
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE KATRINA SHANKLAND

FROM: Benjamin Kranner, Staff Analyst

RE: 2021 Assembly Bill 392 and Enforcement of Wisconsin Environmental Remediation Law

DATE: July 1, 2021

This memorandum, prepared at the request of your staff, discusses the potential impact of [2021 Assembly Bill 392](#), as amended and passed by the Assembly, on enforcement actions under the state's environmental remediation law. The memorandum provides a brief background on the remediation law (part of which is referred to as the "spill law") and the "waiver of action" provisions in the bill. In brief, while the bill does not directly reference the Department of Natural Resources' (DNR) enforcement authority, the bill may preclude enforcement actions by DNR under certain circumstances.

ENVIRONMENTAL REMEDIATION LAW

Under the state's environmental remediation law ([ch. 292, Stats.](#)), a person who "possesses or controls" a discharged hazardous substance¹ (including the owner of land on which a hazardous substance is found), or a person who causes such a discharge, is generally responsible for remediation. [[s. 292.11 \(3\), Stats.](#)] 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.

Among other actions, [ch. 292, Stats.](#), authorizes DNR to: (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 law also directly imposes certain requirements on persons who 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,

¹ For purposes of the environmental remediation statute, "hazardous substance" means 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. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers, or explosives as determined by DNR. [[s. 292.01 \(5\), Stats.](#)]

DNR may conduct monitoring and investigations, and DNR may require a landowner to take preventive measures. [[ss. 292.11 \(4\)](#) and [292.31 \(1\) \(b\) 2., Stats.](#)]

DNR has taken a number of actions under [ch. 292, Stats.](#), to address contamination due to per- and polyfluoroalkyl substances (PFAS). Notably, DNR has used this authority to address PFAS contamination in the Marinette and Peshtigo area, as well as contamination at Truax Field, Volk Field, Fort McCoy, and various industrial sites.

ASSEMBLY BILL 392

As amended and passed by the Assembly, 2021 Assembly Bill 392 directs DNR to administer a program to provide grants to municipalities to address various PFAS-related issues.² The bill also provides a “waiver of action” provision applicable to three types of claims or actions that may be brought against a person alleged to be responsible for the PFAS contamination that is the basis for a grant:

1. Claims or actions brought by a municipality that receives a grant. Under the bill, a grant recipient waives the right to bring or maintain a claim or action against any person alleged to be responsible for the PFAS contamination that is the basis for the grant.
2. Claims or actions brought by a person who receives a financial payment or direct capital improvement from the expenditure of a grant. Under the bill, a person that receives a financial payment or direct capital improvement from the expenditure of a grant may not bring a claim or action against any person alleged to be responsible for the PFAS contamination that is the basis for a grant.
3. Claims or actions that relate to a property that receives a financial payment or direct capital improvement from the expenditure of a grant. Similarly, under the bill, no claim or action may be brought against any person alleged to be responsible for the PFAS contamination that is the basis for a grant with respect to any property that receives a financial payment or direct capital improvement from the expenditure of a grant.

While the first category affects municipalities that receive grants, the latter two categories may affect a wider range of entities. For example, if a municipality uses grants to provide homes with point-of-entry or point-of-use treatment systems to address PFAS contamination, those homes would likely be considered to have received a “direct capital improvement.” In turn, claims or actions against potentially responsible parties with respect to those properties would generally be precluded.³

“Direct capital improvement” is not defined in statute. Based upon the types of projects eligible under the grant program, it appears that the term would generally include water treatment systems. However, environmental remediation (i.e., the containment or removal of PFAS contamination at a site) could also be considered a “direct capital improvement” for the purposes of the waiver of action provisions.

² The bill also directs the Governor to allocate \$10 million in American Rescue Plan Act (ARPA) funds in each fiscal year for the grant program. Assembly Amendment 1 clarifies this funding allocation, directing the Governor to allocate \$10 million in ARPA funds in each fiscal year of the 2021-2023 fiscal biennium.

³ Because the bill precludes claims or actions against “any person alleged to be responsible for the PFAS contamination that is the basis for [a] grant,” a court may consider the nature of the PFAS contamination that was the basis for a particular grant when determining whether a claim or action is precluded. For example, a court may find that a claim or action is not precluded if that claim or action relates to PFAS contamination that is somehow distinct from the PFAS contamination that DNR considered when it awarded the grant.

Impacts on DNR Enforcement Authority

In addition to precluding claims or actions brought by individuals, the bill's waiver of action provisions may also restrict DNR from bringing enforcement actions under the environmental remediation law. While the bill does not explicitly reference DNR enforcement actions, it precludes **any action** against "any person alleged to be responsible for the PFAS contamination that is the basis for a grant, **with respect to any property that receives a financial payment or direct capital improvement from the expenditure of a grant.**" If, for example, a grant was used to provide a property with a direct capital improvement (which may include remediation of the property), then a plain language reading of the bill suggests that DNR could be precluded from bringing an enforcement action with respect to that property.

The Wisconsin Supreme Court has repeatedly affirmed that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning." [*Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45 (citations and internal punctuation omitted).] Further, the Court has stated that "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." [*Id.* ¶ 46.]

It is challenging to determine what a court would consider to be an "absurd or unreasonable interpretation" of the waiver of action provisions in the bill. The plain language of the bill could preclude enforcement actions completely unrelated to PFAS contamination (such as violations of the state's criminal code). While a court would likely view such an interpretation as absurd or unreasonable, it is significantly less clear how a court would interpret the provision in the context of DNR enforcement actions under the environmental remediation law.

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

BK:ty