FILED
11-05-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2022AP718

In the Wisconsin Supreme Court

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

v.

WISCONSIN NATURAL RESOURCES 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 WISCONSIN MANUFACTURERS AND COMMERCE, INC.

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INTRODUCTION

The public has a right to know what the law is. *Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶39, 389 Wis. 2d 486, 936 N.W.2d 573. This case is about securing that right.

The legislature has long been permitted to adopt a "general" statutory policy and authorize an executive-branch agency "to fill up the details." *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928). But in filling those details, the agency must follow the rulemaking process—because that process, like the legislative process, ensures the public receives the fair notice it deserves.

As part of this process, an agency must notify the public of any proposed rule and allow it to comment on the proposed rule. This notice-and-comment process ensures that rules, like legislative bills, are "carefully crafted" and that "democratic values" are rightly served. *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring/dissenting).

Not just legally required, the rulemaking process is beneficial. It ensures "fair warning of potential changes in the law." *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019). It affords the public "an opportunity to be heard on those changes." *Id.* It promotes "government transparency and public participation." *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). And it helps prevent constitutional vagueness concerns with broad statutory language. *See State v. Lambert*, 68 Wis. 2d 523, 530, 229 N.W.2d 622 (1975).

The Wisconsin Department of Natural Resources, however, thinks it did not need to follow the notice-and-comment rulemaking process here.[1] Under our state's Spills Law (Wis. Stat. § 292.01 et seq.), every person responsible for a hazardous-substance discharge must report the discharge, investigate it, and remediate it—or else pay penalties up to

[1] This brief refers to the Defendants-Appellants-Petitioners collectively as "DNR."

$5,000 per day. The cost of investigation and remediation can be immense. Under basic principles of administrative and constitutional law (and as a matter of common sense), the public needs to know which substances are regulated under the Spills Law. Yet DNR asserts it may determine on an *ad hoc* basis—or, in the circuit court's words, on "a whim and a fancy"—whether a substance is hazardous. (R. 120:18.)

Several years ago, without rulemaking, DNR proclaimed that the Spills Law now requires investigation and remediation of a class of substances that it calls "emerging contaminants." Despite that proclamation, DNR has never explained what "emerging contaminants" means. It has said only that the term includes certain "PFAS,"[2] "1,4-dioxabe and others." (R. 14:2.)

DNR has also failed to explain which PFAS it thinks are hazardous substances. As DNR recognizes, "there are an estimated 9,000 individual PFAS compounds and thousands of PFAS mixtures." (R. 79:30.) Indeed, PFAS "are used in hundreds of industrial and commercial applications." (R. 79:30.)

And according to DNR, its reach extends far beyond "emerging contaminants." On its website, DNR claims that even foods like "milk, butter, pickle juice, corn, beer, etc., may be considered a hazardous substance." (R. 7:3.) DNR, though, has not adopted rules to explain when a spill of those foods would subject a person to the Spills Law. What if a person spills a beer at a barbecue or drops a jar of pickles on the way out of the grocery store? In DNR's view, Wisconsinites must guess whether a substance is hazardous—and a wrong guess subjects a person to crippling penalties.

Fortunately, the law does not work that way. DNR may not apply the Spills Law to a vague, broad group of "emerging contaminants" without using notice-and-comment rulemaking first. The people of Wisconsin have the right to know what the law is before they must

[2] "PFAS" means perfluoroalkyl and polyfluoroalkyl substances.

comply with it. The circuit court and court of appeals correctly reached this conclusion. This Court should affirm.

ISSUES PRESENTED

1. DNR announced on its website and in various letters that "emerging contaminants," including unspecified PFAS, are hazardous substances under the Spills Law. Is this announced policy unlawful because DNR adopted it without formal rulemaking?

The circuit court and court of appeals answered "yes."

This Court should answer "yes."

2. Relatedly, DNR also announced on its website that all property owners in Wisconsin must notify DNR of discharges of PFAS. Is this announced policy unlawful without formal rulemaking?

The circuit court and court of appeals answered "yes."

This Court should answer "yes."

3. DNR also announced on its website that it was limiting the liability protections under the statutory Voluntary Party Liability Exemption program. Is this announced policy unlawful because DNR adopted it without formal rulemaking?

The circuit court and court of appeals answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin Manufacturers and Commerce requests oral argument and publication.

SUMMARY OF ARGUMENT

I. DNR's new policy of regulating emerging contaminants as hazardous substances is unlawful for two independent reasons.

A. This regulatory policy violates Wis. Stat. § 227.10(1), which requires an agency to promulgate as a rule any statement of general policy or statutory interpretation that it adopts.

B. This regulatory policy is also unlawful because it is an unpromulgated rule under Wis. Stat. § 227.01(13).

II. DNR's new policy requiring notification of PFAS discharges is unlawful for three independent reasons.

A. This reporting policy violates the rulemaking requirement in Wis. Stat. § 227.10(1).

B. This reporting policy is an unpromulgated rule under Wis. Stat. § 227.01(13).

C. This reporting policy lacks explicit authority as required by Wis. Stat. § 227.10(2m).

III. DNR's new policy limiting the liability protections under the Voluntary Party Liability Exemption program is unlawful because it is an unpromulgated rule under Wis. Stat. § 227.01(13).

STANDARD OF REVIEW

This Court independently reviews whether an agency's action is a rule under Wis. Stat. § 227.01(13), *Lamar*, 2019 WI 109, ¶10, and independently reviews the scope of an agency's statutory authority, *Papa v. DHS*, 2020 WI 66, ¶19, 393 Wis. 2d 1, 946 N.W.2d 17.

ARGUMENT

I. DNR's policy treating emerging contaminants as hazardous substances is unlawful without notice-and-comment rulemaking.

"The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner." *Mack v. DHFS*, 231 Wis. 2d 644, 649, 605 N.W.2d 651 (Ct. App. 1999) (citation omitted).

DNR's new policy of regulating emerging contaminants as hazardous substances under the Spills Law is unlawful for two independent reasons: (1) it violates the rulemaking requirement in Wis. Stat. § 227.10(1); and (2) it is a rule under Wis. Stat. § 227.01(13) but did not undergo the formal rulemaking process. This Court should affirm on either ground.

A. DNR violated Wis. Stat. § 227.10(1) when it announced, without notice-and-comment rulemaking, that unspecified emerging contaminants are hazardous substances.

Wisconsin Stat. § 227.10(1) requires rulemaking whenever an agency adopts a general policy or statutory interpretation. Because the statutory definition of "hazardous substance" is not clear and plain, § 227.10(1) required DNR to use rulemaking before declaring that emerging contaminants are hazardous substances.

DNR's *ad hoc* regulatory approach here raises due process concerns. DNR's vague announcements rob the public of fair notice. This Court should avoid those constitutional concerns and conclude § 227.10(1) required rulemaking.

1. An agency must promulgate a rule when it adopts a general policy or an interpretation to administer a statute.

Under modern administrative law, the legislature often enacts general statutory mandates, expecting an agency to fill in the details via rulemaking. *See supra* at 9. Rulemaking is thus required when an agency "exercise[s] its judgment as to how best to implement a general statutory mandate." *See Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (citation omitted). This requirement is especially important where, as here, people are exposed to "potentially staggering liability because of the generality of the statutory language." *See id.* at 1109.

Wisconsin law codifies that rulemaking requirement: Wis. Stat. § 227.10(1) "requires a rule for each statutory interpretation." *Lamar*, 2019 WI 109, ¶21. This statute provides that "every agency must

'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.'" *Id.* ¶15 (quoting Wis. Stat. § 227.10(1)). This statute forbids "*ad hoc* interpretations of ambiguous statutes." *See id.* ¶21.

This statute thus requires rulemaking when a statute is not "clear and plain." *See id.* ¶25. So, for example, rulemaking is required when an agency interprets "open-ended" statutory text or "vague or vacuous terms—such as 'fair and equitable,' 'just and reasonable,' 'in the public interest,' and the like." *Cath. Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (citations omitted).

Conversely, an agency need not comply with rulemaking requirements when it implements "a plain and unambiguous statute." *Lamar*, 2019 WI 109, ¶24 (citing *Schoolway Transp. Co. v. DMV*, 72 Wis. 2d 223, 228, 240 N.W.2d 403 (1976)). By "administer[ing] the statute according to its plain terms," the agency is not adopting "a statement of general policy or interpretation of a statute." *See Schoolway*, 72 Wis. 2d at 236.

Federal courts have explained why rulemaking is required for open-ended statutory language. When an agency interprets "very general" statutory language, "the 'interpretation' really provides all the guidance" and "gives content to the legal norm in question." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 n.6 (D.C. Cir. 1997) (citation omitted). So an agency must use notice-and-comment rulemaking before it "announc[es] propositions that specify applications of" vague statutory terms "because those terms in themselves do not supply substance from which the propositions can be derived." *Cath. Health Initiatives*, 617 F.3d at 495.

2. The statutory definition of "hazardous substance" is not clear and plain, so Wis. Stat. § 227.10(1) required DNR to follow notice-and-comment rulemaking procedures before it declared that emerging contaminants are hazardous substances.

Rulemaking was required here because DNR must determine whether a substance is hazardous by interpreting judgment-laden terms and making policy decisions.

Around 2018, DNR began regulating unspecified PFAS and other unspecified emerging contaminants as hazardous substances under the Spills Law.[3] (*See* R. 80:5-10.) In 2018 and 2019, DNR announced it would begin regulating PFAS under the Spills Law. (R. 8:2; 11:2.) In an August 2020 letter to all people with an open remediation site in the Remediation and Redevelopment program, DNR announced that "[e]merging contaminants discharged to the environment, including certain PFAS, meet the definition of hazardous substance and/or environmental pollution under Wis. Stat. § 292.01." (R. 14:2.) On its website, DNR announced without qualification 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.)." (R. 10:2.)

Those announcements are a "statement of general policy" or an "interpretation of a statute" that DNR "specifically adopt[ed] to govern its enforcement or administration" of the Spills Law. *See* Wis. Stat. § 227.10(1). To resolve this claim, this Court need only determine whether Wis. Stat. § 292.01(5) is clear and plain. *See Lamar*, 2019 WI 109, ¶25. It is not. DNR thus needed to follow notice-and-comment rulemaking procedures before dictating that emerging contaminants are hazardous substances under the Spills Law.

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[3] It is unclear exactly when DNR's regulatory change occurred because it did not adopt this change through formal rulemaking.

Wisconsin Stat. § 292.01(5) is as clear as mud. It uses inherently ambiguous, judgment-laden terms like "significantly," "serious," and "substantial," and it provides no threshold at which those terms are satisfied. It gives the following amorphous definition:

> "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.

Wis. Stat. § 292.01(5) (emphases added).

Courts routinely hold that words like "significantly," "serious," and "substantial" are ambiguous. *See, e.g.*, *Michigan v. EPA*, 213 F.3d 663, 677-78 (D.C. Cir. 2000) (holding "significant" is ambiguous); *Troy Corp. v. Browner*, 129 F.3d 1290, 1292 (D.C. Cir. 1997) (holding "the term 'serious'" is an ambiguous "word of degree"); *Holy Fam. Cath. Congregation v. Stubenrauch Assocs., Inc.*, 136 Wis. 2d 515, 521, 402 N.W.2d 382 (Ct. App. 1987) (holding "substantial completion" was ambiguous due to the "vagueness of the word 'substantial'"). When an agency determines whether an environmental impact is substantial, it must make a policy "consideration of which risks are worth the cost of elimination." *See Michigan*, 213 F.3d at 677.

So when DNR determines that a substance's hazardousness is substantial enough to subject it to the Spills Law, DNR is not "administer[ing] the statute according to its plain terms." *See Schoolway*, 72 Wis. 2d at 236. DNR is rather interpreting Wis. Stat. § 292.01(5) and adopting a general policy—or, "exercis[ing] its judgment as to how best to implement a general statutory mandate." *See Kelley*, 15 F.3d at 1108 (citation omitted). Again, an agency must use notice-and-comment rulemaking before "announcing propositions that specify applications of" a statute's "vague or vacuous terms." *Cath. Health Initiatives*, 617 F.3d

at 495. This process renders lawmaking transparent and inclusive. DNR was required to follow rulemaking procedures before specifying that the vague definition of "hazardous substance" in Wis. Stat. § 292.01(5) applies to emerging contaminants.

The lack of clarity in § 292.01(5) stems not only from its vague words but also from its silence. Because this statute does "not specifically" identify which substances are hazardous, DNR's recent policy change regarding emerging contaminants is "an interpretation of a statute within the meaning of [Wis. Stat. § 227.10(1)]." *See Schoolway*, 72 Wis. 2d at 236-37. When DNR decided to apply the Spills Law to emerging contaminants, "it was engaging in administrative rule making." *See id.* at 237.

DNR's delegated authority under § 292.01(5) further muddies the text's meaning. Rather than clearly and plainly identifying which substances are hazardous, this statute provides that hazardousness is "determined by the department." Wis. Stat. § 292.01(5). Because such a determination by DNR is extrinsic to the statute, the statutory text itself "does not provide an immediately obvious answer." *See Lamar*, 2019 WI 109, ¶34.

For all these reasons, Wis. Stat. § 292.01(5) is not "clear and plain." *See id.* ¶25. When DNR determines that a substance is hazardous under this statute, DNR is "engaging in rulemaking." *See id.* ¶24. Thus, "Wis. Stat. § 227.10(1) required the [DNR] to engage in formal rulemaking when it adopted its" view that certain but unspecified emerging contaminants are hazardous. *See id.* ¶41.

3. DNR's *ad hoc* regulation here raises serious constitutional concerns.

This Court favors statutory constructions that result in constitutionality. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978).

"Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of

the law and adjudication." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983). If a law fails to do so, it "is void for vagueness." *State v. Curiel*, 227 Wis. 2d 389, 415, 597 N.W.2d 697 (1999).

To avoid constitutional fair-notice concerns, this Court should conclude that Wis. Stat. § 227.10(1) required DNR to use rulemaking *before* declaring that emerging contaminants are hazardous substances under Wis. Stat. § 292.01(5). The Spills Law's notification and remediation requirements are impermissibly vague if applied to a substance that the law does not designate as hazardous. The Spills Law requires notification to DNR and subsequent remediation by any person who causes a discharge of a "hazardous substance" or who possesses or controls a "hazardous substance" that is discharged. Wis. Stat. § 292.11(2)(a) & (3). As explained above, the definition of "hazardous substance" in Wis. Stat. § 292.01(5) is vague, giving the average Wisconsinite no way to determine whether a discharged substance is hazardous.

DNR's *ad hoc* regulation of "emerging contaminants" under the Spills Law raises serious constitutional fair-notice concerns. DNR has announced its view that the Spills Law's notification and remediation requirements apply to emerging contaminants. (R. 14:2.) But DNR has not explained what "emerging contaminants" means; it merely asserted that this term "include[s] perfluoroalkyl and polyfluoroalkyl substances (PFAS), 1,4-dioxabe and others." (R. 14:2.) Relatedly, DNR has not explained which PFAS it thinks are hazardous. As DNR recognizes, "there are an estimated 9,000 individual PFAS compounds and thousands of PFAS mixtures." (R. 79:30.) DNR's regulatory announcements are vague as to which of those thousands of substances are hazardous and in what concentrations and what media (e.g., soil, groundwater). In affidavits in this case, two DNR employees offer a list of about 18 PFAS they consider hazardous. (R. 79:30, 35; 81:3-4.) But affidavits during litigation are not a substitute for notice-and-comment rulemaking.

A few examples highlight these vagueness concerns. If a person sprays PFAS-containing cooking spray onto his outdoor grill, must he report that discharge to DNR? What if a person washes a nonstick pan in his kitchen sink? Or if he puts a PFAS-containing food wrapper into a garbage can at a park? Under DNR's apparent view of the law, all these discharges must be reported to DNR.

And these vagueness concerns are not limited to PFAS. According to DNR, "milk, butter, pickle juice, corn, beer, etc., may be considered a hazardous substance if discharged to a sensitive area." (R. 7:3.) If a person accidentally spills a keg of beer onto the ground at a tailgate party, must he notify DNR of the discharge? What if he spills only a single can of beer—or part of a can? What if he drops a gallon of milk onto the ground? Under DNR's logic, all those "discharges" must be reported to DNR. After all, there is no *de minimis* notification exemption for beer or milk. *See* Wis. Admin. Code § NR 706.07(2) (providing *de minimis* notification exemptions).

Notably, federal law requires the United States Environmental Protection Agency (EPA) to promulgate and update a list of hazardous substances under CERCLA.[4] This list is codified at 40 C.F.R. § 302.4, Table 302.4. *See, e.g.*, *Massachusetts v. Blackstone Valley Electric Company*, 67 F.3d 981, 984 (1st Cir. 1995). This federal list is essential because "[a] complicated regulatory regime like CERCLA … cannot function effectively unless citizens are given fair notice of their obligations." *Id.* at 983.

To meet its obligations under the Spills Law and to give fair notice to the public, DNR may either promulgate its own rules identifying hazardous substances or simply apply the Spills Law to discharges that fall within CERCLA's notification requirements. *See infra* at 29-30.

The average Wisconsinite is not a toxicologist or a psychic who can read DNR's mind. Like the EPA has done under CERCLA, DNR must

[4] Also known as Superfund, CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act.

give people fair notice of their obligations under the Spills Law. Without guidance in the state or federal administrative code, the public cannot determine whether a substance is "hazardous" within the meaning of Wis. Stat. § 292.01(5).

In short, constitutional fair-notice principles confirm that DNR cannot determine on an *ad hoc* basis whether a given substance is hazardous and therefore subject to the notification and remediation requirements in Wis. Stat. § 292.11(2) and (3). If DNR wishes to deem a substance as hazardous even though it is not designated as such under CERCLA, DNR must make that determination through formal notice-and-comment rulemaking, like the EPA does.

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DNR violated Wis. Stat. § 227.10(1) by adopting a policy of regulating unspecified PFAS and other unspecified emerging contaminants as hazardous substances under the Spills Law. This statute required DNR to follow notice-and-comment rulemaking procedures before adopting this policy. A contrary conclusion would raise serious due process concerns.

B. Alternatively, DNR's policy treating emerging contaminants as hazardous substances is an unpromulgated, unlawful rule.

DNR's policy treating emerging contaminants as hazardous substances is a rule under Wis. Stat. § 227.01(13). Because this policy did not undergo notice-and-comment rulemaking, it is invalid and unenforceable for this reason, too.

1. An agency action is invalid if it meets the definition of a rule without being properly promulgated as such.

"If a court determines that an agency action constitutes an unpromulgated rule, then the court must declare the rule invalid." *Midwest Renewable Energy Ass'n v. PSC*, 2024 WI App 34, ¶15, 412 Wis. 2d 698, 8 N.W.3d 848. "[A]n agency directive meeting the statutory

definition of an administrative rule may appear in various forms." *Id.* (citation omitted). "An agency action need not be called a 'rule' to be deemed invalid as an unpromulgated rule." *Id.*

"In this type of challenge, [courts] refer to the agency action as an 'unpromulgated rule.'" *Id.* Such a challenge "requires only interpreting and applying the statute that defines an administrative rule (Wis. Stat. § 227.01(13)) and its related procedural prerequisites." *Wisconsin Prop. Tax Consultants, Inc. v. DOR*, 2022 WI 51, ¶13, 402 Wis. 2d 653, 976 N.W.2d 482.

The definition of "rule" in Wis. Stat. § 227.01(13) has "a five-element test: '(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.'" *Midwest Renewable Energy*, 2024 WI App 34, ¶44 (quoting *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).[5]

An agency action meeting this definition is invalid and unenforceable if it was not promulgated as a rule. *See, e.g.*, *id.* ¶¶14-15, 78.

2. DNR's policy treating emerging contaminants as hazardous substances meets all the elements of a rule—and because DNR did not use notice-and-comment rulemaking, this policy is unlawful.

DNR's declaration that emerging contaminants are hazardous substances meets the five-part definition of a rule. Because DNR did not follow notice-and-comment rulemaking procedures before adopting this policy, it is invalid and unenforceable.

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[5] In 2017 Wis. Act 369, § 32, the legislature changed "effect of law" in Wis. Stat. § 227.01(13) to "force of law." This brief uses these terms interchangeably because this Court has used them "synonymously." *Midwest Renewable Energy*, 2024 WI App 34, ¶44 n.21.

Notably, DNR disputes only the "effect of law" element of this test. DNR's failure to address the court of appeals' analysis on the other four elements "constitutes a concession of the ruling's validity" on those four elements. *See W. Capitol, Inc. v. Vill. of Sister Bay*, 2014 WI App 52, ¶49, 354 Wis. 2d 130, 848 N.W.2d 875.

i. DNR's policy satisfies the four undisputed elements of a rule.

In 2020, DNR sent a letter to all responsible parties with an open remediation site in the Remediation and Redevelopment program, declaring that "[e]merging contaminants discharged to the environment, including certain PFAS, meet the definition of hazardous substance and/or environmental pollution under Wis. Stat. § 292.01." (R. 14:2.) The letter instructed the recipients "to assess emerging contaminants and their potential impacts as early in the cleanup process as possible." (R. 14:2.) The letter announced that "[e]merging contaminants include perfluoroalkyl and polyfluoroalkyl substances (PFAS), 1,4-dioxabe and others" and asserted that "[i]t is the responsibility of [responsible parties] to evaluate hazardous substance discharges and environmental pollution including emerging contaminants under the Wis. Admin. Code NR 700 rule series." (R. 14:2.)

As in that letter, DNR announced on its website 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.)." (R. 10:2.)

These policy statements undisputedly meet four elements of a rule. (They also meet the disputed element, as explained below.)

First element. These statements are regulations, standards, statements of policy, or general orders. They state DNR's policy position that certain (but unspecified) substances are subject to regulation under Wisconsin law. They announce DNR's view that people who discharge those substances are subject to regulatory requirements under the Spills Law. They undisputedly meet the first element of a rule.

Second element. These statements undisputedly meet the second element of a rule, too. "To be of general application, an agency action 'need not apply to all persons within the state. Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class.'" *Midwest Renewable Energy*, 2024 WI App 34, ¶50 (quoting *Citizens for Sensible Zoning*, 90 Wis. 2d at 816). "By contrast, an agency action is not of 'general application' if it applies only to a specific, fixed set of individuals under specific factual scenarios." *Id.* ¶51.

DNR's policy of regulating emerging contaminants as hazardous substances is of general application. This policy "does not speak to a specific case, nor is it limited to an individual applicant." *See Cholvin v. DHFS*, 2008 WI App 127, ¶25, 313 Wis. 2d 749, 758 N.W.2d 118; *see also Josam Mfg. Co. v. State Bd. of Health*, 26 Wis. 2d 587, 595, 133 N.W.2d 301 (1965) (holding a letter announced a policy of general application because it was not limited to one case). Instead, DNR's policy applies to any person who discharges emerging contaminants into the environment. (*See, e.g.*, R. 10:2; 14:2.) Anyone who discovers a discharge on their property can be added to the class.

Fourth and fifth elements. This policy also undisputedly satisfies the fourth and fifth elements of a rule. DNR is an "agency." Wis. Stat. § 227.01(1) (defining "agency" to include a "department … in state government"). And DNR issued the policy—namely, the requirement that property owners report and remediate discharges of emerging contaminants. (*See, e.g.*, R. 10; 14.) DNR's announcement that emerging contaminants are hazardous substances implements and makes specific the Spills Law and regulates how DNR will enforce or administer Wis. Stat. ch. 292. (*See, e.g.*, R. 10; 14.)

DNR is correct to implicitly concede these four elements of the test.

ii. DNR's policy has the effect of law.

DNR's policy of regulating emerging contaminants as hazardous substances also satisfies the only disputed element of the test—it has the effect of law.

"[W]hether or not interpretative rules of an administrative agency have the effect of law is really a question of degree." *Barry Laboratories, Inc. v. Wisconsin State Bd. of Pharmacy*, 26 Wis. 2d 505, 514, 132 N.W.2d 833 (1965). Several factors determine whether an agency's statement has the effect of law.

An agency's statement has such effect when within the agency's "expertise" and if the agency has "authority to enforce compliance" with the stated policy. *See Schoolway*, 72 Wis. 2d at 234; *Barry Laboratories*, 26 Wis. 2d at 514-16.

Also, "an agency action has the 'effect of law' when the agency uses 'express mandatory language' that is 'more than informational' and 'speaks with an official voice intended to have the effect of law.'" *Midwest Renewable Energy*, 2024 WI App 34, ¶71 (citation omitted).

Finally, an "agency action has the 'effect of law' when: 'criminal or civil sanctions can result [from] a violation'; 'licensure can be denied'; or 'the interest of individuals in a class can be legally affected through enforcement of the agency action.'" *Id.* (alteration in original) (citation omitted).

Here, DNR's policy statement has the effect of law. This statement was within DNR's expertise; DNR has the power to enforce it; DNR used mandatory language; and such enforcement carries potential civil penalties.

First, the policy statement was within DNR's expertise. "[T]he D.N.R. is the state agency with the staff, sources and expertise in environmental matters...." *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 157-58, 580 N.W.2d 203 (1998) (alterations in original) (citation omitted). The policy statement here was about the environmental effects

of certain substances when they are discharged to the environment. (R. 10:2; 14:2.) That matter is within DNR's expertise.

Second, DNR has "the power to enforce" the Spills Law's remediation requirement. *State v. Block Iron & Supply Co.*, 183 Wis. 2d 357, 364, 515 N.W.2d 332 (Ct. App. 1994). Specifically, DNR "may issue an emergency order or a special order to the person possessing, controlling or responsible for the discharge of hazardous substances to fulfill the [remediation] duty imposed by sub. (3)." Wis. Stat. § 292.11(7)(c). DNR may also impose fees on a person who fails to remediate a discharge. *See* Wis. Stat. § 292.94.

Third, DNR's mandatory language shows that this policy statement has the effect of law. DNR announced on its website that all people in Wisconsin "who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment, *are responsible for taking appropriate actions*." (R. 10:2 (emphasis added).) DNR also stated on its website that "[t]hose individuals *must* also immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards for the PFAS compounds in each media impacted … and conduct the necessary response actions." (R. 10:2 (emphasis added).) Similarly, in letters that DNR sent to persons engaged in remediation efforts, DNR stated that those persons have "the responsibility" to evaluate unspecified "emerging contaminants." (R. 14:2.)

Fourth and finally, civil penalties may apply to anyone who violates the Spills Law. As DNR's website warns, Wis. Stat. § 292.99 "[a]uthorizes penalties up to $5,000 for each violation of the notification requirement." (R. 7:3.) Those penalties also apply to any violation of the remediation requirement in Wis. Stat. § 292.11(3). *See* Wis. Stat. § 292.99(1).

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DNR's policy of regulating emerging contaminants as hazardous substances under the Spills Law is a rule under Wis. Stat. § 227.01(13). Because DNR undisputedly did not promulgate this rule according to

statutory notice-and-comment procedures, it is invalid. This Court should affirm.

II. DNR's notification requirement for emerging contaminants at certain thresholds is unlawful without rulemaking.

Beyond identifying emerging contaminants as hazardous substances, DNR also declared that specific but uncertain concentrations of emerging contaminants trigger the Spills Law's notification requirement. This new reporting threshold is illegal for three independent reasons: (1) it was not promulgated as a rule as required by Wis. Stat. § 227.10(1); (2) it is a rule under Wis. Stat. § 227.01(13) but did not undergo the formal rulemaking process; and (3) it lacks explicit authority as required by Wis. Stat. § 227.10(2m). This Court should affirm on any of these grounds.

A. DNR's reporting threshold for PFAS violates the rulemaking requirement in Wis. Stat. § 227.10(1).

The Spills Law imposes the following notification requirement: "A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the [DNR] immediately of any discharge not exempted under sub. (9)." Wis. Stat. § 292.11(2)(a).

Because the statutory definition of "hazardous substance" is not clear and plain, as explained above, this statutory notification requirement is also not clear and plain. Indeed, *administrative rules* provide the necessary clarity by adopting reportable quantities for various substances. *See* 40 C.F.R. § 302.4, Table 302.4; Wis. Admin. Code § NR 706.07(2)(a).

When DNR declared that any person in Wisconsin must "notify the state" of PFAS discharges (R. 10:2), it adopted a general policy statement or statutory interpretation. By doing so without rulemaking, DNR violated Wis. Stat. § 227.10(1). This statute requires DNR to use the rulemaking process before adopting a notification threshold, for the same

reasons this statute requires DNR to use rulemaking before declaring a substance to be hazardous. *See supra* at 13-20.

B. Alternatively, DNR's reporting threshold for PFAS is an unpromulgated, unlawful rule.

DNR has a reporting threshold for PFAS discharges, which it is imposing on Wisconsinites, including WMC members. This policy meets all elements of the five-part rule test. Because DNR did not use the notice-and-comment rulemaking process when it adopted this policy, it is invalid and unenforceable.

First element. DNR has adopted a specific but unclear reporting threshold for PFAS, the exceedance of which is considered a hazardous-substance discharge. DNR asserted on its website 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.) This statement by DNR creates a reporting standard, apparently with a threshold of any detectable level of PFAS. (*See* R. 10:2.) This statement by DNR satisfies the first element of a rule because it is "a regulation, standard, statement of policy or general order." *See Citizens for Sensible Zoning*, 90 Wis. 2d at 814.

Second element. This policy statement is of general application. DNR's statement on its website applied to all property owners; it "does not speak to a specific case." *See Cholvin*, 2008 WI App 127, ¶25. This statement satisfies the second element of a rule.

Third element. This policy statement has the force of law. DNR used mandatory language, stating that all persons "must … immediately notify the state" of a PFAS discharge. (R. 10:2.) And, as DNR's website warns, Wis. Stat. § 292.99 "[a]uthorizes penalties up to $5,000 for each violation of the notification requirement." (R. 7:3.) These civil penalties further confirm that DNR's reporting requirement for PFAS has the force of law, satisfying the third element of a rule.

Fourth element. DNR issued this policy (e.g., R. 10:2), satisfying the fourth element of a rule.

Fifth element. DNR is implementing, interpreting or making specific Wis. Stat. §§ 292.01(5) and 292.11(2) by determining that the presence of certain substances at certain concentrations meets the definition of "hazardous substance" and therefore requires reporting. This action satisfies the fifth element of a rule.

In short, DNR's announcement that discharges of unspecified PFAS require reporting at a certain (but unspecified) threshold level is an unpromulgated and thus unlawful rule.

C. Alternatively, DNR lacks explicit authority to impose a reporting threshold for discharges of emerging contaminants.

DNR's reporting threshold for emerging contaminants is unlawful for a third, independent reason: it lacks explicit authority as required by Wis. Stat. § 227.10(2m).

1. Agency policies require explicit authority.

The legislature made "significant revisions to Wis. Stat. ch. 227" in 2011, including by creating an explicit-authority requirement. *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶20, 398 Wis. 2d 433, 961 N.W.2d 611 ("*Clean Wisconsin II*"). This requirement provides: "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 [promulgated] rule...." *Papa*, 2020 WI 66, ¶32 (alterations in original) (quoting Wis. Stat. § 227.10(2m)).

This requirement means that "an administrative agency must have explicit authority under a statute or rule to undertake actions." *State ex rel. Ortiz v. Carr*, 2022 WI App 16, ¶52, 401 Wis. 2d 450, 973 N.W.2d 786. "[A]n agency may not implement or enforce a policy 'unless it is explicitly required or permitted to do so by statute or a previously promulgated rule.'" *Id.* (quoting *Papa*, 2020 WI 66, ¶32). An agency exceeds its authority when it adopts a policy without explicit authority,

regardless of whether the policy is an unpromulgated rule. *See Papa*, 2020 WI 66, ¶¶27, 32 & n.12, 42.

Explicit authority is "'clear, open, direct, or exact' and 'expressed without ambiguity or vagueness.'" *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶24, 398 Wis. 2d 386, 961 N.W.2d 346 (citation omitted) ("*Clean Wisconsin I*").

2. DNR's reporting threshold for emerging contaminants lacks explicit authority and is thus invalid under Wis. Stat. § 227.10(2m).

The Spills Law imposes a notification requirement on any person who possesses or controls a "hazardous substance" that is discharged or who causes such a discharge. Wis. Stat. § 292.11(2)(a).

When DNR determines that a person must report a discharge of a substance, DNR implements a "standard, requirement, or threshold." *See* Wis. Stat. § 227.10(2m). To be lawful, such a reporting threshold must be "explicitly required or explicitly permitted by statute or by a rule." *See id.*

Nothing in the Spills Law or state administrative code explicitly authorizes DNR to enforce the notification requirement for any *particular quantity* of PFAS or other emerging contaminants.

By incorporating federal reporting requirements, the Spills Law requires notification of certain discharges of two particular PFAS: perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). The Spills Law's notification requirement applies to discharges that meet certain federal notification thresholds, including those under CERCLA. *See* Wis. Admin. Code §§ NR 706.02(3), 706.07(2)(a)7.; *see also* Wis. Stat. § 292.11(12)(b). The EPA recently added PFOA and PFOS to its list of CERCLA hazardous substances and adopted a one-pound reporting threshold for these two substances. *See* 40 C.F.R. § 302.4, Table 302.4; *see also* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous

Substances, 89 Fed. Reg. 39124-01.[6] So DNR has explicit authority to enforce the notification requirement for PFOA and PFOS discharges above the federal one-pound threshold.

Beyond the one-pound reportable threshold for PFOA and PFOS, DNR has no explicit authority to treat specific quantities of PFAS or other emerging contaminants as hazardous substances subject to the Spills Law's notification requirement. No Wisconsin statute or rule explicitly authorizes DNR to enforce a notification threshold for those unspecified substances. DNR's attempt to impose such a reporting threshold without explicit authority is unlawful under Wis. Stat. § 227.10(2m).

III. DNR's limitation on the Voluntary Party Liability Exemption program is an unpromulgated, unlawful rule.

Related to its "emerging contaminant" unpromulgated rules discussed above, DNR adopted a limitation regarding the statutory Voluntary Party Liability Exemption (VPLE) program, which provides liability protections for persons who voluntarily perform certain remediation efforts. *See* Wis. Stat. § 292.15. Described by DNR as an "interim decision," this policy limits the scope of Certificates of Completion under the VPLE program and allows DNR to impose further cleanup costs for as-yet-unknown substances.

On its website, DNR announced that "[r]ecent concerns over emerging contaminants, particularly per- and polyfluoroalkyl substances ('PFAS') chemicals in Wisconsin and nationally have prompted the DNR to evaluate the potential for historical discharges of PFAS and other emerging contaminants at properties enrolled in the VPLE program that are pursuing a [Certificate of Completion]." (R. 11:2.) The website also announced that DNR's "interim decision is to offer a voluntary party a Certificate of Completion for the individual hazardous substances that *are investigated* after all the VPLE

[6] Around 2015, U.S. manufacturers voluntarily began phasing out PFOA and PFOS. (R. 79:31.)

requirements have been met." (R. 11:3 (emphasis added).) The website continued, "DNR will *not* issue a Certificate of Completion that covers all potential hazardous substances, including substances that *were not investigated* but could be discovered in the future." (R. 11:3 (emphasis added).) DNR claimed it "has the legal authority to offer this interim approach under Wis. Stat. § 292.15(2)(am)." (R. 11:3.) DNR made similar announcements in a letter that it sent to all participants in the VPLE program. (R. 8:2-5.)

DNR's interim decision is unlawful because it meets the five-part definition of a rule but was not promulgated as one.

First element. The interim decision is a regulation, standard, statement of policy, or general order. It provides DNR's policy position on the circumstances under which it will issue a Certificate of Completion to participants in the VPLE program. As a matter of policy, DNR will not issue a Certificate of Completion that extends liability protection to substances that were not investigated during the VPLE process. The interim decision is also a general order requiring VPLE participants to investigate their properties for certain substances to be eligible for a Certificate of Completion. This policy meets the first element of a rule.

Second element. The interim decision is of general application because it applies to anyone in the VPLE program when it was issued and anyone who subsequently enters the program. Only people who already received a Certificate of Completion are exempt from the interim decision. (R. 11:3.) Because "new members can be added to the class" as more people enter the VPLE program, *see Citizens for Sensible Zoning*, 90 Wis. 2d at 816, the interim decision meets the second element of a rule.

Third element. The interim decision has the effect of law, satisfying the third element of a rule. Again, "agency action has the 'effect of law' when … 'licensure can be denied' or 'the interest of individuals in a class can be legally affected through enforcement of the agency action.'" *Midwest Renewable Energy*, 2024 WI App 34, ¶71 (cleaned up) (citation

omitted). The interim decision has the effect of law for both of those reasons. First, it dictates who may receive liability protection and thus legally affects the interest of individuals in a class, namely, participants in the VPLE program. Second, the interim decision can result in licensure denial. "'License' includes all or any part of an agency permit, *certificate*, approval, registration, charter or similar form of permission required by law…." Wis. Stat. § 227.01(5) (emphasis added). A Certificate of Completion is a certificate that grants exemption from legal liability. Wis. Stat. § 292.15(2)(a)3. (*See also* R. 8:2; 11:3.) A Certificate of Completion thus meets the definition of a license under Wis. Stat. § 227.01(5).

Fourth and fifth elements. The interim decision also meets the fourth and fifth elements of a rule. DNR is the "department" under Wis. Stat. § 227.01(1) that issued the interim decision. (R. 11.) And DNR adopted this policy to implement and regulate the VPLE program's liability protections under Wis. Stat. § 292.15. (R. 11.)

* * *

DNR's interim decision is a rule under Wis. Stat. § 227.01(13). "When a party files an application for a license with an administrative agency and the [agency] points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule...." *Wisconsin Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 236-37, 287 N.W.2d 113 (1980) (citation omitted). The interim decision fits that description because it is an announced agency policy of general application that DNR will cite as a reason for denying a Certificate of Completion to certain VPLE participants.

Because DNR did not promulgate this rule according to statutory notice-and-comment procedures, it is invalid. This Court should affirm.[7]

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[7] The court of appeals held that the challenge to the interim decision is not moot. (DNR's App. 48.) DNR's failure to dispute that holding "constitutes a concession of the ruling's validity" on the mootness issue. *See W. Capitol*, 2014 WI App 52, ¶49.

IV. DNR's arguments are unpersuasive.

A. DNR's statements declaring that emerging contaminants are hazardous substances have the force of law.

In arguing that its new policy treating unspecified emerging contaminants as hazardous substances is not an unpromulgated rule, DNR disputes only the "force of law" element. DNR argues its statements announcing this policy do not have the force of law because they merely reiterated the Spills Law's requirements. (DNR's Br. 37-38.)

That argument, however, simply assumes that the Spills Law means what DNR has declared it to mean. If that reasoning were valid, an agency's policy statement interpreting a statute would never be an unpromulgated rule.

Contrary to DNR's logic, agency interpretations of the law "may have the force of law." *Barry Laboratories*, 26 Wis. 2d at 514. As noted above, whether an agency's statutory interpretation has "the effect of law is really a question of degree." *Id.* "Explanatory material which is merely informational is not within the definition of 'rule.'" *Id.* So an agency letter is not a rule if it merely informs the recipient "of the existence and terms of [a] statute" and "does not attribute anything but obvious meaning to those terms." *See id.* By contrast, an agency's "interpretation embodied in" a letter has "the effect of law" if the agency has "the means to enforce it as law." *See id.* at 516.

As explained above, DNR's letters and website went beyond "merely inform[ing]" the public of the "existence" and "obvious meaning" of a statute. *See id.* at 514. Instead, those communications conveyed a "change in the interpretation and application" of a statute, and DNR has the "means to enforce" this new interpretation. *See Schoolway*, 72 Wis. 2d at 235, 237 (citation omitted).

In other cases, this Court has concluded that agencies engaged in rulemaking when they adopted interpretations of statutes. In one such case, an agency issued a letter to all Wisconsin plumbers. *Josam Mfg.*, 26 Wis. 2d at 591. The letter effectively "prohibited the use of single

vented double chair carrier fittings" because, according to the letter, such fittings conflicted with a specific statute and several administrative rules. *Id.* This Court nevertheless held the letter was "a rule." *Id.* In another case, this Court held that an agency's new interpretation of an ambiguous statute was a rule. *See Frankenthal v. Wisconsin Real Est. Brokers' Bd.*, 3 Wis. 2d 249, 257B, 89 N.W.2d 825 (1958); *see also Schoolway*, 72 Wis. 2d at 235 (discussing *Frankenthal*). The new interpretation "had the effect of law" because the agency "had the means to enforce it as law." *See Barry Laboratories*, 26 Wis. 2d at 515-16 (discussing *Frankenthal*).

Like *Barry Laboratories* and *Schoolway*, *Josam* and *Frankenthal* also show that an agency's policy statement can be an unpromulgated rule even if the statement purports to be applying a statute. When an agency's statutory interpretation fits the definition of a rule, the agency cannot avoid that conclusion by hiding behind the statutes that the agency is interpreting. Like the agency in *Josam*, DNR here announced an unpromulgated rule in letters that it sent (and on its website).

DNR asserts that its policy statements "did not embody a new substantive obligation apart from any statute or promulgated rule." (DNR's Br. 38.) But they did. "PFAS have been manufactured and used in a variety of industries since the 1940s." (R. 8:2.) "PFAS are used in hundreds of industrial and commercial applications." (R. 79:30.) Sometime around 2018, though, DNR began regulating unspecified PFAS and other unspecified emerging contaminants as hazardous substances under the Spills Law. (*See* R. 80:5-10.) Indeed, DNR acknowledges that it began regulating PFAS under the Spills Law due to "recent scientific advances." (DNR's Br. 19.) DNR admits that it "sent letters" and "created a new page on its website" to inform the public that "PFAS compounds are *now* known to meet the statutory definition of 'hazardous substances' under the Spill Law." (DNR's Br. 19 (emphasis added).) Importantly, no changes to the relevant statutes or rules triggered this change in DNR policy; rather, DNR's evolving views triggered this change. DNR's announced policy change imposed a new

substantive obligation on the public. That's why DNR publicly announced this new policy. This policy shift has the force of law.

DNR argues those policy statements were at most guidance documents. (DNR's Br. 39-40.) DNR is wrong. "[A] guidance document does not have the force or effect of law." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶100, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"). Guidance documents "cannot create a policy." *Id.* ¶105. Here, DNR's policy statements have the force of law, as explained above. DNR created a policy when it privately determined and publicly announced that emerging contaminants are subject to regulation under the Spills Law.

DNR's assertion that it will not rely on these policy statements in an enforcement action is irrelevant. By using mandatory language when announcing this new policy, DNR is compelling the public to conform to DNR's new view of the Spills Law. This regulatory shift stems from a change in DNR's thinking, not because of any change to statutes or the administrative code. Even if DNR will not rely on these statements themselves (i.e., its website and letters) in enforcement actions, it still has "authority to enforce compliance *with the opinion expressed* by the statements." *See Schoolway*, 72 Wis. 2d at 234-35 (emphasis added). Because DNR has authority to enforce its interpretation of the Spills Law, this interpretation has the force of law.

B. DNR's threshold for reporting discharges of emerging contaminants is an unpromulgated rule.

DNR claims its reporting threshold for emerging contaminants does not exist. (DNR's Br. 44.) It argues the court of appeals' ruling on this issue "was simply an error of fact." (DNR's Br. 36.) But the circuit court found "that the regulation of emerging contamina[nts] at certain concentrations is an unlawful act by the [DNR]." (R. 120:13.) DNR has not shown that this underlying factual finding is clearly erroneous.

DNR focuses on a letter that it sent to Leather Rich, but DNR's new reporting threshold goes beyond that one letter. On its website, DNR declared that "persons who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the

environment … must also immediately notify the state." (R. 10:2.) To be sure, that statement does not clearly explain which of the thousands of types of PFAS are subject to the reporting requirement or at what threshold. But the vagueness of this announced policy does not mean that it is non-existent. DNR cannot escape rulemaking requirements by being vague about its new policies.

DNR also argues that this challenge to the reporting threshold is premature. (DNR's Br. 45.) But that argument also ignores the notification requirement that DNR announced on its website, focusing only on one letter that Leather Rich received from DNR. Also, the one case that DNR cites is inapposite because it did not address an unpromulgated-rule claim or Wis. Stat. § 227.40, the statute under which the present declaratory-judgment case was brought. The issue there was whether an agency's letter was a reviewable "decision" under Wis. Stat. § 227.52. *Container Life Cycle Mgmt., LLC v. DNR*, 2022 WI 45, ¶2, 402 Wis. 2d 337, 975 N.W.2d 621. Neither Leather Rich nor WMC is challenging a decision that DNR rendered in a letter. They are challenging DNR's announced reporting requirement for unspecified PFAS. Plaintiffs may proactively seek declaratory relief "without subjecting themselves to forfeitures or prosecution." *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626.

Notably, DNR does not dispute that this new reporting threshold is an unpromulgated rule *if it exists*. DNR's failure to address the court of appeals' analysis of the five-element rule test "constitutes a concession of the ruling's validity." *See W. Capitol*, 2014 WI App 52, ¶49.

C. DNR's interim decision is an unpromulgated rule.

DNR argues that its interim decision is "at most, a guidance document, not a rule." (DNR's Br. 41.) But the interim decision is a rule, rather than a guidance document, because it has the force of law. *See supra* at 31-32. Guidance documents "cannot create a policy," *SEIU*, 2020 WI 67, ¶105, but the interim decision plainly created a policy

barring any VPLE participant from receiving a full Certificate of Completion under certain circumstances. That was its sole purpose.

DNR argues the interim decision was an exercise of its discretion. (DNR's Br. 41-42.) However, although an agency "may exercise" discretion "on a case-by-case basis," it may not rely on an unpromulgated rule. *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 199-200, 394 N.W.2d 769 (Ct. App. 1986). What's more, DNR has not identified any statutory authority to adopt a wholesale pause of one aspect of the VPLE program. Although DNR has discretion when applying the VPLE program's requirements on a case-by-case basis, DNR's interim decision is generally applicable.

DNR argues that no VPLE participants have a legal interest in the program because they are not statutorily entitled to any liability exemption. (DNR's Br. 43.) This argument overlooks that the interim decision eliminated *any possibility* of certain participants obtaining a full Certificate of Completion. By changing some chance to no chance, the interim decision affected VPLE participants' legal interests.

DNR tries to distinguish its "communication" of the interim decision from its subsequent application of the interim decision. (DNR's Br. 43.) But this lawsuit is not simply challenging the communication; it is challenging the policy shift embodied in the communication.

DNR's arguments also overlook that the interim decision had the force of law because it allows for licensure denial. DNR baldly asserts that under the interim decision, "[n]o application was denied." (DNR's Br. 42.) But when DNR denies a Certificate of Completion pursuant to the interim decision, it is denying a license and thus acting with the force of law. *See supra* at 31-32.

D. DNR lacks explicit authority to impose a threshold for reporting discharges of emerging contaminants.

DNR argues that Wis. Stat. §§ 292.01(5) and 292.11(2)-(3) give it "explicit but broad" authority to apply the Spills Law to PFAS without rulemaking. (DNR's Br. 51.) DNR notes that "Wis. Stat. § 227.10(2m)

cannot 'strip an agency of the legislatively granted explicit authority it already has.'" (DNR's Br. 50 (quoting *Clean Wisconsin II*, 2021 WI 72, ¶24).)

But § 227.10(2m) here is not stripping DNR of any explicit authority it already has. DNR has no explicit authority to enforce a *reporting threshold* for PFAS or other emerging contaminants.[8] DNR has not cited any statute or rule authorizing it to enforce such a threshold.

DNR asserts that "Respondents offer no serious argument that PFAS falls outside" the definition of "hazardous substance" in Wis. Stat. § 292.01(5). (DNR's Br. 51.) But this case is not about whether any given substance is hazardous. This case is about the procedures that DNR must follow when it determines that a substance is hazardous. The notice-and-comment rulemaking process, not this lawsuit, is the proper venue for any disputes over whether a given substance is hazardous. It would be absurd to expect WMC and Leather Rich to dispute in this litigation which of the approximately 9,000 PFAS compounds and thousands of PFAS mixtures are hazardous. DNR must use the rulemaking process to give the public clear guidance on that issue.

E. DNR's constitutional arguments are meritless.

DNR argues that requiring it to follow the rulemaking process here would be unconstitutional under *SEIU*. Not so. In *SEIU*, this Court held that Wis. Stat. § 227.40 constitutionally subjected agency guidance documents to judicial review. *SEIU*, 2020 WI 67, ¶111. It also held that an agency's use of a guidance document as an unpromulgated rule was "subject to judicial review." *Id.* ¶134. *SEIU* forecloses DNR's argument.

DNR more broadly argues that applying Wis. Stat. ch. 227's rulemaking requirements here would unconstitutionally interfere with its ability to enforce the Spills Law. But this lawsuit challenges DNR's unlawful rulemaking, not its enforcement powers. This distinction

[8] Again, DNR may apply the Spills Law to PFOA and PFOS discharges to the extent they are subject to reporting requirements under CERLA. *See supra* at 29-30.

matters because agency rulemaking is "a legislative power." *Id.* ¶98 (citation omitted). So when an agency adopts an unpromulgated rule, it is (unlawfully) exercising a legislative power. Similarly, when an agency adopts a new interpretation of a statute that is not clear and plain, the agency is engaging in rulemaking. *Lamar*, 2019 WI 109, ¶24. And because an agency "has no inherent constitutional authority to make rules," agencies "remain subordinate to the legislature with regard to their rulemaking authority." *SEIU*, 2020 WI 67, ¶98 (citations omitted). The legislature thus may impose procedural requirements on an agency's rulemaking.

Lamar is instructive here. In *Lamar*, this Court unanimously held that the underlying statute did "not plainly and unambiguously require" the agency's new interpretation of it. *Lamar*, 2019 WI 109, ¶38. The Court thus concluded that the agency violated Wis. Stat. § 227.10(1) by not promulgating that new interpretation as a rule. *Id.* ¶39. *Lamar* had no separate writings. Not a single justice in *Lamar* raised constitutional concerns with requiring agencies to follow rulemaking procedures when they adopt new interpretations of unclear statutes.

Contrary to DNR's suggestion, nobody here is arguing that "agencies cannot interpret and enforce statutes they administer without rulemaking." (DNR's Br. 47.) An agency must follow formal rulemaking procedures when its action constitutes rulemaking under Wis. Stat. § 227.10(1) or 227.01(13) *See Lamar*, 2019 WI 109, ¶15; *Midwest Renewable Energy*, 2024 WI App 34, ¶15. This rulemaking requirement does not raise constitutional separation-of-powers concerns because it cabins an agency's delegated *lawmaking* authority.

If DNR's constitutional argument were sound, the legislature could never require an agency to follow notice-and-comment rulemaking procedures. Instead, whenever an agency adopts a new public policy, it could argue that it was simply interpreting and enforcing a statute within its purview. Agencies could adopt significant policies in the dark, without public participation. Our constitution does not compel this absurd result.

F. The Spills Law's silence does not exempt DNR from rulemaking requirements.

DNR urges this Court to reverse based on the Spills Law's "plain text." (DNR's Br. 31.) As an initial matter, DNR's discussion of the Spills Law has no bearing on the five-element rule test.

If DNR's text arguments have any legal relevance, they show why rulemaking was required here. For example, DNR suggests the Spills Law's "open-ended" definition of "hazardous substance" somehow exempts DNR from rulemaking requirements. (DNR's Br. 25.) But the Spills Law's definition of "hazardous substance" is not clear and plain, so Wis. Stat. § 227.10(1) required rulemaking here. *See supra* at 15-17. Section 227.10(1) requires rulemaking when an agency interprets open-ended language. *See supra* at 14.

Yet DNR argues that as "science evolves," the Spills Law's open-ended definition "allows the Spill Law to incorporate scientific progress without frequent statutory revisions." (DNR's Br. 25.) But nobody is arguing for frequent statutory revisions. As the science of hazardous substances evolves, the law must evolve too through rulemaking by DNR or the EPA. Wisconsinites cannot be expected to remain up-to-date with the breadth of scientific scholarship to which entire careers and educational institutions are devoted, nor can they somehow divine their government's interpretation of these evolving findings in the context of government regulation. Also, whether something meets the legal definition of a hazardous substance is not simply a matter of searching for some undefined degree of consensus among some undefined scientific community. That issue is ultimately a legal and policy question that involves application of vague, subjective statutory language.

DNR also argues that the Spills Law's text does not expressly require rulemaking here. (DNR's Br. 24.) But Wis. Stat. ch. 227 required rulemaking here, and nothing in the Spills Law exempts DNR from this requirement. The legislature knows how to exempt actions under the Spills Law from ch. 227's rulemaking requirements, such as the

exemption for DNR's database of hazardous-discharge sites. *See* Wis. Stat. §§ 292.31(1)(a)4., 227.01(13)(zc). No exemption applies here.

DNR's reliance on *Clean Wisconsin I* is misplaced. (*See* DNR's Br. 27.) That case did not involve an unpromulgated-rule claim or Wis. Stat. § 227.10(1)'s rulemaking requirement. Instead, it addressed whether certain permit conditions had explicit authority as required by Wis. Stat. § 227.10(2m). *Clean Wisconsin I*, 2021 WI 71, ¶21. This Court held that the permit conditions had explicit authority "pursuant to Wis. Stat. § 283.31(3)-(5) and *related regulations*." *Id.* ¶40 (emphasis added). So unlike here, DNR had promulgated rules there.

DNR complains that "trying to list every single hazardous substance in specific concentrations would be practically impossible." (DNR's Br. 25.) But Wis. Stat. ch. 227's rulemaking requirements have no inconvenience exemption. Besides, DNR's complaint is baseless. DNR has created similar lists through rulemaking, including lists of hazardous air contaminants,[9] hazardous air pollutants,[10] groundwater standards,[11] hazardous wastes,[12] and toxic pollutants.[13] The EPA has promulgated a list of about 800 hazardous substances under CERCLA, including PFOA and PFOS.[14] *See* 40 C.F.R. § 302.4, Table 302.4. Several states also have promulgated lists of hazardous substances that include PFOA and PFOS. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 597.3, Table 1; 301 Mass. Code Regs. 41.03(13); Alaska Admin. Code tit. 18, § 75.345, Table C. Such lists are far from impossible—and DNR need not promulgate a lengthy list of hazardous substances because it may apply the Spills Law to discharges that must be reported under CERCLA.

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[9] Wis. Admin. Code § NR 445.07, Tables A-B.
[10] Wis. Admin. Code ch. NR 465, Subch. 1, Table 1.
[11] Wis. Admin. Code § NR 140.10, Table 1.
[12] Wis. Admin. Code §§ NR 661.31, 661.0032, 661.0033.
[13] Wis. Admin. Code § NR 215.03.
[14] U.S. Env't Prot. Agency, "CERCLA Hazardous Substances Defined" (last updated Feb. 2, 2024), https://www.epa.gov/epcra/cercla-hazardous-substances-defined.

Relatedly, DNR complains that "[a]ny attempt to promulgate a definitive list would surely leave out substances that the statutory definition already covers." (DNR's Br. 25.) That assertion has several flaws. First, it wrongly assumes that the Spills Law has a plain, clear definition of "hazardous substance." Second, it ignores that DNR may promulgate a rule to update such a list, and the Spills Law's remediation requirement applies retroactively. *Chrysler Outboard*, 219 Wis. 2d at 162. Such retroactive application minimizes any concern over substances being left out. Third, this concern also ignores that DNR may apply the Spills Law to discharges that are subject to CERCLA's reporting requirements, and CERCLA applies to both listed *and unlisted* hazardous substances. Specifically, something is a hazardous substance under CERCLA if it is listed in Table 302.4 or "if it exhibits any of the characteristics identified in 40 CFR 261.20 through 261.24." 40 C.F.R. § 302.4(a)-(b). Federal regulations provide specific definitions of those characteristics: ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.21-261.24.[15] Those regulations help ensure that Table 302.4 does not leave out hazardous substances.

DNR's milk example illustrates why rulemaking is essential. DNR claims that a "tanker truck of milk spilled into a trout stream" would be a hazardous discharge, at least if fished died. (DNR's Br. 25, 29.) But what if no fish died? Or what if a tanker truck spilled only 100 gallons of milk—or 10 gallons? DNR's attempt to explain when milk is a hazardous substance only causes more confusion, highlighting the need for clear rules.

DNR argues that "responsible parties must read the statute and determine whether and how it applies to them, just like any other regulatory provision." (DNR's Br. 28-29.) But DNR has not identified any similar environmental regulatory program that leaves it up to everyday

[15] By ignoring the federal rules that define the "unlisted" substances, DNR makes the misleading suggestion that CERCLA and the Spills Law "function [the] same way." (DNR's Br. 34.) Via EPA rulemaking, CERCLA provides clear standards for listed and unlisted substances, unlike DNR's *ad hoc* approach here.

folks to determine whether a broad, vague statute applies to them. As just explained, the opposite is true: environmental regulatory programs have lists of the substances to which they apply. Rulemaking is the norm in environmental law—a highly technical and complex area of the law.

G. Statutory history, past practice, and precedent do not support DNR's arguments.

DNR argues that statutory history shows the legislature has never required DNR to promulgate rules to designate substances as hazardous. (DNR's Br. 29-30.) That argument fails for the same reasons as DNR's text argument: although the Spills Law does not contain an explicit rulemaking requirement that would apply here, Wis. Stat. ch. 227 nevertheless required rulemaking here. The Spills Law does not require DNR to promulgate a list of hazardous substances because DNR may apply the Spills Law to discharges that are subject to CERCLA's notification requirements. *See supra* at 29-30. But Wis. Stat. ch. 227 required rulemaking here because DNR declared that the Spills Law applies to "emerging contaminants," *i.e.*, substances that are *not* designated as hazardous substances under either CERCLA or state law.

Regarding past practice, DNR falsely asserts that responsible parties for decades "have fulfilled the Spill Law's requirements without rules further defining hazardous substances." (DNR's Br. 30.) That argument ignores the federal list of hazardous substances.[16] Also, PFAS were widely used throughout society for decades, but DNR did not treat them as hazardous substances until recently. (R. 8:2; 79:30; 80:5-10.) Besides, "[s]imply because an agency took action in the past does not mean its actions were legal…." *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶32, 396 Wis. 2d 391, 957 N.W.2d 208.

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[16] The EPA issued a final rule on March 13, 1978, designating hazardous substances under the authority of the Clean Water Act. *See, e.g.*, Designation of Hazardous Substances; Designation, Reportable Quantities, and Notification, 76 Fed. Reg. 55583-01. Our Spills Law took effect about two months later, on May 21, 1978. *Chrysler Outboard*, 219 Wis. 2d at 141.

In arguing it need not engage in rulemaking here, DNR cites *Chrysler Outboard* and *State v. Mauthe*, 123 Wis. 2d 288, 366 N.W.2d 871 (1985). (DNR's Br. 30.) DNR's reliance on those cases is misplaced because, as DNR recognizes, "neither *Mauthe* nor *Chrysler Outboard* considered the rulemaking argument that Respondents raised here." (DNR's Br. 30.) The parties in *Mauthe* and *Chrysler Outboard* did not dispute—and this Court did not decide—whether DNR had lawfully determined that certain substances were hazardous under the Spills Law. "It is blackletter law that an opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶13, 232 Wis. 2d 217, 607 N.W.2d 50.[17]

Although DNR describes the court of appeals' decision as "novel" (DNR's Br. 31), the reality is that DNR's *ad hoc* regulatory approach here is what is novel. DNR has not cited any case upholding this *ad hoc* approach to determining whether a substance is hazardous. Instead, courts have held that substances were not hazardous without promulgated rules. *See, e.g.*, *Giovanni v. United States Dep't of the Navy*, 433 F. Supp. 3d 736, 744 n.7 (E.D. Pa. 2020) (holding PFOS and PFOA were not hazardous substances under Pennsylvania law because they were not "included in CERCLA's list of hazardous substances appearing at 40 C.F.R. § 302.4" and "the [Pennsylvania] Environmental Quality Board has not promulgated any regulations listing PFOS or PFOA as hazardous substances"). DNR is advancing a novel, troubling view that it may begin regulating a large group of unspecified substances without any notice-and-comment rulemaking at the state or federal level.

DNR argues the court of appeals' logic would "presumably" apply to any substance and thus "would halt virtually all Spill Law

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[17] *Mauthe* involved "hexavalent chromium, as well as other heavy metals." *Mauthe*, 123 Wis. 2d at 292. *Chrysler Outboard* involved "chlorinated solvents." *Chrysler Outboard*, 219 Wis. 2d at 138. The federal list of hazardous substances includes chromium compounds and various chlorinated solvents, such as tetrachloroethylene and trichloroethylene. *See* 40 C.F.R. § 302.4, Table 302.4.

enforcement." (DNR's Br. 31, 33.) Not true. The court of appeals' logic would not apply to anything that is designated as a hazardous substance pursuant to a rule or statute. As DNR recognizes, the court of appeals reasoned that "no statute or rule identified which substances qualify as emerging contaminants." (DNR's Br. 33 (citation omitted).)

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 5th day of November 2024.

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 10,992 words.

Dated this 5th day of November 2024.

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