**WiSupCt\_OralArguments\_WMCvDNR.mp3**

[00:03:14] **Speaker 1** All right. Harry. Harry. Harry.

[00:03:19] **Unidentified** Wisconsin Supreme Court is now in session. That's just an acting good presiding. Your silence.

[00:03:28] **Speaker 1** Is commanded. Must have forgotten something. Glasses. Very important. Where'd she go? She was just a hidden. Good morning. This morning we have 41st case, 22, AP7. And Wisconsin Manufacturers and Commerce Inc versus the Wisconsin Department of Natural Resources. Could we start with your appearances? Morning.

[00:04:07] **Unidentified** These are from time the virus. And I'm joined today by.

[00:04:15] **Speaker 1** All right. Good morning. The lineup that I have just to make sure we're on the same page. 25 minutes followed by 15 minutes and 15 minutes and then back for five minutes in rebuttal. Correct. All right. Very good with that. Please proceed.

[00:04:39] **Speaker 2** Madam Chief Justice, and may it please. For nearly 50 years, DNR and tens of thousands of Wisconsinites have successfully used the spill law to protect our environment and public health against discharges of harmful contaminants. The spill law has worked so well for decades, precisely because the legislature broadly defined the hazardous substances that discharges must report and cleanup, namely those that, quote, may pose a substantial present or potential hazard to human health or the environment. This case involves an ordinary application of that standard. Leather rich wanted a valuable spill liability exemption, so it investigated its property, discovered Pufas, among other things, and reported this to DNR. DNR then asked the rich to address this discharge, which undisputedly poses a public health hazard. Yet respondents insist that DNR must ignore this harmful force discharge and indeed many other kinds of harmful discharges because no administrative rule lists all hazardous substances covered by the spills law. Respondents position would fundamentally rewrite the spills law and cause two serious consequences that I just want to address right now. First, it would greatly hamstring DNR ability to protect public health and the environment. Harmful spills like leather riches would not just vanish. Instead, they would remain in the environment. Unless and until DNR can promulgate rules, something that would very likely require further legislative action, which is a point I want to return to later. Second, respondents position would seriously weaken the entire executive branch's core power to interpret and execute the law. Virtually all statutes require interpretation before agencies can administer them. If agencies cannot administer laws like this one without rulemaking, executive branch activity would grind to a halt.

[00:06:55] **Speaker 3** Counsel your principle brief doesn't address section 227 .10 of the Wisconsin statutes, which says each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which is specific, which it specifically adopts to govern its enforcement or administration of that statute. Doesn't that apply here?

[00:07:19] **Speaker 2** So I think it's important to read that provision in context with the more recent guidance document definitions that the legislature added to the statutes. Because I think when you contrast those two statutes, to me it becomes very clear that what's going on here is simply explaining how it intends to apply the law, which again, the statutes are very clear to constitute guidance documents. And I'd point you to two start to two provisions. First to 27.03 A which defines guidance documents in two very similar related ways, but I'll articulate both of them. Guidance documents, quote, explain the agency's implementation of the statute and alternatively, guidance documents provide guidance or advice with respect to how the agency is likely to apply a statute it enforces. So that's statute one. Statute two is to 27.05, which to be sure was invalidated in the SEIU case, but I think still provides helpful context in terms of what is a guidance document, what is a rule? So two 2705 required past tense agencies to identify support for, quote, any interpretation of law that the agency makes in guidance documents. And so I think those two provisions make clear that there are many, perhaps most occasions in which when the agency explains how it intends to interpret and apply a statute, it's creating a guidance document. And that is something that is not a rule. And I think another way to look at this is to examine Justice Kelly's writing in the SEIU case, where he's very clear, I believe this is paragraphs around 98 to 1 zero eight, somewhere in that range. But in paragraph one of six, Justice Kelly writes guidance documents, quote, explain statutes or provide guidance or advice about how the executive is likely to apply them. They contain the executive's interpretation of the laws.

[00:09:25] **Speaker 3** Then what's a rule? Then what's the rule? Where do we draw the line between guidance and a rule? Because the legislature is supposed to enact the laws, the rules, if you will, that govern society. And that's the complaint here that is being made by the regulated community. We don't know what the government is going to do with this law. And perhaps we can point the finger at the legislature and say, stop drafting this very broad legislation and ceding your power to the executive branch to fill in all the details and actually make the rules, even though the the tution says that's supposed to be what the legislature is doing. But I'm struggling with your interpretation of these statutes to see the distinction between guidance and a rule, because the executive branch, I think you would agree, can't do something different, can't create law that the legislature hasn't sanctioned, if you will. So so what's the difference in your mind between guidance and a new law in the guise of a rule?

[00:10:35] **Speaker 2** Well, I think the primary difference and this is a definitional one in a sense, is that rules themselves have independently the force of law and. Science does not. And I think what that means in this context and I think an example might be helpful. So consider the spill law and a DNR enforcement action they're under. And we actually don't have to imagine a hypothetical here. We have the Johnson Controls case that's pending. And what you can see in that case is when DNR wants to enforce against a violation of the spill law, it doesn't say, for instance, Johnson controls you violated. You know, the statement that we posted on our website. It says, we think p force or hazardous substances. No. Instead, DNR files a complaint that says Johnson controls you violated to 90 to 11 sub three. You violated the statute itself. A rule violation will look very different. A rule violation would come in the form of DNR pleading, you know, a specific code provision that someone has violated. And they'd say, you can't do that. That code provision has the force of law. You can't violate it. There's a fundamental distinction, again here when the agency simply interprets a statute and enforces its interpretation of that statute, what has the force of law is the statute itself. Not the agency's interpretation. And of course, that's tested in an enforcement action. If someone disagrees with the interpretation, it's obviously up to the judiciary to say who's right. And that, I think, is the fundamental reason why if there's any category of interpretations that constitute rules and I'll talk more about that, it has to be a very, very narrow one. And I think what this court has recognized is only in the context of changes in interpretations. Do you do you really have a problem? What you can see is in really almost every single case that this court has considered on the on promulgated rulemaking topic, you know, all the way back to Frankenthaler and Berry Labs, the very old cases never did this court say and those are cases where they found a non promulgated rule. But in none of those cases did the court go on to say agency, you cannot act under the statute until you promulgate a rule that embodies your interpretation. That was never what the court said in those old cases. They said, well, there's a non promulgated rule, but agency, you know, go back and do it again, Go back and make the same evaluation. And I'll give you an example. So I think one good case that I in retrospect regret not discussing more in our brief is Wisconsin telephone versus Department of Industry, Labor and Human Relations. That's at 68 West second 345. And what was going on there is Diller was considering termination, I believe. And the allegation was that it was a sex discrimination because I believe the woman was pregnant. And Diller basically decided pregnancy status counts as a form of sex discrimination under the statute. And the question was presented to the court, is that a rule? Is that an UN promulgated rule? I believe the guidelines that Diller had written down that said, you know, pregnancy status counts. And what the court said was in this case, we view that as a rule that should have been promulgated. But what was the result? Not that the agency had to stop and not enforce the sex discrimination statute until rules had been promulgated, which would be the result. I think if two 2710 one were read as broadly as they say. Instead, the result was a remand to the. To the agency. And so I'll just read you a couple of excerpts that I think are really precisely Respondants position here. That's that's rejected in Wisconsin. Telephone. Again, there the the the employer argues that if the guidelines are invalid, then the policy embedded in the guideline is also unenforceable, which I think would reflect the position that they're articulating, which is that if there's no rule, you basically can't enforce the statute at all. And what the court said, the court rejected that argument. It said failure to file the guideline as a rule, did not deprive the department of the authority to decide. Contested cases dealing with pregnancy leaves went on to say it is within the agency's power to reach the same result under the applicable statute and remanded for further consideration. And that's really the pattern in most of these cases, virtually all of them. You know, the court may find it on promulgated rule, but it will remain to the agency to do it again and again. The reason is these interpretations, they just they don't have the force of law. Again, the agency cannot come in and say, my word is final. I think that's a fundamental misconception that we have here. And the respondents position, I don't think they say I don't.

[00:15:30] **Speaker 3** Think they're saying that, though. Counsel and I'm going to interrupt you there because I want to explore this point with you. The the argument from the regulatory regulated community is here you have leather, which they were cooperative with. D and are they actually reported without being told to do so, Right. The existence. Of the pea fuzz. So you don't have somebody who is trying to avoid the law. Their principal complaint, as I understand it, is they don't know what it is. And the the government's counter is, well, you have to figure it out for yourself. But do you see how unsatisfying that is to the regulated community? Because they have to figure out what a vague, broadly written statute means when they have the government agency saying it means this, you must do this, there's a threat of fines against them. So you're saying it doesn't have the force of law, but they're taking a huge risk, aren't they, Counsel? If they don't follow the directives, which is how I read the the. Letters and communications they received, whether it's posted on DNR website or if it's a letter directly to an individual regulated party. And it feels like, you know, the goalpost is shifting. And I understand the argument. Over, you know, Lamar and other cases. Well, that's when there's been a change in the interpretation. But from the regulated communities perspective, it is a change because in the past those weren't regulated or restricted or deemed to be hazardous substances, and now they are. So the counter to your argument that, well, there hasn't been a change in interpretation. In other words, the agency hasn't flipped its position. Is a bit unsatisfying because. They have in fact changed their position. They're now saying. Be for us our hazardous.

[00:17:20] **Speaker 2** Well, I just want to start on that last point you make, because I do think it's an important one. I think there has to be a fundamental difference between a case like Lamar in which at one point the agency expressly tells the regulated community. We think the statute means X, and then at a later date it reverses course and says we think the statute means not X. I think that is that. 180 degrees shift in what the agency expressly tells the public is what was concerning to the court in school way in Lamar. I think it has to be a fundamentally different situation when an agency for the first time is presented with a new set of facts. This happens all the time. I mean, the legislature crafts regulatory standards that are general. They can't conceivably apply or. In the statute enumerate and articulate every single possible application of the statute. So this happens all the time. An agency has a general regulatory statute that sets out a standard and it's presented with new sets of facts. You know, does this new activity fall within the statutory standard? And that I don't think can be fairly characterized as a change. The agency has never taken a position on this issue. It's never seen this issue because we acknowledge there's scientific progress incorporated into this. And so when the DNR first and the scientific community, you know, first began learning about P, for us, that's a new application of the statute for the first time. I think characterizing that as a change is just not accurate. And, you know, if it were the case that. Agencies whenever they confront a new set of facts to which a statute should be applied, would have to promulgate a rule before it could confront that new factual scenario, which I do think is Respondants position here. That's a serious problem for the executive branch. I think as this court recognized in SEIU and Justice Kelly's opinion that if the executive cannot interpret the law, understand what the law means, and then actually execute the law in accordance with that interpretation. You know, the executive branch can't do its job. I mean, that that is the executive's most basic job. I do have a number of responses on the notice issue that I want to get to, but no, please.

[00:19:46] **Speaker 3** I want to before you leave that point, I want to go back to to 27.10, because there's no reference in that statute to a change in the agency's position. It says the each agency shall promulgate whenever it specifically adopts an interpretation of a statute. So perhaps the cases have rewritten that statute, although I was part of the Lamar Court, and that was not my intent. But we won't get into that. But do you think that the the court has rewritten someone to suggest that there has to be a change? Because that's nowhere in the text?

[00:20:24] **Speaker 2** I wouldn't say it's rewritten sub one. I think what this court has implicitly, we don't.

[00:20:28] **Speaker 3** Have the power to do that.

[00:20:29] **Speaker 2** The course, of course. I think what the cases bear out and again, I would point you to the guidance document definition, which I do think is very important to 2710 sub one must mean something quite narrow. And that I think has to be so it says specifically adopted to govern the enforcement of a statute. So I think right there we have an indication that it's some narrower subset of activity than simply thinking about what a statute means, telling the public and then enforcing in that manner. It has to be a specific adoption that governs the the administration of the statute. And you can see that in cases like Colvin, for instance, in which the Department of Health Services, in administering a Medicare Medicaid benefits provision, had that, I think turned on essentially how functional the individual was in terms of day to day activities. It was I think it was sort of like a the statutory standard was very general. And what DHS did is it issued this booklet that basically said we read this as one third if this individual is incapacitated, don't quote me in the language more than one third of the days in a month they qualify for this benefit under this general statutory standard. And so that independent standard that the agency had had written down and when making benefits determinations, it pointed to that to make the determination that I think is what the court has seen as interpretations that may carry the effect of law. Again, an independent standard apart from the statute, which again is not what we have here. Every statement that you see in which that they point to, in which DNR says conveys to the public, we think P or hazardous, you should probably clean them up under the spills law. They immediately reference the statute. You know, they say to 9211 covers hazardous substances. Here's the definition to 92, a one sub five. So it's very clear that when in this case, DNR is explaining its view of what the spill law requires, it's pointing to the statute itself. It's it's just saying here's the statute, here's how we read it. Regulated parties can disagree. They can say we don't think it's hazardous and we'll fight that out in an enforcement action if we have to. I think it's telling here. This is one of the reasons I have a hard time understanding this notice issue. Really two reasons. One is that, you know, leather rich knew it was subject to the spills la. The rich knew that it had potentially discharged hazardous substances well before they had any contact with the department. They installed an impermeable and permeable barrier. So, I mean, they knew that there were chemicals being dumped. So it's not as if they were not on notice of this law. Two, they they report it like you said, they voluntarily report it. And three, there again, is no dispute here that the previous discharge is hazardous, actually satisfies the statutory criteria. So it's. Fairly difficult for me to understand how there's truly a notice issue when there's no argument that I've seen that this P five discharge actually doesn't fall within the statutory standard.

[00:23:56] **Speaker 1** So attorney, off your your time's ticking by really quickly. So I just want to ask you a I want to get your thoughts about this. Let's suppose the court would require the DNR to undertake rulemaking to designate substances as hazardous. Would the legislature be able to veto those rules?

[00:24:17] **Speaker 2** Well under the current scheme, yes. I mean, obviously in two days have another argument that will. Well all that into some question but under the current scheme. That's correct.

[00:24:27] **Speaker 1** So tell me what you think that would do for parties trying to comply and that level of uncertainty, would that impact that?

[00:24:35] **Speaker 2** Well, I think that's yes, I mean, it would negatively impact regulated parties. And I understand why the rich here says, well, it's it's a burden on us to have to clean up the pie for us. But I think you'll see the reason this all happened is because there was a property transaction whether Rich wanted to sell the property and in ordinary commercial transactions, the buyer doesn't want to buy contaminated property. And so, you know, if we accept this argument and essentially spill's law enforcement comes to a halt until rulemaking is completed. It's not clear to me how that benefits the regulated community. I mean, if council have these contaminants just sitting in, they're sitting in the ground, someone's going to want them cleaned up one way or the other.

[00:25:20] **Speaker 4** I just have maybe two quick questions if I want to make sure I understand your argument. Is your argument on the interpretation piece that what's going on here is not really interpretation of the statute, but application of it? Or is your argument that it is interpretation? But we need to somehow, you know, interpret interpretation narrowly?

[00:25:44] **Speaker 2** I think the latter. I mean, it is an interpretation. I mean, it's it's you know, you can have sort of abstract interpretations or applied to specific facts. It is an interpretation of the statute. What I would say is two 2710 one needs to be interpreted narrowly, both as a matter of constitutional avoidance, because, again, I think it's critical to to to credit the SEIU discussion of what it means to interpose sort of notice and comment procedures and potentially a veto between the executive branch and enforcement of the law. And yeah, so so and narrowly interpreted again, you can you can accomplish that I think by focusing on the specifically adopted to govern it. Again, it's not all interpretations. It's it's there is a qualifier there.

[00:26:35] **Speaker 4** Okay, great. And then my second question is, if this court agreed that these different policy statements or things on the website are guidance documents and not and not rules, does that answer everything with regard to that part of the case or is there more that we would need to decide?

[00:26:58] **Speaker 2** Well. I mean, their claim has evolved over time. Let's let's put it. Put it at that. Below in the Court of appeals, the primary argument was that these statements on the website and in the letters qualified as rules under 227 No. 113 That was the almost sole focus, I think, of the Court of Appeals decision. And I think if this court was to say their guidance documents, that argument would be resolved in Diana's favor. However, I think in this court, they've shifted quite dramatically, in my view, to the much more aggressive argument that doesn't just focus on the statements, but the two 2710 one itself affirmatively requires rulemaking before the executive branch can enforce. That's that's a much more aggressive position. That is not the one on which the Court of Appeals decided the case. And I would note, I think this is very conspicuous. I encourage you to read the legislatures amicus brief and I think.

[00:28:04] **Speaker 1** Very to read what.

[00:28:05] **Speaker 2** Sorry, the legislature's amicus brief. And I think it's very noteworthy that they do not adopt this very aggressive to 27/10 of one argument. And I think they very pointedly say our argument primarily is that what DNR is done is invalid under two 227 10:02 a.m., which is the explicit authority standard. What they say is and I disagree, you know, as you can see in our briefs, but what they say is, you know, this charts a middle course between the two parties, you know, sort of extreme positions is how they put it. But I think that's very telling that the legislature itself comes in and and very notably does not endorse. Do I think the legislature understands what this would mean is that if regulated parties, not just in the civil law context, but anywhere, could resist enforcement action or regulation, period, simply by saying, well, the agency must be interpreting the statute. It doesn't have a rule. So therefore, the statute effectively is inert until the rules are promulgated. I think the legislature understands that that is not a result that it wants. It wants its statutes to have force when it passes them, not for the effect of these statutes to essentially be conditioned on rulemaking activity by the executive branch.

[00:29:27] **Speaker 3** But doesn't to 27/10 of one answer that argument as well because it expressly says it it doesn't apply to a statement of policy or an interpretation that is applied to a specific set of facts. And the distinction here is that this isn't something that's just applying to leather research. It's a statement of policy that DENR is adopting, that these substances are hazardous, and then these steps need to be taken to remediate.

[00:29:59] **Speaker 2** Well, I have two responses. One is that Lamar, as I read it, essentially read that second sentence. I mean, out of the statute, there's there's not much room left for the second sentence under under Lamar. I mean, Lamar essentially says if the agency and again, this is a change case, I think it's critical. Remember, it's a change case. I saw I see my light is on. Can I finish the answer?

[00:30:22] **Speaker 1** You may finish the answer, but I'm also going to give Justice Caskey the chance to ask the questions she tried to do at the same time, just as to say that she was asking her questions, which was then followed by Justice Hagedorn and now Justice Bradley. So we're going to go backwards a little bit. In the beginning was the word.

[00:30:39] **Speaker 5** Thanks to.

[00:30:40] **Speaker 2** Genesis one one. Where was I? Lamar Right. Well, right.

[00:30:46] **Speaker 3** I'm reading something on the statute that the court didn't have the.

[00:30:49] **Speaker 2** Well, I mean, right. So if you look at Lamar, what Lamar basically said is we had an individual application of the statute. Lamar had a billboard dot was deciding whether that billboard was permitted or not. It in the context of that proceeding, it announced its interpretation. And Lamar essentially says, well, sorry, you know, you can't avoid the obligation to promulgate a rule simply by announcing your interpretation in the context of a specific case. So I am I'm quite certain that I mean, that is how this case started. It was an an individual wasn't even an enforcement action yet. But as an individual back and forth between DNR and leather rich, you know, an individual case, one on one facts on the ground and we get this argument. So. I don't know what that leaves us. I mean, where that leaves us is, again, I think to 27/10 of one needs to be construed quite narrowly. And again, the authorities for doing that are the guidance document statutes, which are the later enacted statutes, mind you. I mean, those are the legislature's most recent pronouncement on this topic to 7/10 of one's predecessor dates back, I think to 1953. And it's worth noting at that time, the rulemaking procedures were extraordinarily streamlined compared to what they are now. Justice Hogan, I think you put it very memorably, a canoe traversing the ocean is what it's like now. Back then, maybe you didn't even have to hold a hearing. And you you certainly didn't have to send it to the legislature for their approval. You could just basically publish it. And so in that era, you know, perhaps it made more sense, but now it does not.

[00:32:33] **Speaker 5** Said one preliminary question just to get everyone on the same page. Is it spill singular or spills plural?

[00:32:41] **Speaker 2** There is something.

[00:32:43] **Speaker 5** On the same page.

[00:32:44] **Speaker 2** There's some debate about that.

[00:32:45] **Speaker 5** Okay. All right. I guess we'll have to break the tie. I have a few questions here regarding the notice requirement that you talk to Justice Rebecca Bradley about. And what I want to do is ask you to respond to some of the writings in your friends briefs where I think one actually has to do with vagueness, but I think that that falls under the rubric of notice. Whether or not people whether or not sorry, people realize that this is something that is being regulated. The first is on page eight of Leather Rich's brief. And it says. And and according to leather leather rich, on page eight of their brief, they say simply owning property can subject one to spills law liability according to the other also say something about. So also also can buying a gallon of milk which of course in Wisconsin would make everyone very, very nervous. So I just want to get your thoughts on whether or not someone owning property, simply owning property or someone buying a gallon of milk is going to subject them to the spills law.

[00:34:01] **Speaker 3** Only apply civil injustice, graft.

[00:34:03] **Speaker 5** Or just.

[00:34:04] **Speaker 2** Only.

[00:34:04] **Speaker 3** If they spill it.

[00:34:05] **Speaker 2** I'll I'll take that in two steps.

[00:34:08] **Speaker 5** They spills the property first.

[00:34:11] **Speaker 2** First on the possessor point this court resolve that question long ago in Morphy. That was the first time this court considered a civil law question. It was exactly that one. Is when do simply possessors of the land potentially incur civil liability? And this court took a very broad view of the spills law and said if essentially possessors of a hazardous substance because it's still being discharged, you know, the discharge is not the initial dumping alone. It's also the propagation of the. Of the contamination. Once it's in the environment and the soil, that's a discharge. And the the possessor of the property incurs liability. That's what Marty says. The next case, Chrysler, I think, emphasizes a key point here, which is, again, that the legislature chose to create a strict liability regime here in the legislature had a choice when it considered how to address harmful discharges. One. It can socialize losses, have taxpayers pay for cleanup costs. Alternatively, it can impose that liability on the discharges and the property owners. You know, often the people who actually profited off the activity that led to the discharges and the legislature made the latter decision to place the liability on the possessors and the owners and the discharges rather than socialize the losses. And to do that through a strict liability regime that does not require knowledge. And that's a conscious choice. As as for them, as for milk, the gallon of milk, of course, a gallon of milk does not qualify. Now, what I will say is if there is any question in a regulated party's mind, you can simply call DNR. And DNR will either say, no, we don't think it's a hazardous substance discharge and you're done. Or it says yes, I think it is a hazardous substance discharge, in which case you now have two choices you can start. Complying with the spills obligations. Or you can say, I disagree. And again, that's back to this force of law question. You have the ability to say, I disagree and contest Deanna's view in an enforcement action the and leather which was free to take that course here instead it's taking this one.

[00:36:32] **Speaker 5** What they are seeing in their brief on page eight is quote According to DNR, according to your position, simply owning property can subject one to spills law liability. And my question is, is that your that's accurate.

[00:36:45] **Speaker 2** If there's a spill that qualifies on your property. And again, that is squarely what Mahaffey held in 1985.

[00:36:50] **Speaker 5** And then they say and then I appreciate where Justice Baker was coming from, but but it actually says and according to the arguments put forth by DNR in this case. So can buying a gallon of milk.

[00:37:06] **Speaker 2** Yeah that that I mean I think Justice Rebecca Bradley helpfully articulate why that's right I mean there needs to be a spill and not just any spill. I think it's critical we have to go back to the text of the statute. I just I disagree that it's an unclear statute. It rests on objective scientific facts. And there has to be, you know, the reason the gallon of milk or the keg of beer hypo just doesn't work is there is just no conceivable argument that that poses a substantial present or potential hazard to human health or the environment.

[00:37:35] **Speaker 5** So that would.

[00:37:36] **Speaker 2** Be we have to use a little bit of commonsense.

[00:37:38] **Speaker 5** Here. So that would be your answer if I asked you to respond to page ten of SI's brief that says, What if a person spills a beer at a barbecue or drops a jar of pickles on the way out of the grocery store?

[00:37:50] **Speaker 2** Same answer. Okay.

[00:37:51] **Speaker 3** Until you say I'm sorry.

[00:37:53] **Speaker 5** I think I've got some vagueness questions, but if you want to follow up.

[00:37:57] **Speaker 3** You mentioned that it's not vague because we can rely on objective scientific fact. This the pandemic taught us nothing. It's that objective, scientific fact does indeed involve and sometimes in a short period of time.

[00:38:12] **Speaker 2** Science certainly evolves. I will return to what I said earlier, which is there has never been a hint of a dispute from the other side that this discharge is not actually hazardous. There is. Say what you will about Covid. There is no dispute in the scientific community that p fires discharges at very, very, very small levels pose a serious threat to human health. And just across the of this may anticipate some of your vagueness questions. It's also important to recognize this is not a due process vagueness claim. They very well could have teed this up as one they declined to. And I don't think there's any rule making doctrine that I've seen that says, well, rulemaking is required when it might be nice to have additional notice. I mean, that's that's not how the rule making doctrine has has arisen. Again, there's no vagueness challenge. And I think the reason is they know it would have lost. I mean, the standard for facial invalidation of a statute on vagueness grounds is very high, especially for a civil regulatory statute, and especially when the discharge at issue clearly falls within the four corners of the statute. And that is black letter law that if you fall within the four corners of a statute that you say is vague, you can't make that challenge because the statute applies to you. Clearly, that's very clear in the criminal context, also applies in the civil context. So this this sort of 11th hour vagueness claim that we've seen, I just don't think gets them anywhere.

[00:39:42] **Speaker 5** So just to maybe put a finer point on that, I just want to point to page 19 of WMC. They've characterize your arguments as this, a few example quoting them a few examples highlight these vagueness concerns. If a person sprays P farts containing cooking spray on his outdoor grill. Must he report that discharge to DNR? What if a person washes a nonstick pan in his kitchen sink, or if he puts a p fats containing food wrapper into a garbage can at the park under DNR is apparent view of the law. All these discharges must be reported to DNR. Is that true?

[00:40:22] **Speaker 2** I don't think so. I mean, again, it depends on the facts and circumstances. That is how the legislature crafted this bill's law. I crafted this bill's law using spill law, using a broad standard. I think these hypotheticals a wrapper. There's just again, there's no conceivable universe in which that poses a substantial threat to human health. And again, I understand that the response was not terribly satisfying for justice. Rebecca Bradley But you can DNR is there to help people comply with the statute. That's how this is worked for for 50 years, and the legislature knows that's how this is worked. For 50 years. It saw Martha, it saw Chrysler outboard. It saw that this is a strict liability regime that does land even on the possessors of of land, that is those who did not cause the original discharge. Legislature is well aware of these two seminal decisions of this court and has never amended the spills law either to require rulemaking, which many, many other provisions in Chapter 292 require. Nor has it amended the spills law to impose a mens rea, a requirement which other environmental statutes have. Some statutes require knowing, knowing discharge discharges, but knowing conduct, you know, the person liable has to understand that what it's doing subjected to liability. Again, Chrysler outboard was very clear on this point. This is exactly the argument that Chrysler made and Chrysler outboard said, I didn't know that this was happening, you know, ten years later. And the court said, well, that's the choice the legislature made with strict liability, because, again, when we're dealing with environmental spills, there's no free lunch. Someone's got to pay for it to the taxpayers or it's the people who discharge or possess the land on which the discharge occurs. That's the choice. Someone's got to do it. And the legislature made the choice. And I think that choice needs to be respected.

[00:42:15] **Speaker 5** Chief, I just have one more question, please. Thank you. This has to do with the effect of law that you haven't had a chance to talk about yet. And the WMC Brief says that the Nas policy of regulating emerging contaminants is hazardous substances has the effect of law because and then they list for reasons, right? The statement was within the Nas expertise. DENR had the power to enforce it. DNR used mandatory language. And such enforcement carries potential civil penalties. I just want to give you a chance to respond to there a fact of law argument, and then I'm done, Chief. Thank you.

[00:43:01] **Speaker 2** So I have two things to say on the floor on the effective law. Three, very quickly. One, the the the proposition that whether an interpretation has the effect of law is a question of degree. What if you look at Barry Labs where that quote came from, I encourage you to read very Labs has a very good discussion of this. And it basically says when an agency is acting within the realm of his expertise, what it says about the law is more likely to have the effect of law. And I think you can see where I'm going with this tetra tech. We don't defer to agencies anymore. And so this proposition that interpretations can sometimes have the effect of law rested on an age that's no longer with us when courts would defer to agency interpretations. And this goes back to my core point, which is when the agency simply conveys its view about the law. And Justice Kelly put it this way, and I say you I think it was very apt. Communications about the law are not the law itself. And so that's our that's our core position here about why did our statements do not represent the law? Because they they got to prove it in an enforcement action if they're challenged. And courts will review that issue to novo, there's no deference.

[00:44:19] **Speaker 5** Okay.

[00:44:19] **Speaker 1** Thank you. Thank you. There were a few extra minutes there. We've kept track of that. So, yes, the other side needs a few extra minutes. Will comedy.

[00:44:53] **Speaker 6** Good morning, Madam Chief Justice, and may it please the Court. As an initial matter of EMC, and I intend to divide our argument by subject matter. So I will. I intend to dress the rulemaking requirement for hazardous substance regulation. And he intends to address the program and the constitutional arguments. But first, I think it's important for us to understand how we got here today. Sitting behind me is Miss Joanne Cantor. She is the owner of Leather Rich, and Ms.. Kantor has spent six years and several hundred thousand dollars just trying to decipher what the law requires of her. She's been attempting to remediate the leather rich property, and more than once over those six years, DNR has changed the rules without notice unilaterally. And each time that moves her further from from completing that leather remediation. And in the time since that remediation began, this court unanimously reaffirmed in Lamar. That is fundamental principle of our legal system that regulated parties have fair notice of what is forbidden or required of them. And that's especially important here for this is a self implementing program and it applies to every single business, landowner, individual, even visitors of our state. And that's why rulemaking is required here.

[00:46:28] **Speaker 7** That's right. Can you give me an example of a substance that would be covered by the spill or spills law without any rules?

[00:46:37] **Speaker 6** Certainly the skills laws, it's a very complex set of rules and it references multiple other state and federal environmental regulations. So one example we gave in our brief was in two 9211 sub 12 B where the spills law applies to any discharges regulated under the state and federal emergency protection and any community Right to Know Act, which is epira Epira then references whole a whole suite of federal regulations.

[00:47:10] **Speaker 7** So only the ones that are and in other regulations is what your position is.

[00:47:16] **Speaker 6** Correct. There are also other places in the in our statutes where they have expressly provided a list of substances that, for example, are toxic in a certain medium and at a certain level. And we referenced, I think, 215 as well as 660 an hour to 15 and under six six.

[00:47:35] **Speaker 7** So, for example, is arsenic one of those is cyanide.

[00:47:38] **Speaker 6** One of those those substances are already determined, determined, toxic by DNR in those other rules.

[00:47:46] **Speaker 7** So your position to us is that only if some other rule or the DNR were to listed as a toxic substance, would it be something that would be covered by the spells law?

[00:47:56] **Speaker 6** That's correct. And that goes to the requirement for fair notice.

[00:48:02] **Speaker 5** This be done.

[00:48:03] **Speaker 7** Maybe. Go ahead.

[00:48:06] **Speaker 5** The spills law itself has been around for about 50 years, right? Correct. And there's there's nothing new about this law being applied to emerging contaminants like P. That's right.

[00:48:19] **Speaker 6** I think the application to emerging contaminants of this type and of a category this broad is is new.

[00:48:26] **Speaker 5** I think we can all agree that according to the record that we have, prefabs don't break down. And then vironment right? They remain for long periods in our air, in our.

[00:48:38] **Speaker 6** Well, Your Honor, there are there are, as DENR accounts, at least 9000 compounds. And I don't think the record supports that. That's the case for every single one of them. I don't think science has developed to that point.

[00:48:51] **Speaker 5** The record that is before us, though, shows us that there are compounds that pose significant dangers to human health. Right.

[00:49:01] **Speaker 6** I think that that there are certain substances that may. But again, the science there, we have disputed this issue despite how my friend is portrayed it. There is scientific dispute over what impact these even even the most studied of substances have. And you can see that in the difference between the federal regulations which regulate discharges at 1 pound per day. And what we're talking about here, which is parts per trillion, infinitesimally small amounts. So I think there's just disagreement.

[00:49:38] **Speaker 5** Some of the risks that science have found regarding p fats include increased risks of thyroid disease, increased risk of cancer, negative effects on the endocrine system, negative effects on the reproductive system, increased cholesterol, decreased fertility in women and lower infant birth weight. Isn't that correct?

[00:49:59] **Speaker 6** I will take your your word for word and mean I'm.

[00:50:03] **Speaker 5** I'm reading what has been submitted in this case. And that is in the record of this case.

[00:50:06] **Speaker 6** Yes, Your Honor. But we again, this is not about any particular substance. I want to I want to make sure that's clear. This dispute is not about a particular substance.

[00:50:18] **Speaker 1** Counsel, I want to ask you a little.

[00:50:20] **Speaker 5** Can I just follow I just I just have a couple.

[00:50:21] **Speaker 1** More still going to have. Yeah. No.

[00:50:23] **Speaker 5** I didn't find an instance in your brief where you, in fact, disagreed that p fats is a hazardous substance. Do you disagree with that?

[00:50:32] **Speaker 6** We disagree that P. S is a category is nine. It as a category can be. Can be. Excuse me. Called a hazardous substance because the science of 9000 compounds plus has not developed and we've footnoted that in I'm sorry, I don't have the specific say, but we we absolutely raised that issue in our brief.

[00:50:52] **Speaker 5** If we find in your favor the way that you're asking us to. Then responsible parties would not have to report the discharge of p fabs, is that right?

[00:51:03] **Speaker 6** Until the rules are promulgated. So we have a clear understanding of at what level it needs to be reported and.

[00:51:09] **Speaker 5** Responsible parties would not have to identify p facts, would they?

[00:51:13] **Speaker 6** Again, we're talking about 9000 compounds here. I'm not sure which ones you're asking about.

[00:51:19] **Speaker 5** And responsible parties would not have to investigate contaminated site contaminated sites, would they?

[00:51:25] **Speaker 6** I mean, I know I think the civil law will still apply to certain contaminated sites that are regulated.

[00:51:31] **Speaker 5** We're talking about perhaps here.

[00:51:34] **Speaker 6** There are instances where the spills law will apply to discharges us based on that incorporation of the federal regulatory requirements.

[00:51:42] **Speaker 5** Under your interpretation of the spills law, could these spills law be implemented implemented in a way that would make a responsible party have to investigate sites contaminated with P?

[00:51:57] **Speaker 6** Yes. In if the discharge is at a certain level that it subjects that site to extra requirements federal requirements, then it can be regulated under the spill law.

[00:52:10] **Speaker 3** I have a follow up question to something Justice Cross was asking you. I think that and perhaps that can be addressed on rebuttal as well. But the DNR has estimated that there are 9000 individual people's compounds and thousands of people's mixtures. But DNR provided a list of about 18 that they considered hazardous. So when we're talking about this category, and I think you alluded to this, not all people's are hazardous. And is that part of your argument that your client is unable to determine which they are, which ones are hazardous because DNR won't tell her and she's left guessing at the risk of spending a lot of money and incurring a lot of fines. And so when I think your friend on the other side said, we're from the government and we're here to help you, basically, where's the help? Is that your argument?

[00:53:12] **Speaker 6** That's part of it. And I think it's not just which substances, but at what level. And I think this this idea that you can call the DNR and ask, is this a hazardous substance discharge, Yes or no is a bit of a fallacy. That's not how it works. You have to report the discharge. And when you do, DNR accepts your assertion that this is a hazardous substance discharge and they open a remediation case and it becomes a data point. Now, for a fee, you can then ask DNR, Hey, is there any remediation I have to do? And they might say no, but but they don't unilaterally tell you this isn't a hazardous substance discharge and you don't have to report it in the future.

[00:53:51] **Speaker 7** It sounds like your beef is with the statute, then. Attorney Brewer But the spill is law itself, which is the one that puts the obligation on the person, right? Isn't that your complaint?

[00:54:04] **Speaker 6** I think our our issue here is with the changing interpretation of that statute as applied.

[00:54:11] **Speaker 7** Because I ask you about that, because you say that these documents somehow are the force of law. But isn't it true that you can go into court and challenge the enforcement action and the DNR is not going to be pointing to the website? They're not going to be pointing to the letter they sent you. They're going to point to the statute, the one that says that you have the obligation to clean it up if it's hazardous.

[00:54:35] **Speaker 6** Perhaps in the context of an enforcement action. But I think it's important to understand there is a lot more that DNR can do based on their own interpretation. They can take specific direct action without ever going to an enforcement action. They can require preventative measures. They can come on to your property and investigate and remediate a discharge because of their based on their interpretation without ever going to a court. Right.

[00:54:58] **Speaker 7** But it's the court that determines everything is based on hazardous substance defined in the law. It has nothing to do with the claim you're making. And I get that you're making a larger claim. But the claim you made below is that this documents this website and this letter. Have the force of law. Correct. Tinkler is out of the equation. Can't DNR still do all those things you're talking about and say, Professor, Hazardous substances?

[00:55:24] **Speaker 6** I'm not I'm not certain I understand. I mean, I think I think people are not within the obvious meaning of this definition. One certainly not all 9000 of them, and certainly not at any level. And so the Republican.

[00:55:37] **Speaker 7** Documents don't those aren't the things the DNR is going to point to when they when they tell you to remediate or when they take you to court for an enforcement action, they're going to point to the statute.

[00:55:47] **Speaker 6** But I think if a DNR comes onto your property and says, we're going to investigate and remediate on your property based on our interpretation of the spills law, our interpretation of hazardous substance, then that definition, I mean, I think aside from that, the ability to bring an enforcement action means that DNR has the force of law.

[00:56:07] **Speaker 7** And anything DNR does is the force of law because they have an ability to bring an enforcement action.

[00:56:13] **Speaker 6** I think Joe's a manufacturing and at least one other case on rulemaking actually mentions that it is the ability to bring in enforcement action. That means their interpretation has the force.

[00:56:26] **Speaker 7** Agencies can't do anything under your interpretation.

[00:56:31] **Speaker 6** I don't think that's our position. Our position is that the if the agency is is interpreting this in a manner that is not within the obvious meaning of this definition. The definition is very vague, it's very broad, it has layers of ambiguity. Then they have to put the public on notice. This is this is about putting the regulated community.

[00:56:51] **Speaker 5** And I want to ask about your your ambiguity argument. You're not asking us to overturn SEIU, Correct?

[00:56:59] **Speaker 6** I think SEIU is distinguishable here because that the force of law issue is what distinguishes the guidance document from a rule in SEIU applies to guidance documents.

[00:57:13] **Speaker 5** But but you you you talk about ambiguity and you say that to 27.10 sub one requires rulemaking for agencies to interpret and implement ambiguous statutes. One Has this court ever read to 27.10 sub one to require a rulemaking in that situation?

[00:57:41] **Speaker 6** I Your Honor, I think certainly in Lamar. The the interpretation of an ambiguous statute in a new way for the first time requires.

[00:57:53] **Speaker 5** Well, that's not what Lamar son Lamar wasn't the interpretation of a statute for the first time was it? Lamar was 180 degree interpretation of a statute for not the first time.

[00:58:04] **Speaker 6** I think the same could be said when it's a new interpretation that has not been taken before. And our position is that DNR has not previously regulated a broad category of emerging contaminants like it does here. That is a new interpretation. It is a changed interpretation, and it requires rulemaking so that the regulated community can know what's expected of it.

[00:58:26] **Speaker 5** It seems to me, you know, at the end of your brief, you say that the DNR wants it both ways. But when I read that, I thought perhaps you might be projecting just a bit, because on the one hand, you're suing DNR because they communicated with your client about the spells law and P facts. And then in your briefing you complained that, quote, DNR provided no guidance to Ms.. Canter regarding which of the thousands of facts compounds were considered hazardous substances and at what concentration those substances would be considered an exceedance. I mean, how is how is DNR supposed to communicate with your client when communicating with your client leads to you suing them? They weren't communicating with your client about these very issues.

[00:59:11] **Speaker 6** They should communicate with my client in the same way they communicate with the entire regulated community by rulemaking so that there is a clear standards that can be applied in forward application applications where folks understand when they have an obligation to report a discharge to to the DNR.

[00:59:32] **Speaker 1** Just say thank you, Chief. I've got a statutory construction question for you. The DNR noted that there were 18 places in Chapter 292 where the legislature directs the DNR to promulgate rules. Yet the legislature omitted that directive with respect to hazardous substances. To me, that sounds like or seems like textual evidence that the DNR did not want to require rulemaking on hazardous substances. Can you tell me what your responses to that?

[01:00:07] **Speaker 6** Sure. I see my time is up. I have not responded.

[01:00:10] **Speaker 1** Justice Hagedorn has one for you too. Got a line up going again? Sure. Sure.

[01:00:17] **Speaker 6** You know, I think their DNR cited no case that explicitly explicitly requires such rulemaking demand in the statute at issue. And I think even accepting Deanna's argument that the legislature did not intend to require rulemaking when they when they pass this bill, which we disagree with, but let's say we accept that that's been superseded by the changes to 227 that more broadly require rulemaking in instances like that the the lack of that that sort of demand to DNR to undertake rulemaking here I think is is entirely meaningless in light of chapter 227.

[01:01:04] **Speaker 4** I wanted to just make sure I understand the nature of your argument. You started with talking about sort of fair notice as kind of the foundation. And if there's not fair notice about what chemicals might be regulated, that, you know, rulemaking, I guess is the the prescribed remedy for that. Is it if there was a substance that. Clearly met the statutory definition of hazardous. So you just conceded you agreed that for sure this would meet that definition. I think your position, correct me if I'm wrong, is still that that can't be regulated at this point until a rule is adopted about that. Is that is that correct?

[01:01:49] **Speaker 6** Sort of. I mean, I think if if we're at that position, there is a very, very good chance that that substance will already be regulated under one of the take my hypothetical.

[01:02:01] **Speaker 4** Which you know, it I pathetically is what it is. But let's assume it's not already prescribed under any of the other. Understand that you know there's other things that are listed in federal law, etc.. So let's assume it's not that, let's say, but it's something that you and everybody in the world agrees this is a hazardous substance, meets the statutory definition of. Of that but is not specifically enumerated anywhere like is your position that the diner cannot take action on that until rulemaking is done in competition?

[01:02:34] **Speaker 6** Yes, that I think a rulemaking is going to be a very easy endeavor in that case. And.

[01:02:39] **Speaker 4** Sure, sure. I understand. I'm just trying to understand that.

[01:02:42] **Speaker 5** You don't think lawmaking isn't easy and diverse? Having walked that walk? I don't think so.

[01:02:49] **Speaker 4** In in. Is that in in the reason it's not your argument isn't really a fair notice argument is it. I thought your argument was more because it was an interpretation. So I was a little struck by your argument. I'm just trying to understand the legal ground. I mean, there is no principle that I'm aware of in the law that if the legislature passes a broad, somewhat vaguely worded statutes, but specific enough to do something that they can't act until they pass, they have a rule I'm unaware of any principle of law that makes that a general, a general rule that always applies if there is. Please enlighten me. But I am not. I'm unaware of it. It is your argument that it just meets the definition of a rule because of two 2710 or because of some some notice, some fair notice, kind of generic, you know, general argument along those lines.

[01:03:41] **Speaker 6** I mean, I think we make a couple arguments and the. Three specifically and the two 2710 is one of them. And the fact that it. Their their general application forward looking also means that this meets the definition of 220 7A1 13 of a rule. And then we also argue that the requirement that discharges be reported at a detectable level violates two 2710 to them. So I think all three of those arguments kind of go hand in hand.

[01:04:17] **Speaker 4** Okay. Thanks.

[01:04:18] **Speaker 1** Okay. Thank you.

[01:04:39] **Speaker 8** Good morning. I think it's. Good morning and may it please the court. Lucas Weber, appearing on behalf of Wisconsin Manufacturers and Commerce Inc., are the other plaintiff and respondent in this matter. I'd like to begin by talking, I guess briefly, just following up on justice courtesy, which is a question with regard to where that rulemaking requirement is. That rulemaking requirement is in to 27 exists similar to 27/10 of one as well as in the definition of a rule and 220 7A1 13 The agency, the department or the legislature doesn't always impose a rulemaking requirement when they intend for the agency to promulgate rules. We see that even within chapter 292, under Chapter two, 92.311 sub chapter or subsection one, the DNR is required to promulgate a database of all hazardous substance locations. The legislature recognized that that might be a rule. They then exempted them from rulemaking explicitly. They said in subdivision four there that notwithstanding sections two 2701 13 and notwithstanding sections two 27/10 of one, that database is not a rule. So I think the legislature has recognized that those two sections of the statutes do apply in places where they haven't directed an agency to promulgate rules. Certainly the legislature has commanded that agency shall promulgate rules in particular cases, but they haven't always required it. And I think that's helpful background here. As we go on to the other issue that's in this case, and that's the department's interim decision as it relates to their administration of the voluntary party liability exemption program or the Vpl program.

[01:06:19] **Speaker 5** Counsel, before you get to that, your comments addressed in part now to 2710, Do you agree with your opposing counsel's comment that the posture of your argument has changed in this case from that advanced in the Court of Appeals by making a more, he suggests, aggressive push on to 2710 some more.

[01:06:51] **Speaker 8** Your Honor, I think we've always we've always argued throughout this case that it requires rulemaking. And the source of that requirement comes from two 2710 but it also comes from the definition of a rule and 220.

[01:07:03] **Speaker 5** The question is, do you agree with his assertion that your position has changed from the Court of Appeals where you were advancing arguments, Visa V, the website and the letter among others, that now your emphasis here is an aggressive attack under two 2710. Do you agree with his assertion that there's a change?

[01:07:34] **Speaker 8** Well, no, your Honor. And I think we're still relying on those letters and the website as as evidence of the department's policy that they've adopted here. So the policy is not the letter itself. The policy is the department has a policy that's evidenced by the letter, but it's the policy the department has adopted that was challenged in this action.

[01:07:51] **Speaker 5** It wasn't clear to me ultimately what the response was. So let me ask you this question. Do you agree with your opposing counsel's assertion that there is no dispute that P fair satisfies the definition of hazardous material?

[01:08:09] **Speaker 8** No, I don't agree with that. But I think the appropriate way for the agency to make that determination is to promulgated as a rule. And to my colleagues point that if the if it's something that is almost you know, if it's much easier, if everyone agrees, if it's if it's a standard that very clearly will apply here, then that's certainly where the standards should be drawn in the statute. I would also say that the agency doesn't need to promulgate and list every single substance it can. It could also do what federal law has done, enlist objective criteria for what could meet the statute. That's another way that they could comply with the requirements under to 92. The the video, the interim decision, which is the other issue in this case, relates to the state's brownfield redevelopment program. So the Vpl program allows sites to be remediated, redeveloped, brought back into the stream of commerce. It's a major benefit to the state, local communities and the public at large. The typically when there's a discharge of a hazardous substance, that hazardous substance is remediated once it's remediated to the department's satisfaction. They issue a case closure letter and everyone moves on with the Vpl program. Does it goes above and beyond that. The Vpl program is a voluntary program that parties can apply to once they're in the program, once they've been accepted by the department. They conduct a much broader investigation. They look for any possible hazardous substance discharges that they were not previously aware of. They remediate all of those substances. And then the department issues what's called a certificate of completion.

[01:09:44] **Speaker 5** That's which has the benefit to the property owner. Right. A significant to the other people you've listed, it has a significant advantage to them.

[01:09:54] **Speaker 8** Yes, a significant benefit to the property owner. And the benefit is, is that it gets a clean bill of health or the property owner has remediated that site. The department satisfaction. Once the department is satisfied to say, hey, we don't believe there are any hazardous substances on the site, it then shifts liability from that property owner to the state. If a legacy discharge is found later on on the site, of course, future discharges of hazardous substances are not covered by that. The interim decision policy upended. The EPA program, the interim decision was made to completely eliminate the issuance of those general certificates of completion. Fortunately for landowners who want to rely on the village program, that interim decision is unlawful, and it's unlawful because it meets the definition of a rule under two 2701 13. This Court and Citizens for Sensible Zoning has broken down the definition of a rule into 2701 13 into a five part test. A rule is a regulation standard statement of policy or general order of general application. Having the effect of law issued by an agency to implement, interpret or make specific legislation that is enforced or administered by that agency where an agency action meets that five part test. It is a rule and it is required to be promulgated under chapter 227. Here, the interim decision, as I said, meets that definition of a rule. First, it's a regulation standard statement of policy or general order. It announces the department's policy to all of EPA program participants and D to all Wisconsinites that it was not going to do something in particular that was not going to issue.

[01:11:37] **Speaker 7** Do you do you have a right to participate in the Valley?

[01:11:41] **Speaker 8** It's a voluntary program that you have to apply for.

[01:11:43] **Speaker 7** Right. So you have no real legal interest in it, right? I mean, the department could just decide that they're not going to grant any of these.

[01:11:50] **Speaker 8** Yes. They've made a general policy that they're not going to grant any of them. That's correct. And that general policy is a rule that they would have had to promulgate because it governs their enforcement and administration of it.

[01:12:00] **Speaker 7** No, I'm saying in theory, they don't have to give it to anybody. You don't have a right to come to court and say, I'm entitled to a veto, right?

[01:12:07] **Speaker 8** Correct. They do not. But once the department makes a general policy that's going to apply to everybody who applies in that program with the EPA program, the department has broad discretion. They have discretion on how to run the program, how it operates. But once the department makes a uniform policy as how they're going to exercise that discretion, that they're going to apply to everyone. That's a rule. It's a general policy of general application. It has the force of law. It was issued by an agency to make specific legislation that's enforced or administered by the agency. That's where the interim decision meets the definition of a rule. It was not promulgated as a rule, and it's unlawful. As I say, I.

[01:12:45] **Speaker 7** Still don't see how you have an interest that could be legally affected if you have no interest in having it in the first place. You have. How do you have an interest? That's legally what.

[01:12:53] **Speaker 8** Our members rely greatly on the VLT program. It's it's a tremendous cause.

[01:12:57] **Speaker 7** It's a tremendous program that helps you, but you have no right to it.

[01:13:00] **Speaker 8** It certainly helps us and it's certainly available to our members generally. It was anyways, prior to the interim decision, the interim decision took the value away from that program. They couldn't apply for it. Why? Why would they? There was no benefit to them. And the reason that there was no benefit to them, the benefit that was available potentially to them was taken away by the department's rule. As I was saying, it's it's generally applicable to be generally applicable. It need not apply to all persons within the state. It just has to apply to a class that people could be added to. Certainly here it applies to all VPP program participants, of which, as I said, anybody could apply to join. And third, and there's been a lot of discussion here on the force of law. That's the third element of the 227 and 113 test. The interim decision certainly here has the force of law. Case law indicates that an agency action has the effect of law for two reasons which are applicable here. When licensure can be denied or when the interests of individuals in a class can be legally affected through an action. And that's exactly what the interim decision.

[01:14:06] **Speaker 7** So we're back to that. Individual interests of individuals can be affected. What interests do your clients have in being in participating in the vpl you are?

[01:14:16] **Speaker 8** Well, generally, they could apply for the program.

[01:14:18] **Speaker 7** They can apply and they can be rejected. So what's their interest? They don't have a right under the statute to have it right.

[01:14:23] **Speaker 8** No, but they have the right to apply to the program and for the program to exist.

[01:14:27] **Speaker 7** Yes, they have the right to apply. So that's what you're saying the interest is.

[01:14:30] **Speaker 8** Yeah. And once the decision is made by the department that they're going to again, universally apply that policy to all applicants to the program, which they did here, The agency has adopted a policy. They've adopted a rule. Once an agency adopts a policy, they're engaging in lawmaking. That's a legislative function. They have to exercise that policy according to according to the confines of chapter 227. If an agency adopts an unlawful rule, it has unlawfully usurped the power of the legislature, and our Constitution doesn't allow that person.

[01:15:03] **Speaker 4** Could you respond to just the argument of your opposing counsel that just going back to the force of law? Question Yeah, I understand when you know, there's lots of statutes that give the executive branch discretion to do A, B or C, and that happens all the time. And so, you know, Governor Walker might have done A and then Governor Evers might do B more often or less often. And maybe they maybe they say it, maybe they don't. But those are generally understood in the law to be within the prerogative of the executive and exercising the discretion given to them if that's what the statute does. So the argument you're posing, counsel, is that it's just that it's not a force of law question. It's just how you exercise that discretion that you're given by the law. How would you respond to that?

[01:15:52] **Speaker 8** Yeah, I would respond to that by saying the the department here is characterizing all of these actions as guidance documents that don't have the force of law. I think the primary difference between a guidance document and a rule is that rules have the force of law. Guidance documents do not. So certainly when the executive is administering a statute that's plain and clear, tells the executive exactly what they need to do. The executive is going to take those actions. And there's no adoption of a of a statement of policy or there's no adoption of an interpretation of the statute that's needed here. They just take the steps they're commanded. Once the executive, though, goes a step further, as here, I think the the hazardous substance definition is a perfect example of this. It's a broad, open ended definition of the statute that clearly contemplates that at some point uncertain in the future. Yet unknown substances may become regulated by that statute. The problem is nobody knows when that point uncertain is known. The department says, the science has evolved to the point that it is. But how does everybody know? Because for 50 years it's been operated successfully, as they said. But during those 50 years, people were discharged and nobody thought there were hazardous substances. So at what point do people know or are they supposed to know that those substances become hazardous? And the answer is that once the department makes that determination, they have to promulgate that as a rule, and that gives the fair notice to the regulated community. But it also is their constitutional duty when they're exercising their policymaking power.

[01:17:13] **Speaker 7** So are you seeing this? Are you making have some kind of due process claim here? That they haven't. Duty to fair notice. I mean, that seems to me you didn't make that argument.

[01:17:25] **Speaker 8** In our brief. Your Honor, we we argued the. Our understanding of how the statute works. And we responded to their argument by saying that, you know, if if the statute doesn't work this way and it allows the department to regulate on an ad hoc basis without promulgating rules. So that nobody knows what the law is as they're doing that. Then that would raise constitutional concerns, due process concerns?

[01:17:46] **Speaker 5** Yes, it was. I thought your argument.

[01:17:48] **Speaker 7** That's a pretty high burden.

[01:17:50] **Speaker 5** You. Adopting more of the ambiguity argument of leather ridge and that will go ahead. You know what I'm going to ask you.

[01:17:59] **Speaker 8** I think the it goes hand in hand. Those those two arguments are related, Your Honor. I think the the milk example is is a is a great example here. The department has said that if a tanker truck of milk spills, it is certainly a hazardous substance discharge. But today he said if you drop a gallon of milk, it's not a hazardous substance discharge. So somewhere in the middle there, it becomes a hazardous substance discharge. But when nobody knows.

[01:18:23] **Speaker 7** Well, how would they ever function? Each each individual case is going to be different. Every fact situation is different. What if they spill five gallons? What if they spill ten? What if they spoke to you? What about exactly? What about almond milk? What about oat milk? That's my.

[01:18:38] **Speaker 1** Milk.

[01:18:39] **Speaker 8** Your Honor. That's a whole nother debate. Exactly.

[01:18:41] **Speaker 7** Your point is, these are fact specific situations. Isn't that exactly why we have enforcement actions? Isn't that exactly why we have the ability to interpret that, that the executive has to be able to apply the law? That's called applying the law to the facts?

[01:18:58] **Speaker 8** Yeah, Your Honor. Exactly. And I think that to your point, it does create a significant amount of uncertainty. I mean, where do we draw the line? If I if a milk delivery truck is has a hand truck full of of milk crates and they bring it in and spill it, does that rise to the level?

[01:19:09] **Speaker 7** Well, right. But we know what you're doing to us and what should that. But Attorney Brewer's argument was that somehow DNR has to set all this out in the statute or in the rule before they could possibly act. And that is insane. That means that you can spill the 20 gallons because by the time you make a rule about it, heck, it'll already have done whatever damage it did.

[01:19:30] **Speaker 8** Yeah. And Your Honor, that's what the statutes require. That's what. Two 2710 someone requires.

[01:19:33] **Speaker 7** Requires every single. So we got to see whether it's one gallon, five gallons, a ten gallons, 20 gallons. And then if it's 25 and we don't have a rule, we can't enforce it. That's what I hear you arguing and that's what I hear your attorney for.

[01:19:45] **Speaker 8** Your Honor, as I said, I think the department could provide a list of substances. I think they could also promulgate objective and I'm sorry, my light is on the they could also promulgate a list of objective criteria by which the public could, in each one of those circumstances, affirmatively know if they're violating the hazardous substance statute or not. That's what the federal government does. That's what the DNR could do. But they haven't done it and they refuse to do so. And we're asking this court to require that they do so. And for these reasons, I would ask that you affirm the Court of appeals in this case.

[01:20:14] **Speaker 1** Did we miss anyone up here? Thank you, Chief. Thank you.

[01:20:21] **Speaker 3** Counsel. In the interest of time, as you approach the podium, I'm going to start asking you a question.

[01:20:26] **Speaker 2** Nothing.

[01:20:26] **Speaker 7** What's going to happen to me?

[01:20:28] **Speaker 3** Justice Stallard asked. How is the government supposed to know? The same can be said for the regulated community. How are they supposed to function? The lady behind you was trying to retire. As I understand it, six years ago. She's been cooperating with the DNR and the goalposts keep changing. So there is a way to function, right? And your friend on the other side just alluded to it. This is how federal environmental law and the agencies at the federal level. Manager Right. It's not this absurd idea to promulgate very specific rules. So very specific discharge under very specifics.

[01:21:07] **Speaker 2** If I may, the federal rules to which she is pointing operate very, very differently across sets. And they point this out in their brief, a 1 pound reporting threshold in a 24 hour period. That is a tremendous amount of for us to be discharged. It takes, I think, four drops in an Olympic sized pool to exceed recommended drinking standards. The that so cercla and the federal standards to which they point it's a suit. It's the Superfund site. It's meant to address large facilities, wastewater treatment plants that are pumping out millions of gallons of contaminated material circle and are not meant to do exactly what the spills law is meant to do, which is extend environmental protections to beyond simply huge sore point discharges like wastewater treatment plants to cover again dry cleaning facilities which do discharge significant amounts of P for us. And specifically, I want to make very clear, we hear this 9000 P for substances. I think that's a red herring. What's very clear here is PFOA and PFOs, leather rich PFOA s discharges were eight times. Times greater than the standard they proposed. Again, no one has any doubt that these two compounds that were present on leather riches property are dangerous. Now, I keep hearing while we dispute that there is nothing in the record whatsoever that contradicts Deanna's scientific evaluation, that some of those 9000 substances, including two of which were found and that are at issue in leather, which is property qualified.

[01:22:48] **Speaker 4** Counsel I wanted to just get to just a quick question about something we've talked about quite a bit, and that's the definition of rule. And with regard to what you call our our need to interpret the word interpretation in it narrowly, and I wanted to see if you could offer us a sense of what in your ideal world we would say about that, Like what would be your statement of the rule or principle that you would ask this court to adopt, to manage these and obviously innumerable complex situations that might arise in the future?

[01:23:25] **Speaker 2** It's a difficult question. I mean, one option the court could take is to say, you know, this would be dodging the question a little bit, but we don't have to decide what exactly is covered by two 2710 sub one. What we do have to decide here is that when the agency reads, the statute applies it to a set of factual circumstances presented for the first time that can that just constitutionally and again I heard very little about guidance documents their position I heard nothing about the statute two 2710 or whatever the guidance document definition falls in. I mean, I can't help but read that and think this is exactly what happened here. The agency explains how it intends to administer a statute. So I guess what one way you could write it is to say that's what DNR did here, the guide. It falls under the guidance document definition. And plainly when an agency does that, it can't be rulemaking because that's what the guidance document statute.

[01:24:26] **Speaker 7** That doesn't get to. There are other arguments. So.

[01:24:28] **Speaker 2** Well, right. So there's not.

[01:24:30] **Speaker 7** That broader argument.

[01:24:31] **Speaker 2** Well, there's two, right. And I think well, they do go hand in hand, I think because the way I read two 2710 sub one at some level it has to be the flip side of the definition of a rule. I mean, you can't issue a rule that doesn't have the force of law. I mean, that is a definitional requirement. So it can't be the two 2710 requires you to promulgate something as a rule that itself cannot have the force of law. I mean, it's it's an interpretation and it is tested in court. And that's so that can't be what, two 27/10 of one requires.

[01:25:07] **Speaker 3** But Lamar did interpret it and say exactly what it requires. I'm looking at paragraph 21 while the first sentence referring to 227 Sub10 sub one requires a rule for each statutory interpretation, the department's position in Lamar would, and I think it's your position here, would allow it to regularly engage in ad hoc interpretations of ambiguous statutes. The argument is the statutes ambiguous here because it does not specify hazardous substances, as the department has conceded here. It is a very broad definition and intentionally so. In paragraph 23, Lamar goes on to say the plain meaning of 227 Sub10 sub one is that it describes only one pathway by which an agency can adopt a new interpretation, not a changed interpretation, and prefers, as I think you would concede, were not regulated or considered hazardous substances by the DNR. Until that announcement, the agency must adopt a rule. That's what Lamar says. And I know that Lamar and I understand it was changed interpretation, a flip flop, if you will. We don't have that here, but it is indeed a new interpretation, and I can't get beyond the text that that does not speak to a change. It speaks to interpretations made by this agency.

[01:26:27] **Speaker 2** Well, Lamar was again, I perhaps are not persuaded, but it was very clearly about a change. The entire decision rested on that. There was it was not simply that the statute was ambiguous, that there was a change in the interpretation of the statute. I will say this is not this regulation of p force or assertion that P force falls under the hazardous substance. It is not a changed interpretation. This happens over and over again. I would direct you to page 17 of our opening brief, as happened in the 70s, when PCBs first people first learned about the harmful nature PCBs. PC. I don't have the full words tip of my tongue and then MTBE. But again, these are time and time again this happens under the spills law. Science evolves. People understand the contaminants that were used as part of ordinary commercial activity pose a threat to human health. This is how this bill is. Law has worked for 50 years. Interpreting two 2710 as broadly as they propose is inconsistent with this court's prior. Again, I would encourage you to go back to the pre Lamar Cases school, which I think is another great example. If you look at school way involved a change just like Lamar did. And at the end of the decision, what did the court say? The court said agency, lo and behold, you made the right decision. You know, the result was not agency. You cannot act. This was about whether Doty could grant certain licenses to bus and charter bus companies. And school said, Well, Dottie, you flip flopped, but nevertheless you properly denied this license to this bus company. So it's never been the rule until arguably Lamar that was pardon me, that agencies are barred from acting until they promulgate a rule that contains every single interpretation of the statute, which I just very quickly, the last thing I want to point out here in terms of practical consequences. 227 139 I would direct your attention to, which requires a rule is going to have compliance costs of greater than $10 million. The agency cannot promulgate it without a bill passed by the legislature that authorizes the rule. There's no question that rules under this bill would have that impact. So we're in a situation where not only must the agency promulgate a rule defining hazardous substances, but the legislature would have to pass another bill authorizing that rule. So what do we have? We have a spill law that can't be implemented until another statute is passed, amending it.

[01:28:51] **Speaker 1** With justice and, well.

[01:28:52] **Speaker 2** An absurd result.

[01:28:53] **Speaker 5** Counsel in reviewing the dissent from the Court of Appeals, it seemed to me to be a rather methodical presentation of the issues before it. You suggest in your comments that there's a new thrust here that may not be covered by the existing Court of Appeals dissent. How, if at all, would you modify the Court of Appeals dissent?

[01:29:25] **Speaker 2** Well, I so what I would say is, again, to this question of what was the focus below? I mean, if you read the majority decision, I don't think two 2710 is even mentioned sub one in the majority decision. The majority decision is solely focused on the statements and whether they qualified under 227 or 1 sub 13. And so I think I'm now using my memory, but I don't think the dissent spent much time on two 2710 so on. Correct. Precisely because that really wasn't the argument below. And so in terms of what you would do to sort of tweak the dissent, if that were to be the decision, I'd say on the on the two 2701 sub 13 Question do these statements qualify? I think the dissent got it absolutely right. I do think, though, to nip this to 2710 argument in the bud, you also have to say something about that statute outlined in our brief what that should be.

[01:30:23] **Speaker 1** Thank you. Interesting oral arguments. The court will adjourn and reconvene. I don't know that.

[01:31:17] **Speaker 8** Yeah. Just say it's always good luck.

[01:31:20] **Speaker 2** So, anyway. Pleasure as.

[01:31:21] **Speaker 1** Always.

[01:31:30] **Unidentified** Council for. It was like some of our own people.

[01:31:38] **Speaker 1** I have friends, right? 45 more.

[01:31:42] **Speaker 2** Seriously.

[01:31:43] **Speaker 8** It's just good to see you.

[01:31:48] **Speaker 1** No tic tac, no Facebook, no. Plenty of fish. Nothing like. Yeah, rubber bands. And I've never seen that. I like it.

[01:32:02] **Unidentified** I like it.

[01:32:12] **Speaker 1** As long as they're not in here trying to bring the car too far, too far to go home without what you need for up here to take a moment. Take a breath. What do you need up here? Of course. Yeah.

[01:32:27] **Unidentified** I mean, yeah, I am, you know. I don't know.

[01:32:34] **Speaker 2** Yeah.

[01:32:35] **Unidentified** Yeah, well, I have.