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WMC Environment Committee *Policy Update & Discussion*

March 12, 2020

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Topics Covered

- PFAS Legislation
- DNR PFAS Rules
- DNR PFAS Regulation Under Chapter 292
- AB 794 – Groundwater Standard Setting Process
- Clearinghouse Rule 19-094: Biocriteria Standards
- Clearinghouse Rule 19-083: Site Specific Standards for Phosphorus
- 2017 Act 369 Guidance Requirements

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PFAS Legislation

PFAS Background

- Per- and polyfluoroalkyl substances (PFAS) are a group of man-made chemicals that includes more than 4,000 compounds.
- PFAS have been incorporated into many consumer products because of their resistance to water, grease and stains:
 - Food packaging and fast food wrappers
 - Medical devices
 - Nonstick cookware
 - Stain-resistant carpets and rugs
 - Water-resistant clothing and outerwear
 - Automobiles
 - Smartphones
 - Firefighting foam (PFOS & PFOA)

PFAS Background

- PFOA and PFOS are the most studied PFAS compounds, and are the two most commonly associated with human health impacts (high cholesterol).
- A number of countries have already set standards for PFOA & PFOS:
 - European Union's standard is 100 parts-per-trillion (ppt)
 - United Kingdom's standard is 300 ppt
 - Germany's standard is 300 ppt
 - Canada's standard is 200 ppt for PFOA and 600 ppt for PFOS
- EPA does not have an enforceable standard, but is currently working on one. In the meantime, they have set a "health advisory" for PFOS and PFOA at **70 ppt**.

PFAS Legislation

- **SB 302/AB 321**: Known as the CLEAR Act, these bills would require DNR to regulate at least six PFAS compounds for both air and water quality. Also requires businesses who possess or control PFAS to post proof of financial responsibility for remediation. WMC & WPC opposed this legislation, and it died in committee.
- **SB 310/AB 323** would prohibit the use of testing or training with firefighting foam containing PFAS unless the training area has containment, treatment and disposal measures. The foam could still be used for emergency fire suppression. WMC & WPC supported this bill, and it was signed into law.

PFAS Legislation

- **Assembly Bill 843**: Authored by Rep. John Nygren (R-Marinette) and Dave Hansen (D-Green Bay)
- Would require DNR to set immediate groundwater standards for PFOA and PFOS by emergency rule (presumptive 20 ppt standard)
- Requires DNR to regulate all known PFAS compounds (4,000+) as hazardous air contaminants with associated emission standards under NR 445 – a 10-fold increase in the number of air toxics.
- Requires DNR to establish drinking water and surface water standards for PFOS & PFOA (already doing)

PFAS Legislation

- Gives DNR expansive authority to decide who is responsible for PFAS contamination cleanup, and require anyone who possess or controls any amount of PFAS to post proof of financial responsibility with the DNR
- Creates a PFAS litigation trust fund to receive proceeds from DOJ enforcement/litigation activities
- Would require DHS to conduct a PFAS cancer cluster study for Wisconsin, and conduct PFAS blood testing in Marinette County
- WMC and WPC strongly opposed this legislation, which passed committee but did not advance further

PFAS Legislation

- **Senate Bill 774**: Authored by Senator Rob Cowles (R-Allouez)
- Would require DNR to set establish “PFAS Management Zones” based upon the location of a drinking water source that tests positive for PFOS or PFOA at or above 70 ppt
- Homeowners in the PFAS Management Zone would be eligible for funding to mitigate PFOA or PFOS contamination in their private wells
- WMC and WPC were generally supportive of this legislation as a reasonable approach to addressing a geographically isolated problem without giving the DNR expansive new regulatory authority or adding costly regulatory burdens to businesses
- The legislation had a public hearing in the author’s committee, but ultimately died in committee

PFAS Legislation

- **Senate Bill 559**: Authored by Senator Steve Nass (R-Whitewater)
- The bill has absolutely nothing to do with PFAS
- Assembly attached a “midnight special” amendment to the bill on their last day of session
 - Gives the DNR new surface & groundwater testing authority for PFAS
 - Requires UW to study the health impacts of PFAS
 - Requires UW to study the destruction & disposal of PFAS
 - Gives DNR authority to recover the costs of water quality testing from persons who use firefighting foam
- The bill is now back in the Senate with the PFAS amendment attached. Very unlikely to pass

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DNR PFAS Rules

DNR PFAS Rules

- DNR is currently promulgating three rules to regulate PFAS:
 - Groundwater standard
 - Surface water quality standard
 - Drinking water standard
- Although the rules initially contemplated all PFAS compounds, DNR has indicated they will focus only on PFOS & PFOA
- DNR current timeline suggest final rules presented to the Legislature for review some time in 2022

DNR PFAS Rules

- The PFOA & PFOS groundwater standard is likely to drive standards for the other two rules
- DHS recommendation under Chapter 160:
 - Combined enforcement standard for both PFOA & PFOS of 20 ppt
 - Preventative Action Limit (PAL) at 2 ppt
- The PAL standard at 2 ppt must be considered a regulatory standard in that DNR can take significant regulatory actions when a PAL is triggered up to and including shutting down a facility

DNR PFAS Rules

- It's difficult to assess how expensive these three rules will be given that we can only guess where the standards will ultimately fall. Assuming a 20 ppt/2 ppt regulatory regime:
 - Municipalities in New York expect to spend north of \$850 million to comply with similar standards
 - Wisconsin League of Municipalities testified on AB 843 that the cost differential between a 70 ppt standard and a 20 ppt standard is 1,000%
 - A paper mill testified on AB 843 that the bill would result in compliance costs exceeding \$100 million, with no guarantee of continual compliance
- By any measure, these rules will be extraordinarily expensive

DNR PFAS Rules

- We will continue to participate fully in the rulemaking process for these rules, including attending public meetings and submitting comments on the Economic Impact Statement and draft rules - we will need your help in doing so
- Our goal will be to ensure the rules are science-based, fair, cost-effective, practical, feasible, and protective of the economic competitiveness of Wisconsin businesses
- We will have an important backstop with the Legislature, especially as it relates to compliance costs

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DNR PFAS Regulation Under Chapter 292

DNR PFAS Cleanup Regulation

- Although DNR is currently promulgated rules to enable the agency to regulate PFOS and PFOA for groundwater, surface water, and drinking water, it is already regulating PFAS compounds under Chapter 292 - the environmental remediation and Spills Law
- The agency has not promulgated any rules establishing PFAS cleanup standards, or putting the regulated community on notice as to which PFAS compounds it considers to be a “hazardous contaminant” under Chapter 292
- This failure to promulgate rules and standards, as is required by law under Chapter 227, is creating confusion and regulatory uncertainty with respect to active cleanup projects
- This lack of clarity under the law leaves businesses to wonder which PFAS compounds DNR is regulating under Chapter 292, which of the 4,000+ PFAS they are required to screen for in a site investigation, what the actual cleanup standards are, and what responsible parties must do to get a site closure

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AB 794: Groundwater Standards

- WMC & WPC both testified in support of this important legislation to improve the process for setting groundwater standards in Wisconsin.
- The current process is completely opaque – from beginning to end, there is no opportunity for public input or comment until after the regulatory decision has already been made.
 - DNR decides which substances should have a groundwater standard
 - DNR submits those substances to DHS for scientific review
 - DHS ultimately proposes enforcement standards and PALs for each substance
 - DNR is required to promulgate the DNR standard as a rule
- AB 794 requires the DNR to have a public comment period for substances proposed for groundwater quality standards prior to seeking DHS review, as well as public comments on DHS's proposed standards prior to their finalization.
- AB 794 passed the Assembly on a party-line vote, and is available for scheduling in the Senate.

Clearinghouse Rule 19-094: Biocriteria Standards

- The DNR proposed a new rule to establish “biocriteria standards” that will be used to assess whether a waterbody is impaired
- The biocriteria will measure the biodiversity of plants and aquatic organisms, as well as the waterbody’s overall ability to sustain reproduction of aquatic lifeforms
- The rule establishes a subjective narrative standard for biocriteria, with the actual metrics that will be used to assess the standards in the WisCALM guidance
- Waterbodies that fail to meet the biocriteria standard will be placed on the 303(d) impaired list, triggering TMDL requirements

- WMC and WPC testified to express concerns at a public hearing on CR 19-094 at the Assembly Natural Resources Committee
- Our concerns were twofold:
 - The narrative biocriteria, as opposed to numeric standards, creates uncertainty and could lead to subjective impairment determinations by DNR staff
 - It is inappropriate and unlawful to place the actual regulatory standards in the WisCALM guidance as opposed to rule
- Based on our concerns, Rep. Mursau, the Committee chairman, asked the DNR to recall the rule for additional work. The DNR agreed to recall the rule

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Clearinghouse Rule 19-083: Site Specific Standards for Phosphorus

- DNR promulgated a rule to establish site-specific water quality criteria for three impoundments on the Wisconsin River: Castle Rock Lake, the Petenwell Flowage, and Lake Wisconsin
- According to DNR, there are 109 municipal and industrial dischargers that will be impacted by the rule – some will have their waste load allocations increased, others will have their allocation decrease
- WMC and WPC were concerned with the Economic Impact Analysis (EIA) for the rule because it excluded many cost impacts, and used a 20-year amortization of compliance costs to artificially reduce the cost impact of the rule
- We are asking the co-chairs of the Joint Committee for Review of Administrative Rules (JCRAR) to require the agency to redo the EIA to comply with the law, which will result in a cost impact of at least \$50 million – quite possibly substantially higher.

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2017 Act 369 Guidance Provisions

2017 Act 369

- 2017 Act 369 had many important provisions:
- Defined a guidance document as “any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin” that “Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency...”
- Guidance documents are not legally enforceable and therefore cannot establish regulatory requirements – they may only recite regulatory requirements from the statutes or administrative code
- Act 369 requires all guidance documents to receive public comment, and be posted on the agency’s web site – this is very important for transparency purposes – no more secret playbook

- The new law also establishes a specific legal basis to challenge a guidance document on the grounds that it establishes an enforceable regulatory requirement
- In addition, the JCRAR has the authority to require an agency to promulgate a guidance document as a rule if the guidance meets the legal definition of a rule
- These tools are only helpful and effective if they are regularly used
- **Please contact us if the DNR is using a guidance document as the basis to impose regulatory requirements or restrictions on your business!**

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Questions?