WISCONSIN COURT OF APPEALS
DISTRICT II

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants

Appeal No. 2022AP000718
Circuit Court Case No. 21-CV-0342

ON APPEAL FROM FINAL ORDER OF THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

NON-PARTY AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS ON BEHALF OF CITIZENS FOR A CLEAN WAUSAU, CLEAN WATER ACTION COUNCIL, RIVER ALLIANCE OF WISCONSIN, WISCONSIN ENVIRONMENTAL HEALTH NETWORK, AND DOUG OITZINGER

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INTRODUCTION

The Wisconsin Department of Natural Resources' ("DNR") has consistently applied the Spills Law, Wis. Stat. ch. 292[1], for more than four-decades. Affirming the Circuit Court's decision to invalidate this long-standing interpretation would extinguish the flexibility the Legislature intended to provide DNR to ensure timely responses to hazardous substance spills and minimize the risks to the public health and environment in this State. More specifically, DNR's relatively recent application of the Spills Law to per- and polyfluoroalkyl substances ("PFAS") currently enables it to provide numerous Wisconsin communities with assistance—assistance it would not be able to continue providing without successfully navigating an arduous administrative rulemaking process the Legislature never contemplated in this setting.

Should this Court reach the merits, it must faithfully employ the principles of statutory interpretation and examine the text of the Spills Law in context, with due regard for relevant statutory history and legislative history. Citizens for a Clean Wausau, Clean Water Action Council of Northeast Wisconsin, River Alliance of Wisconsin, Wisconsin Environmental Health Network, and Doug Oitzinger (collectively, "*Amici Curiae*" or "*Amici*") submit this brief to assist the Court in this endeavor.

After a statement of *Amici's* interests in this case, this brief provides an overview of the Spills Law's statutory history, which is relevant to this Court's plain language analysis in the first instance. This brief then provides an overview of the relevant legislative history, which is extrinsic evidence the Court may consider to confirm a plain meaning interpretation, or if it finds the statutory text ambiguous. *Amici* contend that the available statutory and legislative history support the interpretation that the Legislature intended the definition of "hazardous substances" to be broad, versatile, and inclusive of any substance, including PFAS, that might

[1] All citations are to the 2019-20 version of the Wisconsin Statutes unless otherwise noted.

pose a potential threat to the public health or environment when discharged. Accordingly, DNR's decades-long application of the Spills Law should be upheld, and the Circuit Court's decision should be reversed.

STATEMENT OF INTEREST

Amici Curiae have a significant interest in the outcome of this litigation and recognized early on the potential impact it could have on DNR's continued ability to provide them with assistance. The Circuit Court granted *Amici*'s motion to participate in all substantive proceedings below as friends of the court. (R. 87). As a result, *Amici* briefed and provided oral argument on the parties' cross motions for summary judgment and DNR's subsequent motion to stay pending appeal. (R. 93 and 133). By filing this brief and corresponding motion, *Amici* seek to continue that participation and assist the Court in properly interpreting the Spills Law.

In addition, *Amici* and their members live in and around communities contaminated with hazardous substances, including PFAS, and thus have a direct interest in continuing to receive the benefits from DNR's current application of the Spills Law to PFAS. Those benefits include, but are not limited to, the identification of responsible parties, the requirement that responsible parties investigate and remediate contaminated sites the extent practicable, the provision of bottled water for impacted residents, and DNR-hosted informational meetings. Without DNR's current application of the Spills Law to PFAS, *Amici* may have an increased risk of exposure and associated adverse health impacts from drinking contaminated water, recreating in and consuming fish from contaminated waterways, or even consuming food from community gardens irrigated with contaminated water. Communities may also receive less information or no information whatsoever about hazardous substance contamination, which is crucial when it comes to employing basic preventative measures on an individual level.

ARGUMENT

I. DNR IS NOT REQUIRED TO PROMULGATE A RULE LISTING PFAS OR OTHER CONTAMINANTS AS A "HAZARDOUS SUBSTANCE" BEFORE REGULATING THEM UNDER THE SPILLS LAW.

A. The Definition of "Hazardous Substance" is Unambiguous and Purposely Broad, Versatile, and Inclusive of Any Substance that Might Pose a Threat to Public Health or the Environment When Discharged.

Statutory interpretation focuses on the plain meaning of the statutory language itself. *State* ex rel. *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶45, 47, 271 Wis. 2d 633, 681 N.W.2d 110. To discern the plain meaning, words are given their "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* ¶45 (citation omitted). The common, ordinary, and accepted meaning of a word is often determined by consulting a dictionary. *Id.* ¶49.

"Hazardous substance" is unambiguously defined under the Spills Law:

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

Wis. Stat. § 292.01(5). While this definition is broad, the breadth of the terms used is evidence as to the plain meaning of hazardous substance: *Any* substance, in *any* form, which *may* pose a *potential* hazard because of its quantity, concentration, or characteristics, including *but not limited to* those characteristics specifically identified. *See id.*

The Legislature's use of words with broad meanings and its "express direction that the definition is not limited to the words given" indicate an intent to define that phrase broadly. *State v. Mauthe*, 123 Wis. 2d 288, 299, 366 N.W.2d 871

(1985) (interpreting the term "discharge" under the Spills Law). Use of words or phrases like *any*, *may*, *potential*, and *but not limited to* is textual evidence revealing the Legislature's intent that the definition of "hazardous substance" is broad, versatile, and inclusive of any substance that might pose a threat to the public health or environment. Further, the Wisconsin Supreme Court has held that state agencies "may rely upon a grant of authority that is explicit but broad when undertaking agency action." *Clean Wisconsin v. DNR*, 2021 WI 71, ¶25 398 Wis. 2d 386, 961 N.W.2d 346 (interpreting Wis. Stat. § 227.10(2m)). Limiting the definition of "hazardous substance" to only those contaminants identified in a rulemaking would therefore frustrate the legislative intent behind the Spills Law, which "is to prevent, minimize, and if necessary, abate and remedy contamination of this state's environment and the resultant risks to human health caused by discharges of hazardous substances." *See Mauthe*, 123 Wis. 2d at 299.[2]

i. The context and history of statutes closely related to or surrounding the Spills Law support the interpretation that rulemaking is not required.

The context and history of closely related and surrounding statutes are highly relevant to the plain meaning of the Spills Law. *Kalal*, 2004 WI 58, ¶46 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.") (citation omitted). Context includes "the previously enacted and repealed provisions of a statute." *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶22, 309 Wis. 2d 541, 749 N.W.2d 581 (citation omitted). "By analyzing the changes the legislature has made over the course of several years, [courts] may be assisted in arriving at the meaning of a statute." *Id. See also* Wis. Stat. § 990.001(7) ("A revised statute is to be understood in the same

[2] For additional textual analysis, see *Amici*'s non-party brief on the Parties' cross motions for summary judgment before the Circuit Court. (R. 93:9-14).

sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction.").

The Wisconsin Legislature enacted the Spills Law in 1978 as part of 1977 Wisconsin Act 377 ("Act 377"), §§ 9, 23, which, *inter alia*, also revamped Wisconsin's Solid Waste Management Act, §§ 10-19, and created the Hazardous Waste Management Act, § 21. Originally codified in Chapter 144 of the Wisconsin Statutes, the Spills Law has since been amended and renumbered, but has always defined "hazardous substance" and has always included requirements that responsible parties immediately notify DNR of hazardous substance discharges and remediate those discharges to the maximum extent practicable. Wis. Stat. §§ 144.30(10), .76(2)(a), (3) (1977-78). "Hazardous substance" was originally defined almost exactly how it is defined today. *Compare* Wis. Stat. § 292.01(5) *with* Wis. Stat. § 144.30(10) (1977-78).

Although Wisconsin's rulemaking requirement predates the Spills Law, *compare* Wis. Stat. § 227.01(9)-(10) (1975-76) *with* Wis. Stat. §§ 227.01(13) *and* 227.10(1), the Legislature repeatedly identified instances throughout Act 377 where DNR was required to promulgate rules. *See, e.g.*, § 13 ("[t]he department shall by rule adopt county solid waste management criteria"); § 17 ("[t]he department shall, by rule, specify the minimum contents of feasibility reports"), ("[t]he department shall, by rule, specify the minimum contents of a plan of operation"), and ("[t]he department shall, by rule, adopt a graduated schedule of reasonable fees to be charged for administering this section"); § 18 ("[t]he department shall prescribe by rule minimum standards for closing, long-term care and termination of sites for the disposal of hazardous waste or the land disposal of solid waste") and ("[t]he department shall by rule provide for the method of payment" for costs of long-term care); § 21 ("[t]he department shall, by rule, adopt a graduated schedule of reasonable fees to be charged for the direct administration of this section") and ("[t]he department shall prescribe by rule which records, reports or information, if any . . . shall be confidential"). Act 377 even required rulemaking within a

definition. § 21 ("'Storage' means the containment of hazardous waste, for that period of time established by rule by the department not exceeding 18 months, in such a manner as not to constitute disposal of the hazardous waste."). Act 377 also required DNR to:

> Promulgate, by rule, criteria . . . for identifying the characteristics of hazardous waste and based on use of these criteria, maintain and update a list of wastes identified as hazardous wastes which shall be subject to ss. 144.60 to 144.74.

1977 Wis. Act. 377, § 21; Wis. Stat. § 144.62(2)(a) (1977-78).

Act 377 only contained two rulemaking requirements under the Spills Law. In Section 20, the Legislature mandated that "[t]he department shall require by rule that all persons . . . discharging . . . hazardous substances . . . in this state report the manner used, amount used and amount discharged for each such waste, substance or contaminant." Wis. Stat. § 144.54(1) (1977-78). Section 23 required DNR to "establish by rule a contingency plan for the undertaking of emergency actions in response to the discharge of hazardous substances." Wis. Stat. § 144.76(5)(a) (1977-78).

During the 1980s and 1990s, the Legislature continued to amend Chapter 144 to add specific rulemaking requirements under the Solid Waste Management and Hazardous Waste Management Acts, but not the Spills Law. For example, the Legislature explicitly required DNR to promulgate a rule listing hazardous wastes instead of simply maintaining that list based on criteria established in a rulemaking. Wis. Stat. § 144.62(2)(b) (1993-94). Further, DNR was required to "promulgate by rule a list of hazardous constituents." Wis. Stat. § 144.62(2)(c) (1993-94). *See also, e.g.*, Wis. Stat. §§ 144.435(3)(a), .44(7)(f)5.b, .441(3)(f), .442(4)(c)1, .442(9m)(c)2. (1993-94). And again, the Legislature even required rulemaking within a definition. Wis. Stat. §§ 144.50(1)(b) (1993-94) ("'Used oil fuel' means any fuel designated by the department by rule that contains used oil or is produced from used oil from a combination of used oil and other material.")

In 1982, the Legislature amended the definition of "hazardous substance" to the exact form that exists today. 1981 Wis. Act 374, § 18. *Compare* Wis. Stat. § 144.01(4m) (1981-82) *with* Wis. Stat. § 292.01(5). Then, in 1996, the Legislature overhauled Chapter 144 and separated the various regulatory programs thereunder into the statutory chapters that exist today. 1995 Wis. Act 227. Most of the rulemaking requirements described above were retained and still exist. *See generally* Wis. Stat. chs. 289, 291, and 292. That includes but is not limited to the requirement that DNR promulgate as a rule a list of hazardous wastes, Wis. Stat. § 291.05(2)(b), and a list of hazardous constituents, Wis. Stat. § 291.05(4). Since 1996, the Legislature has imposed additional rulemaking requirements on DNR's exercise of authority under the Spills Law. *See*, *e.g.*, Wis. Stat. § 292.12(2)(d)2 (authorizing DNR to require that responsible parties provide proof of financial responsibility, "as determined by the agency with administrative authority by rule" where "the agency" typically means DNR but can mean the Department of Agriculture, Trade and Consumer Protection).

The Spills Law and the Solid and Hazardous Waste Management Acts were all a part of the same statutory chapter for nearly two decades, and no revisions to the Spills Law indicate the definition of "hazardous substance" should not "be understood in the same sense as the original," Wis. Stat. § 990.001(7). These closely related statutes therefore should be considered in this Court's analysis.

Plaintiffs-Respondents essentially argue that, although the rulemaking requirement predates the Spill Law, and although the Legislature has identified in painstaking detail throughout these statutes when the DNR is required to engage in rulemaking, the Legislature somehow forgot to do so when it comes to the definition of "hazardous substances"—not just in 1978 when it created the Spills Law, but also every time it has amended the Spills Law since. On the contrary, the Legislature knows how to tell DNR when to engage in rulemaking under the Spills Law and closely related statutes, and has repeatedly done so. The Legislature even knows how to tell DNR to promulgate a list, and has done so on at least two occasions.

The statutory language, context, and structure of the Spills Law reveal that there is no requirement to list hazardous substances through a rulemaking. The manifest intent of the Legislature was to err on the side of caution and require responsible parties to immediately notify DNR of any discharge of any substance that *might* pose a threat to public health or the environment, without qualifying that those substances need to be identified "by rule." *See Mauthe*, 123 Wis. 2d at 299. By asking this Court to hold that DNR must identify hazardous substances like PFAS through rulemaking, Plaintiffs-Respondents effectively ask this Court to engage in judicial activism and remake the Spills Law in a way that the Legislature never intended. If Plaintiffs-Respondents want to put the people of Wisconsin and its environment at such risk, the Legislature is the proper forum, not this Court.

B. The Legislative History of the Spills Law Supports the Plain Language Interpretation that Rulemaking is Not Required.

Legislative history can be consulted when a statute is ambiguous or to confirm a plain meaning interpretation of a statute. *Kalal*, 2004 WI 58, ¶51 (citation omitted). As explained above, the definition of "hazardous substance" is unambiguously broad, versatile, and inclusive of any substance, such as PFAS, that might pose a potential threat to the public health or environment when discharged. The legislative history of the Spills Law confirms this plain meaning interpretation and underscores the lack of a requirement to list hazardous substances in a rulemaking.

The process to enact the Spills Law began in July 1976 when the Legislative Council established the Special Committee on Solid Waste Management to, *inter alia*, study "the problems of toxic and hazardous waste management, and to draft appropriate legislative remedies." Wis. Legis. Council Rep. No. 23 to the 1977 Legislature, *Legislation Relating to Hazardous Waste Management*, at 1 (July 26,

1977).[3] The Committee's work resulted in the introduction of 1977 Wisconsin Assembly Bill 880 ("AB 880"), which was ultimately repackaged as 1977 Wisconsin Assembly Bill 1024 and enacted as 1977 Wisconsin Act 377 ("Act 377").

The Committee established two subcommittees, including the Hazardous Waste Subcommittee. Wis. Legis. Council Rep. No. 23, at 1. On October 13, 1976, the Hazardous Waste Subcommittee received a staff briefing on eight different approaches to defining hazardous wastes, including the definition of hazardous waste in the Resource Conservation and Recovery Act of 1976 ("RCRA"). Wis. Legis. Council Staff Brief 76-14, *Defining Hazardous Wastes*, at 17 (Oct. 13, 1976). The briefing categorized RCRA's definition of hazardous waste as a "Descriptive Overview" and noted one potential disadvantage of that style of definition: "*May* require further clarification for regulatory purposes." *Id.* at 5-6 (emphasis added). RCRA itself does require the U.S. Environmental Protection Agency to further clarify the definition of hazardous waste by promulgating criteria for identifying the characteristics of hazardous waste and listing particular hazardous wastes. 42 U.S.C. § 6921(a)-(b).

Notably, the Subcommittee agreed to adopt RCRA's definition of hazardous waste "as a working definition, subject to modification." Rec. of Comm. Proceedings for Subcomm. on Hazardous Waste, at 9 (Nov. 4, 1976). RCRA defines hazardous waste as:

> (5) The term hazardous waste means a solid waste, or combination of solid wastes, which because its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

[3] For the Court's convenience, *Amici* have filed a separate Appendix including those pieces of legislative history cited herein that are not available on the Wisconsin State Legislature's online archive located at https://docs.legis.wisconsin.gov/archive.

Id. at 17; 42 U.S.C. § 6903(5).

The definition of "hazardous substance" in AB 880, originally enacted with Act 377 and largely unchanged to this day, clearly draws from RCRA's definition of "hazardous waste". Additionally, the language used to define "hazardous substance" in AB 880 was also originally used in AB 880 to define "hazardous waste." *Compare* 1977 Wis. Assemb. B. 880, § 21 *with id.* § 19. Despite the similar language used to define "hazardous substance" and "hazardous waste" under AB 880, a closer comparison of the two definitions reveals that the Legislature chose to impose a rulemaking requirement for hazardous wastes but not for hazardous substances. For example, AB 880 contained the rulemaking requirement that DNR promulgate a list of hazardous wastes, discussed *supra* at 5-6. 1977 Wis. Assemb. B. 880, § 19. *See also* Wis. Stat. § 144.62(2)(a) (1977-78); Wis. Stat. § 291.05(2)(b). However, that rulemaking requirement was explicitly limited to the Hazardous Waste Management Act and did not apply to hazardous substances under the Spills Law. *Compare* 1977 Wis. Assemb. B. 880, § 19 ("[T]he department shall . . . [p]romulgate, by rule, criteria for identifying the characteristics of hazardous waste and based on use of these criteria, maintain and update a list of wastes identified as hazardous wastes which shall be subject to ss. 144.60 to 144.74.") *with id.* § 21 (proposing to codify the Spills Law as Wis. Stat. § 144.76).

Another distinction between the definitions of "hazardous waste" under AB 880 and "hazardous substance" under AB 880, other than exceptions contained in the definition of "hazardous waste" not relevant here, is that the definition of "hazardous substance" incorporates the definition of "hazardous waste". *See* 1977 Wis. Assemb. B. 880, § 21 ("'Hazardous substance' means any substance or combination of substances, including *wastes*, of a solid, liquid, gaseous or semisolid form . . .") (emphasis added). *See also id.*, § 19 ("'Hazardous waste' or '*waste*' means any waste or combinations of wastes of a solid, liquid, contained gaseous or semi-solid form . . .") (emphasis added). That AB 880 included hazardous wastes—i.e., those contaminants identified in a rulemaking—as a subset of hazardous

substances, further reveals the Legislature's intent to define "hazardous substance" broadly and apply it to more than specific contaminants designated by a rulemaking like the required rulemaking for hazardous wastes. In fact, although the definition of "hazardous waste" has changed, the definition of "hazardous substance" still includes "wastes" to this day, which is relevant to this Court's plain language analysis in the first instance and is confirmed by the available legislative history set forth above. *See* Wis. Stat. § 292.01(5).

Further, the fact that the Hazardous Waste Subcommittee knew that "Descriptive Overview" style definitions may require further clarification, supports the inference that the Legislature made a conscious decision when drafting AB 880 and therefore Act 377 to require clarification through rulemaking for hazardous wastes, but not for hazardous substances. Indeed, although hazardous wastes must be designated by rulemaking to this day, Wis. Stat. § 291.05(1)-(2), the definition of "hazardous substance" has always been broad, versatile, and inclusive of any substance that might pose a threat to the public health or environment when discharged and based on the circumstances under which that substance is discharged.

If the Legislature intended to require rulemaking to establish PFAS or any other contaminant as a hazardous substance, it would have said so, just as it did for hazardous wastes. On the contrary, the available legislative history helps explain that the Legislature chose not to impose such a rulemaking requirement. This Court should not read such a requirement into the Spills Law now.

CONCLUSION

For the foregoing reasons, this Court should uphold DNR's decades-long application of the Spills Law and reverse the Circuit Court.

Respectfully submitted this 18th day of November, 2022.

Electronically signed by Robert D. Lee
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c)3 for a brief produced with a proportional serif font. The length of the Argument and Conclusion portions of this brief, as identified in Wis. Stat. § 809.19(8)(c)3, is 2,960 words.

Dated: November 18, 2022.

Electronically signed by Robert D. Lee
Robert D. Lee

WIS. STAT. § 801.18(6) COMPLIANCE CERTIFICATION

I hereby certify that:

In compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing system, which accomplishes electronic notice and service for all parties who are registered users.

Dated: November 18, 2022.

Electronically signed by Robert D. Lee
Robert D. Lee