apply the ordinary and accepted meaning of [a] term unless it has a technical or special definition." *State v. McKellips,* 2016 WI 51, ¶ 31, 369 Wis. 2d 437. "Solicit" and "request" are not technical or

specially defined words. Courts "may use a dictionary to establish the common meaning of an undefined statutory term." *McKellips,* 369 Wis. 2d 437, ¶ 32 *citing State v. Sample,* 215 Wis. 2d 487, 499-500 (1998).

To "solicit" means "to make petition to" or "to approach with a request or plea." *Solicit,* MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/solicit. Accessed 10 Aug. 2021. To "request" means "the act or an instance of asking for something." *Request,* MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/request. Accessed 10 Aug. 2021. Neither the power to "solicit" nor the power to "request" includes the power to compel someone to respond.

The intent of the EIA statute is to facilitate collaboration. The agency may solicit information and advice from businesses and individuals who may be regulated. Those groups generally have an incentive to cooperate and work with agencies developing regulations such as helping agencies understand cost implications any proposed regulations may have on them. There are other motivations, both affirmative and negative, regulated entities may have in these matters. It is not necessary for this Court to do anything other than acknowledge them here.

The Court further concludes that because Wis. Stat. §227.137 does not confer explicit authority to Defendants to implement and enforce any mandatory sampling program used to develop an EIA as part of the rulemaking process they are then prohibited by law from doing so. Under Wisconsin law Defendants may not compel businesses to participate in EIA preparation, through sampling or otherwise.

The statute only explicitly authorizes agencies to solicit information and advice from businesses that may be affected by the proposed rule and to request such information that is reasonably necessary for the preparation of an economic impact analysis. In explicitly

authorizing agencies to solicit and request information, the Legislature necessarily does not allow the agencies to compel individuals or businesses to participate in a sampling program that exists specifically to facilitate the preparation of an EIA, under that statute.

APPLYING RULES OF STATUTORY CONSTRUCTION

The Court next turns to the issue of whether the DNR is otherwise prohibited from sampling once the Court has made this determination and if not, may the DNR use its independent sampling authority to generate data to use in EIA preparation? In so doing, the Court uses common statutory construction principles.

"Under the general rule of statutory construction, *expressio unius est exclusio alterius*, the express mention of one matter excludes other similar matters not mentioned." *State v. Smith,* 103 Wis. 2d 361, 366, 309 N.W.2d 7, 9 (Ct. App. 1981), aff'd, 106 Wis. 2d 17, 315 N.W.2d 343 (1982). "When the legislature explicitly includes certain conditions in meeting a statutory standard, we may presume that the legislature purposefully excluded others." *Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 29, 394 Wis. 2d 602, 951 N.W.2d 556. Applying this canon of statutory construction to the EIA statute's provisions empowering agencies to solicit and request information, the statute also prohibits agencies from taking additional actions like compelling businesses to participate in the EIA development and to participate in or facilitate any sampling program designated to assist EIA preparation.

In *James v. Heinrich*, 2021 WI 58, 960 N.W.2d 350, the Supreme Court, using the statutory rule of *expressio unius est exclusio alterius,* and the related-statutes canon of statutory construction, concluded that because the statutes authorized the closure of schools in one section, they necessarily did not authorize such a closure in another section where closure was not explicitly mentioned. *Id* at ¶ 18.

The counter argument here is summarized in *Pritchard v. Madison Metropolitan School District*, 2001 WI App 62, 242 Wis. 2d 301. In *Pritchard*, the Court held that the *expressio unis canon* cannot be used to limit grants of authority in separate yet related statutes, absent legislative intent to do so. The Court held:

> When we consider statutes that, though related, were not enacted at the same time such that we can say they were intended as a comprehensive scheme, the fact that the older statute specifically lists certain powers does not necessarily mean the legislature intended a broadly worded, later enacted statute be thus limited. Rather, before we apply the rule, we must have some evidence the legislature intended its application.

"Conflicts between statutes are not favored, and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that." *Pritchard*, 242 Wis. 2d 301, ¶ 15. In *Pritchard*, the Court declined to find a conflict between the two statutes that granted overlapping authority because "[t]he fact that there is some overlap does not mean there is a conflict." *Id.*

Using the rules of statutory construction, the Court, in the case at bar, concludes:

1. In the absence of explicit authority in the EIA statute to force sampling compliance, the DNR has no such authority and may not compel sampling for that purpose.
2. The Department is not prohibited from sampling under rules of statutory construction if independent statutory basis exist authorizing said sampling.
3. The DNR may use independent statutory and administrative rule authority to engage in information gathering, including, if independently authorized, a sampling program to derive data for EIA use or preparation.

4. The Legislature's specific denial of authority to the agency to force businesses to engage in sampling in the preparation of an EIA does not preclude the agency's authority, if it otherwise exists, to sample under that (those) independent statutory basis/bases.

5. The prohibition against forced compliance with EIA preparation does not limit nor prohibit the agency from using data obtained through the agency's independent authority for any purpose authorized by statute or rule.

This interpretation harmonizes the various statutes, enforces the Legislature's determination that EIA preparation must be a cooperative and collaborative endeavor but also permits the agency to obtain information and data if otherwise authorized by statute or rule to further its legislative and rule created purpose.

PLAINTIFF HAS MET REQUIREMENTS AS A PARTY ELIGIBLE FOR RELIEF

Plaintiff WMC and its members have been harmed if it (they) have been subject to (here) EIA preparation through sampling without consent.

"In order to maintain a taxpayer's action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss . . ." *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee,* 15 Wis. 2d 15 (1961). "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *S.D. Realty Co.*, 15 Wis. 2d at 22.

"As a taxpayer, under our well-established law, [a plaintiff] has a legal interest (should taxpayer standing be satisfied) to contest governmental actions leading to an illegal expenditure of taxpayer funds." *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231.

Plaintiff WMC is a taxpayer. Manley Aff., ¶ 5. Because Defendants lack legal authority to prepare an EIA from sampling programs absent consent, and "all sampling costs associated with the samples being taken by WDNR staff are being handled by the WDNR," (Manley Aff., Ex. SJM-2, P. 2), the Defendants are expending taxpayer funds in support of this unlawful use. Plaintiff WMC and its members have suffered a pecuniary loss as a result.

Further, Plaintiff WMC's members have been selected and mandated by Defendants to cooperate with EIA preparation through mandated sampling challenged in this action. Baratka Aff., ¶ 5, Manley Aff., ¶ 7. WMC members are thus being required by the state to cooperate in a process that the state does not have the authority to co-opt.

SUBSECTION SUMMARY

Plaintiff's Motion for Summary Judgment as it relates to Wis. Stat. §227.137 is GRANTED. To the extent Defendants have moved for Summary Judgment as to this topic, Summary Judgment is DENIED. The Agency is prohibited by law from engaging in and/or enforcing any sampling program under Wis. Stats. § 227.137.

DECLARATORY JUDGMENT

The Court concludes that a grant of Declaratory Judgment (as opposed to Injunctive Relief) is the most appropriate remedy under the circumstances presented.

As Federal courts have long recognized, "officials of the Executive Branch must adhere to the law as declared by the court" and so a "declaratory judgment is the functional equivalent of an injunction." *Comm. on Judiciary of U.S. House of Representatives v. Miers,* 542 F.3d 909, 911 (D.C. Cir. 2008); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or

mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court." (Scalia, J.))

Wisconsin courts have recognized similar principle, "Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty . . . until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal." *White House Milk Co. v. Thomson,* 275 Wis. 243, 250 (1957)(citing 52 Am. Jur., *Taxpayers' Actions*, § 26 at 18). The Wisconsin Supreme Court has recognized that a judgment declaring a statute unconstitutional by its own force precludes public officials from enforcing that statute. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365. This same reasoning applies to the declaration WMC seeks here regarding the interpretation of various statutory and regulatory provisions concerning DNR's authority – it should be presumed that DNR will adhere to any such declaration, even without a corresponding injunction. Public officials may not enforce the statute by interpreting their authority in a manner not consistent with this Court's declarations.

RELEASE OF "UNLAWFUL OBTAINED DATA" IN PUBLIC RECORDS REQUEST - SUMMARY JUDGMENT

Plaintiff argues that if any sampling program is declared by the Court to be unlawful as the Court has, in part, already done here, the data collected thereunder is "unlawfully obtained." Plaintiff contends that such "unlawfully obtained data" is not a "record" under the state's public record laws and this Court should use its inherent equitable powers to restore the status quo and block any such disclosure of these unlawfully obtained results.

First, and perhaps most importantly, this case does not involve any pending public records request. It is thus not ripe as that term is used in Wisconsin law. This Court is not in a position to speculate as to whether a request will ever be made, what entity is making the

request, what is specifically requested and what the agency's response may be if a request in the future is made.

"The doctrine of ripeness requires that, for an action to be justiciable, the facts of a case must be sufficiently developed to allow a conclusive adjudication." *Carlin Lake Ass'n v. Carlin Club Props., LLC*, 2019 WI App 24, ¶ 35, 387 Wis. 2d 640. "The basic rationale of the ripeness doctrine is to prevent the courts through the avoidance of premature adjudication from entangling themselves in abstract disagreements over administrative or legislative policies." *Tooley v. O'Connell*, 77 Wis. 2d 422 (1977).

The Court concludes that in the absence of a records request, identification of the "record" being requested or participation by actual requestors, the matter is not ripe for conclusive adjudication.

WMC's Motion for Summary Judgment on this subject is thus DENIED and Defendants' Motion for Summary Judgment on this subject is GRANTED.

In the event superior Courts conclude that this Court is incorrect and that this matter is actually ripe for judicial resolution, the Court continues, herein, to attempt to resolve this issue using Summary Judgment methodology.

Plaintiff asserts that a 1983 opinion of the Attorney General (72 Wis. Op. Atty. Gen. 99) is controlling, here. In that opinion, the Attorney General was asked to determine whether "copies of documents received from other agencies purely for informational purposes and concerning matters not affecting the Department's functions" were subject to disclosure under the law. *Id.* at 100. The Attorney General, reading the various aspects of the public records laws in context, concluded that such documents were not public records, because they did not "have sufficient connection with the function of [the] office to qualify as public records . . ." *Id.* at 101.

Plaintiff asserts that consideration of Wis. Stat. §16.61(2)(b) and Wis. Stat. §19.21(1) is helpful to resolve whether record retention is required here when analyzing that issue as identified in the Attorney General's Opinion.

Wis. Stat. §16.61(2)(b) defines a "public record" for purposes of the Wisconsin Public Records Board, an entity that "prescribe[s] policies and standards that provide an orderly method for the disposition of . . . state records." Wis. Stat. §16.61(1). The statute defines "public records" in a way that again relates to the information at issue here. Wis. Stat. §19.21(1) also governs records retention by describing which government officials are the proper "legal custodian[s]" of records received by their offices.

Wis. Stat. §19.32(2) defines "Record" as follows:

> [A]ny material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority…

Wis. Stat. §16.61(2)(b) defines "Public Record" (in relevant part):

> [A]ll books, papers, maps, photographs, films, recordings, optical discs, electronically formatted documents, or other documentary materials, regardless of physical form or characteristics, made or received by any state agency or its officers or employees in connection with the transaction of public business . . .

Wis. Stat. §19.21(1) requires that:

> Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from the officer's predecessor or other persons and required by law to be filed, deposited, or kept in the officer's office, or which are in the lawful possession or control of the officer or the officer's deputies, or to the possession or control of which the officer or the officer's deputies may be lawfully entitled, as such officers.

In context, Plaintiff asserts that unlawfully obtained and created documents, which by their very nature were not created pursuant to state law, cannot be "public records" subject to disclosure. The law only includes "as public records materials that the officer is under a legal duty or obligation to preserve and that have some relation to the function of his or her office." 72 Atty. Gen. 99, 101.

The Court has already indicated that the DNR is not authorized under Wisconsin law to use data or information derived from any "forced" sampling program in the preparation of an EIA, under the rulemaking process. Such use is prohibited. In that regard, under these circumstances, the data may be seen as "illegally obtained." However, data or information obtained through sampling programs, independently authorized and used in an EIA are not illegally obtained, in this Court's opinion.

Defendants argue that Plaintiff does not identify any "unlawfully obtained data" exception to the definition of a "record" subject to disclosure. The Court agrees with Defendants that the salient issue here is whether the information is or is not a "record" as defined by Wisconsin Statute under "public records" analysis.

The Court concludes that the definition of record encompasses any written information the DNR might possess regarding the results of testing samples collected through sampling programs, even if the data was obtained in contravention of state law.

Under "public records" analysis, WMC is required by Wisconsin law to identify some textual basis for its assertion that the written information it attempts to exclude from the §19.32(2) stats. definition of record is not a "record" subject to a public records request.

Although a series of exceptions to the definition of a "record" exist in the statute, no exceptions exist relating to "unlawfully obtained data":

> "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library. Wis. Stat. §19.32(2).

In *Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, the Supreme Court considered whether public school teachers' personal emails residing on their school district's email system qualified as "records" under Wis. Stat. §19.32(2). In a fractured opinion, four members of the Court agreed that such emails were "records," despite their purely-personal nature. *Id.* ¶ 152 (Bradley, A.W. concurring), ¶ 173 (Gableman, J., concurring), ¶ 188 (Roggensack, J., and Ziegler, J., dissenting).

The Supreme Court has thus held that an analysis of whether information qualifies as a "record" does not turn on whether they have consistent connection with the "function" of the record keeper's office as earlier relied upon by the Attorney General, but rather requires a determination of whether the information falls within the explicit defined terms of Wis. Stat. §19.32(2).

This Court concludes that any information the DNR obtained through its sampling program falls within the definition of a "record" under the public records law. The Court further concludes that the information at issue is a "record" subject to public record requests as defined by Wisconsin Statute. The Court finally concludes that the information at issue here falls within the definition of a "record" in Wis. Stat. §19.32(2) whether obtained within the confines of the

law or if obtained under contravention of the law. If such "illegal" or "illegally obtained" records are to be exceptions under Wisconsin public records law, that issue is one for the Legislature to address, not this Court.

The Court also notes that even though any test results here are "records", it does not necessarily mean that the DNR will or must release them in response to a public records request. Although a "strong" presumption in favor of release exists, it may be overcome "[i]n the absence of a statutory or common law exception . . . when there is a public policy interest in keeping the records confidential." *Lizmeyer v. Forcey,* 2002 WI 84, ¶ 11, 254 Wis. 2d 306.

An agency may deny a public records request when "the surrounding factual circumstances create an 'exceptional case' not governed by the strong presumption of openness." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162 (citations omitted). That analysis "must be applied 'on a case-by-case basis'" because "generally there will be 'no blanket exceptions from release.'" *Milwaukee J. Sentinel v. DOA*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439 (citations omitted). Access/denial determination premised upon whether a record was "illegally" obtained would seem to fit squarely within that analysis.

If and when Defendants receive a public records request, they must, under Wisconsin law, apply the balancing test on a case-by-case basis to determine whether "exceptional" public policy reasons exist to deny the request. In that circumstance, whether the "record" was obtained "legally" (based on facts developed during the determination (release) process), whether the officer is under a duty to preserve it and/or whether the record has some relation to the function of the office (factors listed in the Attorney General's Opinion) are all relevant considerations for the decision making entity to consider.

If this Court's analysis of the merits is required, Plaintiff's Summary Judgment Motion for Declaratory Judgment/Injunctive Relief is DENIED. Defendants' Summary Judgment Motion is GRANTED.

SUMMARY JUDGMENT
DEFENDANT'S INDEPENDENT SAMPLING AUTHORITY
§283.55(2)(a) STATS. AND § 283.55(1)(e) STATS.

Having determined that the statute prohibits mandatory sampling in the preparation of an EIA, the Court next turns to the issue of whether the DNR may sample and enforce its sampling program on one or more independent bases.

Defendants assert that they have independent statute/rules authorizing them to require Plaintiff to allow them access to administer a sampling program.

Defendants contend that Wis. Stat. §283.55(2)(a) gives the DNR the "right" to enter a facility's premises to "sample any effluents" that the owner must itself sample:

> Any duly authorized officer, employee or representative of [DNR] shall have right to enter . . . any premises in which an effluent source that is required to be covered by a permit issued under s. 283.31 is located . . ., and may at reasonable times . . . sample any effluents which the owner and operator of such source is required to sample under this section.

WPDES FACILITIES

When a facility contains an "effluent source" covered by a WPDES permit issued under Wis. Stat. §283.31, the owner and operator of that facility must sample effluents from that source under Wis. Stat. §283.55. Under those circumstances, DNR representatives have been authorized to enter the permitted facility at reasonable times to sample those same effluents. Effluents are "chemical, physical, biological, [or] other constituents [discharged] . . . from point sources into waters of this state." Wis. Stat. §283.01(6). Multiple specific pollutants like PFAS,

phosphates, and chlorine might be contained within effluents – but those pollutants are not "effluents" themselves.

Plaintiff argues that:

> "The actual definition of "effluent limitation" in Wis. Stat. §283.01(6) reads:
>
> "Effluent limitation" means any restriction established by the department, including schedules of compliance, on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into waters of this state.""

It is undisputed that all facilities in the sampling program at issue are "premises in which an effluent source that is required to be covered by a permit issued under s. 283.31 is located." Each facility covered by WPDES permit issued under Wis. Stat. §283.31 is regulated as to its discharges (from effluent sources). (Stocks Aff. ¶ 11.)

It is also undisputed that each facility is "required to sample" effluents on its property under both Wis. Stat. §283.55(1) and under its WPDES permit to facilitate a compliance process.

Multiple subsections in Wis. Stat. §283.55(1) require WPDES-permitted facilities to sample their effluent sources. Subsection (c) requires facilities to "[i]install, use and maintain such monitoring equipment or methods . . . as are necessary to determine the volume of effluent discharged and to identify and determine the amount of each pollutant discharged from each point source under the owner's or operator's ownership or control." Subsection (d) requires "[e]very owner or operator of a point source who is required to obtain a permit issued under s. 283.31" to "[s]ample the effluents discharged from each point source under the owner's or operator's ownership or control in accordance with such methods, at such locations and in such manner as the department shall by rule prescribe."

Plaintiff contends that the sampling authority granted by Wis. Stat. §283.55(2)(a) is not unlimited authority to sample effluents for any pollutants any time for any reason. Plaintiff asserts that Wis. Stat. §283.55 sampling by facilities is limited to that which is required by rule. Plaintiff contends that Defendants' ability to sample is explicitly limited to determine whether WPEDS permit compliance has occurred. If agency power is explicitly limited to ensure compliance, the substances being sampled for must be substances upon which enforcement could be pursued or as otherwise limited by the existing permit.

Defendants of course agree that they are authorized to enter WPDES-permitted facilities and sample their effluent sources under Wis. Stat. §283.55(2)(a) to ensure compliance with the facilities' WPEDS permit. Defendants go further though and contend Wis. Stat. §283.55(2)(a) independently authorizes them to test the effluent the facility must test under its WPDES permit, for any pollutant they so designate. The Defendants also claim independent authorization to sample those same effluents for "any purpose related to water quality" (including to test for PFAS), under Wis. Stat. § 283.55(1)(e).

Wis. Stat. §283.55(1)(e) provides:

> (1) Monitoring and reporting requirements. Every owner or operator of a point source who is required to obtain a permit issued under s. 283.31 shall do all of the following:
>
> . . .
>
> (e) Provide such other information as the department finds is necessary to identify the type and quantity of any pollutants discharged from the point source.

That statute requires WPDES-permitted facilities to "[p]rovide such other information as the department finds is necessary to identify the type and quantity of any pollutants discharged from the point source." The DNR argues that its authorization to enter facilities to collect effluent

samples provides it with information it can use to "identify the type and quantity of any pollutants discharged" from those regulated facilities.

At this point, it is important to establish that it is undisputed, that under Wis. Stat. §283.55(2)(a), the DNR is authorized to sample to ensure a facility's compliance with its WPDES permit. That is an independent statutory authorization to sample. It is also undisputed that most WPDES permits do not (yet) include specific permit limitations or monitoring requirements for PFAS compounds. WPDES facilities have focused permits to discharge specific pollutants in specific quantities on an individual basis. Each facility has unique permit discharge parameters.

WMC argues that because Wis. Stat. §283.55(2)(a) does not itself confer any independent sampling powers and only authorizes agencies to do specific things that permittees are required to do under that section, understanding what Defendants are authorized to do requires examination of the entirety of the statute section. Plaintiff argues that because the rest of Wis. Stat. §283.55(2) or any of §283.55(3) does not plainly and explicitly relate to sampling, the only other part of that section which could "activate" Defendants' sampling authority under Wis. Stat. §283.55(2)(a) is Wis. Stat. §283.55(1).

Defendants argue that WMC misreads Wis. Stat. §283.55(2)(a). That statute, according to Defendants, allows DNR to sample a facility's effluents for any purpose related to water quality. The DNR is authorized to test the effluent for pollutants specified in that facility's WPDES permit and is also authorized to test for pollutants existing in other facilities' permits and even to test for pollutants existing in no current Wisconsin WPDES permits, such as PFAS compounds.

The Court concludes that Wis. Stat. §283.55(2)(a), by its specific terms, does not confer "independent" sampling authority to Defendants. That statutory subsection is limited and authorizes the agency only to do certain things that permittees are required to do under that section. Since the rest of Wis. Stat. §283.55(2) or any of §283.55(3) plainly do not relate to sampling, the only other part of that section which could "activate" Defendants' sampling authority under Wis. Stat. §283.55(2)(a) is Wis. Stat. §283.55(1).

The only subsection of Wis. Stat. §283.55(1) that relates to sampling is Wis. Stat. §283.55(1)(d).

Under Wis. Stat. §283.55(1)(d), an owner or operator is required to "[s]ample the effluents discharged from each point source under the owner's or operator's ownership or control in accordance with such methods, at such locations and in such manner as the department shall by rule prescribe."

The other subsections of §283.55(1) (including subsection (c)), do not and cannot confer sampling power because subsection (d) itself explicitly confers such power.

"Sampling" is referenced in two places in the entirety of Chapter 283. The first is the aforementioned Wis. Stat. §283.55(2)(a), which allows the Department to "sample any effluents which the owner or operator of such source is required to sample under this section." The second is Wis. Stat. §283.55(1)(d). The Legislature obviously knew how to use the word "sampling" and it has limited the situations in which sampling by Defendants is permitted.

Finally, the other subsections of Wis. Stat. §283.55(1), including subsection (c), cannot require sampling unless subsection Wis. Stat. §283.55(1)(d) is rendered superfluous. "In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous." *Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411.

The Court agrees with WMC, here, that sampling by facilities under Wis. Stat. §283.55(2)(a) is limited to that which is required by rule. Under statute and WPDES permit rules, Defendants' ability to sample is limited to that which the facility, by permit, is required to monitor to ensure it is in compliance with the conditions of its permit.

The Court is not persuaded that this particular subsection permits sampling effluents for any purpose related to water quality as Defendants contend. Because agency power is explicitly limited to issues of permit compliance, the substances being sampled must be substances subject to enforcement or otherwise limited by individual WPDES permit. Although Defendants are currently in the process of adopting rules to create such standards for PFAS compounds, and those standards may later be incorporated into individual WPDES permits, that rulemaking process is not complete and certainly whatever standards yet to be developed have not yet been incorporated into WPDES permits.

The Court finally concludes that §283.55(2)(a) stats. is an enforcement and monitoring subsection enacted to authorize the agency to ensure the facilities' compliance with its WPDES permit issued under §283.31 stats. by authorizing the agency to "retest" the effluent that the facility is obligated to test under its WPDES permit. The DNR called this "Trust But Verify." The Court appreciates and endorses this, but concludes that this subsection is limited to its clear and explicit terms. The Legislature, not this Court, is responsible for expanding the scope of the agency's sampling program under this subsection should they choose so to do, not this Court.

The Court now turns to its analysis of Wis. Stat. § 283.55(1)(e). WMC argues that under §283.55(1)(e) stats., the Legislature distinguished between "information" and "sampling" because the two terms are used independently in different subsections of Wis. Stat. §283.55(1). Plaintiff further argues that Wis. Stat. §283.55(2)(a) specifically allows Defendants to parallel

sample effluent facilities are required to sample under that section. In contrast, § 283.55(1)(e) specifically requires the facility to provide information. It then follows, as a result, Wis. Stat. §283.55(1)(e)'s requirements to provide "information" does not authorize Defendants to engage in a sampling program.

Defendants argue that Wis. Stat. §283.55(1)(e) independently authorizes DNR's sampling program and expands the "Trust But Verify" concept. That subsection of the statute, Defendants argue, facilitates the overall mission of the agency to identify the type and quantity of any pollutants discharged from the point source. Defendants argue that this subsection requires WPDES-permitted facilities to permit access to their facilities and authorizes them to enter facilities to collect information, including effluent samples, facilitating the identification of the type and quantity of any pollutants discharged. The Court agrees with Defendants on this issue.

Wis. Stat. §283.55(1)(e) does not preclude or limit agency authority to its compliance monitoring function as it relates to WPDES permits. Wis. Stat. §283.55(1)(e) is an enforcing and monitoring authorization subsection that facilitates the broader aspect of the agencies' mission. It requires WPDES-permitted facilities to provide information necessary for the agency, in its broad function, to identify type and quantity of pollutants discharged from any particular permitted point source. While a sampling program limited to WPDES compliance may yield information relative to compliance, the information referred in this subsection is not limited to monitoring/confirming/affirming permit compliance. The statute subsection here takes into effect all circumstances and information necessary to accomplish the mission of the agency and authorizes it to obtain information, through effluent sampling or otherwise, to monitor any specific WPDES permit holder compliance, to monitor all regulated pollutants and to identify the type and quantity of any pollutants discharged from any facility (point source).

The requirement to provide information, read in context with the rest of the statutory section and with WPDES permit processes and procedures, authorizes independent sampling. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex. rel Kalal*, 271 Wis. 2d 633, ¶ 46.

"In interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous." *Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411. No portion of the statute is rendered superfluous in this interpretation. The statute recognizes multiple monitoring and enforcement purposes. It accommodates each and all of them. It expresses the genius of the Legislature in that regard.

It is important to note herein that although the agency under this subsection of the statute is authorized to identify type and quantity of any "pollutant" through sampling process, it is not authorized to prohibit or set standards for any pollutant, unless and until it promulgates rules thereon. Wis. Stat. §283.11(1).

Plaintiff is GRANTED Summary Judgment as to Wis. Stat. §283.55(2)(a). Defendants' Summary Judgment is correspondingly DENIED. Defendants are GRANTED Summary Judgment as to Wis. Stat. §283.55(1)(e). Plaintiff's Summary Judgment is DENIED.

SUMMARY JUDGMENT
WIS. ADMIN. CODE NR §205.07(1)(d)

Wis. Admin. Code NR §205.07(1)(d) provides:

> (d) Inspection and entry. The permittee shall allow an authorized representative of the department, upon the presentation of credentials, to:
> 1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records are required under the conditions of the permit;

> 2. Have access to and copy, at reasonable times, any records that are required under the conditions of the permit;
> 3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under the permit; and
> 4. Sample or monitor at reasonable times, for the purposes of assuring permit compliance, any substances or parameters at any location.

The DNR may sample effluents to ensure permit compliance under this statute and Wis. Admin. Code NR §102.04(1)(d), which provides:

> Practices attributable to municipal, industrial, commercial, domestic, agricultural, land development or other activities shall be controlled so that all surface waters including the mixing zone meet the following conditions at all times and under all flow and water level conditions:
> . . .
> Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.

The DNR contends that permitted facilities may not discharge any substances that are "toxic or harmful to humans" in "amounts found to be of public health significance." Individual WPDES permits specify permitted pollutant discharges and set thresholds for these discharges (*see e.g.* Stocks Aff. Ex. A:1-3). The Defendants argue that the "narrative toxic standard" makes clear that a facility may not discharge other harmful pollutants even if their WPDES permits do not specifically refer to them nor may they discharge any toxic substances, such as those identified in permits granted to other WPDES facilities or the PFAS compounds at issue here.

The DNR argues that the narrative toxic standard triggers another independent source of authority for DNR to test for PFAS; Wis. Admin. Code NR §205.07(1)(d). Under that provision, WPDES-permitted facilities "shall allow an authorized representative" of DNR to "[e]nter upon

the permittee's premises" and "[s]ample or monitor at reasonable times, for the purposes of assuring permit compliance, any substances or parameters at any location." Wis. Admin. Code NR §§205.07(1)(d)1., 4. This sampling provision is included in every WPDES permit. (Stocks Aff. ¶ 13, Ex. A:12.)

WMC argues that under the permit conditions required by NR §205.07(1)(d)4., the Defendants may only sample "for the purposes of assuring permit compliance."

It contends that the PFAS compounds Defendants purport to test for through their sampling program have no standards under state law and that the Legislature has "explicitly directed" that effluent limitations "must be promulgated by rule." *Maple Leaf Farms*, 247 Wis. 2d 96, ¶30; *see also* Wis. Stat. §283.11(1).

WMC contends that the PFAS compounds being sampled are not included in their effluent limitations promulgated by rule. It claims that the "rule" Defendants currently assert triggers the development and implementation of the DNR's sampling program for the first time. Testing for those compounds cannot be to assure permit compliance, WMC claims, because no existing permit can include effluent limits for substances that have not yet been regulated.

The Defendants argue that when taken together, the narrative toxic standard and Wis. Admin. Code NR §205.07(1)(d) authorize the DNR to sample effluent for the presence of PFAS. Defendants argue that there is no dispute that PFAS are "toxic and harmful to humans" when they enter the body in significant amounts. (Williams Aff. ¶¶ 3-7.) So, to comply with the "narrative toxic standard," permitted facilities may not discharge PFAS in amounts of "public health significance." (Stocks Aff. ¶ 12, Ex. A:17.) Under Wis. Admin. Code NR §205.07(1)(d), to ensure facilities are complying with this permit requirement, the DNR claims authority to

enter their premises, sample their effluents, and test them for toxic or harmful levels of PFAS discharges.

WMC agrees with Defendants that PFAS compounds generally are toxic substances. WMC then argues that under the plain language of Chapter 283, Defendants must promulgate toxic substances by rule. For example, Wis. Stat. §283.11(1) requires:

> *The department shall promulgate by rule* effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, *toxic effluent standards or prohibitions or pretreatment standards for any pollutant.* (emphasis added)

WMC contends that Defendants must promulgate all "toxic effluent standards" as a rule, as well. Wis. Stat. §283.21(1)(a) requires, "The department shall promulgate by rule a list of toxic pollutants or combinations of pollutants subject to this chapter . . ." Not only must the Department promulgate all toxic effluent standards as rules, but they also must promulgate a list of all substance they identify as toxic. It is undisputed that the DNR has not identified or promulgated any rule concerning any PFAS compound as a toxic substance.

First, the Court agrees with Defendants that the "narrative toxic standard," (incorporated into all WPDES permits) authorizes it to compel facilities to allow it entry and access to those facilities for the purpose of sampling effluent (Wis. Admin. Code NR §205.07(1)(d)). This may be for the purpose of ensuring compliance with that facility's WPDES individual permit discharge parameters as to specific permit pollutants and quantification. But this may also be (Wis. Admin. Code NR §102.04(1)(d)) for the purpose of testing for pollutants identified through rulemaking, including but not limited to those the facility is permitted to discharge through effluent, pollutants other facilities are permitted to discharge through effluent, those identified

through administrative process that may not be subject to permit discharge by any WPDES facility and also for any toxic substances in amounts found to be of public health significance (subject to the Court's ruling below).

Next, the Court agrees with WMC that Defendants must promulgate all toxic substances and effluent standards not currently codified as rules, by rulemaking as required by Wisconsin law. An agency in Wisconsin "shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. §227.10(1).

In *Lamar Central Outdoor, LLC v. Division of Hearings & Appeals*, 2019 WI 109., 389 Wis. 2d 486, the Court made clear any *ad hoc* regulating by an agency is not lawful, and agencies must instead adopt rules.

For those reasons, Defendants must promulgate their interpretation that PFAS compounds (not currently subject to toxic substances and effluent standards by rule) are toxic substances (regardless of any "consensus" that they, in fact, are toxic substances) as a rule and follow the procedure for so doing as required by Wisconsin law prior to relying on authorization to sample under the "Narrative Toxic Standard".

As if and when that occurs, the provisions of the Administrative Code then provide for independent sampling authority.

If PFAS compound presence constitutes an issue adversely affecting the preservation of the public peace, health, safety or welfare to such an extent that it is necessitated immediately, the agency may certainly promulgate a rule as an "Emergency Rule" under Wis. Stat. §227.24(1)(a) and proceed to test as set forth herein, as well.

The Defendants may test effluent from any WPDES facility for any toxic substance it has identified, post rule promulgation. At this time, PFAS compounds have not been designated as toxic substances through the rulemaking process. Defendants are not currently authorized by this Administrative Rule to compel entry and/or independently test for PFAS compounds.

Plaintiff's Motion for Summary Judgment is GRANTED in part and denied in part. Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part.

SUMMARY JUDGMENT
FEDERAL LAW

Finally, Defendants appear to assert that Federal law has conferred authority to the DNR through the Clean Water Act to institute a sampling program that may include testing for PFAS compounds to comply with the Federal Clean Water Act. The Court will do its best herein to sort its way through this argument.

Any effort the Court makes to resolve issues concerning the Federal Clean Water Act first assumes that this Court has jurisdiction to make declarations concerning state agencies administering Federal law programs. Assuming jurisdiction, the Court concludes that the DNR has statutory and regulatory authority to comply with the requirements of the Clean Water Act.

However, even if the DNR has authority to sample under the Clean Water Act, it may not enforce discharge "violations" against Wisconsin facilities without determining identity and limitations of discharge of "toxic substances," developed through the rulemaking process required by Wisconsin state law.

The DNR asserts that Federal law provides by default that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Federal law also creates a permitting program, the National Pollutant Discharge Elimination System under 33 U.S.C. § 1342, that, like

Wisconsin's WPDES program, allows facilities to discharge pollutants in compliance with a permit.

The Environmental Protection Agency (EPA) has concluded that the DNR's legal authority to administer the WPDES permit program is at least equivalent to the EPA's authority to administer the parallel Federal program, including the EPA's authority to inspect permitted facilities that discharge pollutants. If Federal law authorizes the EPA to perform the type of sampling at issue here, the Court concludes that the DNR may do the same, to comply with the Clean Water Act.

Although the EPA would typically administer the NPDES program, 33 U.S.C. § 1342(b) allows the EPA to delegate this responsibility to states if it determines the state program meets certain Federal requirements. *Anderson v. DNR*, 2011 WI 19, ¶¶ 33-37, 332 Wis. 2d 41 (explaining relationship between federal NPDES and state WPDES programs). A state's proposed permit program "shall not be approved if the EPA determines that adequate authority does not exist for the state to issue permits which apply, and [e]nsure compliance with, the requirements of the Clean Water Act and of 40 C.F.R. pt. 123." *Id.* ¶ 36. The EPA can withdraw its approval of a state permit program and take over the program if it finds that the state is not administering the program in accordance with the Act's requirements. 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63(a).

Wisconsin law recognizes the DNR's obligations under the Clean Water Act. Wis. Stat. §283.001(2) provides:

> The purpose of this chapter is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system . . . consistent with all the requirements of the [Clean Water Act].

The Federal statute empowers EPA to conduct sampling whenever needed to carry out the objectives of the Clean Water Act, including:

> [w]henever required to . . . develop [ ] or assist [ ] in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; [or] determine[e] whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance . . . 33 U.S.C. § 1318(a).

The Federal statute authorizes the EPA to require permitted facilities to sample effluents for these purposes (in parallel with Wis. Stat. § 283.55(1)(d)):

> the [EPA] Administrator shall require the owners or operator of any point source to . . . sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) . . . 33 U.S.C. § 1318(a)(A).

The Federal statute also authorizes the EPA to independently enter facilities and sample those same effluents (in parallel with Wis. Stat. § 283.55(2)(a)):

> [T]he [EPA] Administrator or his authorized representative . . . shall have a right of entry to . . . any premises in which an effluent source is located . . . and may at reasonable times . . . sample any effluents which the owner or operator of such source is required to sample under such clause . . . 33 U.S.C. § 1318(a)(B).

These provisions under 33 U.S.C. § 1318 empower the EPA to conduct an effluent sampling program of NPDES-permitted facilities. Facilities must sample their effluents under 33 U.S.C. § 1318(a)(A), just as they are required to do by Wis. Stat. §283.55. 33 U.S.C. § 1318(a) of the Clean Water Act **expressly states that effluent sampling – whether performed by facilities or the EPA – may be performed for the purpose of "developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance** . . . ." The DNR sampling

program related to PFAS identification and quantification fits within that purpose. Wis. Stat. §283.55(1)(e), as interpreted by this Court, is consistent with this Federal Statute.

The EPA has delegated its regulatory authority under 33 U.S.C. § 1342 to the DNR (*Anderson,* 332 Wis. 2d 41, ¶ 37). State law inspection (sampling) authorization is conferred to the DNR as it relates to NPDES facilities under the Federal Clean Water Act Law. 33 U.S.C. § 1318(a) contains provisions allowing the EPA to sample effluents for any purpose related to water quality, **including developing new effluent limitations, prohibition and standards**.

The DNR, as a designee of the EPA, has authority to sample effluents for the purpose of developing effluent limitations, standards and/or prohibitions, here relating to PFAS compounds and/or similar pollutants (under Wis. Stat. §283.55(1)(e)).

Under the Federal Clean Water Act and Wisconsin law, then, the DNR is authorized to gather information, including sampling, to develop or assist development of effluent limitations.

WMC argues that the Wisconsin Supreme Court has directed Courts in Wisconsin should not defer to administrative agencies' interpretations of law. *TetraTech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. WMC asserts that Defendants here are arguing that this Court should instead be bound by a Federal administrative agency's purported interpretation of state law.

The Court agrees that this Court is not bound by the agencies' interpretation of either state or Federal law. As such, agency interpretation of Federal law is immaterial to this state court's determination.

Wisconsin courts have "long recognized that administrative agencies are creations of the legislature and that they can exercise only those powers granted by the legislature." *Martinez v. Dep't of Indus., Labor & Human Relations,* 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992),

citing *Thomson v. Racine*, 242 Wis. 591, 597, 9 N.W.2d 91 (1943). In *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56-57, 158 N.W.2d 306, 312 (1968), the Supreme Court made clear that state agencies only get their powers from the Legislature and from state law:

> The very existence of the administrative agency or director is dependent upon the will of the legislature; its or his powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change . . . An administrative agency is subject to more rigid control by the legislature and judicial review of its legislative authority and the manner in which that authority is exercised.

The EPA (or its designee) have authority to test for/sample effluents for any purpose related to water quality, including developing new effluent limitations and standards under the Clean Water Act and, in this Court's opinion, Wisconsin law as well. And, while in this Court's judgment, the DNR can enter upon Wisconsin WPEDS facilities under the provisions of Wisconsin law and the Clean Water Act and may enforce its authorization to enter and test effluent under that Act for PFAS compounds (a purpose related to water quality under the Act), in the absence of state law authorization, the DNR may not enforce, through Wisconsin Courts, nonexistent Wisconsin state standards related to toxic substances unless and until identified and quantified through rulemaking as required by Wisconsin law.

The DNR may only use results obtained from sampling for informational purposes to develop new effluent limitation standards under the Federal Clean Water Act or for informational purposes furthering its broader agency scope, under Wisconsin law (Wis. Stat. §283.55(1)(e)).

Both parties are thus entitled to limited Summary Judgment as to this focused matter. Both are also subject to partial Summary Judgment denial.

CONCLUSION

As to Summary Judgment granted to Defendants herein, those matters are DISMISSED. As to Summary Judgment granted to Plaintiff, Declaratory Judgment is GRANTED but Permanent Injunction DENIED for reasons set forth at page 22, herein. The previously granted Pretrial Injunctive relief is hereby and herein dissolved, replaced by Declaratory Judgment as set forth herein.

Dated this 27th day of January, 2022.

BY THE COURT:

William F. Hue
Circuit Court Judge, Branch 2