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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2022AP0718

WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,
and LEATHER RICH, INC.,

Plaintiffs-Respondents,

v.

WISCONSIN NATURAL
RESOURCES BOARD,
WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,
and PRESTON COLE,

Defendants-Appellants-Petitioners.

APPEAL FROM A DECISION AND ORDER GRANTING
JUDGMENT FOR PLAINTIFFS, ENTERED IN THE
WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL O. BOHREN, PRESIDING

PETITIONERS' OPENING BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants-
Appellants-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (CTR)
(608) 957-5218 (CG)
(608) 267-8904 (GJK)
(608) 267-2238 (ADR)
(608) 294-2907 (Fax)
rothet1@doj.state.wi.us
gibsoncj@doj.state.wi.us
johnsonkarp@doj.state.wi.us
russomannoad@doj.state.wi.us

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INTRODUCTION

The Legislature enacted the Spill Law almost fifty years ago to advance the “vitaly important” work of protecting Wisconsin’s natural environment. *State v. Mauthe*, 123 Wis. 2d 288, 302, 366 N.W.2d 871 (1985). And the Legislature gave the Department of Natural Resources the “tremendous responsibility” of enforcing this law. *Id.*; *see generally* Wis. Stat. ch. 292. Since this broad, flexible law’s enactment, the Department has enforced it by working cooperatively with regulated parties to successfully clean up tens of thousands of hazardous substance discharges. And all this time, the Department has done so without administrative rules listing which substances and at what concentrations the Spill Law covers.

This case involves another of those many Spill Law cleanup efforts—only this one has been derailed by an erroneous “unpromulgated rulemaking” defense that threatens to unravel the Spill Law’s vital protections. Leather Rich, a drycleaning company, found harmful PFAS substances on its property and reported its discovery to the Department. The Department determined that this qualified as a “hazardous substance” discharge under Wis. Stat. § 292.01(5) that triggered the Spill Law’s cleanup obligations. The Department therefore asked Leather Rich to satisfy its statutory obligations to determine the extent of PFAS contamination and remediate the discharge.

Leather Rich and Wisconsin Manufacturers and Commerce (“Respondents”) sued, arguing that the Department could not enforce the Spill Law against PFAS discharges until it promulgated rules listing PFAS as “hazardous substances.” They also argued that rules were required before the Department could pause granting broad Spill Law liability exemptions while it learned more about the extent of statewide PFAS contamination.

In siding with Respondents on both issues, the court of appeals erred in two ways.

First, the court ignored the Spill Law's plain text. The Spill Law broadly defines a "hazardous substance" as "any substance" that "may pose a substantial present or potential hazard to human health or the environment." Wis. Stat. § 292.01(5). Nothing there (or anywhere else) requires rulemaking to list specific substances and concentrations before the Spill Law's reporting and cleanup obligations kick in. Instead, "an agency may rely upon a grant of authority that is explicit but broad when undertaking agency action." *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 25, 398 Wis. 2d 386, 961 N.W.2d 346 ("*Clean Wis. I*"). The Department did just that when it relied on the Spill Law's broad "hazardous substance" definition to enforce the law against Leather Rich's PFAS discharge.

Second, the court misunderstood the nature of an administrative rule, which must have the "force of law." Wis. Stat. § 227.01(13). Nothing like that existed here. Instead, the Department applied the Spill Law itself to Leather Rich's PFAS discharge, not any separate source of legal authority that might qualify as a "rule." And the Department's temporary decision to pause granting broad liability waivers under the Voluntary Party Liability Exemption (VPLE) program was an exercise of the Department's statutory discretion, not a "rule" with the force of law.

The court of appeals' ruling not only misread the Spill Law but also would have an unconstitutional effect. The "very nature of executive authority" is to "interpret and apply the law." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 96, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"). There can therefore be no legislative "interfer[ence] in the relationship between the executive branch's interpretation of the law, its communication of that interpretation to the public, and its

execution of the law.” *Id.* ¶ 120. The decision below would mean that the Department—and, by extension, all executive agencies—cannot enforce or communicate about any statute that requires interpretation without first promulgating a rule. That would impermissibly (and drastically) burden the core executive power to “take care that the laws be faithfully executed.” Wis. Const. art. V, § 4.

To restore the Department’s plain statutory authority to enforce the Spill Law—and to preserve other executive agencies’ core power to enforce their own statutes—the decision below must be reversed.

ISSUES PRESENTED

1. The Spill Law broadly defines “hazardous substance” to include “any substance” whose quantity or concentration in a particular setting presents a hazard to human health or the environment. Those who are responsible for discharged hazardous substances must restore the environment to the extent practicable and minimize the harmful effects.

May responsible parties like Leather Rich avoid investigating and remediating discharges of PFAS (and other hazardous substances) unless and until the Department promulgates rules (1) designating substances as “hazardous” and (2) establishing the concentrations at which they qualify as such?

The circuit court and court of appeals answered yes.

This Court should answer no.

2. An administrative rule is “a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or

procedure of the agency.” Wis. Stat. § 227.01(13). The Department made three types of statements at issue here:

- a. The Department posted on its website that PFAS compounds meet the definition of a hazardous substance under Wis. Stat. ch. 292, and it sent correspondence to VPLE program participants stating the same.

Did the Department have to promulgate an administrative rule before it made the web posting or sent the correspondence?

The circuit court and court of appeals answered yes.

This Court should answer no.

- b. The VPLE program under Wis. Stat. § 292.15 grants the Department discretion to grant various liability exemptions to those who clean up their property after a discharge. The broadest exemption applies to all hazardous substances present on the property, not just those the participant cleaned up. The Department issued a statement saying that it would temporarily pause granting those broad exemptions due to statewide uncertainty over the scope and severity of PFAS contamination.

Did the Department have to promulgate an administrative rule before it exercised its discretion to temporarily suspend granting the broadest liability exemptions?

The circuit court and court of appeals answered yes.

This Court should answer no.

- c. In a letter to Leather Rich, the Department mentioned “exceedances” for PFAS, referring to the concentrations Leather Rich had chosen to govern its site.

Did the Department have to promulgate an administrative rule before it mentioned the selected exceedance level in correspondence with Leather Rich?

The circuit court did not answer this question, and the court of appeals answered yes.

This Court should answer no.

3. Does Wis. Stat. § 227.10(2m) independently prevent the Department from administering the Spill Law until it promulgates administrative rules listing all substances it considers to be “hazardous” and the concentrations at which they qualify as such?

The circuit court answered yes, and the court of appeals did not resolve this issue.

This Court should answer no.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

This case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

I. Wisconsin law protects public health and the environment from the discharge of hazardous substances.

In 1978, Wisconsin enacted the Spill Law, which imposes obligations on those who cause, possess, or control discharges of “hazardous substances” to the environment. *See* Wis. Stat. § 292.11(3). The law generally seeks “to prevent, minimize, and, if necessary, abate and remedy contamination of this state’s environment and the resultant risks to human health caused by discharges of hazardous substances.” *Mauthe*, 123 Wis. 2d at 299.

A. The Spill Law requires people to clean up hazardous substance discharges.

Under the Spill Law, anyone who “possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance” is subject to statutory responsibilities. Wis. Stat. § 292.11(3). The responsible party “shall notify the department immediately” of the discharge. Wis. Stat. § 292.11(2)(a). Then, the responsible party must “take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.” Wis. Stat. § 292.11(3). These obligations apply “regardless of whether [the Department] directs the responsible party to take any action.” (R. 79:2; P-App. 222.)

These notice and cleanup responsibilities hinge on a broad statutory definition of “hazardous substances”:

[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.

Wis. Stat. § 292.01(5).

Under this broad definition, a substance may qualify as hazardous based on (1) substance-specific qualities (its “physical, chemical or infectious characteristics”) or (2) site-specific considerations (the “quantity” or “concentration” of the discharge). *Id.* Because the statute contemplates site-specific considerations, the Spill Law is not limited to substances that are always hazardous in all situations.

Rather, some substances may qualify as hazardous if discharged in sufficient amounts in a particular environment, even if they might ordinarily be innocuous. For example, a tanker truck of milk or manure spilled into a trout stream can threaten fish in the immediate area of the spill—in this context, the discharge could trigger Spill Law obligations. (R. 79:24–25; P-App. 244–45.)

B. Chapter 292 directs the Department to promulgate rules on many specific topics, but not one listing hazardous substances.

Various provisions in chapter 292 expressly direct the Department to promulgate rules about specific components of the hazardous-substance response process. *See, e.g.*, Wis. Stat. § 292.31(2)(a)–(b) (rules relating to “[m]ethods for investigating” contamination and “[m]ethods for remedial action,” among others); *see generally* Wis. Stat. ch. 292 (including 18 topics on which the Department “shall promulgate” administrative rules).

By contrast, nowhere does chapter 292 direct the Department to promulgate rules regarding the statutory definition of “hazardous substance,” such as by expanding on this definition, listing specific substances that qualify as “hazardous,” or establishing set quantities or concentrations at which the Spill Law applies to such substances.

C. The Spill Law has long been applied to so-called “emerging contaminants.”

Since the Spill Law’s enactment nearly 50 years ago, scientific knowledge has advanced significantly. Many once-unknown substances (or known but once thought benign) are now universally understood as hazardous. At times, the Department has colloquially referred to such substances as “emerging contaminants.” (R. 79:27–30; P-App. 247–50.) Several examples illustrate the concept.

One is polychlorinated biphenyls (PCBs), which were widely used until banned in 1979. PCBs come in thousands of varieties, most of which persist for long periods in the environment. They present risks of cancer and adverse effects on the nervous, immune, and reproductive systems. Although no administrative rule lists any of the various PCB mixtures as “hazardous substances” under the Spill Law, over 350 PCB remediation sites exist statewide. (R. 79:27–28; P-App. 247–48.)

Another once-emerging contaminant is tetrachloroethylene (PCE), a solvent used in the dry-cleaning industry from the 1970s through the 2000s. It is commonly found in groundwater near current and former drycleaners. No administrative rule lists PCE as a “hazardous substance,” but 770 PCE cleanup sites exist in Wisconsin. (R. 79:28; P-App. 248.)

Yet another example is methyl tert-butyl ether (MTBE), a once-common fuel additive which has been found in groundwater near former gas stations. No administrative rule lists MTBE as a “hazardous substance,” but there are over 400 MTBE remediation sites in Wisconsin. (R. 79:28–29; P-App. 248–49.)

These examples demonstrate how the Spill Law is structured to avoid a lag between (1) the scientific understanding of a contaminant’s negative impact on the environment and human health and (2) that contamination’s regulation—the two go hand-in-hand, without the need for statutory amendments or rulemaking.

D. The Department has discretion to issue either broad or narrow Spill Law liability exemptions.

When a hazardous substance is discharged, one remedial option under the Spill Law is the “voluntary party liability exemption” (VPLE) program under Wis. Stat.

§ 292.15. This statute authorizes—but does not require—the Department to issue a certificate stating that a property has met statutory clean-up requirements. With such a certificate in hand, the property’s current and future owners are exempted from Spill Law liability for past hazardous substance discharges.

To qualify for the liability exemption, VPLE participants must, among other things, conduct a Department-approved investigation of the property, restore the environment “to the extent practicable,” minimize the harmful effects from the discharge, and obtain certification “that the environment has been satisfactorily restored,” as determined by the Department. Wis. Stat. § 292.15(2)(a)1.–3.

The statute grants the Department discretion to grant both broad and narrow liability exemptions. *See* Wis. Stat. § 292.15(2)(a)–(ag). A “general” certificate broadly exempts from liability all hazardous substances that might still exist on the entire property, whether or not they were addressed during the cleanup. *See* Wis. Stat. § 292.15(2)(a). A “partial” certificate is narrower: it exempts from liability only specified parts of the property or only the specific hazardous substances that were investigated. *See* Wis. Stat. § 292.15(2)(am).

The Department has no statutory obligation to issue certificates in any given case. *See generally* Wis. Stat. § 292.15. The Department issues the broadest certificates only when it determines, in its discretion, that “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. Likewise, the Department “may” issue narrower certificates if “[p]ublic health, safety or the environment will not be endangered by any hazardous substances remaining on or originating from the property after the partial cleanup.” Wis. Stat. § 292.15(2)(am)1m.a.

II. The Department determines that PFAS may qualify as hazardous substances under the Spill Law and temporarily adjusts the VPLE program.

A. Emerging scientific knowledge shows PFAS compounds to be hazardous substances.

Much like the “emerging contaminants” of years past, recent scientific advances have revealed the dangers of a new class of compounds: PFAS. (R. 79:30–31; P-App. 250–51.)

PFAS (like PCBs) do not break down in the environment and remain for long periods cycling in air, water, and soil. And certain PFAS compounds pose significant dangers to human health: increased risks of thyroid disease and some cancers, negative effects on the endocrine and reproductive systems, increased cholesterol, decreased fertility in women, lower infant birth weights, and decreased vaccine response, among others. (R. 79:30–35, 81:2–3; P-App. 250–55, 299–300.) The adverse effects of exposure to these PFAS compounds are now well documented and largely undisputed among toxicologists. (R. 50:2–3, 81:2–3; P-App. 299–300.)

Given the scientific consensus about these harmful effects, PFAS compounds are now known to meet the statutory definition of “hazardous substances” under the Spill Law. The Department therefore sent letters to all responsible parties statewide that were working with it on Spill Law remediation efforts informing them of this fact. (R. 14, 79:38; P-App. 194–197, 258.) The Department also created a new page on its website informing the public that PFAS discharges qualify as “hazardous substances” that trigger the Spill Law. (R. 10; P-App. 182–83.)

B. Due to increasing concerns about PFAS hazards, the Department temporarily pauses broad VPLE liability exemptions.

The rapidly developing PFAS science created a difficult problem for the VPLE program: many open remediation sites likely contained PFAS, but the responsible parties had not addressed PFAS in their investigation or remediation efforts. Under those circumstances, the Department decided that granting broad liability exemptions for all substances—including PFAS—would be contrary to the Spill Law’s purpose. (R. 80:5–7; P-App. 289–91.) By exempting responsible parties from PFAS liability, any subsequently discovered PFAS contamination would have to be cleaned up at the taxpayer’s expense. (R. 80:7–9; P-App. 291–93.)

To avoid this result, the Department temporarily paused issuing broad liability exemptions, and instead issued only narrower exemptions covering the specific hazardous substances addressed during a remediation effort. The Department explained that decision in a January 2019 web post, noting how it was consistent with the Department’s statutory discretion to issue only narrower liability exemptions. (R. 11; P-App. 185–87.)

Since then, the Department has resumed issuing broad liability exemptions in appropriate circumstances. (R. 80:11; P-App. 295.)

III. Leather Rich enters the VPLE program and discovers PFAS contamination on its property.

In 2018, Leather Rich, Inc., a drycleaning and fabric-care company, notified the Department about a discharge of PCE at its property. Leather Rich began investigating its site and later entered the VPLE program. Leather Rich sought a broad liability exemption for the entire property and all possible hazardous substances, and therefore it had to

investigate the entire property rather than just the area of the already-known PCE discharge. (R. 78:2–3; P-App. 199–200.)

During Leather Rich’s site investigation, it found PFAS contamination. (R. 78:4, 16; P-App. 201, 213.) However, the next steps proposed by Leather Rich to the Department did not address PFAS. The Department therefore sent Leather Rich a letter explaining why further action regarding PFAS appeared necessary. (R. 78:3–5; P-App. 200–02.)

Leather Rich responded five months later with an updated plan providing data showing elevated levels of two PFAS compounds. Leather Rich itself proposed a target for its PFAS cleanup based on a groundwater standard recommended by the Wisconsin Department of Health Services.¹ The Department approved Leather Rich’s plan on the condition that the company perform additional PFAS sampling under Wis. Admin. Code DNR ch. 716. Soon after, Leather Rich withdrew from the VPLE program. (R. 78:5–8; P-App. 202–05.)

IV. Respondents sue the Department; the circuit court grants summary judgment in their favor and the court of appeals affirms in a split decision.

Respondents then sued the Department, pleading three claims.

Claim One asserted that the Spill Law cannot be lawfully applied to “emerging contaminants” (and specifically PFAS) until the Department promulgates an administrative

¹ Under Wis. Admin. Code NR § 722.09(2)(b)2., for substances for which a groundwater quality standard has not been established, responsible parties may “develop[] site-specific environmental standards,” based on information from the department of health services.

rule listing PFAS as a “hazardous substance” under Wis. Stat. § 292.01(5). (R. 5:22–23.)

Claim Two asserted that applying the Spill Law to “emerging contaminants, including PFAS” “at certain concentrations is unlawful” until the Department promulgates an administrative rule listing the concentrations for every substance at which the law would apply. (R. 5:22–23.)

Claim Three asserted that the Department could not decide to pause issuing broad liability exemptions to VPLE participants without promulgating an administrative rule. (R. 5:24–25.)

A. The circuit court grants summary judgment in Plaintiffs’ favor.

The circuit court granted summary judgment for Respondents on all three claims. (*See generally* R. 112, 120; P-App. 101–33.) The court stayed its decision pending appeal, recognizing “the broad impact” of its decision. (R. 143, 145:37–53.)

B. The court of appeals affirms.

The court of appeals affirmed the circuit court’s decision in a 2–1, published opinion. *See Wisconsin Mfrs. & Com., Inc. v. DNR*, 2024 WI App 18, 411 Wis. 2d 462, 5 N.W.3d 903 (“WMC”).

1. The majority.

The majority held that each of the Department’s three challenged “policies” represented invalid unpromulgated rules: (1) its “policy” of treating emerging contaminants (including PFAS) as hazardous substances, *id.* ¶¶ 26–34; (2) its “policy” of regulating emerging contaminants at “certain concentrations,” *id.* ¶¶ 35–39; and (3) its interim “policy” of pausing issuance of broad certificates of completion under the VPLE program while the Department analyzed

the scope and extent of PFAS contamination statewide, *id.* ¶¶ 40–43.

Central to the majority’s reasoning was that each “policy” had the “effect of law.” *Id.* ¶¶ 31, 38, 42. As authority for each holding, the court pointed to statutory provisions that had legal effect, rather than anything in the Department’s communications about those provisions. *See id.* ¶ 31 (citing Wis. Stat. §§ 292.11(2)–(3), .99); *id.* ¶ 38 (same); *id.* ¶ 42 (referring to “liability protection” available under Wis. Stat. § 292.15(2)).

2. The dissent.

Judge Neubauer dissented. *Id.* ¶¶ 50–82. She concluded that the Department’s so-called “policies” “do not satisfy the definition of a rule in Wis. Stat. § 227.01(13), at a minimum, because they lack the force of law.” *Id.* ¶ 64. She reasoned that none of the underlying Department communications “impose any new or unique legal obligations on responsible parties beyond what the Spill Law already requires.” *Id.* ¶ 65. Instead, she recognized that the Department’s “communications about the law . . . are not the law itself” because they “impose no obligations, set no standards, and bind no one.” *Id.* (quoting *SEIU*, 393 Wis. 2d 38, ¶ 102).

Because Judge Neubauer did not view the Department’s actions as “rules” under Wis. Stat. § 227.01(13), she addressed another issue not addressed by the majority: whether the Department’s “policies” were invalid under Wis. Stat. § 227.10(2m), which forbids agencies from imposing “standards, thresholds, or requirements” unless they are “explicitly required or explicitly permitted by statute or by a [properly promulgated] rule.” Because the Spill Law’s definition of “hazardous substance” is “explicitly broad,” she concluded that the definition itself “trigger[s] the Spill Law’s notification, investigation, and remediation obligations,” without needing administrative rules. *Id.* ¶ 81.

STANDARD OF REVIEW

This appeal involves questions of statutory interpretation and agency authority, which this Court reviews de novo. *Clean Wis. I*, 398 Wis. 2d 386, ¶¶ 14–15.

ARGUMENT

I. The Department can enforce the Spill Law without rules designating the specific substances that are “hazardous” and the concentrations at which they qualify.

The decision below erred by practically ignoring the Spill Law’s plain text. That law provides the Department with broad authority to regulate “hazardous substances,” without first requiring it to promulgate rules exhaustively listing those substances and corresponding concentrations.

The court of appeals’ contrary decision effectively rewrites the Spill Law by inserting a new rulemaking requirement into the statutory text that does not exist. Worse, the decision would effectively prevent the Department from applying the Spill Law to PFAS discharges (and presumably any others) without first promulgating such rules. There is no indication that the Legislature intended this drastic result, as years of practice and this Court’s decisions confirm. That alone justifies reversal on this issue.

A. The Spill Law’s text does not require this kind of rulemaking.

Nothing in the Spill Law’s text requires the Department to promulgate such rules before the law’s notice and cleanup obligations take effect. Three textual components make this clear: (1) the Spill Law’s broad, open-ended definition of “hazardous substance”; (2) the lack of any express requirement to promulgate a list of “hazardous substances,” contrasted with many express rulemaking requirements on

other topics; and (3) the law’s imposition of obligations directly on responsible parties.

1. The Spill Law has a broad, open-ended definition.

The Spill Law defines “hazardous substances” in a broad and open-ended manner: it covers “any substance” which “pose[s] a substantial present or potential hazard to human health or the environment” due to its inherent characteristics or discharge circumstances. Wis. Stat. § 292.01(5). If a discharged substance falls within this broad statutory definition, the Spill Law covers it, regardless of whether a parallel rule exists. In fact, listing a closed set of all hazardous substances would conflict with this statutory text: the Legislature expressly used open-ended language—“*any* substance”—and so a rule cannot close this flexible definition by listing a defined set of covered substances and concentrations.

The Legislature created an open-ended definition for an obvious reason: trying to list every single hazardous substance in specific concentrations would be practically impossible—whether by statute or by rule. Any attempt to promulgate a definitive list would surely leave out substances that the statutory definition already covers.

For one, science evolves, as it did for PCBs, PCE, and MTBE, and now for PFAS. (R. 79:27–30; P-App. 247–50.) Using the open-ended term “any substance” allows the Spill Law to incorporate scientific progress without frequent statutory revisions.

Equally important, some substances may become hazardous only when spilled under certain circumstances—like the hypothetical tanker truck of milk spilled into a trout stream. (R. 79:24–25; P-App. 244–45.) In that context, dead fish would indicate that the “quantity, concentration, or . . . characteristics” of the discharged substance meet the

statutory definition, requiring notification and cleanup under the Spill Law. *See* Wis. Stat. § 292.01(5), .11(2)(a), (3). Neither a statute nor a rule could cover all such scenarios, which is why the Legislature wrote the Spill Law in an “undeniably broad” manner. *WMC*, 411 Wis. 2d 462, ¶ 52 (Neubauer, J., dissenting).

This Court recognized this logic in *State v. Mauthe*, 123 Wis. 2d at 301, which addressed whether the Spill Law imposes remedial obligations on a property owner who did not himself cause the discharge. The Court observed that “[i]t would be unreasonable to expect the legislature to enumerate all the ways in which a hazardous substance which is discharged may be possessed or controlled.” *Id.* It would be just as “unreasonable” to have to “enumerate all the ways” a substance might become hazardous under Wis. Stat. § 292.01(5)—which is why the Legislature did not choose to do so.

2. The Spill Law includes no express rulemaking requirement.

Complementing its broad “hazardous substance” definition, the Spill Law lacks any express requirement that the Department promulgate rules to expand on this definition. That presents a revealing contrast with at least 18 other provisions in chapter 292 that say the Department “shall promulgate” rules on other topics. *See generally* Wis. Stat. ch. 292; *see also WMC*, 411 Wis. 2d 462, ¶¶ 55–57 (Neubauer, J., dissenting).² This strongly indicates that where the Legislature intended to require rulemaking on a Spill Law topic, it expressed that intention through

² *See also* Wis. Stat. § 291.05(2)(a) (Department “shall promulgate by rule a list of hazardous wastes”); Wis. Stat. ch. 281 (including 36 topics on which Department “shall promulgate rules”); Wis. Stat. ch. 285 (including 28 topics on which Department “shall promulgate rules”).

“shall promulgate” language that is missing from Wis. Stat. § 292.01(5).

The absence of such language is critical, as this Court recognized in *Clean Wisconsin I*, 398 Wis. 2d 386. At issue there was whether the Department needed to promulgate rules before imposing certain permit conditions regarding groundwater standards. *Id.* ¶ 22. The Court looked to the condition-authorizing statute, observing that “[n]otably and of import, [that statute] does not say ‘promulgate rules to assure compliance with the [relevant groundwater standards].’” *Id.* ¶ 28 (emphasis in original). Based partly on this silence, the Court concluded that the permit statute’s “explicit but broad” language authorized the conditions, even without rulemaking. *Id.* ¶¶ 25, 40. The Spill Law has the same kind of “explicit but broad” language as in *Clean Wisconsin*, and similarly lacks any rulemaking language.

Notably, such language does exist in a similar law. The “hazardous substances act” in Wis. Stat. § 100.37 creates various consumer protection requirements for the sale of “hazardous substances,” which also are defined there in an open-ended way. *See* Wis. Stat. § 100.37(1)(c)1. (referring to “[a]ny substance or mixture of substances” that meets specified criteria). Unlike in the Spill Law, the Legislature expressly authorized (but did not require) rulemaking to flesh out that broad definition, providing that DATCP “may by rule declare . . . any substance or mixture of substances” to be a “hazardous substance,” whenever the agency determines such a rule is necessary to “promote the objectives” of the statute or to “avoid[] or resolv[e] uncertainty.” Wis. Stat. § 100.37(2)(a).

This contrast yields two important conclusions, especially considering *Clean Wisconsin*.

One, when the Legislature wants to authorize rulemaking to make specific a broad definition of “hazardous substances,” it does so expressly. Its choice not to include similar text in the Spill Law context must be given effect.

Two, the Legislature’s use of “may” in the Hazardous Substances Act implicitly recognizes that DATCP can enforce that statute without rulemaking. If that statute, which expressly authorizes rulemaking, can still be enforced without a rule, the same must also be true of the Spill Law, which does not even mention this kind of rulemaking.

3. The Spill Law directly regulates individuals.

Last, the Spill Law directly regulates individuals, with no textual indication that the Department must promulgate “hazardous substance” rules before the law takes effect. As Judge Neubauer put it, “no action by the DNR is required to trigger [the Spill Law’s] reporting, investigation, and remediation obligations.” *WMC*, 411 Wis. 2d 462, ¶ 58 (Neubauer, J., dissenting). But the majority below effectively held otherwise—no one needs to follow the Spill Law (and the Department cannot enforce it), unless and until the Department promulgates such rules.

That is simply not how the statute works. Wisconsin Stat. § 292.11(3) provides that anyone “who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance *shall take the actions necessary* to restore the environment to the extent practicable and minimize the harmful effects from the discharge.” Accordingly, “responsible parties are initially obliged to assess whether a discharge of a hazardous substance has occurred.” *Id.* ¶ 58 (Neubauer, J., dissenting). Nothing requires the Department to inform responsible parties whether the Spill Law covers their discharge of PFAS (or any other substance). Instead, responsible parties must

read the statute and determine whether and how it applies to them, just like any other regulatory provision.

B. Statutory history, past practice, and this Court’s precedents confirm that rulemaking is not required to trigger the Spill Law’s obligations.

For nearly fifty years, the Spill Law’s definition of “[h]azardous substance” has remained largely unchanged, as have responsible parties’ obligations “to restore the environment to the extent practicable” and to “minimize the [discharge’s] harmful effects . . . to the air, lands or waters of this state.” *Compare* Wis. Stat. §§ 144.30(10), 144.76(3) (1977–78), *with* Wis. Stat. §§ 292.01(5), 292.11(3).

Throughout these decades, the Department has never promulgated rules establishing a list of qualifying “hazardous substances” or concentrations. That makes sense, because such a list would prevent the Department from responding to the daily spill events that it must address under the Spill Law. Revisit the hypothetical milk discharge into a trout stream. As the Spill Law is currently written and applied, if there are dead fish, there has been a discharge of a hazardous substance that the Department can address. But if Spill Law enforcement is confined by a list of “hazardous substances” at particular concentrations, such spills likely could not be addressed, thereby undermining the Spill Law’s broad language and purpose.

The statutory text has never directed the Department to promulgate a list of hazardous substances and concentrations—which is particularly notable given how often the Legislature has amended the law. *See* Wis. Stat. §§ 292.01 (statutory history), 292.11 (statutory history); *see also* *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 693, 307 N.W.2d 227 (1981) (recognizing that legislature’s maintenance of statutory provisions during long period of

agency application of statute “constitutes substantial evidence” that agency’s application “comported with the legislative intent”). Over those decades, tens of thousands of responsible parties have fulfilled the Spill Law’s requirements without rules further defining hazardous substances. (R. 79:9–10; P-App. 229–30.)

Case law confirms that the Spill Law does not require this type of rulemaking. This Court has twice held that the law imposes significant personal responsibility on dischargers, despite the lack of a rule listing hazardous substances.

First, in *State v. Mauthe*, an industrial facility had discharged hexavalent chromium, which the Department alleged “[was] a hazardous substance within the meaning of [the Spill Law.]” 123 Wis. 2d at 298. No administrative rule listed hexavalent chromium as a “hazardous substance,” yet the Court concluded that the Spill Law required the property owner to remediate the discharge, explaining that the Legislature “acted well within its authority” by creating the type of strict-liability regime it did in the Spill Law. *Id.* at 302.

Second, in *State v. Chrysler Outboard Corporation*, 219 Wis. 2d 130, 162–64, 580 N.W.2d 203 (1985), a manufacturing facility discharged various waste paints, oils, and solvents that created a half-mile long plume of groundwater contamination. There was no dispute that some of these discharges “contained hazardous substances as defined by [the Spill Law].” *Id.* Again, this Court affirmed the Spill Law enforcement action, even though no administrative rule defined the specific substances at issue as “hazardous.”

To be sure, neither *Mauthe* nor *Chrysler Outboard* considered the rulemaking argument that Respondents raised here. But these cases cast serious doubt on the idea that the Department’s past enforcement actions were all out of “compliance with the relevant legal requirements.” *WMC*,

411 Wis. 2d 462, ¶ 28 n.13. Simply put, it is very unlikely that, for nearly 50 years, the Department, this Court, and the regulated community simply overlooked the rulemaking requirement that the court of appeals unearthed here.

C. The decision below ignored all this and would halt virtually all Spill Law enforcement.

The decision below is unmoored from the Spill Law’s text—indeed, other than a few cursory citations, the opinion does not discuss the statutory text *at all*. *See id.* ¶¶ 23–44. The decision never explains why PFAS might not trigger the broad “hazardous substance” definition, or why its reasoning would only require rules for PFAS but not every other substance regulated under the Spill Law. Nor does the decision grapple with how, without “hazardous substance” rules, the Department and regulated parties have successfully implemented the Spill Law for nearly 50 years or how this Court has twice affirmed enforcement actions under it.

Instead of addressing any of this, the court of appeals relied on a novel and expansive theory of administrative rulemaking. As explained more in Argument II below, that theory is unpersuasive and provides an additional basis for reversal. But most simply, the court’s disregard for the Spill Law’s plain text alone compels reversal on the hazardous substance claims.

And the decision’s practical effects are stark. In effect, it would eliminate the Spill Law’s statutory reporting and clean-up obligations until and unless the Department promulgates more rules. *See id.* ¶¶ 34, 39. This would render the law’s critical environmental protections inert, subject to the vagaries of the lengthy and uncertain rulemaking

process.³ And even if rules were promulgated, they would inevitably fail to capture the entire universe of hazardous substance discharges, given how some substances become hazardous only in certain circumstances.

Consider first the decision's impact on harmful PFAS discharges. Critically, no one—neither Respondents nor the courts below—contends that PFAS *are not*, in fact, “hazardous substances” under Wis. Stat. § 292.01(5). That is unsurprising, since all the available evidence indicates that PFAS are, indeed, hazardous. (R. 79:30–38; R. 81; P-App. 250–58, 299–301.) Indeed, many responsible parties under the Spill Law implicitly acknowledge as much: as of the date of this filing, the Department is overseeing PFAS cleanup projects at nearly 150 active sites in Wisconsin.⁴ Under the court of appeals' decision, the Department could not compel remediation at any of these sites, even though these responsible parties have already acknowledged their PFAS cleanup obligations.

Worse, the decision below likely cannot be cabined to PFAS enforcement. Nothing in the court of appeals' reasoning rested on attributes unique to PFAS or “emerging contaminants” more broadly. *WMC*, 411 Wis. 2d 462,

³ Respondents have argued that the Department could still enforce the Spill Law against substances covered by federal CERCLA regulations, citing Wis. Stat. § 292.11(12)(b). (PFR Resp. 10.) But that state statute merely incorporates federal regulations implementing CERCLA's notice requirements, and so the Department could not use these federal *notice* rules to enforce the Spill Law's *cleanup* requirements. What good is a notice requirement if the Department cannot then require cleanup?

⁴ This number has more than doubled in the three years since the parties submitted summary-judgment filings in this case. (R. 79:36; P-App. 256.) See Bureau of Remediation and Redevelopment Tracking System, *Wisconsin Dep't of Nat. Res.*, <https://apps.dnr.wi.gov/botw/SetUpSearchAction.do> (search “Substance” for “PFAS”) (last visited Oct. 15, 2024).

¶¶ 29–33. Rather, the court of appeals reasoned that the Department could not enforce the Spill Law against such discharges because “no statute or rule identified which substances qualify as emerging contaminants.” *Id.* ¶ 26. That sweeping logic would apply to *any* substances, not just PFAS (or even once-“emerging” contaminants like PCBs, PCE, and MTBE). If the Spill Law cannot be enforced against PFAS discharges without first defining that specific “hazardous substance” in an administrative rule, the same would presumably be true for any other substance commonly addressed through Spill Law cleanups. (R. 79:22–28; P-App. 242–50.)

Halting Spill Law enforcement would have a massive statewide impact: the Department responds to approximately 1,000 spills per year and oversees several thousand open contamination cases at a time. Stopping those remediation efforts would have significant environmental and economic impacts, leaving massive amounts of hazardous substances cycling in Wisconsin’s water, air, and soil, and potentially hindering thousands of current and future remediation projects. (R. 79:9, 11, 20; P-App. 229–31, 240.)

All this would also create significant economic uncertainty. One key effect of the Spill Law is to support the safe reuse of contaminated land. Without such remediation, it can be difficult to sell and develop land, creating doubt for owners, lenders, developers, and communities statewide. (R. 79:3, 7, 9; P-App. 223, 227, 229.)

Because nothing in the Spill Law’s text justifies this result, the “hazardous substance” aspects of the decision below should be reversed on this basis alone.

D. The Spill Law is unlike CERCLA in important ways.

Respondents have pointed to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), arguing that administrative rules promulgated thereunder demonstrate the feasibility of the rules they request here. (PFR Resp. 7–14, 25.) But key differences between CERCLA and the Spill Law undermine the comparison.

First, and most importantly, Congress expressly required the federal Environmental Protection Agency to promulgate regulations under CERCLA designating hazardous substances and establishing the quantity of any hazardous substance release that must be reported. 42 U.S.C. § 9601(14)(A)–(E). Congress thus did for CERCLA exactly what the Wisconsin Legislature did *not* do for the Spill Law: require rulemaking.

Second, even CERCLA twice implicitly recognizes the impracticability of exhaustive rulemaking. For one, CERCLA also requires, in addition to its reporting obligations, cleanup plans for “pollutants” and “contaminants”—and neither of these need to be exhaustively listed in an administrative rule. *See generally* 42 U.S.C. § 9621. The Spill Law’s cleanup obligations function that same way. Moreover, even CERCLA’s reporting functions—which are accompanied by rules listing hazardous substances and concentrations—contain a catch-all provision capturing “unlisted” substances that are not enumerated in the rule. *See* 40 C.F.R. § 302.4(b).

Third, the Spill Law applies more broadly than CERCLA. CERCLA primarily emphasizes cleaning up the nation’s most contaminated sites—manufacturing facilities,

mines, landfills, and the like.⁵ By contrast, the Spill Law covers real-time spills that are unregulated under CERCLA, meaning that the Spill Law requires significantly more flexibility. Put simply, CERCLA would not cover the discharge of thousands of gallons of milk into a trout stream, while the Spill Law could. Reporting standards for major contamination sites under CERCLA thus say little about the feasibility of rules covering all substances and discharges that would trigger the Spill Law.

* * *

In sum, the Spill Law's text, this Court's prior decisions, and nearly fifty years of practice all demonstrate that the Department can enforce this law without first promulgating administrative rules purporting to list all "hazardous substances" and their qualifying concentrations.

II. The Department's statements about the Spill Law were not rules and cannot constitutionally be treated as such.

Rather than address the Spill Law's plain text, the court of appeals found that two of the Department's so-called "policies" amounted to unpromulgated administrative rules under Wis. Stat. § 227.01(13): (1) the Spill Law covers PFAS discharges; and (2) the Department would temporarily pause broad VPLE liability exemptions. *WMC*, 411 Wis. 2d 462, ¶ 28.

The court of appeals erred because the Department merely interpreted and exercised its existing statutory authority under the Spill Law; it did not create an

⁵ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities, *U.S. EPA*, <https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal> (last visited Oct. 5, 2024).

independent “policy” with the force of law that could possibly amount to an unpromulgated rule. A contrary result would extend far beyond the Spill Law and unconstitutionally limit the executive branch’s ability to execute and communicate about virtually any law it administers.

The court also discovered a so-called “specific-concentration” policy in an off-hand reference to “exceedances” in a single letter to Leather Rich, deeming that an unpromulgated rule too. The court’s identification of such a policy was simply an error of fact.

A. The Department’s conclusion that PFAS may qualify as “hazardous substances” was not an unpromulgated rule.

The court of appeals wrongly found the Department’s “determination that emerging contaminants fall within the Spill Law’s definition of hazardous substances” to be a “new policy” that represented an unpromulgated rule. *WMC*, 411 Wis. 2d 462, ¶ 27. As evidence of this “policy,” the court pointed to a Department web posting stating that “[w]hen discharged to the environment, PFAS compounds meet the definitions of a hazardous substance and/or environmental pollution under state statutes (s. 292.01, Wis. Stats.),” and a letter the Department sent to VPLE program participants reiterating that “certain PFAS[] meet the definition of hazardous substance and/or environmental pollution under Wis. Stat. § 292.01.” *Id.*

At most, the court of appeals identified Department guidance documents, not unpromulgated rules.

1. The court of appeals identified no “policy” with the force of law aside from what the Spill Law itself requires.

The court of appeals erred because the so-called “policy” here is merely the Department’s conclusion that PFAS substances can fall within the statutory definition of “hazardous substances” in Wis. Stat. § 292.01(5). That “policy” does not itself have the “force of law”—only the Spill Law itself does. That means it does not satisfy this element of Wis. Stat. § 227.01(13) and *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 280 N.W.2d 702 (1979).

A rule is “(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation of procedure of such agency.” Wis. Stat. § 227.01(13); *Citizens for Sensible Zoning, Inc.*, 90 Wis. 2d at 814. The court of appeals failed to properly apply that definition here.

First, the court identified nothing in the Department’s statements themselves that had independent legal effect. The court opined that the Department’s statements that PFAS qualify as “hazardous substances” did not “simply communicate intended applications of the law; rather the statement[s] ha[d] the effect of law *because [they] carrie[d] civil penalties.*” *WMC*, 411 Wis. 2d 462, ¶ 31 (emphasis added). But the court pointed to nothing in the Department’s *statements* that “carries civil penalties”; instead, it cited the *Spill Law itself. Id.*, ¶¶ 31–32 (“the Spill Law requires parties to report the discharge of hazardous substances and to take actions to restore the environment, *see* Wis. Stat. § 292.11(2)–(3).” Similarly, the court pointed to the Department’s statement that Wis. Stat. § 292.99 authorizes penalties for “violation[s] of the notification requirement.”

Id. ¶ 31. Those legal consequences follow from violations of Wis. Stat. § 292.11(2), not violations of the Department’s statement.

As Judge Neubauer rightly put it, the Department’s “statements about the law do not have the force of law because they do not impose any new or unique legal obligations on responsible parties beyond what the Spill Law already requires.” *Id.*, ¶ 65 (Neubauer, J., dissenting). That was exactly right.

The court of appeals offered one other rationale on this key “force of law” element: that the Department “used . . . mandatory language in its policy statement on its website,” citing *Cholvin v. DHFS*, 313 Wis. 2d 749, 758 N.W.2d 118 (Ct. App. 2008). *WMC*, 411 Wis. 2d 462, ¶ 32. But that does not resolve the key question here: did the website posting itself purport to impose a “mandatory” requirement, or did the posting merely describe a legal authority like a statute that did so?

Cholvin provides an instructive contrast that helps answer this question. There, the Department of Health and Family Services determined that a Medicaid applicant was not eligible for certain reimbursements based on a standard set out in an agency instruction manual, not in any statute or promulgated administrative rule. *Cholvin*, 313 Wis. 2d 749, ¶¶ 13–19. The manual’s “mandatory language” operated with the “force of law” because the standard it articulated was used to determine eligibility independently from any statute or administrative rule. *Id.* ¶ 29.

Unlike in *Cholvin*, the Department’s statements here did not embody a new substantive obligation apart from any statute or promulgated rule. Instead, they reflected the Department’s position on “what the Spill Law already requires.” *WMC*, 411 Wis. 2d 462, ¶ 65 (Neubauer, J., dissenting). To be sure, the Department used mandatory

language to describe the Spill Law’s requirements—but that is because the Spill Law itself, through its “hazardous substance” definition, imposes mandatory reporting and cleanup obligations on regulated parties. An agency cannot help but use mandatory language to describe the legal effect of the laws it administers, and doing so does not somehow transform a communication about the law into an independent legal obligation.

2. The Department’s statements that the Spill Law covers PFAS discharges were, at most, guidance documents.

The court of appeals’ basic misunderstanding stemmed from its conflation of guidance documents with administrative rules. While an agency’s statement *about* the law may represent a guidance document, it cannot *itself* represent a rule that has the force of law.

“Guidance documents” are a category of agency actions consisting of “any formal or official document or communication issued by an agency” that “[e]xplains the agency’s implementation of a statute or rule enforced or administered by the agency,” or “[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency.” Wis. Stat. § 227.01(3m)(a)1.–2.

Because guidance documents merely represent “the written record of the executive’s thoughts about the law,” *SEIU*, 393 Wis. 2d 38, ¶ 106, they “are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions.” *Id.* ¶ 102. Such documents themselves “impose no obligations, set no standards, and bind no one. . . . Functionally, and as a matter of law, they are entirely inert.” *Id.* Again, they “merely explain statutes and rules”—they are not statutes or rules themselves. *Id.* ¶ 106.

The two statements on which the court of appeals relied were, at most, guidance documents. Again, one said “PFAS compounds meet the definitions of a hazardous substance and/or environmental pollution under state statutes (s. 292.01, Wis. Stats)” (R. 10:2; P-App. 182), and the other, sent to certain parties who were actively remediating property, said “certain PFAS[] meet the definition of hazardous substance and/or environmental pollution under Wis. Stat. § 292.01” (R. 14:2; P-App. 194).

In both, the Department communicated its views about what the *Spill Law itself* requires when dealing with PFAS substances. Neither purported to impose independent legal requirements apart from what the Spill Law already demanded. Indeed, both expressly cross-referenced the definition of hazardous substances in Wis. Stat. § 292.01, making it clear that recipients’ legal obligations sprang from that Spill Law provision, not the statements themselves. In other words, both statements “simply ‘explain[ed]’ statutes and rules”—here, the Spill Law—and were “communications *about* the law . . . not the law itself.” *SEIU*, 393 Wis. 2d 38, ¶ 102 (emphasis in original). They were at most guidance documents, not rules, and did not need to undergo rulemaking procedures.

To illustrate why the Department’s statements cannot themselves possess the force of law, consider a Department enforcement action against a PFAS discharger. There, the Department would and could not point to its statements about the Spill Law as establishing the legal basis for the entity’s liability. Rather, the Department would need to cite Wis. Stat. § 292.01(5)’s “hazardous substance” definition and prove that the PFAS discharge fell within that legal standard.⁶ And the

⁶ Indeed, that is exactly what the Department has done in a major ongoing PFAS enforcement action under the Spill

discharger could contest that argument, contending that the PFAS discharge does not fall within Wis. Stat. § 292.01(5). The Department's statements about Wis. Stat. § 292.01(5) on its website and in its letters to parties in the VPLE program would play no role in such an action, again because they represent communications about the law rather than the law itself.

B. The Department's decision to exercise its statutory discretion to pause issuing broad liability exemptions was not an unpromulgated rule.

The same analysis applies to the Department's decision to temporarily pause granting broad liability exemptions under the VPLE program. Again, the Department here did not adopt any independent "policy" that itself had the force of law. Rather, it decided to exercise its discretion under the Spill Law a certain way and communicated that fact to the public—at most, a guidance document, not a rule.

Key here is the broad discretion the Legislature gave to the Department to issue either broad or narrow liability exemptions. The Department "*may* approve a partial cleanup and issue a certificate of completion" for only those portions of the property or substances that are satisfactorily addressed. Wis. Stat. § 292.15(2)(am)1m. The Department can also grant broad exemptions (for all substances across the entire covered property), but only "if" the Department determines that the applicant has "satisfactorily restored" the environment "to the extent practicable" such that "the harmful effects from the discharges have been minimized," Wis. Stat. § 292.15(2)(a)3. The Department has no obligation

Law, *State v. Tyco Fire Products, Limited Partnership, et al.*, No. 22-CX-0001 (Marinette Cnty. Cir. Ct.). That complaint relies on statutory Spill Law provisions in Wis. Stat. ch. 292, not any Department statements about that law. (P-App. 317–27.)

to issue broad or narrow liability exemptions in any given case, nor does the statute mention rulemaking as a prerequisite to the Department's exercise of discretion.

Here, the Department merely explained its exercise of discretion; it did not adopt any "policy" that itself somehow had legal effect on VPLE participants. In the January 4, 2019, web posting, the Department explained its "interim decision" to offer narrower liability exemptions "for the individual hazardous substances that are investigated after all the VPLE requirements have been met," rather than broad exemptions that "cover[] all potential hazardous substances, including substances that were not investigated but could be discovered in the future." (R. 11:3; P-App. 186.) The Department also noted its "legal authority to offer this interim approach under Wis. Stat. § 292.15(2)(am)." (R. 11:3; P-App. 186.)

This announcement again was, at most, a guidance document, since it merely "[e]xplain[ed] the agency's implementation of a statute or rule enforced or administered by the agency," Wis. Stat. § 227.01(3m)(a)1., or, put differently, "intended applications of the law." *SEIU*, 393 Wis. 2d 38, ¶ 102. Nothing in the announcement itself carried any legal effect. No application was denied, no binding legal standards were imposed, and no liability resulted. It also "impose[d] no obligations, set no standards and b[ound] no one." *SEIU*, 393 Wis. 2d 38, ¶ 102.

The court of appeals again pointed to nothing in the Department's web posting that itself had the force of law, a necessary rule element under Wis. Stat. § 227.01(13). The court addressed this "force of law" element in a single, cryptic sentence:

[T]he interim decision, which dictates the type of future liability protection a party may receive vis-à-vis the type of [exemption] that the DNR issues, has the effect of law because it legally affects “the interest of individuals” in the VPLE program in regard to liability protection for future remediation.

WMC, 411 Wis. 2d 462, ¶ 42. This analysis appears to hinge on a supposed “interest” that VPLE participants have in Spill Law liability exemptions, *id.*, but that reference is doubly flawed.

For one, the VPLE statute never entitles participants to either kind of liability exemption. *See* Wis. Stat. § 292.15(2). Rather, in every case, the Department has discretion to issue an exemption based on whether the applicant fulfills the statutory criteria to the Department’s satisfaction. Because the Department has discretion, VPLE participants simply have no “interest” that could be “legally affected.”

And even if they did, the Department’s communication did not “legally affect” that interest. Rather, the Department simply explained how it intended to exercise its discretion when applying the statutory criteria in Wis. Stat. § 292.15. Namely, the Department communicated its view that un-remediated PFAS would mean properties are not “satisfactorily restored” and that “not all of the harmful effects from a discharge of a hazardous substance ha[d] been minimized” under Wis. Stat. § 292.15(2)(am)1m. The Department therefore said it would only use its statutory authority to issue narrower liability exemptions under those circumstances. Nothing in the communication had any legal effect—only the Department’s later exercise of discretion to issue partial narrower exemptions could.

C. There is no evidence that the Department had a “specific-concentration” policy.

Last, the court of appeals made a factual error in holding that the Department had a “specific-concentration” policy that it should have promulgated as a rule. *WMC*, 411 Wis. 2d 462, ¶¶ 35–39. By this, the court meant that the Department supposedly “determined a level at which the concentration of a given emerging contaminant falls within the definition of a ‘hazardous substance.’” *Id.* ¶ 36. Simply put, there is no evidence that such a Department policy ever existed.

Judge Neubauer correctly identified the core evidentiary flaw in the majority’s analysis: it rests on a single letter, torn out of context, in which the Department mentioned “exceedances . . . for PFAS.” (R. 13:3; P-App. 191.) As she explains, that mention of “exceedances” referenced “concentrations of two PFAS in excess of the standards [*Leather Rich*] had selected to govern its site.” *WMC*, 411 Wis. 2d 462, ¶ 71 (Neubauer, J., dissenting) (emphasis added). Because this communication was “grounded in the particular circumstances of [*Leather Rich*’s] matter” and arose from *Leather Rich*’s own proposal, it was not required to be promulgated as a rule. *Id.*

The majority acknowledged that it “does not appear that the DNR had announced specific concentrations of emerging contaminants that render those substances ‘hazardous.’” *WMC*, 411 Wis. 2d 462, ¶ 35. That should have ended the analysis, since there is simply no evidence that the Department had any kind of uniform “policy” that could conceivably represent a rule. The majority pointed only to the mention of “concentrations” in Wis. Stat. § 292.15 itself (which itself says nothing about the existence of a Department “policy”) and the “exceedances” letter which, again, was taken out of context.

And even if this letter did purport to represent an enforceable “policy,” Respondents have an independent problem: their challenge jumps the gun under *Container Life Cycle Management, LLC v. DNR*, 2022 WI 45, 402 Wis. 2d 337, 975 N.W.2d 621 (“*CLCM*”). There, this Court held that a letter to a regulated party was not subject to judicial review under Wis. Stat. § 227.52 because it was “not the consummation of the decisionmaking process but instead [was] just a step along the way.” *Id.* ¶ 50. The same is true here—Respondents essentially challenge a letter from the Department to Leather Rich in the middle of the “ongoing” Spill Law remediation process. *Id.* ¶ 44. Just as the regulated party in *CLCM* could not short-circuit the agency process and challenge a letter that itself “resolve[d] nothing regarding [the regulated party’s] rights,” so too Leather Rich cannot do so here. True, Respondents frame their claim as arising under Wis. Stat. § 227.40 rather than § 227.52, but that is a distinction without a difference. *CLCM*’s holding would lose all its force if regulated parties could evade it through trivial pleading adjustments like this.

D. The constitution forbids the result reached by the court of appeals here.

The court of appeals’ rulemaking approach poses significant constitutional problems. First, it interferes with the executive branch’s core power to communicate with the public about the laws it executes. Worse, it prevents executive agencies from executing the law without navigating the onerous rulemaking process (including its multiple legislative vetoes). Those effects would reach far beyond the Department’s efforts to administer the Spill Law here, extending to *all* executive agencies and *all* the statutes they administer.

1. Subjecting these statements to the rulemaking process would be unconstitutional under *SEIU*.

By holding that the Department's statements about the Spill Law must travel through the rulemaking process, the court of appeals sanctioned the same kind of legislative interference with executive authority that this Court invalidated in *SEIU*.

There, the Court facially invalidated statutes that required executive agencies to navigate a notice-and-comment process before releasing their guidance documents to the public. *See SEIU*, 393 Wis. 2d 38, ¶ 90. It reasoned that the “creation and dissemination of guidance documents fall within the executive’s core authority” because such documents “contain the executive’s interpretation of the laws, his judgment about what the laws require him to do.” *Id.* ¶¶ 105–06. Accordingly, such communications about how an agency intends to apply the law may not be “mute[d] or modulate[d]” by the Legislature. *See id.* ¶ 108. As the Court put it:

Capturing the executive’s ability to communicate his knowledge, intentions, and understanding of the laws he is to execute makes him a drone without the energy or independent wherewithal to act as a co-equal member of government.

Id.

If mere notice-and-comment procedures cannot be applied to statements that, at most, are guidance documents, the onerous rulemaking process cannot either. In *SEIU*, the notice-and-comment provisions involved no legislative veto and could be completed relatively quickly—and even that installed an impermissible legislative “gate.” *Id.* ¶ 107. Here, by contrast, the rulemaking process involves a legislative veto (*see generally* Wis. Stat. § 227.19) and is generally much lengthier (*see generally* Wis. Stat. §§ 227.135–227.22). Both

therefore impose impermissible “gate[s]” between the executive branch and its communications with the public. *Id.* ¶ 107.

2. Requiring the Department to promulgate rules before enforcing the Spill Law poses an even more serious constitutional problem than in *SEIU*.

This constitutional “gatekeeping” problem becomes even worse considering how the decision below would block the executive branch not just from *communicating* about the law, but also from *executing* it without rulemaking. Indeed, the court of appeals held that the Department’s so-called “policy” of applying the Spill Law to PFAS is “*invalid and unenforceable*.” *WMC*, 411 Wis. 2d 462, ¶ 46. That apparently means the Department cannot enforce the Spill Law against PFAS (or any other substances it considers hazardous) until it promulgates corresponding administrative rules.

This result would cripple the core executive power to “determine ‘what the law requires as well as [to] apply[] it.’” *Evers v. Marklein*, 2024 WI 31, ¶ 15, 412 Wis. 2d 525, 8 N.W.3d 395. This authority flows from the basic executive power to “take care that the laws be faithfully executed.” Wis. Const. art. V, § 4. Forcing the executive branch to pass through the rulemaking process—including legislative veto provisions in Wis. Stat. § 227.19 and § 227.26—before interpreting and applying laws like the Spill Law would unconstitutionally “interfere with and even override the executive branch’s core power of executing the law.” *Evers*, 412 Wis. 2d 525, ¶ 24.

The principle that agencies cannot interpret and enforce statutes they administer without rulemaking would bring wide swaths of executive activity to a grinding halt.

Consider, for instance, *Wisconsin Property Tax Consultants, Inc. v. DOR*, 2022 WI 51, 402 Wis. 2d 653, 976 N.W.2d 482. There, the plaintiffs argued that the Department of Revenue could not apply its interpretation of the personal property tax exemption for “machinery, tools, and patterns, not including such items used in manufacturing” without promulgating a rule. *Id.* ¶¶ 2–3; *see also* Wis. Stat. § 70.111(27)(b). Under the court of appeals’ reasoning, they likely would have been right: the Department of Revenue “determined” that certain activity fell within the tax exemption, just as the Department here “determined” that PFAS qualify as “hazardous substances.” *WMC*, 411 Wis. 2d 462, ¶ 27.

As another example, a key consumer protection statute, Wis. Stat. § 100.18(1), broadly prohibits “untrue, deceptive or misleading” marketing tactics, and includes multiple open-ended terms regarding its coverage. Although the statute lists a few specific kinds of deceptive activity, *see* Wis. Stat. §§ 100.18(2)–(10r), it does not purport to do so exhaustively. Under the court of appeals’ logic, the Department of Agriculture, Trade and Consumer Protection could not enforce that statute outside those enumerated examples without first promulgating administrative rules that comprehensively define all the additional trade practices it views as “deceptive or misleading.”

In short, an agency likely could not enforce *any* statute that requires *any* interpretation without first promulgating a rule. That would tremendously (and unconstitutionally) burden the executive’s core law-execution authority.

The court of appeals’ decision would also have far-reaching effects elsewhere, given how it would mean executive agencies must promulgate rules announcing how they plan to exercise their statutory discretion. Again, the court of appeals held that the Department could not exercise

its discretion to grant only narrow Spill Law liability exemptions without first promulgating a rule.

That logic would greatly constrain the core executive function of exercising discretion in enforcing statutes. When the Legislature “elect[s] to leave some decisions to executive branch discretion,” it cannot then “interfer[e] with the exercise of discretion” it gave to the executive branch. *Evers*, 412 Wis. 2d 525, ¶ 34. Yet that is the precise effect of the decision below. The executive branch cannot be constitutionally forced through the rulemaking process before exercising its discretion under statutes like Wis. Stat. § 292.15.

* * *

The Department was free to decide that the Spill Law can apply to PFAS discharges without promulgating a rule, and the same is true for the Department’s decision to pause granting broad liability waivers given statewide uncertainty over PFAS contamination. That is true both as a statutory and a constitutional matter. The Department’s statements about the law did not represent law itself and thus did not qualify as rules. Any other result would unconstitutionally constrain agencies’ ability to communicate with the public and enforce the laws they are charged with administering.

III. The broad and explicit enforcement authority granted to the Department by the Spill Law satisfies Wis. Stat. § 227.10(2m).

Below, the circuit court entered judgment for Respondents on another theory: that Wis. Stat. § 227.10(2m) somehow narrows the Spill Law’s broad text and itself requires rulemaking before the Department can enforce the Spill Law against PFAS. This Court should reject that theory too.

As Judge Neubauer rightly recognized, this Court’s recent *Clean Wisconsin* decisions squarely foreclose this alternate theory. *WMC*, 411 Wis. 2d 462, ¶¶ 77–81 (Neubauer, J., dissenting). In short, “an agency may rely upon a grant of authority that is explicit but broad when undertaking agency action, and such an explicit but broad grant of authority complies with § 227.10(2m).” *Clean Wis. I*, 398 Wis. 2d 386, ¶ 25. That is exactly the situation here.

Wisconsin Stat. § 227.10(2m) states that “[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 this subchapter.” Wis. Stat. § 227.10(2m). Respondents argued that, under this provision, the Department lacks “explicit authority . . . to implement or enforce any standard, requirement, or threshold related to emerging contaminants, including PFAS.” (R. 5:23; 74:20.) The circuit court agreed, holding that this procedural statute restricts the applicability of the Spill Law “at certain concentrations” unless DNR promulgates rules specifying numeric thresholds. (R. 112:2; P-App. 133.)

This Court rejected a theory just like that in *Clean Wisconsin I & II*, where it held that Wis. Stat. § 227.10(2m) does not narrow an agency’s broad authority under separate substantive statutes. Where separate statutes grant “explicit but broad” authority, no violation of Wis. Stat. § 227.10(2m) occurs when an agency exercises that authority. *See Clean Wis. I*, 398 Wis. 2d 386, ¶ 24; *see also Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶¶ 25–27, 398 Wis. 2d 433, 961 N.W.2d 611 (“*Clean Wis. II*”). In other words, Wis. Stat. § 227.10(2m) cannot “strip an agency of the legislatively granted explicit authority it already has.” *Clean Wis. II*, 398 Wis. 2d 433, ¶ 24.

Those decisions foreclose Respondents' theory. Wisconsin Stat. § 292.01(5) provides an "explicit but broad" definition of hazardous substances, and Respondents offer no serious argument that PFAS falls outside this definition. This definition triggers other Spill Law reporting and cleanup obligations that are also "explicit but broad." *See, e.g.*, Wis. Stat. § 292.11(2)–(3). Under the *Clean Wisconsin* decisions, the Department has ample authority to administer those statutes without rulemaking.

CONCLUSION

The court of appeals' decision should be reversed.

Dated this 16th day of October 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Colin T. Roth
COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants-
Appellants-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (CTR)
(608) 957-5218 (CG)
(608) 267-8904 (GJK)
(608) 267-2238 (ADR)
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us
gibsoncj@doj.state.wi.us
johnsonkarp@doj.state.wi.us
russomannoad@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,970 words.

Dated this 16th day of October 2024.

Electronically signed by:

Colin T. Roth

COLIN T. ROTH

Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of October 2024.

Electronically signed by:

Colin T. Roth

COLIN T. ROTH

Assistant Attorney General