STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

and

LEATHER RICH, INC.,
1250 Corporate Center Drive,
Oconomowoc, WI 53066

Plaintiffs,

v.

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

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

and

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

Defendants.

Case Type: Declaratory Judgment

Case Code: 30701

COMPLAINT

Wisconsin Manufacturers and Commerce, Inc. ("WMC") and Leather Rich, Inc. ("LRI"), (collectively "Plaintiffs"), through their undersigned counsel, hereby allege the following as their complaint:

INTRODUCTION

1. This action seeks declaratory and injunctive relief from certain unlawfully adopted standards and policies of Wisconsin Department of Natural Resources ("DNR"), the Wisconsin Natural Resources Board ("NRB"), and Mr. Preston Cole, in his official capacity as Secretary of the DNR, (collectively, "Defendants"), regarding the administration and enforcement of Wisconsin's Remediation and Redevelopment ("RR") program and Voluntary Party Liability Exemption ("VPLE") program.

2. LRI, a small, family-owned business, voluntarily began a remediation of its site almost three years ago in hopes of selling the property so the owner, Mrs. Joanne Kantor, could retire. LRI believed it was doing the right thing by entering the VPLE program, and taking responsibility for hazardous substance contamination attributable to the facility.

3. However, since LRI entered the RR program, Defendants' have unilaterally and unlawfully changed the rules for LRI, and all other property owners in Wisconsin, including WMC members, who are involved, or may be subject to, the RR or VPLE program.

4. Now, Defendants are attempting to enforce un-promulgated standards, changing policies, and completely reinterpreting statutes and rules governing the RR and VPLE programs, all without following the rulemaking procedures codified in Chapter 227 of the Wisconsin Statutes.

5. Defendants freely change what substances and concentrations of substances are considered a "hazardous substance," as defined in Wis. Stat. §292.01(5) ("Hazardous Substance"), without notice, and with no public input or legislative oversight. Despite the opaque and ever-changing nature of Defendants' approach to regulating Hazardous Substances,

the public is expected to know exactly what Defendant DNR considered a Hazardous Substance at any given point in time, or face substantial penalties.

6. Defendants continue to create new policies, including what they refer to as "emerging contaminants" in the definition of Hazardous Substances, and implementing what they call an "interim decision" policy, which fundamentally changes the way the VPLE program is administered and enforced, again with no public input or legislative oversight.

7. Even more concerning, Defendants are enforcing testing and potential remediation of these substances at certain numeric thresholds without vetting the validity of those thresholds through the required rulemaking process.

8. Through these changes, Defendants continually move the goalposts for the regulated community, prolonging cases, and preventing closure and redevelopment of properties.

9. Defendants' actions go well beyond the authority granted to them by the legislature. Defendants' unilateral and unlawful behavior has prevented LRI from beginning remediation work, instead requiring LRI to invest significant resources in plans and reports, preventing Mrs. Kantor from selling the property, and indefinitely delaying her retirement.

10. Defendants' unilateral and unlawful policy changes also impact WMC and its members by denying them the right to participate in regulatory development, as required by Wis. Stat. Chapter 227.

11. Accordingly, Plaintiffs ask this Court to declare Defendants' behavior unlawful and prevent further enforcement of these illegal standards and policies.

PARTIES

12. 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.

13. 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.

14. LRI is a business corporation organized under the laws of Wisconsin with its principal place of business at 1250 Corporate Center Drive, in the City of Oconomowoc, Waukesha County, Wisconsin.

15. LRI is a family-owned and operated specialty dry cleaning company serving retail dry cleaners in the Midwest for over 43 years, and a small business pursuant to Wis. Stat. § 227.114.

16. Defendant 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 established the policies challenged in this action.

17. Defendant 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 established the policies challenged in this action. DNR is under the direction and control of the NRB pursuant to Wis. Stat. § 15.34.

18. 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.

JURISDICTION AND VENUE

19. This Court has jurisdiction to hear this case pursuant to Wis. Stat. §§ 227.40 and 806.04(1)-(2).

20. Venue in this County is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b) because Plaintiff LRI maintains its principal place of business in this County.

FACTUAL BACKGROUND

The RR Program

21. Wisconsin's environmental remediation program, the RR program, encompasses enforcement of Chapter 292 of the Wisconsin Statutes and Wis. Admin. Code. §§ NR 700-799, collectively referred to as the "Spills Law." The Spills Law authorizes the Defendants to regulate the discharge of Hazardous Substances into the air, water, and soil.

22. Hazardous Substance is defined in Wis. Stat. § 292.01(5) as:

> [A]ny substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

23. Any person who possesses or controls a Hazardous Substance or causes discharge of a Hazardous Substance must notify Defendant DNR immediately of a Hazardous Substance

discharge. Defendants interpret this mandatory and immediate reporting requirement as applicable to any person who possesses or controls real property and is made aware of the existence of a Hazardous Substance in the air, soil, or water on that property.

24. Upon reporting the discharge of a Hazardous Substance or existence of a Hazardous Substance on property that a person controls or possesses, that person becomes subject to expansive remediation requirements, the extent and severity of which is largely dependent upon whether and how Defendants decide to enforce the Spills Law in that case. Defendants open a remediation case against that person and property, and publish associated records on the Bureau for Remediation and Redevelopment Tracking System ("BRRTS"), an online database accessible by the public.

25. Failure to report discharge or discovery of a Hazardous Substance, or to follow any subsequent investigation and remediation requirements prescribed by Defendant DNR, may result in an enforcement action by Defendants, and forfeitures up to $5,000 per day. Wis. Stat. §292.99(1).

26. A remediation case remains open and subject to the Defendants' discretionary enforcement until Defendant DNR declares the case closed and issues a case closure letter.

27. "Case closure" means a determination by Defendant DNR, based on the information available at the time of the review, that no further remediation action is necessary at the site. Wis. Stat. §292.12(1)(b).

The VPLE Program

28. The complex regulatory structure of the Spills Law includes a voluntary remediation program, the VPLE program, which is an environmental clean-up program

designed to help parties proactively identify and remediate contamination from Hazardous Substances on properties so those properties can be safely redeveloped.

29. A party who is interested can apply to participate in the VPLE program and seek a "Certificate of Completion" ("COC"), which goes above-and-beyond a mere case closure. A COC is issued when "the environment has been satisfactorily restored to the extent practicable with respect to the discharges and that the harmful effects from the discharges have been minimized." Wis. Stat. § 292.15(2)(a)3. A COC ensures that Defendant DNR will not require the property owner, or future property owners, to conduct any additional investigation or cleanup for the discharge after the certificate is issued, as described on Defendant DNR's website, a copy of which is attached as **Exhibit 1**.

30. Alternatively, Defendant DNR may issue a partial COC in some instances where "not all of the property has been satisfactorily restored or that not all of the harmful effects from a discharge of a hazardous substance have been minimized." Wis. Stat. § 292.15(2)(am)1m.

31. As part of the VPLE program, the party will conduct an environmental investigation and then remediate any known Hazardous Substance contamination from the property, all at the party's expense, and all under the oversight of Defendants. Upon entering the VPLE program, a remediation case is opened on BRRTS, and all documents related to the VPLE application and activity are published on the BRRTS website.

32. Under the VPLE program, after any identified Hazardous Substances have been remediated from the site, the party receives a COC, which grants the party an exemption from future environmental liability for historical contamination at the site under Wis. Stat. § 292.15(2)(a).

33. The COC, and the protection from future liability that it confers, is transferable to future owners. *See* **Exhibit 1**. This effectively allows the site to then be redeveloped and reused again. Once remediated, the property essentially gets a clean bill of health, and liability for Hazardous Substance discharges prior to the remediation shifts to the state.

34. The VPLE program is a public-private partnership program which is designed to benefit the state, the public and the private party. The state and the public benefit from the cleanup of these properties at the expense of the private party, and also benefit from any potential reuse or redevelopment of those properties. The private party benefits by transferring future environmental liability, including for existing but undiscovered Hazardous Substances present at the site, to the state.

The Definition of Hazardous Substance

35. The statutory definition of Hazardous Substance. Wis. Stat. § 292.01(5), is broad and open to varying interpretations. *See* ¶ 22 *supra*. Defendants acknowledge this broad understanding of Hazardous Substance, describing Hazardous Substances as "[a]ny substance that can cause harm to human health and safety, or the environment, because of where it is spilled, the amount spilled, its toxicity or its concentration." *See* **Exhibit 2**.

36. Wisconsin statutes do not contain, and the Defendants have not promulgated by rule, a list of Hazardous Substances, or combinations or concentrations of substances that may make them Hazardous Substances.

37. In fact, there is no publicly available list of all substances the Defendants consider hazardous. Instead, Defendants assert that "common products such as milk, butter, pickle juice, corn, beer, etc., may be considered a hazardous substance." *See* **Exhibit 2**.

38. The public truly has no definitive idea what substances, or what amounts of substances, are "hazardous" under state law. Defendants use a method not known to the public to determine which substances, or which combinations or concentrations of those substances, qualify as a Hazardous Substance and which do not, often on a case-by-case basis.

39. However, Defendants require that any person discharging a Hazardous Substance report it immediately, or be subject to *significant* environmental liability and penalties. Without knowing how Defendants define Hazardous Substance, it is impossible for a party to know when they are required to report the discharge or discovery of any particular substance as a Hazardous Substance spill. Defendants essentially expect the public to read their minds in order to determine what should be reported.

40. Because Defendants have not promulgated a list of substances, or combinations or concentrations of those substances, that they consider Hazardous Substances, Defendants freely, and of their own volition, change the substances regulated under the RR program.

41. Defendants recently made such a change. Defendants now include certain substances that they refer to as "emerging contaminants" in the definition of Hazardous Substance. It is unclear when this change occurred, and Defendants made the change without any notice, legislative oversight, or opportunity for comment from the public that state law requires as part of the administrative rulemaking process.

42. The term "emerging contaminants" does not exist in statute or rule, and Defendants have not promulgated any rule explaining how they identify substances as emerging contaminants.

43. However, Defendants have identified these "emerging contaminants" as Hazardous Substances and now require investigation, reporting, and potential remediation of emerging contaminants as a condition of approval during remediation under the RR and VPLE programs.

44. To implement this policy change, Defendants sent letters to nearly all parties responsible for open RR and VPLE cases, including LRI, requiring additional assessment of emerging contaminants. Defendants' letter to LRI is attached as **Exhibit 3**. A letter from the publicly available BRRTS website that was sent in a VPLE case is attached as **Exhibit 4**.

45. Some examples of what Defendants consider emerging contaminants include PFAS. *See* **Exhibit 3, 4**. Defendant DNR defines PFAS, or perfluoroalkyl and polyfluoroalkyl substances, as a large group of human-made chemicals that have been used in industry and consumer products worldwide since the 1950s.

46. However, Defendants admit that they do not have enough knowledge of PFAS to determine which compounds are hazardous and to what degree. As described in another letter from the publicly available BRRTS website, attached as **Exhibit 5**, Defendants refuse to define specific requirements for remediation, explaining that "as knowledge surrounding PFAS continues to grow, further investigation may be necessary to define degree and extent of different compounds."

47. Defendants are currently undertaking multiple rulemakings to set explicit numeric standards for certain PFAS compounds. However, none of those rulemakings are complete, and no enforcement standards or thresholds exist for any PFAS compound in statute or in rule.

48. Nonetheless, through this reinterpretation of the definition of Hazardous Substance to include emerging contaminants, Defendants now regulate PFAS, requiring testing at open remediation sites, and requiring exceedances of these unpublished standards to be reported. It

is unclear what constitutes an exceedance, though upon information and belief, Defendants rely on a recommendation by the Wisconsin Department of Health Services ("DHS") for groundwater enforcement standards that have not yet been promulgated as a rule.

49. Despite the fact that there is no promulgated threshold or standards at which any PFAS compound becomes a Hazardous Substance, Defendants require that "persons who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment, are responsible for taking appropriate actions. Those individuals must also immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards for the PFAS compounds in each media impacted (e.g., soil, groundwater, surface water and sediment) and conduct the necessary response actions." *See* **Exhibit 6**. In other words, any person who discovers any PFAS compound on property must report the discovery as a Hazardous Substance discharge.

50. According to Defendant DNR, a party reporting the existence of PFAS compounds must determine an appropriate remediation level for each compound. However, Defendants have no legally enforceable standards in any program related to PFAS, nor any statue or rule that explicitly allows Defendants to regulate PFAS compounds at a certain numeric threshold or standard. Accordingly, Defendants have no statutory authority to regulate investigation and remediation of PFAS compounds.

51. Defendants also have no statutory authority to invent a category of substances, namely "emerging contaminants," and then regulate them as part of the RR or VPLE programs.

52. Moreover, Defendants' decision to include emerging contaminants in the definition of Hazardous Substance represents a change in policy and reinterpretation of statute.

Defendants' VPLE "Interim Decision" Policy

53. As Defendants continually change what is considered a Hazardous Substance, parties seeking to enter the VPLE program have no way to definitively know which substances qualify as Hazardous Substances under the statute, nor any assurance that at some point in the future, a substance previously thought to be non-hazardous will not suddenly be declared hazardous by Defendants.

54. Defendants now assert that emerging contaminants pose a liability risk to the State because the State assumes liability for future discoveries of Hazardous Substances at completed VPLE sites. Accordingly, Defendants determined they would no longer offer the traditional blanket liability protection that the VPLE program historically has provided, and that is required pursuant to Wis. Stat. § 292.15(2)(a).

55. Instead, on January 4, 2019, through a post on the RR program news website attached as **Exhibit 7**, Defendants issued an "interim decision" policy, providing that VPLE COCs would no longer offer broad environmental liability protection for undiscovered, and previously unknown, Hazardous Substances.

56. Defendants' "interim decision" policy explained that "[t]he interim decision is to offer a voluntary party a COC for the Hazardous Substances that are investigated after all the VPLE requirements have been met. COCs will not be awarded that cover substances that were not investigated but could be discovered in the future." *See* **Exhibit 7**.

57. Defendant's "interim decision" policy means interested parties seeking VPLE protection can no longer receive the broad liability protection historically offered, and statutorily required, by the VPLE program, and can now only receive liability protection for those *individual* Hazardous Substances that were specifically investigated.

58. In announcing the "interim decision" policy, Defendants made clear that this "interim decision" represented a change in Defendants' policy. This is supported by Defendants' statement that parties who had already been issued a VPLE COC would not be impacted by this policy change. *See* **Exhibit 7**.

59. Defendants appear to maintain the previous VPLE COC interpretation for those who already completed the program, but apply the new interpretation to those who had not yet completed the VPLE program at the point of the announced policy change, as well as anyone entering the program after Defendants posted the policy change on the RR news website.

60. Parties who applied for entry to the program, but did not receive a COC prior to the "interim decision" are now forced to either take on the entire cost of the program without the benefit of the blanket liability protection at the end, or to withdraw from the program and lose the intended benefits of the program, as well as the application fees and any other investments made. However, even after withdrawing from the program, those parties will still have an open remediation case for which they are responsible, and will be required to remediate the property under the RR program.

61. In addition, those parties who did not receive a COC prior to the "interim decision" policy change will be forced to remediate emerging contaminants that were unknown to even be considered Hazardous Substances when they entered the program but have now been deemed to be such by Defendants. This is true regardless of whether the party withdraws from the VPLE program.

62. This "interim decision" policy change has resulted in parties who voluntarily and proactively began remediating property being left with significant and unanticipated environmental liability and expense.

63. Defendants have not followed the required rulemaking process, codified in Chapter 227 of the Wisconsin Statutes, to promulgate this "interim decision" policy despite it being a clear change in policy by Defendants.

LRI's Remediation

64. LRI is owned by Mrs. Joanne Kantor. Mrs. Kantor, along with her late husband, has owned and operated LRI for over 43 years. LRI has been operating at its current location since 1993.

65. In spring of 2018, after the passing of her husband of 57 years, Mrs. Kantor decided to sell the LRI property in order to retire.

66. Through the voluntary investigation performed to facilitate the property sale, LRI became aware that the property was potentially contaminated with certain Volatile Organic Compounds ("VOCs") commonly found at dry cleaning locations and relatively easy to remediate. LRI immediately notified Defendant DNR, and a remediation case was opened against LRI, with all related documents published on BRRTS.

67. As required by the Defendant DNR, LRI hired an environmental consultant to begin investigating the extent of VOC contamination in anticipation of remediating the property in order to sell it. The investigation lasted from March to September, 2018, and a 511-page Sight Investigation Report ("SIR") was published on the BRRTS website by Defendant DNR on November 20, 2018. The SIR, authored by LRI's environmental consultant, recommended in-situ remediation for addressing the VOC contamination in groundwater.

68. Believing that the VOC remediation would be relatively straight forward, LRI applied to enter the VPLE program. On January 2, 2019, Defendant DNR received LRI's application to enter the VPLE program. LRI hoped to proactively remediate the property, and

believed the VPLE program would help them accomplish this effectively and efficiently, shortening the time necessary for LRI to receive a COC from the Defendants for the property and releasing LRI from future liability.

69. LRI's VPLE application was approved by the Defendants and recorded on the BRRTS website on February 15, 2019. Defendants' "interim decision" policy change was made after LRI applied to the VPLE program. LRI's payment of the $4,000 fee to participate in the program was recorded on the BRRTS website on March 4, 2019, at which point LRI was still unaware of the "interim decision" policy change by the Defendants prior to its application or approval to participate in the VPLE program.

70. On March 26, 2019, LRI submitted a 19-page Sight Investigation Work Plan ("SIWP") to Defendant DNR detailing the plan for investigating the LRI property for VOCs.

71. On June 13, 2019, Defendant DNR recorded approval of the SIWP and a Notice to Proceed with the investigation and remediation on its BRRTS website.

72. Between February 18 and July 19, 2019, LRI took several steps to move the remediation forward, including significant investigatory activity as described in the SIWP. During a meeting with Defendant DNR staff in June 2019, one staff member explained that LRI is required to incorporate PFAS into its testing and remediation. This is the first time LRI recalls Defendant DNR mentioning PFAS in relation to the remediation at the LRI facility.

73. On July 19, 2019, LRI's environmental consultant submitted to Defendant DNR another 273-page report detailing the status of the site investigation, and making recommendations for treating VOCs in soil and groundwater.

74. On November 21, 2019, LRI's environmental consultant submitted an 86-page report to Defendant DNR describing LRI's plan for remediating the property. LRI hoped that

Defendant DNR would approve moving forward with the remediation within 60 days, and anticipated beginning the remediation in late 2019.

75. Investigatory work continued, and on February 17, 2020, LRI's environmental consultant submitted a 46-page report detailing the planned scope of work for remediating the VOCs. LRI was eager to move forward with the remediation.

76. In a letter, attached as **Exhibit 8**, dated March 3, 2020 (nearly two full years after the LRI's remediation case began), Defendant DNR informed LRI that its plan to remediate the VOCs was not approved. The letter explained that LRI was a potential source for PFAS, an emerging contaminant, and also that the Defendant DNR has regulatory authority to ask LRI "to evaluate hazardous substance discharges and environmental pollution including emerging contaminants."

77. Defendant DNR's demand for PFAS testing was not based on information specific to PFAS use at LRI. Rather, Defendant DNR reasoned that PFAS has generally been associated with dry-cleaning operations. The letter required additional information on PFAS use, and that PFAS be included in the site investigation. *See* **Exhibit 8**.

78. On August 17, 2020, LRI, along with nearly every other party responsible for an open remediation in Wisconsin, received a letter, attached as **Exhibit 3**, explaining that all sites must be evaluated for "hazardous substance discharges and environmental pollution including emerging contaminants," such as PFAS.

79. Believing it had no choice, LRI tested groundwater on the site for two PFAS compounds for which Defendant DNR is currently undergoing rulemaking to determine enforcement standards. On August 24, 2020, LRI's environmental consultant submitted a 110-page Supplemental SIWP to Defendant DNR, which included those test results.

80. The Supplemental SIWP explained that the water repellant used by LRI does not contain PFAS, and that no PFAS-containing material products were used in carpet cleaning operations.

81. The Supplemental SIWP concluded by explaining that, although DNR was insisting that PFAS investigation and sampling were necessary before approval for VOC remediation would be granted, LRI is a small business and would like to move forward with the VOC remediation in support of a real estate transaction.

82. On October 28, 2020, over two and a half years after LRI began attempting to remediate its property, Defendant DNR provided conditional approval for the site investigation. The conditions included collecting and testing several additional soil samples for PFAS, and "that both individual and combined exceedances" for PFAS be identified. Defendant DNR refused to approve LRI's remediation of VOCs unless/until LRI complied with the additional requirements related to PFAS, which would add significant time and expense to the remediation project. The conditional approval is attached as **Exhibit 9**.

83. Defendant DNR did not explain which of the more than 4,000 PFAS compounds LRI was required to test, nor the levels at which those substances would be considered in exceedance. The letter directed LRI to a website with "[a]dditional resources regarding PFAS investigation and cleanup." However, the website, attached as **Exhibit 6**, provided no additional details on the testing and exceedance requirements for PFAS.

84. Defendant DNR also required as a condition of moving forward with the investigation that yet another revised SIWP be submitted by November 27, 2020, just 30 days after the conditional approval was sent. *See* **Exhibit 9**.

85. On November 18, 2020, LRI notified Defendant DNR of its withdrawal from the VPLE program. LRI believed that the Defendant DNR was acting beyond its authority and unnecessarily prolonging the site investigation.

86. On December 31, 2020, LRI submitted a 49-page report, including additional groundwater sampling results, to Defendant DNR. LRI only tested the groundwater samples for the VOCs known to be present near the site. Because Defendant DNR did not set clear expectations on the substances and concentrations of PFAS that were considered hazardous and did not appear to have legal authority to do so, LRI did not test for any PFAS compounds.

87. LRI has been actively attempting to remediate its property for nearly three years, and has not, to date, received approval from the Defendants to take any action to remediate the VOCs in groundwater.

88. LRI has submitted at least seven reports, totaling over 1,094 pages, to Defendants since beginning the remediation process. Each of these reports is prepared by an environmental consultant at great cost to LRI.

89. To date, LRI has invested $235,398 toward investigating and hopefully remediating the LRI property. LRI estimates the final costs of Defendant's requirements will approach the total value of the property. LRI has been unable to identify sources to help fund this effort, and also unable to acquire insurance for additional future costs. The business must continue operating in order to attempt to offset the cost of the investigation.

90. LRI has not received clear guidance on the substances Defendants' consider emerging contaminants, nor the levels at which those substances must be reported. Accordingly, LRI has no understanding of what Defendants will require before issuing a closure letter for the site.

CLAIM ONE: DECLARATION PURSUANT TO WIS. STAT. §§ 227.40(4)(a) AND 806.04 THAT DEFENDANTS' REGULATION OF EMERGING CONTAMINANTS AS "HAZARDOUS SUBSTANCES" IS UNLAWFUL

91. Plaintiffs re-allege and incorporate by reference all allegations made above as if fully set forth herein.

92. Defendants' new policy of regulating what it calls emerging contaminants, including PFAS compounds, as Hazardous Substances is a rule because it is a regulation or standard of general application issued by Defendants to implement, interpret, administer, and/or enforce the Spills Law. *See* Wis. Stat. § 227.01(13).

93. Additionally, Defendants' new policy of regulating emerging contaminants as Hazardous Substances is also a change in interpretation of a statute. Our Supreme Court has also long held that changes in interpretation of a statute by an agency must be promulgated as a rule. *See, e.g.,* *Schoolway Transp. Co. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976).

94. Under Wis. Stat. § 227.10(1), "[e]ach agency shall 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."

95. Chapter 227 of the Wisconsin Statutes includes multiple rulemaking procedures Defendants must follow in order for Defendants to properly promulgate a rule.

96. Defendants' new policy of regulating what it calls emerging contaminants, including certain PFAS compounds as Hazardous Substances, was not promulgated pursuant to the requirements of Chapter 227.

97. A court shall declare a rule invalid "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted

without compliance with statutory rulemaking or adoption procedures." Wis. Stat. § 227.40(4)(a).

98. Plaintiffs and Plaintiff WMC's members have been substantially harmed by Defendants' failure to comply with the statutory rulemaking procedures, including that they were denied the opportunity to participate in the statutorily mandated rulemaking process.

99. Defendants' application and threatened future application of this rule interferes with the legal rights and privileges of Plaintiffs and Plaintiff WMC's members.

100. Accordingly, Plaintiffs are entitled to a declaration that Defendants' new policy of regulating emerging contaminants as Hazardous Substances in the RR and VPLE programs is an unlawfully adopted rule, and is invalid and unenforceable.

CLAIM TWO: A DECLARATION PURSUANT TO WIS. STAT. §§ 227.40(4)(a) AND 806.04 THAT DNR'S REGULATION OF EMERGING CONTAMINANTS AT CERTAIN CONCENTRATIONS IS UNLAWFUL.

101. Plaintiffs re-allege and incorporate by reference all allegations made above as if fully set forth herein.

102. Defendants' do not have explicit statutory authority, nor an explicit statutory requirement, to implement or enforce any standard, requirement, or threshold related to emerging contaminants, including PFAS, in the RR and VPLE programs.

103. Defendants' enforcement of certain standards, requirements, and thresholds for PFAS and related substances in the RR and VPLE program is a rule as that term is defined by Wis. Stat. § 227.01(13).

104. The Standards, requirements, and thresholds currently implemented and enforced by Defendants for emerging contaminants, including PFAS, were not promulgated pursuant to the requirements of Chapter 227 of the Wisconsin Statutes.

105. Under Wis. Stat. §227.10(2m), Defendants are prohibited from implementing or enforcing "any standard, requirement, or threshold…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 Chapter 227.

106. A court shall declare a rule invalid "if it finds that it violates constitutional provision or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a).

107. Plaintiffs and Plaintiff WMC's members have been substantially harmed by Defendants' failure to comply with the statutory rulemaking procedures, including that they were denied the opportunity to participate in the statutorily mandated rulemaking process.

108. Defendants' application and threatened future application of this rule interferes with the legal rights and privileges of Plaintiffs and Plaintiff WMC's members.

109. Accordingly, Plaintiffs are entitled to a declaration that Defendants' enforcement of any numeric standard, requirement, or threshold related to an emerging contaminant, including PFAS, in the RR and VPLE programs is an unlawfully adopted rule and otherwise beyond Defendant's statutory authority, and is invalid and unenforceable.

CLAIM THREE: DECLARATION THAT THE "INTERIM DECISION" POLICY IS INVALID PURSUANT TO WIS. STAT. §§ 227.40(4)(a) AND 806.04

110. Plaintiffs re-allege and incorporate by reference all allegations made above as if fully set forth herein.

111. Defendants' new "interim decision" policy is a rule as that term is defined by Wis. Stat. § 227.01(13).

112. Additionally, Defendants' new "interim decision" policy is a statement of general policy as to how they will issue VPLE program COC, and an interpretation of the VPLE program statute, Wis. Stat. § 292.15.

113. Defendant's "interim decision" policy is also a change in interpretation of a statute. Our Supreme Court has also long held that changes in interpretation of a statute by an agency must be promulgated as a rule. *See, e.g.,* *Schoolway Transp. Co. v. Div. of Motor Vehicles, Dep't of Transp.*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976).

114. Under Wis. Stat. § 227.10(1), "[e]ach agency shall 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."

115. Chapter 227 of the Wisconsin Statutes includes multiple rulemaking procedures that must be followed in order for Defendants to properly promulgate a rule.

116. Defendants' new "interim decision" policy was not promulgated pursuant to the requirements of Chapter 227.

117. A court shall declare a rule invalid "if it finds that it violates constitutional provision or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a). Plaintiffs and Plaintiff WMC's members have been substantially harmed by Defendants' failure to comply with the statutory rulemaking procedures.

118. Defendants' application and threatened future application of this rule interferes with the legal rights and privileges of Plaintiffs and Plaintiff WMC's members.

119. Accordingly, Plaintiffs are entitled to a declaration that Defendants' "interim decision" policy is an unlawfully adopted rule, and is invalid and unenforceable.

CLAIM FOUR: DECLARATION UNDER WIS STAT. § 806.04

120. Plaintiff re-alleges and incorporates by reference all allegations made above as if fully set forth herein.

121. Plaintiffs seek a declaration that Defendants must promulgate as a rule a list of Hazardous Substances, and the quantities or concentrations of substances that make them hazardous.

122. Pursuant to Wis. Stat. § 806.04, any person whose rights are affected by a statute may have determined any question of construction arising under the statute and obtain a declaration of rights thereunder.

123. When Defendant determines that a substance or combination of substances or the location of a substance causes them to meet the statutory definition of Hazardous Substance it is engaging in statutory interpretation, and is specifically adopting an interpretation to govern its enforcement or administration of the statutory definition of Hazardous Substance.

124. Plaintiffs and Plaintiff WMC's members' rights are affected by this statute.

125. Plaintiffs therefore seek a declaration that under Wis. Stat. § 292.01(5), Defendants are required to promulgate as a rule a list of Hazardous Substances, and quantities or concentrations of the substances which make them hazardous.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court grant the following relief:

A. A declaration that Defendants' policy of regulating substances they refer to as emerging contaminants, including PFAS compounds, as Hazardous Substances in the RR and VPLE programs is an unlawfully adopted rule, and is invalid and unenforceable;

B. A declaration that Defendants' enforcement of any numeric standard, requirement, or threshold for substances they refer to as emerging contaminants, including

PFAS, in the RR and VPLE programs is an unlawfully adopted rule and otherwise beyond Defendant's statutory authority, and is invalid and unenforceable;

C. An order enjoining Defendants from attempting to regulate emerging contaminants as discussed herein;

D. A declaration that Defendants' "interim decision" policy is an unlawfully adopted rule, and is invalid and unenforceable;

E. An order enjoining Defendants from enforcing the "interim decision" policy;

F. A declaration that Defendants are required to promulgate as a rule a list of Hazardous Substances, or quantities or concentrations of substances which make them hazardous;

G. An order awarding Plaintiffs their reasonable costs and fees allowed by law;

H. Such other relief as the Court deems appropriate.

Dated this 23rd day of February, 2021.

Respectfully submitted,

WISCONSIN MANUFACTURERS & COMMERCE, INC.

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