

ISSUE: Potential changes to Voluntary Party Liability Exemption (VPLE) considering risks related to emerging contaminants

BACKGROUND

Recent concerns over emerging contaminants, particularly per- and polyfluoroalkyl substance (“PFAS”) chemicals in Wisconsin and neighboring states have prompted the department to offer a voluntary party a Certificate of Completion (COC) for the individual hazardous substances that are investigated after all the VPLE requirements have been met. The department currently issues a COC that covers the hazardous substances investigated at a property.

The department made this decision in August 2018 in part to protect state taxpayers if PFAS were discovered at a closed VPLE property that posed a health threat and there are no other responsible parties available to address the issue. Since this decision, the department has issued 8 COCs. From 1998, when the program began, to August 2018, 185 COCs were issued. The department would be remiss in its responsibility to protect public health and safety, and serve as good stewards of state taxpayer dollars, if it issued a COC for PFAS contamination that was not sampled or could not be sampled given lack of analytical methods. This decision was also based on an evaluation of the research and guidance available about the complex nature and limited understanding of PFAS including the fate and transport and site characterization. The department was also concerned that it may be difficult to determine that there is no risk of PFAS discharges for many industrial facilities because of the large number of uses of the chemicals and scientific uncertainty.

Some brownfields stakeholders have raised concerns with this approach because it reduces the benefits of a COC; property owners could be exposed to the risk that actions could be needed if contamination was discovered in the future that was not one of the hazardous substances covered by the COC. As a result, some developers, local governments, investors and others may be less willing to take on brownfield cleanup and redevelopment sites in Wisconsin. Even with this change however, Wisconsin still has one of the broadest liability releases in the nation.

Governor Evers signed Executive Order #40 in August 2019 regarding PFAS. One of the items ordered is that the DNR should modify the VPLE program to protect taxpayers from potentially costly cleanup liability.

PROPOSED CHANGES

This paper outlines statutory changes that could be made to Wis. Stat. § 292.15 with the goal to have a program that continues to encourage investment in clean up and redevelopment of brownfields and protects state taxpayers. Changes that encourage sampling for PFAS contamination should also be considered.

The law would be changed to add the following options to the existing VPLE laws in Wis. Stat. § 292.15 and to modify the type of COCs that are currently being awarded. The existing partial option under Wis. Stats. § 292.15(2)(am) would remain in place if someone wanted to clean up only an area of their property or only clean up certain hazardous substances (understanding that they are still required to complete remainder of the cleanup).

Note for all alternatives: property owners or developers could explore private options to address the risk associated with emerging contaminants through use of private environmental insurance, indemnification agreements, restrictive covenants or other options.

Option 1 - Status Quo.

Do not change VPLE law and continue what DNR is currently doing, using authority in Wis. Stat. § 292.15(2)(am) to provide liability exemption that is limited to the hazardous substances sampled. DNR has been issuing Certificates of Completion under one of the existing sections of the VPLE law, Wis. Stats. § 292.15(2)(a), (ae), (af), or (ag) that are qualified by 292.15(2)(am).

Option 2 – Modifications to 292.15

DNR issues a Certificate of Completion for all substances that have either been sampled or screened out.

Modification to the VPLE statutes would allow a Certificate of Completion (COC) for a standard list of compounds. If sampling of some compounds is not warranted per Wis. Admin. Code § NR 716.07, the voluntary party would get liability protection that covers those compounds if the consultant can demonstrate, and the DNR agrees, that they can be screened out because there is not a reason to think the substance could have been used or discharged to the environment at the property. If the listed compound is not screened out, the compounds could be covered by the liability exemption if sampled for and 1) the substance is not found, 2) the substance is found to be coming from an off-site source, or 3) if from an onsite source, the property can obtain closure for the release of that compound. The liability exemption would not include PFAS or other emerging contaminants.

The voluntary party would get liability protection from Wis. Stats. §§ 289.05 (1), (2), (3) and (4), 289.42 (1), 289.67, 291.25 (1) to (5), 291.29, 291.37, 292.11 (3), (4) and (7) (b) and (c) and 292.31 (8), and rules promulgated under those provisions which are all the statutory sections listed in Wis. Stats. § 292.15(2)(a) and (ae). This proposed modification is a broader exemption than what is provided under the current partial cleanup section, Wis. Stats. § 292.15(2)(am).

Add-on for Emerging Contaminants - DNR issues a Certificate of Completion covering emerging contaminants only if sampling is conducted. VPLE liability protection is not available for discharges of PFAS or other emerging contaminants by screening them out. Modification to the VPLE statutes would only allow a COC for specific PFAS or emerging contaminant compounds when that compound is sample for and 1) the substance is not found, 2) the substance is found to be coming from an off-site source, or 3) if from an onsite source, the property can obtain closure for the release of that compound.