

FILED
03-29-2021
Clerk of Circuit Court
Cindy R. Hamre Incha
2021CV000111

STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,
501 East Washington Avenue,
Madison, WI 53703,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
101 South Webster Street,
Madison, WI 53707,

Case Type: Declaratory Judgment

WISCONSIN NATURAL
RESOURCES BOARD,
101 South Webster Street,
Madison, WI 53707,

Case Code: 30701

and

PRESTON COLE, in his official capacity as
Secretary of the Wisconsin Department of
Natural Resources,
101 South Webster Street,
Madison, WI 53707,

Defendants.

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject

or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Clerk of Circuit Court, Jefferson County Courthouse, 311 S. Center Avenue, Room 115, Jefferson, WI 53549**, and to Lucas Vebber, Plaintiff's attorney, whose address is **501 East Washington Avenue, Madison, WI, 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 29th day of March, 2021.

Respectfully submitted,

**WISCONSIN MANUFACTURERS &
COMMERCE, INC.**

/s/ Electronically signed by Lucas T. Vebber

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Defendants.

COMPLAINT

Plaintiff Wisconsin Manufacturers and Commerce, Inc. (“WMC”), through their undersigned counsel, as and for their complaint against the Defendants, allege as follows:

INTRODUCTION

1. This action seeks declaratory and injunctive relief from certain unlawful actions of Defendants. Defendants have created a “sampling program” which they are requiring certain Wisconsin facilities to participate in, including facilities of Plaintiff’s members. This sampling

program seeks to test effluent for certain compounds for which there are no standards in state law, and to make those results public.

2. Defendants do not have the statutory authority to implement and enforce their program to sample for compounds that they have no standards for under state law. Moreover, insofar as Defendants seek to publish the results of their sampling program, they are risking significant reputational harm to the businesses that are being unlawfully forced to participate in this program, even those businesses that are in compliance with state law and their own permits.

PARTIES

3. Plaintiff WMC is a membership-based business trade association. WMC is Wisconsin's manufacturers' association and statewide chamber of commerce. WMC is a nonstock corporation organized under the laws of the State of Wisconsin. WMC maintains its principal place of business at 501 East Washington Avenue, in the City of Madison, Dane County, Wisconsin.

4. WMC members include businesses of all sizes in sectors throughout the state's economy. WMC's mission is to make Wisconsin the most competitive state in the nation in which to conduct business. To accomplish this mission, WMC provides input on policy at the state level by engaging with policy makers in administrative rulemaking proceedings and in the legislative process. WMC also engages in litigation to the extent the interpretation of the applicable rules or legislation is at issue.

5. WMC has associational standing to assert this claim on behalf of its members because its members have standing, the interests at stake in this litigation are germane to its purpose, and neither the claims asserted nor the relief requested requires any particular member's participation in this lawsuit. *See Munger v. Seehafer*, 2016 WI App 89, ¶¶53-54, 372 Wis. 2d 749, 890 N.W.2d 22.

6. Defendant Department of Natural Resources (“DNR”) is an agency of the State of Wisconsin with its offices and principal place of business at 101 South Webster Street, in the City of Madison, Dane of Wisconsin. DNR implemented and is enforcing the sampling program challenged in this action.

7. Defendant Natural Resources Board (“NRB”) is an agency of the State of Wisconsin with its offices and principal place of business at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. DNR is under the direction and control of the NRB pursuant to Wis. Stat. § 15.34.

8. Defendant Secretary Preston Cole is the Secretary of DNR and is named in his official capacity only. Defendant Secretary Cole maintains his principal office at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin.

9. Defendants each meet the definition of “agency” under Wis. Stat. § 227.01(1).

JURISDICTION AND VENUE

10. This Court has jurisdiction to hear this case pursuant to Wis. Stat. § 806.04(1)-(2).

11. Venue in this county is proper pursuant to Wis. Stat. § 801.50(3)(a) because the sole Defendants are the state, a state board, and a state official, and Plaintiff designates this county as the venue.

FACTUAL BACKGROUND

WPDES Permitting

12. A Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit is a type of permit issued by Defendants which allows the permittee to discharge certain substances into the waters of the state.

13. Under state law, the discharge of any “pollutant” into the waters of the state by a “point source” is unlawful unless that discharge is done pursuant to a WPDES permit issued by Defendants. Wis. Stat. § 283.31(1).

14. The term “point source” is a defined term under Chapter 283, and the relevant part of that definition for purposes of this action is “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.” Wis. Stat. § 283.01(12)(a).

15. The term “pollutant” is also a defined term under Chapter 283, and means “any 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.” Wis. Stat. § 283.01(13).

16. WPDES permits rely upon surface water quality standards, promulgated by Defendants as rules, in order to determine allowable discharge levels of specific pollutants.

17. WPDES permits are issued for a five year term and contain certain monitoring, reporting, and compliance schedules.

Administrative Rulemaking

18. State 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).

19. The process required for an agency to formally adopt a rule is laid out in Wis. Stat. Ch. 227. Rules can either be permanent, which have no expiration, or emergency, which are valid for an initial period of only 150 days.

20. The permanent rulemaking process is comprehensive and can be time consuming for an agency. The typical process to promulgate a rule involves the agency publishing an approved scope statement, preparing a draft of the rule, preparing an economic impact analysis (“EIA”) outlining the anticipated costs of that rule, holding a public hearing, and then submitting the final proposed rule to the legislature for their review before the rule may be published and take effect.

21. State agencies cannot enforce rules that have not been formally adopted through the statutorily mandated process. In fact, Courts shall declare any rule which is adopted *without* compliance with those statutory rulemaking provisions to be invalid. Wis. Stat. § 227.40(4)(a).

Defendants’ Rulemaking

22. Defendants are currently engaged in a permanent rulemaking to develop surface water quality criteria and analytical methods for poly- and perfluoroalkyl compounds (also known as PFAS). PFAS is a general term for a group of thousands of individual compounds and Defendants’ rulemaking is focused primarily on developing standards for just two specific PFAS compounds: perfluorooctane sulfonate (“PFOS”) and perfluorooctanoic acid (“PFOA”).

23. This rulemaking is referred to by Defendants as Rule No. WY-23-19, and formally began with the approval of Scope Statement SS 091-19, and publication of that scope statement in the state's administrative register no. 765A1 on September 3, 2019. A true and correct copy of SS 091-19 is attached hereto as Exhibit 1.

24. As approved in the scope statement, the "primary objective of [the] rule is to create human health surface water quality criteria for perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), as well as any other PFAS which the department determines may be harmful to human health in ch. NR 105, Wis. Adm. Code." Exhibit 1, Page 1, Section 2.

25. Developing such standards would allow Defendants to regulate those compounds (PFOS and PFOA) as pollutants under WPDES permits.

26. Defendants have informed Plaintiff and others that despite the broad "as well as any other PFAS..." language in the scope statement, that the rulemaking would only establish surface water quality standards for PFOS and PFOA.

27. If Defendants adopt this proposed rule, any point source discharging PFOS and PFOA will have to treat their effluent to remove those compounds, or limit the amounts thereof being discharged until the rule's standards can be achieved.

28. Defendants have acknowledged in the scope statement that the cost of such treatment upon permittees "is expected to be significant." Exhibit 1, Page 4, Section 8.

29. Indeed, WMC members expect the cost associated with compliance with this proposed rule to be in the tens of millions of dollars.

30. Under state law, any agency which has proposed a rule which is expected to have \$10,000,000 or more in implementation and compliance costs which are reasonably expected to be incurred by or passed along to businesses, local government units, and individuals over any

two-year period *may not* promulgate that rule unless the legislature first formally approves of that rule, or the agency modifies the proposed rule to reduce those expected costs. Wis. Stat. § 227.139.

31. Due to the expected significant cost of this proposed rule, it is very likely that it will be impacted by the legislative approval requirement of Wis. Stat. § 227.139, and it is thus uncertain if this regulation will even be allowed to move forward.

32. Scope Statement SS 091-19 expires on March 3, 2022, which is 30 months after the date it was first published in the state administrative register. Wis. Stat. § 227.135(5).

The Unlawful Sampling Program

33. Recently, Defendants created and began implementing and enforcing a PFAS sampling program related to their rulemaking, and it is this sampling program which plaintiff alleges is unlawful and challenges in this complaint.

34. As part of the sampling program, Defendants are requiring certain WPDES permittees to allow Defendants' staff to enter their facilities and obtain samples of effluent from the permittee's facility.

35. Facilities who are selected may not opt out of Defendants' sampling program or otherwise refuse to participate.

36. Defendants' PFAS sampling program is unrelated to Permittees actual permits, and not done to detect any *regulated* compound under state law; rather, Defendants intend to test for more than 30 PFAS compounds, well beyond the two compounds (PFOA and PFOS) which are the subject of the ongoing, and not yet complete, rulemaking.

37. The sampling program has already begun. Defendants have given less than a week's notice that Defendants' staff would be visiting their facility to engage in PFAS sampling,

making it logistically difficult, if not impossible, for WMC members to talk with legal counsel and environmental consultants and make arrangements to ensure that they have staff and resources available to oversee Defendants' sampling program work at their facilities.

38. It is unclear how Defendants selected facilities to sample, or what method or policies were employed as part of that selection process. Yet facilities who are sampled risk being publicly stigmatized as polluters, despite the fact that the PFAS compounds being sampled for are not regulated under state law, and the rulemaking that Defendants are engaged in to regulate some of those compounds may not even ultimately result in regulations being adopted. Further, Defendants are not even attempting to regulate the overwhelming majority of compounds they are sampling for.

39. Defendants intend to make information gathered from their unlawful PFAS sampling activity available publicly, and have openly stated that this data "will be an open record and is [sic] no way confidential." Exhibit 2, Page 3, Section 9.

40. Further, Defendants' PFAS sampling program is only studying effluent, and is not considering intake water bodies or influent, and as a result, permittees may be identified as discharging these compounds which were already present in their intake water without having added any PFAS to their discharge.

41. There are no standards in place for any PFAS compound in state law.

Preparation of an Economic Impact Analysis

42. State law requires agencies, including Defendants, to prepare an economic impact analysis for any proposed rule. Wis. Stat. § 227.137(2).

43. An economic impact analysis “shall contain 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).

44. Defendants have repeatedly stated that the primary purpose of their sampling program is to “gather facility effluent data from diverse facilities in order to project economic impacts of the PFAS surface water standard rule creation expected for 2021.” Exhibit 2, Page 1, Section 2.

45. That is, Defendants’ stated primary purpose for gathering this data is preparation of the required economic impact analysis for the aforementioned rulemaking.

46. When preparing an economic impact analysis state law 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).

47. Further, 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.*” Wis. Stat. § 227.137(3) (emphasis added).

48. Nothing in the economic impact analysis statutes provides Defendants with explicit authority to *compel* participation in the preparation of such a document, as their sampling program requires.

49. In fact, *compelling* a business to participate in the development of an economic impact analysis is, by negative implication, disallowed by the statute.

Other Statutory Authority

50. Since Defendants lack the explicit authority to conduct this sampling program under the economic impact analysis statute, they have instead cited to other authority as the purported basis to compel sampling for unregulated compounds.

51. Defendants have stated that “Both s. 283.55(2)(a), Wis. Stats, and s. NR 205.07(1)(d), Wis. Adm. Code allows authorized representatives of the department to enter the permittee’s premises to access records, perform inspection of facility [sic] and equipment, and to take samples of permitted discharges.” Exhibit 2, Page 1, Section 1.

52. Defendants further state, “[a]dditionally, s. 283.55(1)(e), Wis. Stats, requires that the permittee ‘provide such other information as the department finds is necessary to identify the type and quantity of any pollutants discharged from the point source.’” *Id.*

53. However, despite Defendants’ claims to the contrary, neither of the statutes nor the regulation cited provide explicit authority to Defendants to implement and enforce their PFAS sampling program.

54. Wis. Stat. § 283.55(2)(a) provides:

Any duly authorized officer, employee or representative of the department shall have right to enter upon or through any premises in which an effluent source that is required to be covered by a permit issued under s. 283.31 is located or in which any records required to be maintained by this section are located, and may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required by this section, and *sample any effluents which the owner and operator of such source is required to sample under this section.*

55. Wis. Stat. § 283.55(2)(a) does not, itself, convey any new regulatory authority upon Defendants. It merely allows Defendants to conduct the same sampling that an owner or operator is required to undertake under that section.

56. Likewise, Wis. Stat. § 283.55(1)(e)'s requirement to "provide such other information" also does not require any facility to participate in the sampling program as required by Defendants. In fact, sampling is covered under Wis. Stat. § 283.55(1)(d).

57. Under Wis. Stat. § 283.55(1)(d) an owner or operator shall:

Sample 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.

58. Since 283.55(1)(d) already relates to sampling, it is clear that the legislature intended for 283.55(1)(e)'s requirement to provide information to mean something *other* than sampling.

59. Finally, the cited regulation, Wis. Admin. Code § NR 205.07(1)(d) also does not allow for Defendants sampling program. It requires each WPDES permit to include provisions stating:

(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.

60. Under the permit conditions required by NR 205.07(1)(d), the Defendants may only sample "for the purposes of assuring permit compliance."

61. Defendants' primary purpose here is to prepare an economic impact analysis, *not* permit compliance. In fact, Defendants' FAQ document never mentions that they are conducting sampling for permit compliance of any kind.

62. Indeed, given there are no standards for *any* of the compounds Defendants' sampling program is looking for, it is not even possible that the sampling program is being conducted for the purposes of permit compliance.

Impact on WMC Members

63. Defendants' unlawful sampling program forces businesses to open their doors to Defendants so that Defendants can sample for compounds that are not regulated under state law, and may never be regulated under state law, and then make those sample results public in a way that stigmatizes those businesses as polluters, even though they are in full compliance with state law and their state-issued permits.

64. Engaging in the type of fishing expedition that the sampling program establishes is unlawful because Defendants lack statutory authority to take such actions, and is additionally irresponsible and unfair to permittees in Wisconsin.

65. Defendants' unlawful sampling program will cause irreversible reputational damage to Plaintiff's members.

66. Further, since it is unknown how Defendants selected the businesses to be tested so far, it is unknown if other businesses will similarly be forced to participate in the future, or if Defendant will attempt to sample for additional unregulated compounds at some point in the future through some expansion of this sampling program or through the creation of additional sampling programs.

67. In the absence of promulgated PFAS standards for these compounds, and without conducting influent sampling to ascertain background levels of PFAS, the publicly released sampling data will lack the context necessary to enable the public to make informed judgments

about the results. Businesses, and the brands they have spent decades to develop, will be irreparably harmed by the stigmatization flowing from Defendants' sampling program.

68. Further, as this program is being implemented and enforced without statutory authority, Plaintiff and Plaintiff's members are harmed as taxpayers.

CLAIM ONE – DECLARATION THAT DEFENDANTS' PFAS SAMPLING PROGRAM GOES BEYOND DEFENDANTS' STATUTORY AUTHORITY AND IS UNLAWFUL

69. All allegations made in this complaint are incorporated as if fully set forth herein.

70. Our Supreme Court has "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, 697, 478 N.W.2d 582, 585 (1992).

71. As explained, *supra*, Defendants lack statutory authority to implement their sampling program.

72. As a result, Plaintiff's members are harmed because they are being subjected to an unlawful sampling program, and may be identified as discharging compounds for which Defendants have no authority to even regulate.

73. Plaintiffs seek a declaration that the sampling program exceeds Defendants' statutory authority and is unlawful.

CLAIM TWO – IN THE ALTERNATIVE OR IN ADDITION TO, A DECLARATION THAT DEFENDANTS' SAMPLING PROGRAM VIOLATES WIS. STAT. § 227.10(2m) AND IS UNLAWFUL

74. All allegations made in this complaint are incorporated as if fully set forth herein.

75. To the extent this Court finds Defendants have *any* authority for the sampling program challenged herein, that authority is only *implied* authority, not *explicit* authority as required by state law.

76. Pursuant to Wis. Stat. § 227.10(2m), “[n]o 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” statutory rulemaking procedures.

77. Defendants each meet the definition of “agency” under Wis. Stat. § 227.01(1).

78. Defendants are implementing and enforcing a requirement that certain WPDES permit holders participate in their sampling program to develop an economic impact analysis for a proposed rule.

79. Defendants claim authority for the sampling program under Wis. Stat. §§ 283.55(1)(e) and (2)(a) as well Wis. Admin. Code § NR 205.07(1)(d). However, neither of those statutes nor the regulation cited provide Defendants with the required *explicit* authority to conduct this particular sampling program for PFAS.

80. As a result, Plaintiff’s members are harmed because they are being subjected to an unlawful sampling program, and may be identified as discharging compounds for which Defendants have no authority to even regulate.

81. Plaintiff seeks a declaration that Defendants’ attempts to implement and enforce their PFAS sampling program violates Wis. Stat. § 227.10(2m) and is unlawful.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court:

1. Declare that Defendants’ sampling program, as described herein, exceeds the scope of Defendants’ statutory authority and is unlawful;

2. In the alternative, or in addition to, Declare that Defendants' sampling program violates Wis. Stat. § 227.10(2m) and is unlawful.
3. Enjoin Defendants from further implementing or enforcing the sampling program, and from releasing any information regarding the samples unlawfully taken thereunder; and
4. Such other relief as the Court deems appropriate.

Dated this 29th day of March, 2021.

Respectfully submitted,

**WISCONSIN MANUFACTURERS &
COMMERCE, INC.**

/s/ Electronically signed by Lucas T. Vebber

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