



# JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES

COMMITTEE CO-CHAIRS: SENATOR STEVE NASS AND REPRESENTATIVE ADAM NEYLON

Emergency Rule 2045

## Report to the Legislature Emergency Rule 2045 The Joint Committee for Review of Administrative Rules Produced pursuant to 227.26 (2) (g), Stats.

Emergency Rule 2045, promulgated by the Wisconsin Department of Natural Resources (DNR), regulates firefighting foam that contains certain PFAS contaminants, pursuant to 2019 Wisconsin Act 101. Act 101 provided the DNR with limited rulemaking authority, but only as directed specifically by the act. Act 101 provided an exception to state statute by allowing this Emergency Rule to remain in place for up to 3 years (usually an emergency rule can only remain in place for 150 days, with the possibility of up to two 60-day extensions that can be granted by JCRAR).

### Description of Problem

The Joint Committee for Review of Administrative Rules (JCRAR) held a public hearing on Emergency Rule 2045, relating to the regulation of firefighting foam that contains certain PFAS contaminants, on December 18, 2020. The JCRAR co-chairs (Sen. Steve Nass and Rep. Joan Ballweg), members of the Wisconsin Natural Resources Board, and various other groups expressed significant concerns that part of the contents of EmR 2045 greatly exceeded the limited statutory authority provided to the DNR in 2019 Act 101.

On August 11, 2020, the JCRAR Co-Chairs submitted a letter to the Wisconsin Natural Resources Board to notify them that the rule as drafted went beyond the statutory authority and legislative intent granted the DNR in Act 101. The NR Board temporarily delayed EmR 2045, but in October 2020 voted 5-2 to publish it, without addressing the issues raised by the JCRAR Co-Chairs or various other groups. The DNR published EmR 2045 on Dec. 4, 2020.

### Arguments In Favor of Suspension

- *Portions of EmR 2045 exceeds the statutory authority delegated to the DNR by the Legislature in 2019 Wisconsin Act 101 to regulate certain PFAS containing firefighting foam, and therefore the rule fails to comply with legislative intent of the Legislature.*
- *Creation and use of a definition of the term “foam contaminated material” is not authorized under Act 101. The statute regulates foam only. Adding this definition expands the scope of regulation authorized under the statute.*
- *Act 101 does not authorize the creation and regulation of individual PFAS treatment indicator parameters set out in Table 1 of EmR 2045. In fact, the State Senate specifically rejected an*

*amendment on this topic when it was debated on the floor. The Assembly ruled the same amendment non-germane.*

- *Act 101 requires notification of foam discharge into the environment only, not mitigation. Therefore, cross references to the Wisconsin Spills Law (Ch. NR 706), which deals with cleanup, remediation, and liability, is an unintended expansion of regulatory authority by the DNR and not authorized under the act passed by the Legislature.*
- *JCRAR left in place strong foam treatment technology requirements in EmR 2045, estimated by some to be the most stringent PFAS treatment standards in the United States.*
- *The JCRAR co-chairs attempted to work with the DNR to address concerns with the rule before publication, however the Department refused to address the issues raised by the co-chairs.*

### **Arguments Against Suspension**

- *PFAS contamination from firefighting foam poses a significant health hazard and has particularly harmed residents in certain areas of the state, including Marinette. The rule is necessary to regulate and mitigate this problem.*
- *The DNR contended they believed the rule was proper as drafted and assert that the Department has broad regulatory authority that allowed them to promulgate it as written.*
- *Some argued that they supported the rule because it was stronger than the statute, Act 101, in regulating PFAS substances, and that Act 101 did not go far enough to address PFAS contamination in the state. (It should be noted that agencies are prohibited from promulgating and enforcing an administrative rule that exceeds authority provided to it by statute).*

### **Action by Joint Committee for Review of Administrative Rules**

On December 18, 2020, the Joint Committee for Review of Administrative Rules (JCRAR) held a public hearing and executive session on Emergency Rule 2045. The committee passed the following motion on a 6-4 vote, objecting to the rule in part (YES: Nass, Ballweg, Stroebel, Feyen, Neylon, and Quinn; NO: Larson, Wirsch, Hebl, and Subeck):

*Moved, that the Joint Committee for Review of Administrative Rules, pursuant to s. 227.26 (2) (d), Stats., partially suspend Emergency Rule 2045, relating to regulating firefighting foam that contains certain contaminants (DNR), as indicated in items A. to N., below, on the grounds that the emergency rule fails to comply with legislative intent and an absence of statutory authority:*

- A. The phrase "or foam contaminated materials" in s. NR 159.02 (3), as created in SECTION 1 of Emergency Rule 2045.*
- B. Section NR 159.03 (15), as created in SECTION 1 of Emergency Rule 2045.*
- C. Section NR 159.03 (20). As created in SECTION 1 of Emergency Rule 2045.*
- D. The phrase "so as to immobilize, remove, or destroy the contaminant" in s. NR 159.03 (25), as created in SECTION 1 of Emergency Rule 2045.*

- E. The phrase “, according to ch. NR 706,” in s. NR 159.05 (1) (a) and (b), as created in SECTION 1 of Emergency Rule 2045.
- F. The Note in Section NR 159.05(1) as created in SECTION 1 of Emergency Rule 2045.
- G. The phrase “and any foam contaminated materials” in s. NR 159.08 (intro.), as created in SECTION 1 of Emergency Rule 2045.
- H. The phrase “or foam contaminated materials” in s. NR 159.08 (1) (a), as created in SECTION 1 of Emergency Rule 2045.
- I. Section NR 159.08 (1) (b) 4., Table 1, and Note, as created in SECTION 1 of Emergency Rule 2045.
- J. The phrase “indicator parameter responses” in s. NR 159.08 (1) (b) 5. (title), as created in SECTION 1 of Emergency Rule 2045.
- K. The phrase “If the concentration of PFAS in a wastewater sample exceeds a treatment indicator parameter action level listed in Table 1 or treatment indicator parameter level in a modified list approved under subd. 6, the person responsible for the treatment of foam shall take one or more of the following actions until the indicator parameter action level is achieved again:” in s. NR 159.08 (1) (b) 5. (intro.), as created in SECTION 1 of Emergency Rule 2045.
- L. Section NR 159.08 (1) (b) 5. a. to c., as created in SECTION 1 of Emergency Rule 2045.
- M. Section NR 159.08 (1) (b) 6., as created in SECTION 1 of Emergency Rule 2045.
- N. The phrase “and foam contaminated materials” in s. NR 159.08 (2) (intro.), (a), and (b), as created in SECTION 1 of Emergency Rule 2045.

On December 18, 2020, the Joint Committee for Review of Administrative Rules (JCRAR) voted 6-4 (YES: Nass, Ballweg, Stroebel, Feyen, Neylon, and Quinn; NO: Larson, Wirch, Hebl, and Subeck) to introduce LRB-0824 and LRB-0889, which maintain the committee’s suspension of portions of EmR 2045, relating to regulation of firefighting foam containing certain PFAS contaminants. The bills were not introduced in the 2019-20 legislative session, in accordance with 227.19 (5) (g).

On January 21, 2021, the Joint Committee for Review of Administrative Rules voted 6-4 (YES: Nass, Neylon, Stroebel, Bradley, August, Spiros; NO: Roys, Larson, Hebl, Subeck) to introduce LRB 0824 and LRB 0889, which support the suspension of portions of Emergency Rule 2045 by the joint committee. The bills were introduced as Senate Bill 34 and Assembly Bill 13 in the 2021-22 legislative session.

Passage of one of these bills in support of the JCRAR suspension would permanently remove the DNR’s ability to enforce the suspended portions of Emergency Rule 2045, relating to the definition of “foam contaminated material,” references to requirements under NR ch. 706 (the Wisconsin Spills Law), and setting effluent treatment indicator parameter standards.