

Minnesota Pollution Control Agency
520 Lafayette Road
Saint Paul, MN 55155



March 27, 2026

Re: Draft Rule Concept Summary for PFAS in products: Currently unavoidable use (CUU) rule

Minnesota Center for Environmental Advocacy (“MCEA”) appreciates the opportunity to comment on the Minnesota Pollution Control Agency’s (“MPCA”) Draft Rule Concept Summary for the Currently Unavoidable Use Rule. MCEA generally supports many of MPCA’s preliminary definitions, and we propose a few modifications and considerations that will help uphold the Legislature’s intent to strictly regulate the continued use of per- and polyfluoroalkyl substances (“PFAS”) in Minnesota starting in 2032.

Below are MCEA’s responses to some of the questions posed by MPCA.

5. Do you have any recommended changes or other considerations that you think the MPCA should take into account when defining the term "essential for health, safety, or the functioning of society"? (Please review the proposed definitions prior to answering)

MCEA has three suggestions for MPCA as it looks to define the term “essential for health, safety, or the functioning of society. The first is the recommendation to explicitly include process in the list of products and components where the need for PFAS is considered. This can be easily accomplished by adding “or process” in the appropriate part of the definition:

“Essential for health, safety, or the functioning of society” means a use of a PFAS in a product, ~~or~~ component, or process when the function provided by the PFAS is, at the time of a determination by the commissioner, necessary for the product, component, ~~or~~ spare or replacement component, or process to perform as intended, such that the unavailability of the PFAS for use in the product or process would cause the product’s or process’s service to be unavailable.

Second, MCEA suggests slight modifications to the definition of “extreme conditions of use” to honor the type of conditions that are indeed extreme. This can be accomplished by adding “very” (or a similar qualifier) before the condition being described. These changes are needed to reflect the fact that products containing intentionally added PFAS

are, for example, currently used in high operating temperatures that should not be considered extreme. A nonstick pan used in a household kitchen should not be considered an extreme use, but without some qualifier to “high or low operating temperatures,” it could be argued that kitchen range temperatures are high enough to meet this definition. Care should be taken to modify this definition to avoid this type of outcome.

MCEA’s third suggestion relates to the use of the word “significant” as a threshold determination for whether the use of PFAS in a product, component, or process is essential for health, safety, or the functioning of society. The proposed definition of “essential for health, safety, or the functioning of society” permits exemptions where the absence of PFAS would result in a “*significant* increase in negative health outcomes,” an “inability to mitigate *significant* risks,” or a “*significant* disruption” of services on which society relies. “Significant” serves as the operative threshold for determining when the currently unavoidable use exemption applies, but the absence of a clear standard risks undermining the rule’s core purpose. To avoid this outcome, MPCA should provide additional guidance on what constitutes a “significant” impact by anchoring the term in existing Minnesota environmental law.

The Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. ch. 116D, provides a clear framework. Under MEPA, an environmental impact statement (“EIS”) is required if a proposed project has the “potential for significant environmental effects.”¹ This threshold is the key decision point in the environmental review process. If it is met, then an EIS, the most thorough level of environmental review, must be prepared.² If not, then a more limited environmental assessment worksheet (“EAW”) is sufficient, and the project may proceed forward without more environmental study. In this way, “significant” serves as a gatekeeping standard that decides when increased regulatory oversight is necessary. Therefore, the term has considerable legal and practical importance, much like in the proposed currently unavoidable use rule.

Under MEPA, the threshold for “potential significant” effects is exceptionally high. Although MEPA requires only the *potential* for significant environmental effects, responsible government units in practice “almost invariably conclude . . . that the

¹ Minn. Stat. § 116D.04, subd. 2a(a).

² *Id.*

proposed project has no potential for significant environmental impact.”³ As a result, environmental impact statements are rare. For example, in 2020, sixty-three EAWs resulted in no findings of potential significant environmental impacts.⁴ In 2021, 2022, and 2023, a total of 198 mandatory EAWs were completed, while only one discretionary EIS was completed.⁵ In 2024, forty-seven EAWs were completed, none of which resulted in a finding of potential significant effects.⁶ Similar patterns persist across other years, with EIS preparation consistently representing the exception rather than the rule.⁷ These figures are striking because they reflect the operation of a threshold that is triggered by the mere *possibility* of significant effects. Yet even under this comparatively permissive framing, the standard is seldom satisfied, exemplifying the high bar that is “potential for significant” effects.

Case law reinforces this understanding. Minnesota courts have a history of upholding determinations that projects do not present the “potential for significant environmental effects,” even where the underlying facts suggest nontrivial environmental concerns. For example, in *Iron Rangers Responsible Ridge Action v. Iron Range Resources*, the Minnesota Court of Appeals upheld a finding of no significant environmental effects despite major potential forest fragmentation resulting from the project’s construction of 200 to 250 housing units.⁸ Another example is *In re American Iron & Supply Co.’s Proposed Metal Shredding Facility*, where the Minnesota Court of Appeals affirmed a finding of no potential significant environmental effects regarding a proposed metal shredding facility, despite the potential cumulative impacts on air, soil, and water given the project’s capacity to shred up to 100 tons of metal scrap per hour.⁹ These examples reflect the

³ Stacy Lynn Bettison, *The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review*, 26 WILLIAM MITCHELL L. REV. 967, 970 (2000).

⁴ Kevin Swanberg, *No Alternative: The Failure of the Minnesota Environmental Policy Act to Consider Project Alternatives and Proposed Remedies*, 49 MITCHELL HAMLINE L. REV. 126, 135 (2023).

⁵ *Mandatory Environmental Review Categories: Legislative Assessment Report*, MINN. ENV’T QUALITY BD. 11 (Dec. 1, 2024), https://www.eqb.state.mn.us/sites/eqb/files/2024_mandatory_category_report_2.pdf.

⁶ *Minnesota Environmental Review Performance Report*, MINN. ENV’T QUALITY BD. 3 (March 7, 2025), <https://www.eqb.state.mn.us/sites/eqb/files/2024%20performance%20report.pdf>.

⁷ Bettison, *supra* note 3, at 9-10; Swanberg, *supra* note 4.

⁸ 531 N.W.2d 874 (Minn. Ct. App. 1995).

⁹ 604 N.W.2d 140 (Minn. Ct. App. 2000).

demanding nature of the potentially “significant” threshold under MEPA. “Significant” functions as a high bar, even when paired with the comparatively lenient concept of “potential.”

The proposed PFAS rule should be understood against this backdrop. Amara’s Law establishes a broad prohibition on the use of PFAS in products, reflecting a legislative judgment that these substances pose substantial risks to human health and the environment.¹⁰ Unlike MEPA, which requires only the *potential* for significant environmental effects, the currently unavoidable uses definition requires a showing that the absence of PFAS would *result in* a significant disruption or harm. In this respect, the currently unavoidable use standard is more demanding than MEPA’s threshold.

The currently unavoidable use exemption is intended to be a limited carveout for uses that are truly essential and for which no feasible alternatives exist. If “significant” is interpreted expansively, however, products could qualify for exemption based on relatively modest disruptions or speculative harms, eroding the effectiveness of the ban. To prevent this outcome, MPCA should clarify that “significant” in the currently unavoidable use definition reflects a high threshold consistent with its use in MEPA. Defining “significant” as a stringent standard ensures that the exemption is applied in a manner that is both consistent with existing Minnesota environmental law and faithful to legislative intent.

By drawing on MEPA’s existing framework, MPCA has an opportunity to provide clear, administrable guidance that preserves the narrow scope of the exemption while maintaining the integrity of Amara’s Law. MPCA should revise the proposed definition to either define “significant” explicitly or provide interpretive guidance that reflects its function as a demanding threshold. Grounding that interpretation in Minnesota’s existing environmental review framework would promote consistency and ensure that the currently unavoidable use exemption remains limited to circumstances where the consequences of unavailability are truly substantial and societally consequential.

6. Do you have any recommended changes or other considerations that you think the MPCA should take into account when defining the term "alternative"? (Please review the proposed definitions prior to answering)

MCEA is concerned that the requirement that an alternative “result in a functionally equivalent product” sets too high of a standard and it may exclude reasonable alternatives. The definition should allow an acceptable tolerance of functionality

¹⁰ Minn. Stat. § 116.943.

difference so that alternatives are not limited to perfect like-for-like swaps. Here is a suggested change:

"Alternative" means a non-PFAS chemical, substance, material, manufacturing process change, non-chemical change, or other product that, if used in place of a PFAS or PFAS-containing product or process would result in a comparably functionally equivalent product or process, relative to its primary function.

7. Do you have any recommended changes or other considerations that you think the MPCA should take into account when defining the term "reasonably available"? (Please review the proposed definitions prior to answering)

MCEA appreciates that MPCA's proposed definition of "reasonably available" includes non-PFAS alternatives that can perform "comparably" to the PFAS being considered for replacement. The final definition of "reasonably available" must continue to include this concept: that the available non-PFAS alternative need not perform identically to the PFAS being replaced.

MCEA also appreciates that MPCA's determination of whether an alternative is available does not hinge on cost. This approach correctly focuses the inquiry on the alternative's performance independent of cost.

MPCA should tweak the definition of "reasonably available" to include process and to clarify that the alternatives focus is on the product function:

"Reasonably available" means that one or more alternatives to a PFAS that result in a product, component or process that can perform comparably to the ~~PFAS~~one being considered for replacement ~~in a product, or component, or process~~ and is currently available or may be procured in sufficient quantity. PFAS alternatives that are in use and perform comparably to products, ~~or components, or processes~~ that contain or use PFAS are considered "reasonably available." Conditions of current reasonable availability may change over time as a result of new research, or innovation, or increased demand.

11. The agency is seeking feedback on the potential that the initial positive CUU determination duration for existing products will expire eight years from the date of issuance regardless of product category. This is intended to stagger renewal deadlines and ease the administrative burden of processing renewals.

MCEA supports MPCA's approach to staggering renewals to ease administrative burden. While eight years is a long time to allow the continued use and sale of a product

containing PFAS, one way to balance this lengthy exemption period is to allow the public to petition for MPCA to reexamine a CUU exemption prior to its expiration date. This concept is explained in greater detail below, in response to question 20. Related, MPCA should consider whether shorter CUU exemption periods make sense for products or industries that are rapidly evolving or where the use of the PFAS performs a non-complex role. In these situations, it is likely that alternatives will become available more rapidly, and having a shorter exemption period makes sense.

13. What are the potential ongoing costs to society if the commissioner issues a positive currently unavoidable use determination for the continued use of PFAS within a product or product category? (For example: environmental, human health, or remediation costs)

The potential costs to society for continued PFAS use in Minnesota are severe, and much of the costs to the environment and human health can be difficult to quantify, as environmental costs often are. The examples of costs discussed below should not be considered holistic, but are simply examples of tangible, direct costs to the public that result from PFAS contamination in the environment. Each CUU determination granted by MPCA runs the risk of further contributing to the crisis, and thus these costs.

The first tangible cost to society is the funding required to effectively remove PFAS from publicly owned wastewater treatment facilities (“WWTFs”) before the effluent is discharged into the environment, either as water or biosolids. PFAS treatment at WWTFs is prohibitively expensive for many facilities. Research led by Dr. Ali Ling, provided to the MPCA in a 2023 report, estimates that treatment costs in Minnesota over the next 20 years could be up to \$28 billion. These expenses on a per-pound removal basis will be especially high for small municipalities. Although the PFAS does not originate at these facilities, they will be responsible for treatment and removal as MPCA rolls out new permits that impose effluent limitations on a facility’s PFAS discharges.

Another place where major direct costs on society appear in PFAS remediation is at public drinking water utilities. PFAS-producing corporations like 3M and DuPont have collectively contributed over \$10 billion dollars through litigation settlements to water utilities to remediate PFAS in drinking water. These large settlements again illustrate the high costs associated with treatment. Focusing on Minnesota, the state received a settlement from 3M that sent approximately \$720 million towards PFAS remediation in the East Metro region of the Twin Cities. This funding goes towards treatment plant construction and retrofits, in-home treatment, and more. In the eight years, this money has already almost run dry, and public water utilities in the East Metro are looking for other funding sources to upgrade facilities or dig new wells to ensure they can provide clean drinking water.

This dovetails with upcoming PFAS maximum contaminant levels that will take effect

soon. These regulations will require additional testing, planning, and costly treatment upgrades to water utilities across the state. The burden will fall on public utilities to remove PFAS to near non-detect levels, and these public utilities will need funding to pay for needed upgrades.

For both drinking water and wastewater remediation, the extremely high costs make source reduction the best way to mitigate this crisis in a cost-effective manner. Each CUU exemption granted by the commissioner will be an additional potential source of PFAS to Minnesota's environment. As explained above, there are massive direct costs to PFAS removal and remediation, but there are also substantial indirect costs that MPCA should consider as it moves forward with rulemaking.

One of those indirect costs is aquatic recreation. According to the Minnesota Department of Natural Resources, fishing in Minnesota generated \$5.9 billion dollars in economic activity in 2022 and supports almost 30,000 jobs annually. Environmental PFAS contamination puts this economic and cultural value at risk. PFAS concentrations in fish tissue are widespread across the state, often at levels of health concern. The potential economic impacts are not evenly spread across the state, communities, or people. There are many communities in Minnesota that rely more heavily on fish for their diet, cultural importance, and tourism opportunities, and these populations will be disproportionately impacted from PFAS. In addition, eating PFAS contaminated fish poses higher risks for sensitive populations, increasing morbidity across the state and adding additional financial costs across Minnesota. Continued release of PFAS into Minnesota's environment could result in long-term decreases in the health of the state's fish population, and the ability of Minnesotans to safely consume fish caught in state, due to PFAS accumulation in fish tissue. There are both negative economic and negative cultural effects to this with inherent value beyond monetary cost estimates.

The major direct costs to taxpayers, as discussed here, are remediation and treatment costs associated with drinking water utilities and municipal wastewater treatment plants. These costs are extreme, and in many cases prohibitive, without outside sources of money like legal settlements. Agency-sponsored research and examples across the East Metro portend a massive bill that MPCA can lower by strictly regulating PFAS through narrow and limited CUU exemptions. Indirect costs to Minnesota's outdoor recreation and tourism economies are also likely consequences of continued use of PFAS, as well as heavy cultural and health costs to those communities that rely on fish.

20. Do you have any additional questions or comments regarding the PFAS in products: Currently unavoidable use rule?

MPCA should develop a framework for the public to petition for review of a CUU determination within the exemption period. This is to account for the fact that alternatives that were not available when MPCA approved the CUU exemption may become

available before the exemption is up for renewal. The public should be able to request MPCA reexamine a CUU determination to reassess whether a newly available alternative means that the CUU exemption should no longer apply. This is consistent with MPCA's understanding that "[c]onditions of current reasonable availability may change over time as a result of new research or innovation." If an alternative becomes available either through innovation or ramped up production, MPCA must allow a mechanism for reexamining a CUU exemption before the five-year exemption period expires.

MCEA wants to underscore MPCA's requirement that sales of products containing intentionally added PFAS after 2032 is only permitted if a "positive CUU determination" has been made by MPCA. Amara's Law requires an affirmative finding by MPCA "that the use of PFAS in the product is a currently unavoidable use." The draft rule is consistent with this understanding, and MPCA should resist any suggestion to allow for default CUU approvals without an explicit determination from MPCA.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Jay Eidsness".

Jay Eidsness
Senior Staff Attorney
jeidsness@mncenter
Andrew Hillman
Water Resources Specialist
ahillman@mncenter.org
Minnesota Center for Environmental Advocacy