



TO: Wisconsin Natural Resources Board

FROM: Scott Manley, Executive Vice President of Government Relations

DATE: February 16, 2022

RE: Comments on Proposed PFAS Rules

The Natural Resources Board (NRB) is being asked to approve three rules establishing PFAS standards for drinking water, surface water, and groundwater. However, **none of the three PFAS rules are approvable in their current form because each of them exceed statutory authority and violate Chapter 227 rulemaking requirements.** Because the NRB may not lawfully adopt these rules, we respectfully ask that you send them back to agency staff with a directive to, at a minimum, (1) align the rules with statutory authority; and (2) remedy violations of Chapter 227 rulemaking requirements.

At the outset, it is important to remember that there are three grounds for a court to invalidate an agency rule: the rule is unconstitutional, the rule exceeds statutory authority, or the rule was promulgated without following Chapter 227 requirements. The three PFAS rules violate the latter two criteria, and are therefore subject to court invalidation. **The NRB is therefore left with two choices: direct the agency to fix the legal problems with these rules, or give approval to unlawful rules that will be invalidated in court.**

Following are several (but not all) of the problems related to legal authority and rulemaking requirements that must be corrected prior to lawful adoption by the NRB.

Legal Authority Problems with the Drinking Water & Groundwater Rules

- The drinking water and groundwater rules propose to establish combined standards for PFOS and PFOA at 20 parts per trillion (ppt).
- The Wisconsin Statutes do not grant the agency explicit authority to establish combined standards for either drinking water or groundwater. To the contrary, the statutes repeatedly refer to establishing standards in the singular form. For example, s. 160.01(2) defines “enforcement standard” for groundwater as “a numerical value expressing the concentration of **a substance** in groundwater.”
- If the Legislature intended to allow combined standards, it could have used language that clearly allowed combined standards, but it did not do so.
- Recognizing that DNR lacks the statutory authority to promulgate combined standards, Governor Evers attempted to change the law to give the agency this new authority in his budget bill last year (see 2021 Assembly Bill 68, Section 2294). However, the Legislature rejected the Governor’s change and maintained current law which does not allow combined standards.

Legal Authority Problems with the Surface Water Rule

- Section 281.15(2)(c) prohibits staff from establishing water quality standards that are more stringent than reasonably necessary to assure attainment of the designated use for the water bodies. Following are examples of how staff failed to follow this statutory directive:
 - Establishing an effluent limitation applicable to new sources for PFOA equal to the criteria, despite the fact that PFOA is not bioaccumulative.

- Using a daily consumption factor for fish of 32 g/d to artificially inflate the PFOS criteria, despite NR 105 requirements to use an intake factor of 20 g/d. The result is an inflation of assumed fish consumption by 60 percent. DNR staff did not even follow its own rules in establishing these standards.
- Contrary to U.S. EPA and NR 105.10 procedures, the Department used the Receiver Operating Characteristics (ROC) curve to contrive a criteria that results in a substantially more stringent standard for PFOS than the law contemplates.
- Failing to adhere to NR 105.08 requirements to establish PFOA criteria that are orders of magnitude more stringent than what the law prescribes (95 ppt instead of 12,444 ppt).

Chapter 227 Rulemaking Problems with All Three Rules

- DNR is required under s. 227.137 to prepare an Economic Impact Analysis (EIA) that provides the “total” cost of the proposed rule for businesses and local governments. However, staff repeatedly ignored costs that both industry and local governments told the agency would be incurred as a result of this rule.
- Staff also intentionally lowballed the costs in an effort to stay below a \$10 million cost threshold **that required the agency to immediately stop working on the rule.** For example, staff absurdly estimated replacement of a small municipal drinking water well to be \$50,000, when the actual costs range from \$1 million to \$1.5 million.
- Staff also unlawfully amortized the capital costs of compliance of a 20-year period, despite no explicit authority under Chapter 227 to do so. This allowed staff to again artificially and unlawfully deflate the cost of these rules to avoid breaching the **\$10 million threshold that should have required the agency to stop working on the rule unless and until the Legislature authorizes the rule to move forward (see s. 227.139(1)).**
- If DNR staff had done an honest and lawful accounting of costs, the following table summarizes what would have been a reasonable estimate of the compliance costs incurred by businesses, local governments, and individuals:

Rule	DNR Compliance Cost Estimate: Two-Year Period	Coalition Cost Estimate: Two Years
Groundwater (DG-15-19/NR 140)	\$9,537,243 (or \$0) ^[1]	\$118,750,000
Drinking Water (DG-24-19/NR 809)	\$9,350,949.15	\$115,200,000
Surface Water (WY-23-19/NR 105)	\$9,268,046	\$123,359,816
Statutory Cap (per s. 227.139)	\$10,000,000	\$10,000,000

Practical Considerations

- Wisconsin has never adopted a drinking water standard for a substance prior to EPA proposing a standard, and we should not do so now.

^[1] The DNR’s EIA for DG-15-19 states that “there is no cost directly attributable to the standards” but later provides an estimate of \$9,537,243 for “other regulatory programs and rules that refer to ch. NR 140 standards.” We strongly disagree that no compliance costs are associated with the PFOA/PFOS groundwater rule.

- There is no need to jump out ahead of the EPA with a Wisconsin-only drinking water standard. The Biden EPA committed on October 18, 2021 to propose a final drinking water standard next year. There is no point in asking local governments and ratepayer to comply with a state rule which will be almost immediately superseded by a federal rule.
- Similarly, there is no need to jump ahead of the EPA on a surface water rule. The Biden EPA also committed on October 18, 2021 to establish surface water quality criteria for both aquatic life and humans.

Recommended Actions

- WMC does not believe it is necessary to move forward with drinking water or surface water standards given EPA's commitment to do so. We recommend that both those rules be sent back to the agency or tabled.
- If the NRB does wish to move forward with a drinking water standard in advance of EPA standards, the following changes must be made to address legal problems:
 - The rule must be sent back to staff with the directive to perform a lawful EIA that accounts for all costs without unlawfully deflating capital costs.
 - The rule must be changed to eliminate the use of combined standards for PFOA and PFOS, as the agency lacks explicit statutory authority for this approach. The standards must be expressed as individual standards.
- If the NRB does wish to move forward with surface water quality standards in advance of EPA standards, the following changes must be made to address legal problems:
 - The rule must be sent back to staff with the directive to perform a lawful EIA that accounts for all costs without unlawfully deflating capital costs.
 - Staff must follow its own rules and comply with the limitations in s. 281.15(2)(c) to arrive at a reasonably stringent standard that does not stand out as an absurd outliers among other states and countries (e.g. DNR 12 ppt standard vs Michigan 12,000 ppt standard).
- The rule to establish a groundwater standard requires several changes to make it lawful:
 - The rule must be sent back to staff with the directive to perform a lawful EIA that accounts for all costs without unlawfully deflating capital costs.
 - The rule must be changed to eliminate the use of combined standards for PFOA and PFOS, as the agency lacks explicit statutory authority for this approach. The standards must be expressed as individual standards.
 - The standard must be set at 70 ppt (the Obama EPA Health Advisory) because Chapter 160 requires that groundwater standards be established the same as a "federal number." DNR did not meet the statutory criteria to deviate from a federal number.

Given the numerous deficiencies with all three rules related to legal authority and Chapter 227 rulemaking requirements, the rules before you today are not approvable. In fact, they shouldn't even be before you because DNR staff should have followed the law and stopped working on them as required by s. 227.139.

DNR staff's inability or unwillingness to follow the law has placed the NRB in a very difficult position, but it is a problem of their own making. The only lawful option the NRB has is to send these rules back to staff with the directive to make the changes referenced above that will bring the rules into compliance with Wisconsin law.