

June 3, 2021

Filed Via Email

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DNRAdministrativeRulesComments@wisconsin.gov

Department of Natural Resources
Attn: Adam DeWeese - DG/5
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**RE: Comments on Statement of Scope for DG-31-20
Revisions to ch. NR 809 related to the promulgation of new drinking water MCLs
for 12 additional PFAS and combined standards for 4 PFAS**

Dear Mr. DeWeese:

These comments are filed on behalf of the Municipal Environmental Group - Water Division (MEG - Water). MEG - Water is an association of 69 municipal water systems that provides input on legislative and regulatory issues involving water supply.

The Department has released a Statement of Scope for Rulemaking No. DG-31-20 which would revise ch. NR 809 and add new drinking water maximum contaminant levels (MCLs) for 12 additional PFAS and combined standards for 4 PFAS. This proposed rulemaking is in addition to the Department's current rulemaking (Rule No. DG-24-19) which proposes to revise ch. NR 809 to add new drinking water MCLs for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS). Both of these rulemakings address PFAS contaminants that are identified as emerging contaminants.

It is MEG - Water's understanding that up until now all drinking water MCLs included in ch. NR 809 have been first established by EPA pursuant to the federal Safe Drinking Water Act (SDWA). Wisconsin has never before adopted a drinking water MCL before a federal drinking water MCL was in place.

MEG - Water supports continuing that precedent and waiting to revise NR 809 until after EPA establishes federal drinking water standards for PFAS using the SDWA standard-setting process. EPA has made it clear that it is moving ahead to regulate PFAS in drinking water. On March 3, 2021, EPA published its final regulatory determination to regulate PFOA and PFOS under the SDWA. In addition, in that final determination, EPA committed to making regulatory determinations for additional PFAS in advance of the next SDWA deadline. EPA stated that:

although SDWA does not require the Agency to complete regulatory determinations for the contaminants from the fifth CCL until 2026, because of the significant progress related to developing new high-quality PFAS information, combined with the Agency's commitment in the PFAS Action Plan to assist states and communities with PFAS contaminated drinking water, EPA will continue to prioritize regulatory determinations of additional PFAS in drinking water. The Agency is committing to making regulatory determinations in advance of the next SDWA deadline for additional PFAS for which the Agency has a peer reviewed health assessment, has nationally representative occurrence data in finished drinking water, and has sufficient information to determine whether there is a meaningful opportunity for health risk reduction for persons served by public water systems.

86 F.R. 12278-12279.

MEG - Water asks the Department to wait for EPA to promulgate federal drinking water MCLs before proceeding to adopt state standards. When EPA promulgates federal drinking water standards, EPA follows the SDWA standard-setting process. Under the SDWA standard-setting process, a health goal is set that considers risks to the most sensitive populations including infants, pregnant women, and the immuno-compromised. The next step sets the enforcement standard (the MCL) to be as close to the health goal as feasible, considering available treatment technologies and costs. This cost-benefit analysis is a critical component of the SDWA standard-setting process.

Under the SDWA standard-setting process, drinking water standards are not set at the lowest possible level regardless of cost, treatment feasibility, and relative health benefits. The SDWA cost-benefit analysis provides assurance that the health benefits achieved by a new standard justifies the cost of meeting that standard, and that comparable health benefits could not be achieved with a higher standard that would be less costly to meet.

It appears from the Statement of Scope (and the Department's actions on Rule No. DG-24-19) that the Department will not be following the SDWA standard-setting process when it proceeds to set state standards for PFAS. Instead the Department will seek to promulgate state drinking water standards based on the Wisconsin Department of Health Services' proposed groundwater standards without conducting a cost-benefit analysis of the proposed state standards. The Department will not be considering whether comparable health benefits could be achieved with a higher standard and a lower cost.

MEG - Water is concerned with the Department's intent to establish drinking water standards without weighing the relative costs and benefits of those standards and the precedent that this may set for establishing future state drinking water standards for other emerging contaminants. MEG - Water questions the Department's authority to establish state drinking water standards in this way. While Wis. Stat. § 281.17(8)(a) provides that "the department may establish, administer and maintain a safe drinking water program no less stringent than the requirements of the safe drinking water act, 42 USC 300f to 300j-26," this subsection does not provide

permission for the Department to set state drinking water standards where there is no comparable federal drinking water standard.

Under Wis. Stat. § 227.10(2m) an agency is prohibited from implementing any standard unless that standard “is explicitly required or explicitly permitted by statute or by a rule.” To MEG - Water’s knowledge, no statutory or regulatory authority explicitly permits the Department to establish a state drinking water standard in the absence of a federal drinking water standard.

MEG - Water supports the development and implementation of federal PFAS MCLs using the SDWA rulemaking process. MEG - Water also supports the Department’s efforts to obtain additional information about the presence of PFAS in Wisconsin, to provide public information about PFAS, and to encourage action where PFAS levels are elevated. But MEG - Water does not support establishing state PFAS standards in a manner that is inconsistent with the SDWA standard-setting process and that does not consider the relative costs and benefits of the proposed standards.

Public water systems are charged with protecting public health and they take this responsibility extremely seriously. Public water systems currently face a host of expensive challenges to ensure the continued protection of public health -- like eliminating lead service lines, replacing old infrastructure, implementing corrosion control treatment to prevent leaching from lead pipes, and treating for contaminants like radium, arsenic, and nitrate. At the same time, there are concerns about public water supply remaining affordable.

As we respond to emerging contaminants, like PFAS, it is important that these emerging contaminants receive the same scrutiny and analysis as was given to the contaminants that already have MCLs. This is best done by having EPA develop federal drinking water standards for PFAS using the SDWA standard-setting process. If drinking water standards for PFAS are established based upon the same uniform and consistent methodology used to establish standards for other drinking water contaminants, public water systems and the public at large can be assured that PFAS is receiving the attention and resources that it deserves.

Thank you for this opportunity to provide the Department with our additional input. If you have any questions, please do not hesitate to contact us.

Sincerely,

MUNICIPAL ENVIRONMENTAL GROUP – WATER DIVISION



Lawrie J. Kobza
Legal Counsel

cc: MEG - Water Members