

Minnesota Pollution Control Agency

Resource Management and Assistance Division

REQUEST FOR COMMENTS

Planned New Rules Governing Currently Unavoidable Use Determinations about Products Containing Per-and polyfluoroalkyl substances (PFAS), Revisor's ID Number R-4837

NOTICE IS HEREBY GIVEN that the Minnesota Pollution Control Agency (MPCA) is requesting comments on planned new rules for the MPCA's determination of Currently Unavoidable Uses of PFAS in products. This rulemaking is referred to as the **PFAS in Products Currently Unavoidable Use Rule**. The main purpose of this rulemaking is to establish criteria and processes through which the MPCA will make decisions on what if any uses of intentionally added PFAS will qualify as currently unavoidable uses in products sold, offered for sale, or distributed in Minnesota. Any such determinations must be published by rule by the MPCA by January 1, 2032, as required by [Minnesota Statutes 116.943, subdivision 5\(c\)](#). Comments are requested from affected or interested parties. Comments should be submitted in writing as described in the [Comments](#) section below.

This Request for Comments is the MPCA's legal notice of its intent to begin rulemaking. This is an opportunity to provide information or comment on any relevant issues related to this rulemaking that we need to consider. For example, we recognize that the definition of "currently unavoidable use" in the law leaves terms such as "reasonably available" alternatives not fully defined. If you have input, information or data related to future MPCA determinations of "currently unavoidable use" of PFAS in products that you wish to share with us to inform our decisions, please submit that information. Draft rule language is not available at this time. We want your written comments on the ideas described under the [Subject of Rules](#) section.

Submitting your ideas and information at this early stage in rulemaking allows us more time to address issues that may come up and helps to ensure informed decision-making on our part. If the planned rules affect you in any way, the MPCA encourages you to participate in the rulemaking process.

Alternative Format/Accommodation. Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make such a request, please contact the [MPCA Contact Person](#).

Statutory Authority. Minnesota Statutes 116.943, subdivision 5©; and *Minnesota Statutes* 116.943, subdivision 9.

Subject of Rules. The MPCA requests comments on planned new rules governing determinations of currently unavoidable use of PFAS in products. Beginning January 1, 2032, products containing intentionally added PFAS which are sold, offered for sale, or distributed in the state are banned unless the MPCA determines by rule that the use(s) of PFAS they contain are currently unavoidable uses. [See [Minnesota Statutes 116.943](#) for the complete law.] Related subdivisions in the law include the following:

Several definitions in subdivision 1:

- (j) "Currently unavoidable use"
- (l) "Intentionally added"
- (n) "Manufacturer"
- (p) "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS"
- (q) "Product"
- (r) "Product component"

Prohibitions in subdivision 5(c):

(c) "Beginning January 1, 2032, a person may not sell, offer for sale, or distribute for sale in this state any product that contains intentionally added PFAS, unless the commissioner has determined by rule that the use of PFAS in the product is a currently unavoidable use. The commissioner may specify specific products or product categories for which the commissioner has determined the use of PFAS is a currently unavoidable use. The commissioner may not determine that the use of PFAS in a product is a currently unavoidable use if the product is listed in paragraph (a)." [Ban of certain products containing intentionally added PFAS as of January 1, 2025.]

Rulemaking authority in subdivision 9:

"The commissioner may adopt rules necessary to implement this section. [Section 14.125](#) does not apply to the commissioner's rulemaking authority under this section." Subdivision 9 gives authority to the MPCA commissioner to adopt rules necessary to implement the entirety of Minnesota Session Law – 2023, chapter 60, article 3, section 21. The MPCA reads this to provide authority to make any clarifications or define any processes necessary to implement the law, including the currently unavoidable use definition and the determination process.

The definitions in subdivision 1 listed above are a starting point of related terms possibly requiring clarification. You may believe that other terms should be defined or require additional clarification to make clear whether any products and product components sold by your organization, or its suppliers may be considered a currently unavoidable use of intentionally added PFAS. We invite you to submit comments and suggestions to that effect, with as much specificity and supporting information as you are able to share.

In developing the currently unavoidable use rule, the MPCA would appreciate comments on the following questions:

- 1) Should criteria be defined for "essential for health, safety, or the functioning of society"? If so, what should those criteria be?
- 2) Should costs of PFAS alternatives be considered in the definition of "reasonably available"? What is a "reasonable" cost threshold?
- 3) Should unique considerations be made for small businesses with regards to economic feasibility?
- 4) What criteria should be used to determine the safety of potential PFAS alternatives?
- 5) How long should PFAS currently unavoidable use determinations be good for? How should the length of the currently unavoidable use determination be decided. Should significant changes in available information about alternatives trigger a re-evaluation?

- 6) How should stakeholders request to have a PFAS use be considered for currently unavoidable use determination by the MPCA? Conversely, could stakeholders request a PFAS use not be determined to be currently unavoidable? What information should be submitted in support of such requests?
- 7) In order to get a sense of what type of and how many products may seek a currently unavoidable uses determination, please share what uses and products you may submit a request for in the future and briefly why. There will be a future opportunity to present your full argument and supporting information for a possible currently unavoidable uses determination.
- 8) Should MPCA make some initial currently unavoidable use determinations as part of this rulemaking using the proposed criteria?
- 9) Other questions or comments relating to defining currently unavoidable use criteria and the process MPCA uses to make currently unavoidable use determination.

Parties Affected. The new rule could affect any manufacturer of a product sold, offered for sale, or distributed in the state that contains intentionally added PFAS. The definition of manufacturer is provided in [subdivision 1\(n\)](#):

““Manufacturer” means the person that creates or produces a product or whose brand name is affixed to the product. In the case of a product imported into the United States, manufacturer includes the importer or first domestic distributor of the product if the person that manufactured or assembled the product or whose brand name is affixed to the product does not have a presence in the United States.”

Manufacturers may be located in Minnesota or anywhere outside the State, as long as their product containing intentionally added PFAS is being sold , offered for sale, or distributing a product (or product component) in the state by a person.

Note that in some cases manufacturer may include people or entities not typically thought of as manufacturers, such as retailers which have their brand name or a private label brand name, they own affixed to products. Manufacturer does not include any person who sells, offers for sale, or distributes in Minnesota:

- Products for which federal law governs the presence of PFAS in the product in a manner that preempts state authority;
- A product regulated under section 325F.072 (firefighting foam) or 325F.075 (food packaging);
- A used product; or
- Products which contain a pesticidal or soil amending ingredient regulated by and reported to the Minnesota Department of Agriculture, unless the commissioner of agriculture approves the action.

While subdivision 8 of the law also exempts them from prohibitions and testing and certificate of compliance requirements, “manufacturers” of prosthetic or orthotic devices or any products that are medical devices or drugs or that are otherwise used in a medical setting or in medical applications regulated by the United States Food and Drug Administration are not exempted from information submittal requirements.

Where to Get More Information. Information about this rulemaking is available on the rulemaking website at <https://www.pca.state.mn.us/get-engaged/pfas-in-products-currently-unavoidable-use>. As stated above, we do not yet have draft rule language. If you are interested in being notified of opportunities for public comment, when the draft rules are available for review, and of other

activities relating to this (or other MPCA rulemakings) register for GovDelivery bulletins at <https://public.govdelivery.com/accounts/MNPCA/subscriber/new>.

Comments. Interested parties may submit written comments or information on these possible rules until **4:30 p.m. on March 1, 2024**. Submit written comments or information to the Office of Administrative Hearings (OAH) Rulemaking eComments website at <https://minnesotaoah.granicusideas.com/>. Any questions about submitting comments via the Rulemaking eComments website should be directed to William Moore, OAH, telephone 651-361-7893, email William.T.Moore@state.mn.us. You may view frequently asked questions about the OAH eComments website at https://mn.gov/oah/assets/ecomments-faq_tcm19-82012.pdf. Comments received are public and will be available for review at the OAH Rulemaking eComments website at <https://minnesotaoah.granicusideas.com/discussions> and at the OAH, 600 North Robert Street, P.O. Box 64620, St. Paul, Minnesota 55164-0620.

The MPCA will not publish a Notice of Intent to Adopt the rules until more than 60 days have elapsed from the date of this RFC.

The MPCA does not anticipate that the rule amendments will require a local government to adopt or amend an ordinance or other regulation under *Minnesota Statutes*, section 14.128. Local governments may submit written information to the contrary.

The MPCA requests any information pertaining to the cumulative effect of the rule amendments with other federal and state regulations related to the specific purpose of the rule. Cumulative effect means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules.

NOTE: The MPCA will carefully consider all comments received in response to this RFC. However, these comments will not necessarily be included in the formal rulemaking record submitted to the Administrative Law Judge (ALJ) if and when a proceeding to adopt rules is started. The MPCA is required to submit to the ALJ only the written comments received in response to the draft rules after they are proposed with a Notice of Intent to Adopt Rules. If you submit comments during the RFC stage of rule development and want to ensure that the ALJ reviews them, you should resubmit your comments after the rules are formally proposed with a Notice of Intent to Adopt the rules.

MPCA Contact Person. The MPCA contact person is Quinn Carr at the MPCA, 520 Lafayette Road North, St. Paul, Minnesota 55155-4194; telephone 651-757-2722, email quinn.carr@state.mn.us. Technical questions on the planned rules should be submitted to Maya Gilchrist, telephone 651-757-2685, email Maya.Gilchrist@state.mn.us. You may also call the MPCA at 651-296-6300 or 1-800-657-3864; use your preferred relay service.



Katrina Kessler, Commissioner
Minnesota Pollution Control Agency

December 8, 2023

Date