# Wisconsin Legislative Council

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Director

TO: SENATOR ERIC WIMBERGER

FROM: Anna Henning, Principal Attorney

RE: Questions Relating to 2023 Senate Bill 312, as Enrolled

DATE: March 22, 2024

You asked how 2023 Senate Bill 312, as passed by the Senate and Assembly and enrolled, affects the Department of Natural Resources' (DNR) enforcement authority under the remediation law. More particularly, you asked how provisions of the bill that require DNR to demonstrate that a "promulgated standard" has been exceeded may apply with respect to sites that have per- and polyfluoroalkyl substances (PFAS) contamination in groundwater but that do not have surface waterbodies or regulated drinking water infrastructure. You also requested a summary of the enforcement exemptions for "innocent landowners" under the bill. Finally, you asked whether there are sources of law, unaffected by the bill, under which DNR may require certain regulated entities to conduct testing for PFAS. Each of those topics are addressed below.

## REQUIREMENT TO SHOW THAT A "PROMULGATED STANDARD" HAS BEEN EXCEEDED

The short answer to your question regarding the bill's application to sites with only groundwater contamination is that the "promulgated standard" requirement only applies to certain types of property under the bill. For those types of property, DNR would not currently be able to rely on exceedance of groundwater standards to take enforcement actions.

In two specific situations, 2023 Senate Bill 312 requires DNR to demonstrate that PFAS levels exceed a "promulgated standard" before taking certain actions under the remediation law. First, the bill prohibits DNR from requiring a recipient of a grant under the "municipal PFAS grant program" from taking action to address PFAS, unless testing demonstrates that PFAS levels exceed "any applicable promulgated standard under state or federal law." Second, the bill prohibits DNR from taking any enforcement action based on the results of samples taken on land not owned by the state, unless the testing demonstrates that PFAS levels exceed "any promulgated standard under state or federal law."

If neither of those two situations applies to a given property, then DNR does not need to demonstrate that a promulgated standard has been exceeded in order to proceed under the remediation law. In other words, if a site is not one for which a municipal PFAS grant was received, and DNR's enforcement action is not based on samples taken on the property, then current law would apply with respect to DNR's enforcement authority (unless the property is eligible for the innocent landowner grant program, summarized below). For example, DNR could continue to require an industrial discharger to remediate

PFAS contamination it has caused, regardless of whether any particular standards have been promulgated.

Currently, promulgated state drinking water and surface water standards are in effect for two specific PFAS compounds. [See ss. NR 102.04 (8) (d) and 809.20 (1), Wis. Adm. Code.] A rulemaking effort proposing PFAS standards for groundwater is currently paused, because DNR's economic impact analysis estimated compliance costs over $10 million in a two-year period. [See s. 227.139 (1), Stats.] At the federal level, the Environmental Protection Agency published proposed maximum contaminant levels for PFAS in drinking water in March 2023, but no federal standards have yet been finalized.

Given that regulatory landscape, the bill would currently require DNR to demonstrate that PFAS contamination violates the state drinking water or surface water standards before taking certain actions with respect to the two specific categories of property mentioned above – i.e., before requiring municipal PFAS grant recipients to take action, and before taking enforcement action based on testing of samples collected on land not owned by the state.

In practice, such demonstrations may be possible in some, but likely not all, circumstances involving groundwater contamination on those two specific types of property. For example, if a site with PFAS in groundwater also had contaminated surface water, DNR could take action at the site if the department was able to demonstrate that PFAS on the site exceeds the state's applicable promulgated surface water standards. In contrast, DNR might arguably be prohibited from taking action on a site with no surface water or public water system infrastructure, depending on how the bill is interpreted. That may be particularly true with respect to sites for which a municipal PFAS grant has been received, because the bill requires DNR to show that an "applicable" promulgated standard has been exceeded before proceeding with enforcement under the remediation law on those sites, suggesting that the surface water and drinking water standards may only apply if the site contains surface water or regulated drinking water infrastructure. In contrast, for sites where enforcement is based on samples, DNR may arguably proceed if any promulgated standard – including a standard that is not directly "applicable" – has been exceeded, meaning that DNR could arguably proceed based on a groundwater sample showing a level of PFAS that would violate the surface water or drinking water standards if found in surface or drinking water.

Regardless, again, DNR could generally proceed as authorized under current law with respect to property that does not fall within one of the two categories discussed above. For example, if the bill is enacted, DNR could continue to require an industrial discharger to remediate pollution they have caused, regardless of what standards have been promulgated or exceeded, as long as: (1) DNR's action is not based solely on samples taken at the property in question; (2) the person who manages or owns the property does not qualify for a municipal PFAS grant under the bill; or (3) the enforcement is otherwise lawful under current law. However, any such authority may be limited under a recent court decision.[1]

## ENFORCEMENT EXEMPTIONS FOR CERTAIN "INNOCENT LANDOWNERS"

In addition to the requirements summarized above, the bill prohibits DNR from commencing an enforcement action under the remediation law against a person who meets the eligibility criteria for the innocent landowner grant program created by the bill, if the person grants permission to DNR to

[1] On March 6, 2024, the Wisconsin Court of Appeals held that policy of regulating PFAS and other emerging contaminants as hazardous substances under the remediation law is a "rule" subject to the rule promulgation process under ch. 227, Stats., and is therefore currently invalid. [*Wisconsin Manufacturers and Commerce v. DNR*, 2022AP718.]

remediate the person's land at DNR's expense. To qualify for an "innocent landowner" grant under the bill, an applicant must be one of the following:

- 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.

The enforcement exemption for "innocent landowners" does not apply to property owners or actors who do not fall into one of those six categories listed above. In addition, I interpret the enforcement exemption to apply only with respect to a particular property for which an applicant qualifies as an "innocent landowner" under the bill. For example, a company or other owner of property with PFAS contamination would not gain an exemption from enforcement on their property by acquiring other property on which PFAS-contaminated biosolids were spread pursuant to a permit from the state.

## OTHER SOURCES OF AUTHORITY FOR INVOLUNTARY TESTING

Finally, you asked whether DNR or other government entities may require a landowner or facility operator to conduct testing under sources of authority that are unaffected by the bill. The short answer is yes.

Under current law, unaffected by the bill, DNR and other government entities may require testing under various sources of authority, depending on the circumstances. For example, DNR may require testing for PFAS as part of source monitoring requirements for certain holders of Wisconsin pollutant discharge elimination system permits. [See s. 283.55, Stats.; s. NR 106.99, Wis. Adm. Code.] Similarly, DNR may require drinking water systems to monitor for PFAS, under a recent revision of DNR's administrative rules relating to safe drinking water. [See ch. NR 809, Wis. Adm. Code.]

In addition, the bill does not affect DNR's authority to conduct investigations under the remediation law. However, as mentioned, a recent court decision affected that authority with respect to PFAS.

Please let me know if I can provide any further assistance.

AH:jal