No. 2022AP0718

In the Wisconsin Supreme Court

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,
AND LEATHER RICH, INC.,
PLAINTIFFS-RESPONDENTS,

v.

WISCONSIN NATURAL RESOURCE BOARD,
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
AND STEVEN LITTLE,
DEFENDANTS-APPELLANTS-PETITIONERS,

On review of a decision by the
Wisconsin Court of Appeals, District II

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT LEATHER RICH, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

This case turns on a fundamental principle in our legal system: in order to comply with the law, the public must know what the law requires. *Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 09, ¶ 9, 389 Wis. 2d 486, 936 N.W.2d 573. Or, as applied here, in order for the public to comply with Wisconsin's Spills Law, (section 292.01 *et seq.*), the Department of Natural Resources, with the direction of Acting-Secretary Little and oversight of the Natural Resources Board (collectively, "DNR") must inform the public when the Spills Law applies.

But DNR withheld this vital information from the public by refusing to promulgate administrative rules with objective requirements for when a hazardous substance discharge is subject to the Spills Law. Instead, DNR unilaterally and continuously changed these criteria, leaving the regulated community (in this case the entire public) guessing at when they might be subject to an enforcement action.

What's more, also unilaterally and without notice, DNR changed the rules of the elective program intended to speed up environmental cleanup - the Voluntary Party Liability Exemption ("VPLE") program. *See* Wis. Stat. § 292.15(2).

As this case demonstrates, DNR's constant movement of the proverbial goal post with respect to these regulations has very real consequences for Wisconsin residents. Ms. Joanne Kantor is the owner of Leather Rich, Inc. ("LRI"), a small, family-owned dry-cleaning business. (R. 71:1.) As a law-abiding citizen, Ms. Kantor made every effort to comply with DNR's changing regulations under the Spills Law, investing hundreds of thousands of dollars and several years investigating potential contamination on the LRI property just so DNR would allow her to *begin* the remediation process. (R. 71:2-3.) Ultimately, unable to get the necessary clarity from DNR on how the Spills Law and VPLE program applied to her, Ms. Kantor was faced with a choice: either spend the remainder of her savings and her well-earned retirement trying to guess how DNR would apply the regulations or bring this action

to force DNR to promulgate those requirements through the legally-required process.

The lower courts agreed with this fundamental concept that Ms. Kantor, members of Wisconsin Manufacturers and Commerce, Inc. ("WMC"), and the public at large deserve to know what the law requires. *Wisconsin Mfrs. & Com., Inc. v. DNR*, 2024 WI App 18, 411 Wis. 2d 462, 5 N.W.3d 903. And in Wisconsin, the manner in which an agency provides this necessary information to the public is through the administrative rulemaking process. Accordingly, the court of appeals correctly upheld the circuit court's determination that DNR's *ad hoc* regulation of emerging contaminants as hazardous substances under the Spills Law, and DNR's *ad hoc* changes to the VPLE program were both unpromulgated rules, and therefore invalid and unenforceable. *Id.* ¶46. This Court should do the same.

STATEMENT OF THE CASE

The purpose of Wisconsin's Spills Law is to "prevent, minimize, and, if necessary, abate and remedy contamination of this state's environment … caused by discharges of hazardous substances." *State v. Mauthe,* 123 Wis. 2d 288, 299, 366 N.W.2d 871 (1985). The Spills Law applies to all. It is not limited to industrial facilities or to individuals who possess known toxic substances. Rather, it applies to every Wisconsin resident who possesses or controls a substance that DNR deems hazardous. According to DNR, simply owning property can subject one to Spills Law liability. And according to the arguments put forth by DNR in this case, so can buying a gallon of milk. It is precisely because of its broad regulatory reach that DNR must clarify when and how the Spills Law applies, and must do so through regulatory rulemaking.

The Spills Law process envisioned by the legislature is simple: First, DNR determines what substances are hazardous and tells the public as much. Members of the public, in turn, will prevent and minimize discharges of those hazardous substances. If a hazardous substance happens to be discharged, the discharger must report it to

DNR and work with the agency to abate and remedy contamination. *See, generally,* Wis. Stat. Ch. 292; Wis. Admin. Code Chs. NR 700-799.

To encourage compliance with this important law, one who does not immediately report a hazardous substance discharge to DNR is subject to enforcement action and fines that would prove ruinous to an average citizen - totaling thousands of dollars per day. Wis. Stat. § 292.99. Collectively, the Spills Law's simple structure and steep penalties lay out a clear framework for environmental protection, obliging DNR to interpret and implement this framework through rulemaking.

But DNR's behavior contradicts this clear legislative mandate. DNR argues it can skip the step where it informs the public when a substance is regulated as hazardous under the Spills Law. According to DNR, the Spills Law works differently. First, Joe Citizen discovers a substance (*any* substance) has been discharged. Then, Joe must determine whether DNR believes the discharge would be reportable as a hazardous substance discharge under the Spills Law. If Joe reports the discharge, DNR will accept Joe's determination that the substance is hazardous and open a remediation case. Joe will spend significant resources to hire an environmental consultant and undertake the lengthy and complex process of investigating, planning, and remediating the discharge. Alternatively, if Joe does not report the discharge because he does not believe he has discharged a hazardous substance, DNR may at any point determine, unilaterally and without notice, that Joe's discharge is subject to the Spills Law. DNR will then bring an enforcement action against Joe, subjecting Joe to thousands of dollars in fines per day, potential citizen suits, and even tort actions.

What's more, DNR asserts that different substances can be considered hazardous in different circumstances, so even common substances like milk are hazardous. (DNR Br. 25-26.) But DNR refuses to clarify in which situations that is the case.

For those of us committed to following the law, DNR's position in this case is bewildering. Ms. Joanne Kantor is one such citizen,

committed to following the law. She is a regular, hard-working Wisconsinite who dedicated much of her adult life to building a small business, Leather Rich, with her husband, Ron. (R. 77:1.) After Ron's untimely passing in 2018, Ms. Kantor decided to retire and began exploring selling the LRI property. (*Id.*) Ms. Kantor was not concerned about significant environmental issues with the property because she and Ron proactively and voluntarily installed an impermeable barrier under the facility to prevent contamination. (R.88:2.) Nonetheless, Ms. Kantor evaluated the property and discovered certain low-level volatile organic compounds. (R. 77:1.) She reported the discovery to DNR, and a remediation case was opened for the LRI property. (R. 77:2.)

Ms. Kantor made every effort to follow the Spills Law. Between March 2018 and June 2019, she invested significant resources in investigating the site, submitting hundreds of pages detailing the investigation and proposed remediation. (R. 71:4.) LRI even entered the VPLE program to expedite the remediation and, thus, Ms. Kantor's hopeful retirement. (R. 71:2.) Ms. Kantor hired an environmental consultant and followed DNR's direction at every step. (R. 71:2-4.)

On June 13, 2019, LRI met with DNR representatives to discuss beginning the remediation. (R. 88:1.) At that meeting, DNR staff informed LRI they would need to investigate PFAS[1] at the site. (R.88:2.) Prior to this conversation, Ms. Kantor had never heard of PFAS. (*Id.*) Despite demonstrations that neither water repellants nor other cleaning products used by LRI contained PFAS, DNR refused to allow Ms. Kantor to begin remediating the property unless and until LRI sampled for PFAS. (R. 71:3.)

Believing she had no choice but to comply with DNR's directive, Ms. Kantor agreed to test for several PFAS and reported those results to DNR. (R. 71:3.) But Ms. Kantor's compliance led to even more demands from DNR, requiring soil and additional water samples be tested for

[1] "PFAS" refers to perfluoroalkyl and polyfluoroalkyl compounds. DNR states that there are approximately 9,000 PFAS compounds. (R. 79:30.)

PFAS, and "both individual and combined exceedances" to be reported to DNR. (R. 13:3.)

At that point, Ms. Kantor had invested significant time and resources in the investigation, but still had no clear picture of what DNR would require. She had been forced to withdraw from the VPLE program, forfeiting the $4,000 program fee, because the value of participation had been substantially diminished based on DNR's changed approach to implementing it. (R. 71:4.) DNR provided no guidance to Ms. Kantor regarding which of the thousands of PFAS compounds were considered hazardous substances, and at what concentrations those substances would be considered in exceedance. (R. 71:3.) So, when DNR once again refused to allow LRI to begin its remediation after spending nearly $300,000 on investigating the site, Ms. Kantor made the difficult decision to bring this action. (R. 71:4.)[2]

Ms. Kantor's story demonstrates the real-world impact of DNR's capricious interpretation and unlawful implementation of the Spills Law, which cost LRI hundreds of thousands of dollars and delayed Ms. Kantor's much-deserved retirement. This case presents an opportunity for the Court to prevent others from dealing with the uncertainty Ms. Kantor has faced for the last six and a half years. The Court should take that opportunity and uphold the appellate court's decision.

STANDARD OF REVIEW

Whether an agency action meets the definition of a rule under Wis. Stat. § 227.01(13) is a question of law which this Court reviews *de novo*. *Lamar*, 389 Wis. 2d 486, ¶ 10. Likewise, issues of agency authority are

[2] Despite DNR's refusal to tell Ms. Kantor what the law requires, Ms. Kantor has nonetheless continued the remediation process at the LRI site during the pendency of this investigation. *See* Bureau of Remediation and Redevelopment Tracking System, *Wisconsin Dep't of Nat. Res.,* https://apps.dnr.wi.gov/botw/SetUpSearchAction.do (search "Activity or Location Name" for "Leather Rich" and "Activity Status" for "Open") (last visited Nov. 5, 2024).

reviewed *de novo*. *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶ 9, 398 Wis. 2d 433, 961 N.W.2d 611.

ARGUMENT[3]

I. DNR Cannot Regulate Emerging Contaminants Under the Spills Law Without Rulemaking Identifying them as Hazardous Substances

This Court, quoting the U.S. Supreme Court, made clear that a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Lamar*, 389 Wis. 2d 486, ¶ 39 (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). "It is axiomatic that a new rule cannot reach back into history to give a [regulated party] notice of a requirement the Department has not yet adopted." *Id.*

This requirement for fair notice of regulatory requirements makes especially good sense when considered in the context of the Spills Law. The purpose of the Spills Law is to "prevent, minimize, and, if necessary, abate and remedy contamination of this state's environment … caused by discharges of hazardous substances." *Mauthe*, 123 Wis. 2d at 299. Thus, the primary goal of the Spills Law is to prevent and minimize hazardous substance discharges, which can only be achieved if one is aware of what constitutes a hazardous substance discharge.

Moreover, it is DNR's intent that an individual subject to the Spills Law "be able to efficiently move through the process … with minimal department oversight." Wis. Admin. Code § NR 700.01(2). But this, too, can only be achieved if DNR sets clear requirements for when a

[3] As noted throughout this brief, LRI concurs with much of the brief filed by Co-Plaintiff-Respondent WMC, and where possible, will avoid repeating WMC's analysis for the sake of brevity. Pursuant to Wis. Stat. § 809.19(5)(b), LRI is filing a separate brief, with the consent of petitioners, to present its unique perspective and arguments reliant thereon.

discharged substance is considered hazardous thereby triggering the Spills Law requirements.

These very practical considerations, as well as law, require DNR to promulgate rules in order to regulate emerging contaminants under the Spills Law.

A. Wis. Stat. § 227.10(1) Requires Rulemaking for DNR to Regulate Emerging Contaminants as Hazardous Substances

"Each 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." Wis. Stat. § 227.10(1). To be valid, rules must be promulgated according to the rulemaking process laid out in chapter 227, which includes gubernatorial review of a scope statement, economic impact analysis, public notice and hearings, and legislative review.

DNR was required to promulgate rules codifying its interpretation of the definition of "hazardous substance" in section 292.01(5) to include regulation of certain emerging contaminants. DNR has clear legislative authority to undertake such rulemaking, and the Spills Law's direct regulation of individuals further supports this rulemaking requirement.

1. DNR's reinterpretation of the ambiguous definition of hazardous substance to include certain emerging contaminants requires rulemaking.

Unless a statute is clear and unambiguous, an agency must interpret the statute in order to take actions permitted by it. *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 25, 396 Wis. 2d 434, 957 N.W.2d 261 (lead op.) (citing *Lamar*, 389 Wis. 2d 486, ¶ 38.) Such interpretation by an agency must be promulgated as a rule. Wis. Stat. § 227.10(1). If an agency changes its interpretation of an ambiguous statute, that change must also be promulgated as a rule. *Schoolway Transp. Co. v. DMV*, 72 Wis. 2d 223, 237, 240 N.W.2d 403 (1976). These

rulemaking requirements prohibit an agency from "engag[ing] in *ad hoc* interpretations of ambiguous statutes." *Lamar*, 389 Wis. 2d 486, ¶ 21.[4]

The Spills Law requires that a person who discharges a hazardous substance notify DNR immediately. Wis. Stat. § 292.11(2). However, in order to follow this requirement, that person – and every person – must first determine whether a hazardous substance has been discharged.

Central to this determination (and this case) is the definition of "hazardous substance" provided in section 292.01(5):

> "Hazardous substance" means any 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.

DNR describes this definition as "broad and open-ended." (DNR Br. 25.) LRI agrees. However, it is also ambiguous and therefore requires rulemaking for the agency to interpret and implement.[5]

The ambiguity of the definition is clearly demonstrated by LRI's ongoing inability to determine which emerging contaminants DNR intends to regulate at their site. (R. 71:3.) DNR itself highlights this ambiguity, explaining the definition changes based on circumstances of the discharge as well as external factors such as scientific developments. (DNR Br. 25-26.) In other words, there is no objective way to determine when DNR will consider a substance hazardous based on this broad and open-ended definition. Thus, contrary to DNR's argument that the broad

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[4] This type of *ad hoc* regulation also raises serious constitutional concerns, which are fully addressed in section A.3 of WMC's brief. WMC Br. at 17-20.

[5] Section A.2 of WMC's brief explains the statute's ambiguity. LRI agrees with WMC's analysis. WMC Br. at 15-17.

definition somehow prohibits rulemaking, in reality, the broad language creates ambiguity that *requires* rulemaking to implement.

Notably, DNR does not argue that the definition of hazardous substance is unambiguous. Rather, DNR makes multiple arguments for why it should be permitted to continue engaging in *ad hoc* interpretation of the ambiguous statute, each of which is easily rebutted.

First, DNR argues the broad, open-ended definition demonstrates the legislature's intent to prohibit rulemaking. (DNR Br. 25.) DNR asserts that *any* substance, including milk and beer, can (and must) be subject to Spills Law regulation. *Id*. But taken to its logical end, this premise would compel an absurd result. For instance, water is a substance that "…may pose a substantial present or potential hazard to human health or the environment because of its quantity." Wis. Stat. § 292.01(5). Does flooding on one's property, then, equate to a hazardous substance discharge subject to the Spills Law? Certainly, there are limitations on what is regulated under the Spills Law, and defining those limitations requires rulemaking.

Next, DNR argues that the broad definition in section 292.01(5) prohibits DNR from further defining hazardous substances by rule. (DNR Br. 25.) One need only look to nearby statutes to refute DNR's argument. For example, chapter 285 includes a definition for hazardous substance that is identical to section 292.01(5). Wis. Stat. § 285.01(21). Chapter 285 later provides testing requirements for "dioxins, furans, arsenic, lead, hexavalent chromium, cadmium, mercury and *any other hazardous substance identified by the department by rule*…" Wis. Stat. § 285.35(1)(b) (emphasis added). The legislature clearly expected DNR to further define hazardous substances through rulemaking despite the broad definition in section 285.01(21) (the same as found in the Spills Law). It is illogical to conclude the legislature expected rulemaking to further define hazardous substance in chapter 285 but intended to prohibit rulemaking by using the exact same language in chapter 292.

DNR's claim that it would be "practically impossible" to identify all hazardous substances and their concentrations is also easily disproven.

(DNR Br. 25.) This is precisely the approach taken by the federal government and multiple other states.[6] For example, the federal equivalent to the Spills Law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) explicitly lists the hazardous substances regulated under it and quantities at which discharges must be reported. 40 C.F.R. § 302.4(a).

CERCLA also refutes DNR's warning about the need for "frequent statutory revisions" to keep up with evolving science. (DNR Br. 25.) Substances are still regulated as hazardous under CERCLA if they are not explicitly listed but meet certain objective characteristics of ignitability, corrosivity, reactivity, or toxicity. *See* 40 C.F.R. § 261.20-24. DNR could easily take the same approach by promulgating rules that include objective criteria for determining a substance is hazardous.[7] This approach would give fair notice to the regulated community of conduct that is forbidden or required (*See Lamar*, 389 Wis. 2d 486, ¶ 19) and still provide flexibility to incorporate changing science without legislative or rule changes.

Finally, DNR argues that rules could not address situations where a substance is only considered hazardous because of the circumstances of the discharge, such as milk spilled into a trout stream. (DNR Br. 25.) But this argument relies on a faulty premise – the Spills Law does not authorize DNR to determine whether a substance is hazardous based on the circumstances of the discharge. A hazardous substance is one that

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[6] *See*, *e.g.*, Minn. Stat. § 115B.02 subd. 8 (2023) (defining "hazardous substance" as a defined group of commercial chemicals, hazardous air pollutants, and hazardous wastes); 415 Ill. Comp. Stat. § 5/58.2 (2024) (defining "regulated substance" subject to the remediation program as a defined group of hazardous substances as defined under CERCLA and petroleum products).

[7] DNR makes a lengthy argument about the differences between the Spills Law and CERCLA. (DNR Br. 34.) While LRI disagrees with DNR's representations about CERLA's purpose and provisions, the issue is of no consequence here. DNR concedes that CERCLA has managed to effectively regulate "unlisted" substances, so it follows that DNR is capable of doing the same.

poses a threat "because of *its* quantity, concentration or physical, chemical or infection characteristics." Wis. Stat. § 292.01(5). The definition in no way allows DNR to change their determination of whether a substance is hazardous based on the location or circumstances of the discharge. DNR can determine (through rulemaking) that a substance is hazardous at a certain quantity or concentration, but that determination cannot change from one application to another.

Ultimately, DNR's arguments hold no water. DNR does not dispute that the definition of hazardous substance in section 292.01(5) is ambiguous. An ambiguous statute requires rulemaking to implement.

2. DNR has clear authority to promulgate rules identifying hazardous substances.

DNR has ample authority to promulgate rules identifying hazardous substances even if the legislature has not expressly required it to do so. As explained *supra*, rulemaking is required when an agency implements an ambiguous statute or changes its interpretation of a statute. But rulemaking is also expressly authorized when an agency is interpreting *any* statute it enforces or administers. Wis. Stat. § 227.11(2)(a). The legislature has provided this express authority to all agencies, as well as enumerating instances where rulemaking is expressly not authorized. *See* Wis. Stat. §§ 227.10(2), (2p), 227.11; 227.111.

In addition, DNR is authorized to promulgate rules that are necessary to carry out its mandated duties. *Wisconsin Ass'n of State Prosecutors v. WERC*, 2018 WI 17, ¶ 45, 380 Wis. 2d 1, 907 N.W. 2d 425 (internal cites omitted). Authorization of an act also authorizes a necessary predicate act. *Id.* Here, DNR is authorized to enforce the Spills Law, and determining when the Spills Law applies is a necessary predicate act to enforcing the law. Thus, pursuant to section 227.11, DNR is authorized to promulgate rules identifying hazardous substances to indicate when the Spills Law will apply. In fact, DNR provided this very justification in a recent scope statement to revise Wis. Admin. Code Chs. NR 700 through 799, explaining, "Section 227.11(2), Wis. Stats.,

also confers rulemaking authority to the department to promulgate rules that are necessary to perpetuate the purpose of ch. 292, Wis. Stats." See SS075-23 Statement of Scope, Wis. Admin. Reg. No. 816A3 (Dec. 18, 2023), https://docs.legis.wisconsin.gov/code/register/2023/816a3/register/ss_notices/ss_075_23_notice_of_preliminary_hearing/ss_075_23_scope_statement (last visited Nov. 5, 2024).

DNR now contradicts itself, arguing that lack of an express rulemaking mandate in chapter 292 means the legislature does not want the agency to promulgate rules identifying hazardous substances. (DNR Br. 26.) But if agency rulemaking authority was limited to instances where it was expressly authorized in the applicable statute, sections 227.10 through 227.111 would be rendered meaningless. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations omitted) ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.") Accordingly, DNR is not limited to rulemaking only when expressly directed or permitted to do so by legislation outside of chapter 227.

3. The Spills Law's direct regulation of individuals further necessitates rulemaking to clearly identify hazardous substances DNR will regulate.

Perhaps DNR's most flagrant disregard for Wisconsin's regulatory construct is its claim that DNR is not required to inform the public whether the Spills Law covers a discharge of any substance because the Spills Law directly regulates individuals. (DNR Br. 28.) "Regulated parties should know what is required of them so they may act accordingly." *Lamar*, 389 Wis. 2d 486, ¶ 39. The right to know and understand regulators' expectations does not change if a regulation directly applies to individuals. In fact, most regulations are, at least in part, directly applicable to individuals. It is in these instances, where the

regulated community is directly responsible for compliance, that it is most vital for regulators to make clear their expectations.

Moreover, it is DNR's intent that "responsible parties and other interested persons should be able to efficiently move through the [remediation] process set forth in [the Spills Law] with minimal department oversight." Wis. Admin. Code. § NR 700.01(2). The express purpose of the rules promulgated under the Spills Law is "to establish consistent, uniform standards and procedures" for identifying hazardous substance discharges. *Id.* Thus, the language of the Spills Law itself supports a requirement for DNR rulemaking in this case.

Instead of promulgating rules, DNR doubles down on its position that it is Joe Citizen, not the regulator, who determines whether a hazardous substance discharge has occurred. (DNR Br. 28.) Putting aside DNR's disregard for constitutional due process and the right of regulated parties to know what is expected of them, DNR's argument flies in the face of its stated intent, the Spills Law's purpose, and common sense.

Take, for instance, Ms. Kantor's situation. Prior to DNR staff telling Ms. Kantor she would need to investigate for PFAS, she had never heard the acronym. (R. 88:2.) In response to DNR's insistence that LRI investigate PFAS contamination, Ms. Kantor determined LRI did not use PFAS-containing substances in its processes. (R. 88:2.) If it was truly up to Ms. Kantor to determine if a hazardous substance discharge of PFAS had occurred on the LRI property, the investigation would have understandably ended there. Still, DNR insisted she sample groundwater for PFAS and report the results to the agency, including any "exceedances." (R. 13:3.) But DNR refused to explain to LRI which of the thousands of PFAS compounds it considered hazardous, or at what concentrations those substances would be considered exceedances. (R. 71:3.) Instead, DNR demanded Ms. Kantor take a "guess and check" approach – by guessing what DNR may consider a hazardous substance discharge and then waiting to see if DNR will do nothing or bring an enforcement action against LRI.

Consider the absurd results if such a "guess and check" approach was applied in other legal or regulatory contexts. For example, what if numeric speed limits were abolished and drivers were expected to determine for themselves what driving speed is safe? Or if individuals were obligated to determine for themselves the amount of taxes they are obligated to pay to support public services? The results would be disastrous, with unending litigation and opportunities for abuse on both sides. Luckily, in both cases, clear and objective criteria are provided to the individuals directly regulated by those requirements. The same should be true for the Spills Law.

B. Statutory history, past practice, and court precedent do not foreclose the requirement for rulemaking.

DNR is not only authorized to clearly define what is a hazardous substance discharge through rulemaking, but it is also required to do so. History, past practice, and case law do not change that.

DNR highlights the long history of Spills Law enforcement as evidence that its *ad hoc* regulation is lawful. But the longevity of an administrative agency's actions is not indicative of the legality of the same, and DNR cites no cases to support the proposition that an illegal agency practice continuing over many decades is somehow more legal at the end of that time than at the beginning. Additionally, administrative law and rulemaking requirements have evolved over the last 40 years, as the result of statutory changes and changes in caselaw. Whether DNR has been acting illegally for nearly fifty years or for one day is irrelevant to this Court's analysis.

It is possible this is the first challenge of its kind because DNR's abuse of the Spills Law has never been so egregious. DNR repeatedly denied LRI's requests to remediate their property and instead, forced Ms. Kantor to delay her retirement and spend hundreds of thousands of dollars (so far) and multiple years just *investigating* potential contamination, without ever telling her what, specifically, she should be investigating. (R. 71:3.) And DNR has yet to provide clarity on which emerging contaminants are considered hazardous substances and at

what quantity or concentration. (R. 71:3.) DNR concedes it has continued to move the goalpost (*see generally* R. 80), and it has done so unilaterally and without formal notice to LRI or any other Wisconsin resident. And by refusing to provide this information, DNR is preserving the opportunity to bring future enforcement actions against any entity that has not met these unknown requirements.

As previously explained, LRI began the remediation process with every intent of following the Spills Law's requirements. But DNR's vague and arbitrary requirements forced Ms. Kantor to make a choice: either file this lawsuit or spend the remainder of her savings and her well-earned retirement trying to read the minds of DNR regulators. So, despite DNR's fear mongering about what *might* happen if they are forced to follow the law, the true tragedy is what has already happened to Ms. Kantor because of DNR's failure to do so.

But this tragedy is not limited to Ms. Kantor. In fact, DNR brags about the unprecedented increase in open remediation cases since it began messaging that discovery of PFAS on a property may be regulated as a hazardous substance discharge. (DNR Br. 32.) Parties responsible for each of the 150 sites DNR discusses are likely facing the same difficulties as Ms. Kantor in decoding DNR's unpromulgated expectations.[8] DNR inexplicably frames this as acknowledgement by the parties responsible for these 150 sites of their PFAS cleanup obligation. In reality, it is from fear, not acknowledgement, that these parties reported discharges and continue the remediation process – fear of the enforcement action and astronomical fines they will incur if they guess

[8] This upward trend of open remediation cases will continue absent rules defining which PFAS compounds are hazardous and at what concentrations. This is because PFAS compounds are ubiquitous and widespread in the environment, meaning if one looks for them, one will likely find them. (R. 81:2.) For example, a residential homeowner in a subdivision that used to be farmland could very likely find PFAS in the soil, resulting in an open remediation case. Land with a stream running through could easily result in the same.

incorrectly about which PFAS compounds are hazardous and at what concentrations. [9]

C. Following the law would not halt Spills Law enforcement.

Requiring DNR to promulgate rules defining which emerging contaminants are hazardous substances, and at what concentrations, would not halt activity under, nor enforcement of, the Spills Law. In fact, neither respondent has argued that DNR does not have authority to regulate *any* substance under the Spills Law absent additional rulemaking, or that DNR cannot regulate *any* substances under the Spills Law during the pendency of the required rulemaking to include emerging contaminants. The Spills Law language incorporates several references that allow for ongoing regulation of known hazardous substances. For example, Spills Law obligations, including providing notice *and* taking remedial action, apply to discharges reportable under the federal Emergency Planning and Community Right-to-Know Act ("EPCRA").[10] Wis. Stat. § 292.11(12)(b). EPCRA incorporates CERCLA reporting standards. 42 U.S.C. § 1104(a). In addition, hazardous substances include those which "are toxic…as determined by [DNR]." Wis. Stat. § 292.01(5). DNR already promulgated, through rulemaking, a list of toxic substances and the level at which each substance is considered toxic. Wis. Admin. Code § NR 661.0024. In fact, this list contains the substances in LRI's initial discharge notice to DNR.[11] Thus,

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[9] DNR also cites this Court's prior decisions on enforcement of the Spills Law but neither case addressed the issue here. (WMC Br. at 44.)

[10] Section 292.11(12)(b) makes the Spills Law obligations applicable to all releases of hazardous substances for which a notification is required under section 323.60(5). Section 323.60(5) references EPCRA notice requirements in 42 U.S.C. § 11004. EPCRA subjects facilities to reporting requirements in section 103(a) of CERCLA (42 U.S.C. § 9603(a)). *See* 42 U.S.C. § 11004(a).

[11] Wisconsin Admin. Code § NR 661.0024 lists regulatory levels for both trichloroethylene (TCE) and tetrachloroethylene (PCE), the two VOCs in LRI's initial discharge report.

upholding the lower courts' decisions would not render the Spills Law inert.

DNR goes to great lengths to describe the parade of horribles that will occur if it is forced to follow the law, but in doing so, DNR ignored existing Spills Law language and distorted facts.

First, DNR's focus on PFAS is a I red herring. Though DNR's *ad hoc* and unpredictable regulation of PFAS is a glaring example of why rulemaking must be undertaken to define hazardous substances, this case is not specific to PFAS.[12] Rather, it relates to all emerging contaminants and other substances that have not been clearly defined, through the rulemaking process, as hazardous at a certain quantity or concentration.

Second, the purported length and uncertainty of rulemaking does not excuse an agency from following the statutorily-prescribed process when it is required, like it is here.[13] (DNR Br. 31.) And the truncated emergency rulemaking process is also available when necessary to preserve public health and safety. Wis. Stat. § 227.24.

Next, DNR warns that requiring rulemaking will have significant environmental impact. (DNR Br. 33.) DNR's dire contention is

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[12] Despite DNR's statements to the contrary (DNR Br. 31.), LRI does dispute DNR's assertion that there is scientific consensus surrounding the toxicity of each of the thousands of more than 9000 PFAS compounds. However, this Court should disregard DNR's attempt to turn this case into a debate about the potential health impacts of PFAS. That debate should occur in an open, public forum with legislative oversight, as DNR is required to do by the statutorily mandated rulemaking process.

[13] Notably, the length and uncertainty of the rulemaking process pales in comparison to the length and uncertainty of navigating a remediation case under the Spills Law. It is not uncommon for a Spills Law remediation to span decades. Currently, BRRTS lists several thousand "open" remediations cases opened prior to 2014, with the oldest dating back to 1969. *See* Bureau of Remediation and Redevelopment Tracking System, *Wisconsin Dep't of Nat. Res.,* https://apps.dnr.wi.gov/botw/SetUpSearchAction.do (search "Start Date" for "<2014" and "Sort Results by Start Date") (last visited Nov. 5, 2024).

speculative, at best, and as previously explained, requiring DNR to promulgate rules to define which emerging contaminants are regulated under the Spills Law and at what quantities will not render the Spills Law inert.

Finally, DNR argues that requiring it to promulgate rules clearly explaining its regulations to the public will somehow create significant economic uncertainty. (DNR Br. 33.) But the concern DNR raises – regulatory uncertainty leading to delays in development – is precisely what is occurring as a result of DNR's refusal to promulgate rules clearly defining hazardous substances. These uncertainties are preventing or delaying property sales, like in the case of LRI, and redevelopment, including development of much needed housing.[14]

For these reasons, the dire consequences DNR warns of will not materialize simply because the agency is forced to follow the law and promulgate rules identifying hazardous substances subject to the Spills Law.

II. DNR's Sudden and Unilateral Decisions to Begin Regulating Certain Emerging Contaminants as Hazardous Substances and To Change VPLE Requirements Both Equate to Unlawful Rules

DNR unilaterally and without notice changed internal policies to begin regulating certain emerging contaminants as hazardous substances and to change the VPLE requirements, both of which are unlawful rules. A "rule" is defined by Wis. Stat. § 227.01(13). This Court developed a five-factor test for determining if an agency action is a rule,

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[14] For example, a multifamily affordable housing development has been delayed due to uncertain regarding PFAS remediation. The project was anticipated to be ready for occupancy by August 2024, but to date, construction has not begun. *See* Bureau of Remediation and Redevelopment Tracking System, *Wisconsin Dep't of Nat. Res.*, https://apps.dnr.wi.gov/botw/SetUpSearchAction.do (search "BRRTS No." for "02-36-589295") (last visited Nov. 5, 2024).

defining a rule as "(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 or procedure of such agency." *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979).

Both actions of DNR challenged in this case meet the five elements of a rule under *Citizens*, but neither went through the proper promulgation process in chapter 227.[15] Thus, both amount to unlawful rules.

A. DNR's Policy of Regulating Emerging Contaminants as Hazardous Substances in an Unpromulgated Rule.

For the reasons fully briefed by co-respondent WMC, DNR's unilateral determination to regulate certain emerging contaminants as hazardous substances is an unpromulgated rule, and therefore unlawful.

1. DNR's Communications Demonstrate that its Unpromulgated Policies Had the Force of Law.

DNR's policy to regulate certain PFAS and other emerging contaminants as hazardous substances meets all five elements of a rules under *Citizen*, including having the force of law. DNR argues that their policies did not have the force of law, and therefore are not unpromulgated rules. However, LRI's experience unequivocally demonstrates the opposite.

An agency action has the force of law when it is expressed through mandatory language, when interests of individuals in a class are legally affected through its enforcement or when criminal or civil sanctions can result from a violation. *Midwest Renewable Energy Ass'n v. PSC*, 2024

[15] LRI agrees with WMC's exhaustive legal analysis for why DNR's actions meet the definition of a rule. WMC Br. at 20-27; 30-32.

WI App 34, ¶71, 412 Wis. 2d 698, 8 N.W.3d 848 (internal citations omitted).

There are several examples of how DNR's communications with LRI had the force of law. Perhaps the most obvious was DNR's October 28, 2020 letter conditionally approving LRI's supplemental Site Investigation Work Plan ("SIWP"). (R. 13.) As the letter explains, Wis. Admin. Code § NR 716.09 required LRI to submit a SIWP describing the scope and conduct of the investigation to be undertaken at the property, and LRI was not permitted to proceed with the remediation process until DNR approved the SIWP.

The letter stated, "Emerging contaminants discharged to the environment, including certain PFAS, meet the definition of hazardous substance." (R. 13:2.) It explained "DNR will require a soil sample be collected and analyzed for PFAS in the source area at the proposed vertical aquifer profiling (VAP) location," that "DNR requires that [VAP groundwater] samples collected…be analyzed for PFAS," and that "both individual and combined exceedances need to be identified for PFAS." (R. 13:3.) Finally, the letter warns LRI to "be aware that if the above requirements are not met, a notice of noncompliance (NON) may be issued for the site." (R. 13:4.)

As DNR concedes, its directives were mandatory. (DNR Br. 39.) It explained what DNR *required* of LRI and what LRI *needed* to do. These requirements affected the interests of Ms. Kantor, as an individual in the class of regulated entities. They forced her to undertake a more expansive, costly, and time-consuming investigation of PFAS before even beginning remediation of the VOCs, and ultimately delayed her retirement. And as DNR threatened in the letter, civil sanctions were a very real possibility if Ms. Kantor was noncompliant with DNR's directive. DNR's letter plainly demonstrates how DNR's policy to regulate certain PFAS as hazardous substances had the force of law.

DNR contends that these statements do not have the force of law because they do not impose any new or unique legal obligation beyond what the Spills Law already requires (DNR Br. 38), but that statement

is simply inaccurate. There is no language in the Spills Law requiring soil and water samples from a specific location on the LRI site be sampled for PFAS. And nowhere in the Spills Law are there PFAS limits for which "exceedances" can be identified. One could not simply read the Spills Law and deduce these requirements from its language. Rather, these requirements came directly from DNR based on their unpromulgated policy to regulate certain PFAS as hazardous at certain levels.

DNR attempts to create a new requirement for the "force of law" analysis, arguing that *Cholvin v. DHFS* demonstrates that an agency action has the force of law only if it "embod[ies] a new substantive obligation apart from any statute or promulgated rule." (Br. at 38.); 2008 WI App 127, 313 Wis. 2d 749, 758 N.W.2d 118. But DNR's argument misrepresents *Cholvin*.

The *Cholvin* court held that a mandatory standard put in place by DHFS to screen for the level of Medicaid waiver eligibility was an improperly promulgated rule in part because it had the effect of law. *Id.* at ¶ 29. DHFS's statutory authority to determine the eligibility of persons for medical assistance was never in question, and was described in detail by the court. *Id.* ¶¶ 3-5. However, DHFS unlawfully relied on that general authority to implement a mandatory standard for eligibility without going through the rulemaking process. *Id.* ¶¶ 6-7; 34. Contrary to DNR's claim, this mandatory standard was not "independent of any statute or administrative rule," (DNR Br. 38), and the court did not declare DHFS's rule unlawful on that basis.

In fact, the holding in *Cholvin* supports the requirement for rulemaking here. Much like in *Cholvin*, where the legislature provided DHFS general authority to determine eligibility for medical assistance, the legislature has similarly provided DNR with general authority to determine what constitutes a hazardous substance. Like in *Cholvin*, where DHFS relied on that general authority to implement a mandatory, across-the-board standard for eligibility without going through rulemaking, DNR has similarly relied on its general authority to implement mandatory, across-the-board regulation of certain emerging

contaminants as hazardous substances without going through rulemaking. And just like DHFS's unpromulgated eligibility standards were unlawful, so too is DNR's unpromulgated regulation of certain emerging contaminants.

Ultimately, DNR makes no convincing argument for why their mandatory requirements do not have the force of law.

2. DNR's Regulations of Emerging Contaminants as Hazardous Substances Goes Well Beyond Guidance Documents.

DNR's mandatory, across-the-board requirements go well beyond the limits of guidance documents.[16] DNR's argument to the contrary relies on the faulty premise that its policies did not have the force of law, which were fully dispelled, *supra.* DNR has relied on these policies to impose specific requirements on Ms. Kantor and others.

DNR's argument that its policies are mere guidance because they could not be relied on in court is nonsensical. This Court has long relied on the elements set out in *Citizens* when determining whether an agency policy or action is a rule. *See, e.g., Tavern League*, 396 Wis. 2d 434, ¶ 19. Notably missing from those five factors is the requirement that a rule can be relied upon by the agency in court. That makes sense since an *unlawful* rule could never be relied on in court.

Accepting DNR's argument would nullify the rulemaking process in chapter 227 and allow agencies to claim any action is "guidance" unless and until it is litigated in an enforcement action. For these reasons, and those provided in co-respondent WMC's brief, the DNR policies challenged in this case are unlawful rules, not guidance documents.

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[16] LRI agrees with WMC's legal analysis that DNR's statements are not mere guidance documents. WMC Br. at 34-39.

B. DNR's Amended VPLE Requirements are an Unlawful Rule.

DNR's adoption of an interim decision policy to administer and enforce the VPLE program also meets the definition of a rule under the five-part *Citizens* test.[17] DNR changed its approach to implementing the VPLE program, substantially limiting the program benefit, without promulgating the changed interpretation as a rule. For the reasons explained in co-respondent WMC's brief, DNR must promulgate rules to make such changes to the VPLE program.

C. DNR's Determination that Certain Emerging Contaminants are Hazardous at Specific Quantities or Concentrations is an Unpromulgated Rule.

The record evidence indicates, without question, that DNR regulates certain PFAS substances as hazardous at specific concentrations.[18] As the lower courts correctly held, such a regulation is invalid unless properly promulgated pursuant to chapter 227. *Wisconsin Mfrs. & Com., Inc. v. DNR*, 2024 WI App 18, ¶¶ 35-37, 411 Wis. 2d 462, 5 N.W.3d 903.

DNR adopted specific thresholds for certain substances, the exceedance of which is considered a hazardous-substance discharge. DNR asserted this policy in a letter to LRI, stating that "[i]n future reports" regarding possible groundwater contamination on LRI's property, "both the individual and combined exceedances need to be identified for PFAS." (R. 71:15.) Moreover, DNR asserts that all persons in Wisconsin "who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment" must "immediately notify the state" of the discharge. (R. 10:2.) The requirement to notify the state creates a reporting standard

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[17] LRI also agrees with WMC's legal analysis on this issue and will forgo repeating it for the sake of brevity. WMC Br. at 30-32.

[18] LRI joins this argument as presented by WMC. WMC Br. at 26.

of any detectable level of PFAS.[19] In another example, DNR explains to the manager of General Mitchell International Airport that the presence of PFAS in water samples collected for an entirely different purpose (as part of the process to obtain a water discharge permit) resulted in DNR opening a remediation case pursuant to chapter 292, indicating that DNR determined the concentrations in the samples exceeded the hazardous substance discharge reporting standard. (R. 9:2.) These reporting standards must be (and have been) determined by DNR, though not through rulemaking, as required by law.

DNR now claims it did not ever determine a level at which the concentration of these PFAS compounds or other emerging contaminants were considered hazardous substances. (DNR Br. 44.) Specifically with respect to LRI, it claims "exceedances" referenced in its letter refer to standards LRI itself set to govern its site. (Br. 44).

This statement is not only contradicted in multiple places throughout the record, as highlighted above, it also does not reflect how the law functions. DNR does not dispute that it has the final say on whether a discharged substance is subject to the Spills Law. In fact, DNR recognizes throughout its brief that it is DNR, *not* LRI or Joe Citizen, that makes this determination.[20] So it defies common sense for DNR to

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[19] The same webpage sets numerical cleanup standards or residual contamination levels (RCL) for certain PFAS in soil. (R. 10:2.) At a minimum, this indicates anything above that level would need to be reported under DNR's unpromulgated policy.

[20] *See, e.g.*, DNR Br. at 10 ("The Department determined that this qualified as a hazardous substance discharge under Wis. Stat. § 292.01(5)"); DNR Br. at 18 ("The Department determines that PFAS may qualify as hazardous substances…"); DNR Br. at 30 ("an industrial facility had discharged hexavalent chromium, which the department alleged [was a hazardous substance]"); DNR Br. at 37 (DNR concluded "that PFAS substances can fall within the statutory definition of hazardous substances.").

now argue that LRI proposed a reporting standard for PFAS, and DNR was simply allowing LRI to implement that standard.[21]

Moreover, DNR's statement that LRI selected the standards to govern its site is simply dishonest. Despite DNR's presentation that the Spills Law is self-implementing, allowing responsible parties to work through the remediation process on their own, practically speaking, that is not how it works. DNR directed LRI every step of the way, as demonstrated by the detailed requirements in their communications to LRI. (R. 12; 13.) LRI sampled for PFAS because it was directed to do so by DNR staff. (R 88:2; 12.) It was DNR, not LRI, that determined the levels reported reflected a hazardous substance discharge and required further investigation and remediation under the Spills Law. (R. 13.) And it was DNR that refused to allow LRI to begin remediation at the site until this additional PFAS information was collected and reported. (*Id.*) Coincidentally, in the one instance where LRI *did* explicitly propose standards to DNR (for non-PFAS substances), DNR outright rejected the standards because they were not recognized in a fully promulgated rule.[22] (R. 12:4.)

Finally, in a last desperate attempt to evade responsibility for its unlawful actions, DNR argues that LRI and WMC could not bring a declaratory action under section 227.40 because DNR's letters were not reviewable decisions under section 227.52. Although LRI disagrees that certain letters from DNR were not reviewable decisions under section

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[21] DNR attempts to create confusion between the reporting standard (the level at which a substance is considered hazardous and a discharge must be reported) and the remediation standard (the level to which a contaminated site must be cleaned up). The Spills Law allows flexibility with respect to remediation standards based on technical and economic feasibility, which varies from site to site. (R. 82:16.) However, the reporting standard is inflexible, imposing an obligation on all persons to report known or discovered discharges. Wis. Stat. § 292.11(2)(a).

[22] LRI requested using PCE and TCE standards based on proposed but not yet finalized rules. DNR responded it was "unable to recognize any of the recommended levels until the rule is published and in effect." (R. 12 at 4.)

227.52, that issue is irrelevant because a declaratory judgment proceeding under 227.40 is not predicated on a reviewable agency decision.

DNR's regulation of certain emerging contaminants, including PFAS, as hazardous substances at specific quantities is unlawful unless those parameters are promulgated through the chapter 227 rulemaking process.

III. DNR Does Not Have Explicit Authority to Impose and Enforce a Reporting Standard for Emerging Contaminants

"No agency may implement or enforce any standard, requirement, or threshold…unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [properly promulgated rule]." Wis. Stat. § 227.10(2m). DNR does not have explicit authority to require that discovery of certain emerging contaminants be reported to the agency as a hazardous substance discharge at a certain quantity or concentration.[23]

DNR's reliance on *Clean Wisconsin* to avoid this requirement is misplaced. 398 Wis. 2d 433. DNR cites to the broad and ambiguous definition of hazardous substance in section 292.01(5) for its purported "explicit but broad" authority to implement the Spills Law on an *ad hoc* basis. (DNR Br. 51.) In *Clean Wisconsin*, the Court explained that general standards are common in environmental statutes because they allow DNR to "utilize its expertise in determining how best to protect the environment within its statutory limits." 2021 WI 72, ¶ 18 (citations omitted). But here, DNR makes clear its position that the broad definition in section 292.01(5) is aimed at the regulated community – it is the average citizen who is expected to interpret how best to protect the environment. (DNR Br. 28.) However, the average citizen does not have

[23] LRI agrees with the legal analysis of this issue presented in WMC's brief. WMC Br. 28-30.

the necessary expertise to determine how best to protect the environment. Thus, if DNR is correct that Joe Citizen must determine if his discharge is subject to the Spills Law, then section 292.01(5) cannot be relied on as a broad grant of authority to DNR based on DNR's expertise.

DNR cannot have it both ways. They cannot abscond their obligation to clearly define hazardous substances through rulemaking by claiming it is the regulated community that must interpret the term, and at the same time declare that the broad definition gives the agency explicit authority to interpret and enforce the Spills Law.

CONCLUSION

For the reasons stated above, LRI respectfully requests the Court affirm the court of appeals' decision.

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Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,204 words.

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