



TO: Bruce Rheineck – DG/5

FROM: Wisconsin Manufacturers & Commerce
Wisconsin Paper Council
American Chemistry Council

DATE: April 22, 2022

RE: Comments on SS 021-22 (Board Order DG-04-22), which affects NR 140, and is related to setting numerical standards for Cycle 10 bacteria in order to minimize the concentration of polluting substances in groundwater

The above referenced organizations – Wisconsin Manufacturers & Commerce, Wisconsin Paper Council, and American Chemistry Council – appreciate the opportunity to comment on Scope Statement 021-22. According to the scope statement, this rulemaking (Board Order DG-02-22) is being proposed by the Department of Natural Resources (“DNR” or “Department”) in relation to groundwater standards for Escherichia coli (E. coli) bacteria and total coliform bacteria. Specifically, this rulemaking proposes the adoption of a new groundwater standard for E. coli bacteria. It also proposes to revise the metric for total coliform bacteria from a public health groundwater quality standard to an indicator parameter.

Our organizations respectfully request that SS 021-22 be amended to make it explicitly clear that this rulemaking will only be used to propose groundwater standards for E. coli bacteria and total coliform bacteria and no other Cycle 10 substance. To clarify, the scope statement only describes changes to standards for E. coli bacteria and total coliform bacteria, so any attempt by the Department to expand DG-02-22 to include other Cycle 10 substances would be a plain violation of ch. 227 rulemaking requirements. Thus, adjusting the scope statement as requested would simply clarify the Department’s intention to the regulated community, and also ensure that the Department intends to follow lawful rulemaking requirements.

1. Background on Related Rulemaking

In June 2019, the Department of Health Services provided the DNR recommended groundwater standards for 27 substances. These are often referred to as the “Cycle 10” recommendations, as it reflects the 10th time that the DNR requested that DHS develop new recommended groundwater standards for consideration via rulemaking. The Cycle 10 list includes the aforementioned E. coli bacteria and total coliform bacteria, as well as two polyfluoroalkyl substances (PFOA and PFOS), Trichloroethylene (TCE), Hexavalent chromium, and many other substances.

All 27 substances from the Cycle 10 list were incorporated into Board Order DG-15-19. Our organizations submitted numerous concerns about this rule and participated throughout the rulemaking process. Our concerns included – but were not limited to – the Department’s statutory authority for the rule, the rule’s compliance costs, and the scientific justification for the standards included in the rule.

In February 2022, after hearing concerns from our organizations and a number of other stakeholders, the Natural Resources Board declined to approve DG-15-19. Last month, the Department formally withdrew the rule from legislative consideration and the rule’s scope statement expired.

Also last month, the DNR submitted SS 021-22 to the Legislature, which proposes groundwater quality standards for two types of bacteria found in Cycle 10. To date, the DNR has not submitted a scope statement for any of the other 25 substances found in Cycle 10. This raises the obvious question as to whether the Department intends to use this rulemaking as a vehicle to (unlawfully) propose groundwater quality standards for other Cycle 10 substances.

2. Incorporating any other substances besides bacteria into DG-04-22 would be an unlawful violation of ch. 227 rulemaking requirements.

In reference to SS 021-22, the scope statement only describes making changes to two substances, as noted in the first paragraph of page 2:

The proposed rule will amend ch. NR 140, Wis. Adm. Code, to replace the existing total coliform bacteria standards with new state groundwater quality standards for Escherichia coli (E. coli) bacteria. The proposed rule will also transition total coliform bacteria from a public health groundwater quality standard to an indicator parameter.

Since no other substance besides bacteria is identified in the scope statement, any attempt by the Department to incorporate other Cycle 10 substances into this rulemaking would be unlawful. Specifically, s. 227.135(4) restricts changing the scope of the rule in a “...meaningful or measurable way, including changing the scope of the proposed rule so as to include in the scope any activity, business, **material, or product** [emphasis added] that is not specifically included in the original scope of the proposed rule...” If such a change in the scope of a rule is made, the agency must stop work on the proposed rule and instead prepare a revised scope statement. A change to add additional Cycle 10 substances such as PFOA, PFOS, or TCE would clearly constitute a change in the scope statement in a “meaningful or measurable way” by including a “material” or “product” that was not included in the original scope statement.

3. The proposed scope statement should be clarified to make it clear that this rulemaking only addresses Cycle 10 bacteria.

Although incorporating other Cycle 10 substances would be a plain violation of ch. 227 rulemaking requirements under the currently proposed scope statement, there are other unnecessarily vague sections of the scope statement that should be amended. These adjustments would ensure that proper notice is provided to appropriate regulated entities, and also ensure the scope statement is lawful.

3-A. Relating clause for scope statement should be clarified.

First, it should be noted that the relating clause for SS 021-22 is nearly identical to SS 090-19, the scope statement for the aforementioned rejected groundwater rule. The only difference is noted below (underlined and in red):

Amendments to ch. NR 140 to set numerical standards to minimize the concentration of polluting substances in groundwater (Cycle 10 Bacteria)

It is unclear what the practical impact is for a statement in parentheses; such a convention does not appear in ch. 227 rulemaking. Use of parentheses in administrative rulemaking is discouraged by Legislative Council [see page 15 of the Legislative Council "[Administrative Rules Procedures Manual](#)"]. In addition, to our knowledge, using parenthetical statements in a relating clause is not a convention used or otherwise condoned by the Legislative Reference Bureau. Thus, it may be a violation of ch. 227 rulemaking requirements [see. 227.135(3)].

Thus, our organizations urge the DNR to adjust the relating clause of SS 021-22 to remove the parenthetical note, and instead explicitly state that this rulemaking is only for two Cycle 10 Bacteria substances.

3-B. The text of section #2 of the scope statement should be altered to explicitly state that only changes to total coliform bacteria standards and E. coli standards will be considered.

The first paragraph of section #2 indicates that the proposed rule will amend NR 140 to incorporate groundwater standards for total coliform bacteria and E. coli bacteria. No other substances are listed here (or anywhere else in this paragraph). A sentence should be added to this paragraph to explicitly state that this rulemaking will consider groundwater standards only for these two types of bacteria, and no other substance.

3-C. The statement "additional rule changes may be considered to accomplish the objectives described in this scope statement" should be significantly altered or removed.

In the fourth paragraph of section #2 of the scope statement, the Department states that "Additional rule changes may be considered to accomplish the objectives described in this scope statement." The immediately preceding paragraph describes the process of promulgating NR 140 groundwater standards, and notes that the Department is required to develop

numerical groundwater quality standards. Importantly, neither paragraph make any mention of limiting that process to simply total coliform bacteria and E. coli bacteria.

Taken together, the third and fourth paragraph of section #2 are overly broad. They may even suggest that the Department believes it has the authority to add additional groundwater standards recommended under NR 140 to this rulemaking.

Our organizations urge the DNR to clarify the aforementioned statement to make it explicitly clear that the only rule changes being considered apply to total coliform bacteria and E. coli bacteria.

4. Conclusion

To reiterate, any attempt by the Department to add other Cycle 10 substances under this rule would be an unlawful violation of ch. 227 rulemaking requirements, since the Department did not identify any Cycle 10 substances besides total coliform bacteria and E. coli bacteria.

However, the suggested changes above would further help clarify the Department's intent with this rulemaking, and signal the DNR's interest and willingness to work with the regulated community on this rule. They would also ensure that the scope statement complies with all applicable rulemaking requirements.

Thank you for considering our comments.