
Wisconsin Legislative Council



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TO: SENATOR ROBERT COWLES

FROM: Ethan Lauer, Staff Attorney, and Anna Henning, Senior Staff Attorney

RE: 2019 Senate Bill 302 (“The CLEAR Act”)

DATE: December 13, 2019

This memorandum responds to your request for a discussion of 2019 Senate Bill 302, commonly referred to as “The CLEAR Act,” which provides certain funding, authority, and direction to the Department of Natural Resources (DNR) and the Department of Health Services (DHS) relating to the regulation of per- and polyfluoroalkyl substances (PFAS). Specifically, you requested a comparison of the bill with any: (1) similar provisions in the 2019-21 Biennial Budget Act; (2) existing statutory authority for regulatory action by DNR or the Department of Agriculture, Trade, and Consumer Protection (DATCP); and (3) actions that the agencies have already taken.

FUNDING FOR MODELING, STUDY, AND INVESTIGATION

The Bill

The bill appropriates the following funds relating to modeling, testing, surveying, and investigation in the 2019-21 fiscal biennium:

- \$150,000 in fiscal year 2019-20 for DNR to create a model to assist in identifying and prioritizing sites with likely contamination by PFAS or environmental pollution caused by PFAS.
- \$50,000 in fiscal year 2019-20 for DNR to conduct a survey of local and state emergency responders and the use of firefighting foam containing PFAS.
- \$87,500 in each of fiscal years 2019-20 and 2020-21 to DNR for sampling and testing leachate and groundwater from landfills for PFAS.
- \$120,000 in fiscal year 2019-20 to DNR for investigating PFAS and providing temporary potable water or treatment systems.

Comparison With Current Law and Agency Actions

The budget act appropriated the same amounts as are described in the first two bullets, above, for creating a model and conducting a survey of emergency responders in the 2019-20 fiscal year.¹ [See the amounts in the schedule under s. 20.005, Stats., for s. 20.370 (4) (mq), Stats.; Legislative Fiscal

¹ Unlike the general purpose revenue appropriated by the bill, the budget act appropriated segregated fund revenue from the environmental fund.

Bureau, *Comparative Summary of Provisions, 2019 Act 9* (Aug. 2019), at 437.] DNR has also established a PFAS Technical Advisory Group that is engaging in activities related to modeling and gathering data regarding firefighting foams.² Among other functions, the advisory group is charged with examining what, where, when, and how PFAS are potentially impacting the state. The advisory group has a number of subgroups, including a History and Use of PFAS Subgroup and a Fate and Transport of PFAS Subgroup. Based on meeting materials posted on DNR's website,³ the latter subgroup appears to be examining a model regarding PFAS fate and transport, and both subgroups appear to be examining fire suppression foam as a source of PFAS.

With respect to the third bullet above, the budget act did not contain specific funding for sampling and testing leachate and groundwater from landfills. Current law authorizes DNR to require certain sampling and testing of landfills. For instance, DNR must promulgate rules establishing minimum standards for solid waste facilities, including standards for monitoring. [s. 289.05 (1), Stats.] Under this authority, DNR rules require solid waste facilities to monitor leachate and groundwater at specified frequencies and for specified contaminants, although PFAS is not currently included in the list of specified contaminants. [ch. NR 507 and NR 507 Appendix I, Wis. Adm. Code.]

The budget act also did not provide specific funding relating to the appropriation described in the final bullet, above. Under current law, DNR, along with several other state agencies, must continually identify any substance that might decrease the quality of groundwater. [s. 160.05 (1), Stats.] In addition, DNR's well compensation grant program provides funds that can, in some circumstances, be used to procure equipment to treat the contaminated water or to provide alternative sources of potable water. [s. 281.75 (7) (c) 1. and 2. a., Stats.]

NEW STAFF POSITIONS

The Bill

The bill authorizes 7.5 new full-time equivalent (FTE) positions at DNR for the administration and enforcement of activities relating to PFAS and appropriates \$574,700 in each of fiscal years 2019-20 and 2020-21 to fund those positions. In addition, the bill increases existing appropriations to DHS by \$248,600 in each of fiscal years 2019-20 and 2020-21 to support an increase in FTE positions at DHS by 4.0 positions for the purpose of recommending groundwater enforcement standards for PFAS substances.

Comparison With Current Law and Agency Actions

As noted elsewhere in this memorandum, DHS has recommended groundwater enforcement standards to DNR within its existing funding and position authorizations. With regard to additional DNR positions, the budget act provided 2.0 positions for PFAS-related research and other emerging chemical contaminants. [Legislative Fiscal Bureau, *Comparative Summary of Provisions, 2019 Act 9* (Aug. 2019), at 416-417.]

² For example, at the September 20, 2019, meeting of the advisory group, DNR announced that it was preparing a statewide survey of airports and fire departments regarding the types and quantities of firefighting foams being used and stored at those locations.

³ Information on the advisory group is available at: <https://dnr.wi.gov/topic/Contaminants/PFASGroup.html>.

DNR GROUNDWATER STANDARDS

Background

Enforcement Standards and Preventive Action Limits

Groundwater protection standards are established on a two-tiered basis; both an “enforcement standard” and a “preventive action limit” are determined for each substance. An enforcement standard is a numerical expression of the concentration of the substance in groundwater. In general, attaining or exceeding an enforcement standard means that a violation has occurred. A preventive action limit is a lesser concentration of the substance, as compared to the enforcement standard, and functions as a warning that a groundwater problem is occurring before an enforcement standard has been violated.

Identification of Substances

The process of setting a groundwater standard begins with certain regulatory agencies submitting to DNR a list of substances which either have been detected in or have a reasonable probability of entering, the groundwater of the state and are related to activities within the agency’s authority to regulate. In addition, any person may petition a regulatory agency to include a substance on its list. [s. 160.05 (1) and (2), Stats.]

After receiving the name of a substance, DNR places the substance into one of three categories for purposes of determining the priority in which standards will be established. DNR ranks each substance within its category. DNR then submits to DHS the list of categories and rankings of substances, and DHS must recommend to DNR an enforcement standard for each substance submitted to it. [ss. 160.05 (3) and (4) and 160.07 (2) and (3), Stats.]

Establishing Enforcement Standards and Preventive Action Limits

After receiving the recommendation from DHS, DNR must propose rules establishing the recommendation as the enforcement standard for that substance. [s. 160.07 (5), Stats.]

DNR is required to establish a preventive action limit for each substance for which it has established an enforcement standard. State law specifies that the level of each preventive action limit is either 10 percent,⁴ 20 percent,⁵ or 50 percent⁶ of the enforcement standard, based on the health-related characteristics of the particular substance. DNR, however, may establish a more stringent preventive action limit if it concludes, to a reasonable degree of scientific certainty, that a more stringent level is necessary to protect human health or welfare. Like enforcement standards, preventive action limits are adopted by DNR by rule. [s. 160.15, Stats.]

The Bill

The bill modifies certain agency authority with regard to the existing groundwater protection law. Specifically, the bill authorizes DHS to recommend a standard by any of three methods: (1) as an

⁴ This level is for a substance that has carcinogenic, mutagenic, or teratogenic properties or interactive effects. [s. 160.15 (1) (c), Stats.]

⁵ This level is for a substance of “public health concern,” meaning that it may cause or contribute to mortality, illness, incapacity, or other adverse human health effects. [ss. 160.05 (6) (a) and (b) and 160.15 (1) (b), Stats.]

⁶ This level is for a substance of “public welfare concern,” meaning that it may influence the aesthetic suitability of water for human use, influence the suitability of water for nonhuman use, or have substantial adverse effect on plant or animal life. [ss. 160.05 (6) (d) and 160.15 (1) a), Stats.]

individual standard for each substance; (2) as a standard for these substances as a class; or (3) as a standard for a group of these substances. The bill provides that if DHS recommends an enforcement standard for PFAS, either individually, as a class, or as a group, DNR must apply that standard as an interim enforcement standard pending emergency or permanent rules establishing an enforcement standard.

With respect to DNR's role, under the bill, if DNR applies an interim enforcement standard, as required by the bill, DNR must also apply an interim preventive action limit for that substance, class, or group that is 20 percent of the concentration of the interim enforcement standard pending emergency or permanent rules establishing a preventive action limit. In addition, the bill directs DNR to identify certain PFAS substances, groups, or classes as groundwater contaminants, and to categorize and rank them according to the procedures set forth in the state groundwater protection law.

Comparison With Current Law and Agency Actions

Current law, by referring to "each" substance for which DHS must recommend an enforcement standard, could be interpreted as requiring the agency to treat the substances individually and not as a class or as a group. In practice, however, DHS has treated certain PFAS as a group or class. In a letter to DNR dated June 21, 2019, DHS recommended a combined enforcement standard for two separate PFAS substances.⁷ For this recommendation and any future recommendations related to PFAS, the bill would clarify DHS's statutory authority to treat substances by group or class rather than individually.

Although DHS has already recommended an enforcement standard for two types of PFAS, there is no procedure in current law for DNR to apply that recommendation as an interim enforcement standard. The bill would therefore expand DNR's current enforcement authority. It would also specify which of the three categories of preventive action limits (10 percent, 20 percent, and 50 percent) to apply to this recommendation.

DNR has in letters to DHS dated March 2, 2018, and April 10, 2019, identified, categorized, and ranked certain PFAS substances.⁸

In the absence of enforceable limits, DNR has taken other action regarding PFAS contamination in groundwater. For example, it has requested a local water utility not to return to active service a well, which had previously tested positive for PFAS contamination, without further consultation with a DNR drinking water engineer.⁹

DRINKING WATER STANDARDS

Background

State law authorizes DNR to establish, administer, and maintain a safe drinking water program no less stringent than the requirements of the federal Safe Drinking Water Act. [s. 281.17 (8) (a), Stats.] State administrative rules include maximum contaminant levels (MCLs), which are enforceable standards

⁷ The letter is available at: <https://dnr.wi.gov/topic/Contaminants/documents/pfas/DHSLetter20190621.pdf>.

⁸ The March 2, 2018, letter listed PFOA and PFOS as separate substances, and is available at: <https://dnr.wi.gov/topic/Contaminants/documents/pfas/DHSLetter20180302.pdf>. The April 10, 2019, letter listed several separate PFAS substances, and is available at: <https://dnr.wi.gov/topic/Contaminants/documents/pfas/DHSLetter20190410.pdf>.

⁹ See DNR letter to the City of Rhinelander at: https://dnr.wi.gov/topic/Contaminants/documents/pfas/RhinelandLetter_signed_11-19-19.pdf.

established to protect public health and welfare by limiting the levels of contaminants in groundwater and drinking water. MCLs apply to new and existing public water systems, as well as water suppliers and laboratories certified to analyze drinking water. [ch. NR 809, Wis. Adm. Code.]

The Bill

The bill provides that if DHS recommends a groundwater enforcement standard for PFAS, either individually, as a class, or as a group, DNR must apply that standard as an interim MCL pending emergency or permanent rules establishing MCLs for the substance.

Comparison With Current Law and Agency Actions

Although DHS has already recommended a groundwater enforcement standard for two types of PFAS, as discussed above, there is no procedure in current law for DNR to apply that recommendation as an interim MCL. The bill would therefore expand DNR's enforcement authority. In addition, DNR on August 27, 2019, finalized a statement of scope for a permanent rule to establish a MCL for PFAS.¹⁰ The public comment period closed on November 19, 2019, and written comments are available on the DNR website.¹¹

HAZARDOUS AIR EMISSIONS

Background

As required by the federal Clean Air Act, DNR establishes emissions standards for air quality, including hazardous air emissions standards. With regard to hazardous air emissions, under state law, DNR must promulgate a standard for a hazardous air contaminant if such a standard is promulgated pursuant to the federal Clean Air Act. If a federal emission standard for a hazardous air contaminant has not been promulgated, DNR may establish a hazardous air emission standard if it is needed to provide adequate protection for public health or welfare. [s. 285.27 (2), Stats.]

The Bill

The bill directs DNR to determine whether a hazardous air emission standard for any known PFAS, or group or class thereof, is needed to provide adequate protection for public health or welfare. If DNR finds such a standard is needed, it must promulgate an emission standard for that substance.

Comparison With Current Law and Agency Actions

To date, it does not appear that DNR has initiated a rulemaking on this issue.

REMEDICATION AND SOLID WASTE

Background

Under current law, DNR has general authority to conduct an investigation of a certain site or facility if the discharge of a hazardous substance or other environmental pollution has been reported. Current

¹⁰ The statement of scope may be viewed in the Administrative Register at:
https://docs.legis.wisconsin.gov/code/register/2019/765A1/register/ss/ss_089_19/ss_089_19.

¹¹ <https://dnr.wi.gov/topic/surfacewater/documents/PFASScopeComments.pdf>.

law enumerates actions DNR may take as part of the investigation, but it also makes explicit that DNR's authority is not limited to those actions. [s. 292.31 (1) (b) 2., Stats.]

Current law also grants narrow authority to DNR regarding its ability to gain access to certain information related to the waste that is at a site or facility that is under investigation. It requires any person who generated, transported, treated, stored, or disposed of solid or hazardous waste which may have been disposed of at a site or facility under investigation by DNR to provide access to certain information, including the type of waste generated, and the identity of the person or subsidiary that generated the waste. [s. 292.31 (1) (d), Stats.] On its face, this provision applies when waste handled at a site or facility **not under** investigation is disposed of at a site or facility that **is under** investigation.

The Bill

The bill requires a person who generates solid or hazardous waste at a site or facility under investigation by DNR to provide DNR with access to information relating to the type and quantity of waste generated at the site or facility that was transported to, treated at, stored at, or disposed of at another site, facility, or location, and the date and locations of these activities.

Comparison With Current Law and Agency Actions

The relevant sections of the bill could be interpreted as clarifying existing DNR authority. There could be an argument that the narrow provision under current law regarding access to information trumps the general grant of authority to conduct an investigation. Under this interpretation, DNR would be unable to obtain access to information about waste generated at a site or facility under investigation that is then transported to, treated at, stored at, or disposed of at a site or facility not under investigation. But it does not appear that DNR has adopted that view. For instance, DNR sent a letter dated July 2, 2019, to a site that is under investigation.¹² In that letter, DNR asked for information regarding certain wastes generated at that site that were subsequently transported off-site.

FINANCIAL RESPONSIBILITY

Background

Under current law, certain parties must submit proof of financial responsibility for certain remedial actions, including solid waste disposal sites, sites with residual contamination, or sites with contamination from petroleum storage. [ss. 289.41, 292.12, and 292.63, Stats.]

The Bill

The bill authorizes DNR to require a person who possesses or controls PFAS to provide proof of financial responsibility for remediation and long-term care to address contamination by a potential discharge of PFAS or environmental pollution that may be caused by a discharge of PFAS, if DNR determines such proof is necessary to protect human health or the environment. This proof is in addition to any other proof of financial responsibility required under ch. 292, Stats.

Comparison With Current Law and Agency Actions

The bill grants new authority to DNR specific to requiring proof of financial responsibility relating to contamination from discharges of PFAS.

¹² The letter is available at: <https://dnr.wi.gov/topic/Contaminants/documents/jci/FTCFollowUpLetter20190702.pdf>.

REPORTING AIR CONTAMINANTS

Background

Under current law, DNR must require by rule that all persons discharging air contaminants to report on the amount of those contaminants discharged. DNR may further, by rule, establish minimum reporting levels for those contaminants. [s. 299.15 (1) and (2), Stats.]

The Bill

The bill requires DNR to consider all known PFAS to be air contaminants and requires reporting of any level of emission of these substances.

Comparison With Current Law and Agency Actions

Under current law, DNR has the discretion to determine whether PFAS are air contaminants, and if so, at what level discharges of PFAS must be reported. The bill would remove that discretion.

EMERGENCY RULEMAKING

Background

In certain situations, current law allows an agency to promulgate an emergency rule with a less formal rulemaking process than is required for permanent rules. In order to promulgate a rule as an emergency rule, the agency must satisfy a finding of emergency as defined by s. 227.24 (1), Stats. In general, an agency must assert that the preservation of public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the permanent rulemaking procedures. Once an emergency rule takes effect, it remains in effect for 150 days and may be extended for periods totaling no more than 120 additional days at an agency's request, with approval by the Joint Committee on Review of Administrative Rules. [s. 227.24 (1) (c) and (2) (a), Stats.]

The Bill

The bill requires DNR to promulgate emergency rules to establish acceptable levels and standards, monitoring requirements, and required response actions for any PFAS which DNR determines may be harmful to human health or the environment, in all the following: drinking water; groundwater; surface water from point sources and nonpoint sources; air; solid waste and solid waste facilities; beds of navigable waters; and soil and sediment.

The bill also requires DNR to promulgate emergency rules to establish criteria for certifying laboratories to test for any PFOA or PFOS substance, group, or class of such substances, and to certify laboratories that meet these criteria.

Comparison With Current Law and Agency Actions

The bill expands DNR's emergency rulemaking authority in two ways. First, for this PFAS-related rulemaking, the bill removes the requirement that DNR find that an emergency rule is necessary to the preservation of public peace, health, safety, or welfare. Second, the bill specifies that an emergency rule would remain in effect until July 1, 2022, or until a permanent rule takes effect, whichever is sooner.

SURFACE WATER QUALITY STANDARDS

Background

As required by the federal Clean Water Act, Wisconsin establishes surface water quality standards according to the designated use for a given body of water, and the water quality criteria required to maintain that use. [s. 281.15, Stats.]

The Bill

The bill requires DNR to establish water quality standards for a list of specific types of PFAS and any other PFAS substance, group, or class of such substances, that DNR determines may be harmful to human health and necessary to protect a water's designated use.

Comparison With Current Law and Agency Actions

Pursuant to its authority under current law, DNR, on August 27, 2019, finalized a statement of scope for a permanent rule to establish surface water quality standards for certain types of PFAS.¹³ The public comment period closed on November 19, 2019, and written comments are available on the DNR website.¹⁴

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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¹³ The statement of scope may be viewed in the Administrative Register at:

https://docs.legis.wisconsin.gov/code/register/2019/765A1/register/ss/ss_091_19/ss_091_19.

¹⁴ <https://dnr.wi.gov/topic/surfacewater/documents/PFASScopeComments.pdf>.