

# Judge rules DNR illegally adopted hazardous materials cleanup standards

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A Waukesha County judge has ruled the DNR lacked the authority to require the cleanup of hazardous materials such as PFAS because the agency has failed to properly go through the rulemaking process.

Waukesha County Circuit Court Judge Michael Bohren in yesterday's ruling accused the agency of operating on "a whim and a fancy" as it tried to regulate PFAS.

He sided with Wisconsin Manufacturers & Commerce and Oconomowoc leather cleaning company Leather-Rich Inc. in their challenge of the Department of Natural Resources' power to regulate the chemical.

In the initial complaint, the plaintiffs argued the DNR "freely" changed the definition of hazardous substances and created new policies related to "emerging contaminants" — including PFAS — without public input or legislative oversight.

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Bohren agreed the DNR is required to go through a rulemaking process in order to establish acceptable thresholds for hazardous substances, which it did not do.

Bohren also said the DNR seems to think it has "virtually unlimited authority" to regulate hazardous substances in the air, water and soil.

"The DNR seems to operate on a whim and a fancy to make a determination based upon what they know, or what they think they know, and then to apply it to the responsible parties involved in the remediation process," Bohren said.

Per- and polyfluoroalkyl substances are a series of chemicals found in industrial and everyday products, most notably firefighting foam. They are commonly referred to as “forever chemicals” because they do not break down easily in the environment and are linked to several diseases and cancers in humans.

Assistant Attorney General Gabe Johnson-Karp, representing the Natural Resources Board, requested Bohren stay the order to avoid “significant regulatory uncertainty” with the agency likely to appeal.

Bohren called the request “ridiculous,” but agreed to stay the effect of the order to allow time for the DNR to file a motion by May 12.

Bohren said the department has a responsibility to determine what hazardous substances are and to do so before parties get involved in the remediation process.

Johnson-Karp said ahead of Bohren’s ruling the parties who identify hazardous substances are responsible for initially determining if a substance is hazardous or not.

Attorney Delanie Breuer, representing Leather Rich Inc., countered the DNR told the company it would have to investigate for PFAS.

“Leather-Rich did not decide on its own to test for PFAS because they were not aware that it would be considered a hazardous substance by DNR,” Breuer said.

Johnson-Karp requested that the NRB and Cole be dismissed as parties to the lawsuit, which Bohren declined to do.

“If the department’s argument is that the board and the secretary are not proper parties, then what that in essence means is that the Department of Natural Resources somewhat operates as an automaton,” Bohren said. “It’s an all-knowing, all-functioning, all-proceeding body, without any way to control it.”

Environmental groups panned the decision.

Midwest Environmental Advocates staff attorney Rob Lee called the ruling “disappointing” but said the group expected it to be appealed.

River Alliance of Wisconsin Executive Director Allison Werner called WMC’s efforts an “assault” on the state’s ability to regulate PFAS.

“WMC’s assault on the state’s ability to address PFAS contamination is a significant threat to Wisconsin’s water resources, to public health, and to all the sectors of our economy—including tourism and agriculture—that rely on clean water,” Werner said.

Scott Manley, WMC executive vice president of government relations, in a statement said the decision “assures the business community that regulators must operate within their own authority.”

“When the government ignores the rulemaking process, employers are left in the dark as to what regulations they must follow,” Manley said. “Businesses cannot afford to have that kind of uncertainty, and we do not think it is too much to ask for DNR to simply follow the law as written.”

See the Midwest Environmental Advocates release [here](#).

See the WMC release [here](#).