

Wisconsin Judge Rules that the WDNR Lacks Authority to Regulate PFAS

Apr 14 2022

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Practice Area: Environmental Law and Litigation

On April 12, 2022, a Wisconsin judge ruled in the case of *Wisconsin Manufacturers & Commerce, Inc. and Leather Rich, Inc. v. WDNR*, (Waukesha County Case 2021CV000342) that the WDNR lacks the authority to regulate PFAS chemicals because the Wisconsin Legislature has not established regulatory standards for them. According to the lawsuit, Leather Rich, Inc. entered into a voluntary WDNR environmental cleanup program in 2019, and the following year WDNR indicated that the businesses enrolled in the program were required to test for emerging contaminants, including PFAS. The plaintiffs in the case argued that because the WDNR had created a list of emerging contaminants without any legislative oversight or opportunity for public comment, and had not adopted regulatory standards through administrative rulemaking, the WDNR lacked the authority to require such testing. The judge's ruling would require the WDNR to wait until legislators have established standards for PFAS through adoption of regulatory limits in state law or through administrative rules. It is estimated that the adoption of standards for PFAS could require 1-2 years. An attorney for the WDNR indicated that the WDNR plans to appeal the decision and file a motion to place the judge's order on hold.

The WDNR has historically taken the position that the agency has authority under Wisconsin's "Hazardous Substance Spill Act" ("Spill Act" - Wis. Stats. 292.11) to regulate PFAS even in the absence of established standards, as the Spill Act gives the WDNR broad authority to require testing and remediation of such chemicals. In late February, the WDNR's Natural Resources Board (NRB)—the entity that sets policy for the WDNR—took steps toward the adoption of statewide standards for two of the most common PFAS compounds, which included an approval to adopt a drinking water standard of 70 parts per trillion (ppt) for two of the most common PFAS compounds; perfluorooctanoic acid (PFOA) and polyfluorooctane sulfonate (PFOS).

PFAS is an acronym for per- and polyfluorolalkyl substances, which are chemicals that were widely used from the 1960s to the early 2000s in the manufacture of a variety of consumer products, such as stain resistant carpets, non-stick cookware (e.g., Teflon), firefighting foam, food packaging (e.g., microwave popcorn bags/pizza boxes), water resistant clothing (e.g., pre-2000 GoreTex), water resistant repellent (e.g., Scotchgard) and dental floss. While the use of PFAS compounds has largely been phased out in the U.S., these compounds are still used in the manufacturing of many products worldwide. These substances, known as "forever chemicals," have received considerable attention by federal and state environmental regulatory agencies because of their resistance to chemical breakdown due to the chemical bond between carbon and fluorine atoms in the PFAS compounds, which is one of the strongest in nature. Because of this, humans can still be exposed to PFAS long after the chemicals were released into the environment.

The WDNR has identified approximately 90 sites throughout Wisconsin with PFAS contamination, including municipalities such as Madison, Marinette, Peshtigo and Wausau with PFAS-contaminated groundwater.

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