

## Wisconsin Supreme Court Upholds State's Authority to Regulate PFAS Without Formal Rulemaking

Alert

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By Zachary Wright, Andrew Davis, Kristen Ellis Johnson, & Sarah Struby

On June 24, 2025, the Wisconsin Supreme Court rejected a challenge to the authority of the Wisconsin Department of Natural Resources (WDNR) to compel the cleanup of perfluoroalkyl and polyfluoroalkyl (PFAS) substances under Wisconsin's Spills Law, Wis. Stat. § 292.01 *et seq.* The decision upholds the long-standing discretion of WDNR in applying the Spills Law and has significant implications for the cleanup of PFAS and other emerging contaminants, even if not yet formally regulated within the state.

The Spills Law requires parties responsible for a "hazardous substance" discharge on their property to notify WDNR and, thereafter, initiate "actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters." Wis. Stat. § 292.01(5), 292.11(2)–(3). The question before the Court was whether, under Wisconsin's Administrative Procedure and Review Act, WDNR must promulgate rules specifically identifying PFAS and other emerging contaminants as "hazardous substances" before it may apply the Spills Law to those substances.

The Court held WDNR did not need to formally promulgate a rule to apply the Spills Law to PFAS, and rejected arguments by the respondents—a Wisconsin business association and business—that rulemaking should have preceded certain WDNR actions. Accordingly, the Court held that the following agency actions were proper exercises of WDNR's authority under the Spills Law:

- Stating on its website and in letters to responsible parties its intent to apply the Spills Law to PFAS and other emerging contaminants as "hazardous substances" and—further—stating PFAS and other emerging contaminants are indeed "hazardous substances" under the Spills Law.

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- With respect to the respondent business specifically, requiring the continued reporting of PFAS exceedances based on concentration standards established by the Wisconsin Department of Health Services (4 nanograms per liter, for PFOA and PFOS) and—more generally—establishing and enforcing a threshold for reporting a PFAS discharge without promulgating a rule.
- Issuing an interim decision informing participants in the Spills Law's Voluntary Party Remediation and Exemption from Liability program that WDNR would award only partial liability exemptions, rather than broad liability exemptions, for properties with PFAS discharges.

In a concurring opinion, Justice Hagedorn wrote that, while the WDNR statements at issue were guidance documents, and not improper unpromulgated rules, guidance documents may still be subject to pre-enforcement challenge and should go through a notice-and-comment period prior to their adoption.

Stinson attorneys are actively tracking the evolving regulatory and litigation landscape around PFAS. For more information, please contact one of the attorneys listed or the Stinson LLP contact with whom you regularly work.

## CONTACTS

Andrew W. Davis

Kristen Ellis Johnson

Sarah Lintecum Struby

Zach Wright

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