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# Wisconsin Legislative Council



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Director

TO: SENATORS ERIC WIMBERGER AND ROBERT COWLES

FROM: Anna Henning, Principal Attorney, and Benjamin Kranner, Staff Analyst

RE: Qualification as an Innocent Landowner and Enforcement Authority Under 2023 Senate Bill 312, as Amended and Passed by the Senate

DATE: December 4, 2023

This memorandum, prepared at your request, discusses two topics relating to 2023 Senate Bill 312, relating to programs and requirements to address per- and polyfluoroalkyl substances (PFAS), as amended and passed by the Senate (“the bill”).<sup>1</sup> Following a description of relevant current law, the memorandum specifically discusses: (1) the criteria under which an entity may qualify as an “innocent landowner” under the bill; and (2) the Department of Natural Resources’ (DNR) enforcement authority under the bill with respect to a person who recklessly or intentionally causes environmental contamination.

## LIABILITY FOR ENVIRONMENTAL REMEDIATION UNDER CURRENT LAW

Wisconsin’s remediation law (part of which is generally referred to as the “spill law” or “spills law”), clarifies liability and regulatory procedures for addressing environmental contamination in the state. Under the remediation law, a person who causes the discharge of a hazardous substance is responsible for remediating the resulting contamination. With some exceptions, a person who “possesses or controls” a discharged hazardous substance, including the owner of land on which a hazardous substance is found, may also be held responsible for remediation.

In practice, DNR may initiate formal remediation requirements by issuing what is known as a “responsible party letter” to a person subject to the environmental remediation requirements. [[s. 292.11 \(3\), Stats.](#)] DNR also may: (1) order certain preventive measures to be taken by any person possessing or controlling a hazardous substance; (2) take actions to directly contain, remove, or dispose of a hazardous substance (and obtain reimbursement from the responsible party for those efforts); (3) issue emergency orders to require responsible parties to act; and (4) enter into agreements containing schedules for conducting nonemergency actions. [[s. 292.11 \(4\) and \(7\), Stats.](#)]

The remediation law also directly imposes certain requirements on persons who cause, possess, or control a hazardous substance. Specifically, such persons must notify DNR of contamination “immediately.” [[s. 292.11 \(2\) \(a\), Stats.](#)] Such notifications trigger various remediation requirements and procedures. For example, DNR may conduct monitoring and investigations, and may also require a landowner to take preventive measures. [[ss. 292.01 \(15\), 292.11 \(4\), and 292.31 \(1\) \(b\) 2., Stats.](#)]

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<sup>1</sup> On November 14, 2023, the Senate adopted Senate Amendment 1 to Senate Substitute Amendment 2, and the substitute amendment, as amended, on voice votes. The body then voted to pass Senate Bill 312, as amended, on a vote of Ayes, 22; Noes, 11. Further discussion of the bill and the adopted amendments is available in [Legislative Council, 2023 Senate Bill 312, Amendment Memo](#).

For purposes of the remediation law, “hazardous substance” is defined to mean “any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics.” [s. 292.01 (5), Stats.] What constitutes a “hazardous substance” sufficient to trigger remediation requirements is situationally dependent. DNR determines whether a substance is a “hazardous substance” for purposes of the remediation law on a case-specific basis, based on the risk of harm to health and the environment at a particular site.

The remediation law itself does not establish specific, numeric thresholds that apply uniformly to every site. However, once liability is established, the remediation law incorporates existing environmental standards from the state’s groundwater and surface water laws in actions to remediate contamination at a particular site. [See s. NR 722.09 (2) (b) and (c), Wis. Adm. Code.]

## **INNOCENT LANDOWNER GRANT PROGRAM UNDER THE BILL**

The bill establishes an “innocent landowner” grant program, under which DNR may provide grants to certain categories of entities to address various costs<sup>2</sup> associated with preventing or remediating PFAS contamination. As described in more detail below, the bill prohibits DNR from commencing an enforcement action against an entity that meets the grant program’s eligibility criteria, if the entity gives permission to DNR to remediate the entity’s land at the department’s expense.

### **Eligibility Criteria**

To qualify for an “innocent landowner” grant under the bill, an applicant must fall within one of the following six categories:

- A person that spread biosolids or wastewater residuals contaminated by PFAS in compliance with any applicable license or permit.
- A person that owns land upon which biosolids or wastewater residuals contaminated by PFAS were spread in compliance with any applicable license or permit.
- A fire department or municipality that responded to emergencies that required the use of PFAS or conducted training for such emergencies in compliance with applicable federal regulations.
- A solid waste disposal facility that accepted PFAS.
- A person that owns, leases, manages, or contracts for property on which the PFAS contamination did not originate.
- Any other person or category of persons submitted as a proposed eligible category of persons by DNR to the Joint Committee on Finance (JCF) and approved by JCF under a 14-day passive review process.

An applicant generally must: (1) own, lease, manage, or contract for property that is contaminated by PFAS; or (2) hold a DNR-issued solid waste facility license for PFAS-contaminated property. A person may also apply for a grant on behalf of multiple eligible entities that are located in the same geographic

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<sup>2</sup> Grants may be used to cover costs associated with additional testing; environmental studies; engineering reports; clean drinking water supplies, including temporary potable water, filtration, well replacement, or interconnection to a municipal water supply; remediation costs; and any other cost resulting from landspreading of contaminated biosolids, detection of groundwater contamination events, or other contamination events affecting a particular property.

region and that will be conducting similar activities to address PFAS contamination, provided that the applicant itself will be conducting the activities to address the contamination.

You asked whether a company or other entity that manufactures PFAS would be likely to fall within any of the enumerated categories above. The short answer is no.<sup>3</sup> In general, the entities most likely to fall within the eligibility categories listed above include agricultural landowners, wastewater treatment facilities, solid waste facilities, municipal governments, and owners of property near to property on which a discharge occurred. Manufacturers of PFAS are unlikely to fall within any of those categories.

You also asked whether a company or other entity that conducts testing of products that contain PFAS would be likely to fall within any of the enumerated categories. The short answer is that a municipality or fire department that utilized PFAS during an emergency response or while conducting training is eligible for the grant program under the bill. The categories listed above would not otherwise be likely to apply to an entity that conducted testing. In addition, the bill does not affect a state law, created by 2019 Wisconsin Act 101, which generally prohibits the use or discharge of Class B firefighting foam,<sup>4</sup> if the foam contains intentionally added PFAS. [[s. 299.48 \(2\), Stats.](#)] An exemption to that general prohibition allows the use of such foam for testing purposes. However, for the exemption to apply, the testing facility must implement containment, treatment, and disposal or storage measures established in DNR's administrative rules to prevent discharges of the foam to the environment.

## **Enforcement Exemption**

Under the bill, DNR may not commence an enforcement action (e.g., issuance of an order directing a person to remediate contamination) against a person who meets the eligibility criteria for the innocent landowner grant program, described above, if the person grants permission to DNR to remediate the person's land at DNR's expense. The bill does not require a person to apply for or receive an innocent landowner grant to benefit from the enforcement exemption.

## **DNR AUTHORITY UNDER THE BILL WITH RESPECT TO RECKLESS OR INTENTIONAL CONTAMINATION**

Except with respect to certain limited situations, the bill does not prohibit DNR from taking enforcement action against a person who recklessly or intentionally caused environmental contamination.

Under current law, DNR has various sources of authority to address PFAS contamination, including Wisconsin's remediation law, described above, and various permitting requirements.<sup>5</sup> Generally, the bill affects DNR's authority under the remediation law in the following four ways:<sup>6</sup>

1. The bill provides the enforcement exemptions described above for persons eligible for the innocent landowner grant program.

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<sup>3</sup> The last category listed above – additional persons proposed for eligibility by DNR – is a possible exception. However, it seems relatively unlikely that DNR would propose PFAS manufacturers as an additional category of persons eligible for the grant program.

<sup>4</sup> Class B firefighting foam, also referred to as aqueous film-forming foam, is used to extinguish burning oil, gasoline, and other flammable liquids.

<sup>5</sup> For more detailed background information regarding sources of authority for state regulation of PFAS in Wisconsin, see [Legislative Council, Regulation of Per- and Polyfluoroalkyl Substances \(PFAS\), Information Memorandum \(June 2023\)](#).

<sup>6</sup> The amendments adopted by the Senate significantly narrowed the introduced bill's limitations on DNR authority.

2. For recipients of grants through the “municipal PFAS grant program,”<sup>7</sup> a separate grant program created by the bill, the bill limits disclosure of certain test results, and it prohibits DNR from requiring a grant recipient to take action under the state’s remediation law unless testing demonstrates that PFAS levels exceed an applicable, promulgated state or federal standard.
3. The bill generally prohibits DNR from preventing, impeding, or delaying a construction or public works project. However, that prohibition does not apply if: (a) the entity proposing the project is responsible for the contamination as a result of conduct that was reckless or was done with the intent to discharge PFAS into the environment; (b) the project poses a substantial risk to public health or welfare; or (c) the federal Clean Water Act specifically requires DNR to act.
4. The bill requires DNR to follow certain procedures when conducting testing on nonstate land pursuant to voluntary consent from the landowner. This requirement could be characterized as a procedural requirement and does not directly affect DNR’s authority to take enforcement action under the remediation law.

Only the third limitation described above explicitly addresses situations involving recklessness or intentionally caused contamination. For the enforcement exemptions relating to the bill’s grant programs, the applicability of the exemptions is instead limited by the eligibility criteria for the grant programs. For example, for the innocent landowner grant program, a person must fall within one of six enumerated categories to be eligible for the program, and thus, for the enforcement exemption.

In limited situations, it could be argued that a person who qualifies for one of the six “innocent landowner” eligibility categories may have acted recklessly or may have intentionally caused PFAS contamination. For example, a municipal fire department that has trained using firefighting foam may have acted recklessly or intentionally with respect to its use of PFAS in a given instance. However, the situations where the bill would arguably shield reckless or intentional conduct would generally relate to actions taken by government entities or actions taken by persons operating pursuant to a government permit (e.g., a permit to spread biosolids). The bill does not otherwise provide any general exemption from DNR enforcement that would apply to a business that recklessly or intentionally caused PFAS contamination.

Please let us know if we can provide any further assistance.

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<sup>7</sup> Under the bill, the municipal PFAS grant program provides grants to municipalities, certain water utilities, sewer utilities, and other entities that provide drinking water, and certain private landfills, for certain testing, remediation, and facility upgrades relating to PFAS contamination.