

Wisconsin Judge Places Earlier PFAS Decision on Hold

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This week, a Wisconsin judge placed on hold his previous decision regarding the WDNR's authority to regulate PFAS chemicals. As we reported in a previous von Briesen Environmental Law Update, a Waukesha County Circuit Court judge ruled on April 12, 2022 in the case of *Wisconsin Manufacturers & Commerce, Inc. and Leather Rich, Inc. v. WDNR*, (Waukesha County Case 2021CV000342) that the WDNR lacked the authority to regulate PFAS chemicals because the Wisconsin Legislature had not established regulatory standards. The plaintiffs in that case argued that because the WDNR had not adopted regulatory standards for PFAS through administrative rulemaking, the WDNR lacked the authority to require such testing. The judge's ruling would have required 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. At the time of the April 12th decision, an attorney for the WDNR indicated that the WDNR planned to appeal the decision.

The judge that placed the decision on hold indicated that he anticipates that the Wisconsin Supreme Court will likely take the case on appeal rather than the intermediate Wisconsin Court of Appeals so that a decision can be made expeditiously. It is not known at this point when the decision would be reviewed by a higher Wisconsin court. 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.

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