CHAPTER 292

REMEDIAL ACTION

Note: 1995 Wis. Act 227 renumbered the provisions of chs. 144, 147, 159 and 162, Stats. 1993−94, to be chs. 280−299, Stats. 1995−96. For a table tracing former section numbers see the Addenda & Errata at the end of Volume 5.

SUBCHAPTER I

DEFINITIONS

292.01 Definitions. In this chapter:

(1) "Approved facility" has the meaning given in s. 289.01 (3).

(1m) "Approved mining facility" has the meaning given in s. 289.01 (4).

(2) "Department" means the department of natural resources.

(3) "Discharge" means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

(4) "Environmental pollution" means the contaminating or rendering unclean or impure the air, land or waters of the state, or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.

(5) "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 the department.

(6) "Hazardous waste" means any solid waste identified by the department as hazardous under s. 291.05.

(7) "Landfill" means a solid waste facility for solid waste disposal.

(8) "Lender" means a bank, credit union, savings bank, savings and loan association, mortgage banker or similar financial institution, the primary business of which is to engage in lending activities or an insurance company, pension fund or government agency engaged in secured lending.

(9) "Lending activities" means advancing funds or credit to and collecting funds from another person; entering into security agreements, including executing mortgages, liens, factoring agreements, accounts receivable financing arrangements, conditional sales, sale and leaseback arrangements and instalment sales contracts; conducting inspections of or monitoring a borrower's business and collateral; providing financial assistance; restructuring or renegotiating the terms of a loan obligation; requiring payment of additional interest; extending the payment period of a loan obligation; initiating foreclosure or other proceedings to enforce a security interest in property before obtaining title; requesting and obtaining the appointment of a receiver; and making decisions related to extending or refusing to extend credit.

(10) "Long−term care" means the routine care, maintenance and monitoring of a solid or hazardous waste facility following closing of the facility.

(11) "Municipality" means any city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district or metropolitan sewage district.

(12) "Nonapproved facility" has the meaning given in s. 289.01 (24).

(13) "Person" means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.

(15) "Preventive measures" mean the installation or testing of equipment or devices, a designated way of performing a specified operation or the preparation of an emergency response plan.

(16) "Representative" means any person acting in the capacity of a conservator, guardian, court−appointed receiver, personal representative, executor, administrator, testamentary trustee of a deceased person, trustee of a living trust or fiduciary of real or personal property.

(17) "Secretary" means the secretary of natural resources.

(18) "Site or facility" means, except in ss. 292.35 and 292.61, an approved facility, an approved mining facility, a nonapproved facility or a waste site.

(19) "Solid waste" has the meaning given under s. 289.01 (33).

(21) "Waste site" means any site, other than an approved facility, an approved mining facility or a nonapproved facility, where waste is disposed of regardless of when disposal occurred or where a hazardous substance is discharged before May 21, 1978.

History: 1995 a. 227 s. 599, 600, 702, 993.

SUBCHAPTER II

REMEDIAL ACTION

292.11 Hazardous substance spills. (2) NOTICE OF DISCHARGE. (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge not exempted under sub. (9).

(b) Notification received under this section or information obtained in a notification received under this section may not be used against the person making such a notification in any criminal proceedings.

(c) The department shall designate a 24−hour statewide toll free or collect telephone number whereby notice of any hazardous discharge may be made.

(d) The department shall report notifications that it receives under this subsection related to discharges of agricultural chemicals, as defined in s. 94.73 (1) (a), to the department of agriculture, trade and consumer protection. The department shall report notifications under this paragraph according to a memorandum of understanding between the department and the department of agriculture, trade and consumer protection under s. 94.73 (12).

(e) The department shall report notifications that it receives under this subsection related to discharges from petroleum storage tanks, as defined in s. 101.144 (1) (bm), to the department of commerce.

(3) RESPONSIBILITY. A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

(4) PREVENTION OF DISCHARGE. (a) The department may require that preventive measures be taken by any person possessing or having control over a hazardous substance if the department finds that existing control measures are inadequate to prevent discharges.

(b) The department shall specify necessary preventive measures by order. The order shall be effective 10 days after issuance, unless the person named requests a hearing, in which case no order may become effective until the conclusion of the hearing.

(5) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the undertaking of emergency actions in response to the discharge of hazardous substances.

(b) The contingency plan shall:

1. Provide for efficient, coordinated and effective action to minimize damage to the air, land and waters of the state caused by the discharge of hazardous substances;

2. Include containment, clean−up and disposal procedures;

3. Provide for restoration of the lands or waters affected to the satisfaction of the department;

4. Assign duties and responsibilities among state departments and agencies, in coordination with federal and local agencies;

5. Provide for the identification, procurement, maintenance and storage of necessary equipment and supplies;

6. Provide for designation of persons trained, prepared and available to provide the necessary services to carry out the plan; and

7. Establish procedures and techniques for identifying, locating, monitoring, containing, removing and disposing of discharged hazardous substances.

(6) HAZARDOUS SUBSTANCES SPILLS; APPROPRIATIONS AND RELATED PROVISIONS. (a) *Contingency plan; activities resulting from discharges.* The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in implementing and carrying out the contingency plan developed under sub. (5) and to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in identifying, locating, monitoring, containing, removing and disposing of discharged substances.

(b) *Limitation on equipment expenses.* No more than 25% of the moneys available under the appropriation under s. 20.370 (2) (dv) or (my) during any fiscal year may be used for the procurement and maintenance of necessary equipment during that fiscal year.

(c) *Reimbursements.* 1. Reimbursements to the department under sub. (7) (b) shall be credited to the environmental fund for environmental repair.

2. Reimbursements to the department under section 311, federal water pollution control act amendments of 1972, P.L. 92−500, shall be credited to the appropriation under s. 20.370 (2) (my).

(7) REMOVAL OR OTHER EMERGENCY ACTION. (a) Subject to ss. 94.73 (2m) and 101.144 (3), in any case where action required under sub. (3) is not being adequately taken or the identity of the person responsible for the discharge is unknown, the department or its authorized representative may identify, locate, monitor, contain, remove or dispose of the hazardous substance or take any other emergency action which it deems appropriate under the circumstances.

(b) The person who possessed or controlled a hazardous substance which was discharged or who caused the discharge of a hazardous substance shall reimburse the department for actual and necessary expenses incurred in carrying out its duties under this subsection.

(c) Subject to ss. 94.73 (2m) and 101.144 (3), the department, for the protection of public health, safety or welfare, may issue an emergency order or a special order to the person possessing, controlling or responsible for the discharge of hazardous substances to fulfill the duty imposed by sub. (3).

(8) ACCESS TO PROPERTY AND RECORDS. Any officer, employe or authorized representative of the department, upon notice to the owner or occupant, may enter any property, premises or place at any time for the purposes of sub. (7) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to a hazardous substance for the purpose of ascertaining the state of compliance with this section and the management rules promulgated under this section. Notice to the owner or occupant is not required if the delay attendant upon providing it will result in imminent risk to public health or safety or the environment.

(9) EXEMPTIONS. (a) Any person holding a valid permit under ch. 283 is exempted from the reporting and penalty requirements of this section with respect to substances discharged within the limits authorized by the permit.

(b) Law enforcement officers or members of a fire department using hazardous substances in carrying out their responsibility to protect public health, safety and welfare are exempted from the penalty requirements of this section, but shall report to the department any discharges of a hazardous substance occurring within the performance of their duties.

(c) Any person discharging in conformity with a permit or program approved under chs. 281, 285 or 289 to 299 is exempted from the reporting and penalty requirements of this section.

(d) 1. In this paragraph:

a. "Fertilizer" has the meaning given in s. 94.64 (1) (e).

b. "Label" has the meaning given in s. 94.67 (19).

c. "Pesticide" has the meaning given in s. 94.67 (25).

d. "Registered" means registered under the federal insecticide, fungicide, and rodenticide act, as amended (7 USC 136 et. seq.), and regulations issued under that act or registered under the rules of the department of agriculture, trade and consumer protection.

2. Any person applying a registered pesticide according to the label instructions, or applying a fertilizer at or below normal and beneficial agronomic rates, is exempted with respect to the application from the reporting and penalty requirements of this section.

(e) 1. In this paragraph, "municipality" includes a redevelopment authority under s. 66.431 or a public body designated by a municipality under s. 66.435 (4).

1m. A municipality is exempt from subs. (3), (4) and (7) (b) and (c) with respect to property acquired by the municipality before, on or after May 13, 1994, in any of the following ways:

a. Through tax delinquency proceedings or as the result of an order by a bankruptcy court.

b. From a municipality that acquired the property under a method described in subd. 1m. a.

2. Subdivision 1. does not apply to a discharge of a hazardous substance caused by any of the following:

a. An action taken by the municipality.

b. A failure of the municipality to take appropriate action to restrict access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property.

c. A failure of the municipality to sample and analyze unidentified substances in containers stored aboveground on the property.

d. A failure of the municipality to remove and properly dispose of, or to place in a different container and properly store, any hazardous substance stored aboveground on the property in a container that is leaking or is likely to leak.

(f) Any person discharging high−volume industrial waste used in a highway improvement project under s. 84.078 is exempted from the penalty requirements of this section.

(10) WAIVER. The department may waive compliance with any requirement of this section to the extent necessary to prevent an emergency condition threatening public health, safety or welfare.

(11) ENFORCEMENT EXCLUSIONS. (a) Any person proceeded against for a violation of this section shall not be subject to penalties under s. 291.97 for the same act or omission.

(b) Any person who discharges a hazardous substance, where the responsibilities for such a discharge are prescribed by statute other than ch. 291, shall be subject to the penalty under either this section or the other section but not both.

(12) APPLICABILITY. (a) Action by the department under this section is not subject to s. 292.31.

(b) This section applies to all releases of hazardous substances for which a notification must be made under s. 166.20 (5) (a) 2.

(13) LIEN. Any expenditures made by the department under sub. (4), (6) or (8) shall constitute a lien upon the property for which the expenses are incurred, as provided in s. 292.81.

History: 1995 a. 227 ss. 700, 703 to 707, 710, 993.

Owner of property from which hazardous substance seeped into neighboring properties was required to take remedial action. Seepage was "discharge" even though not related to current human activity. State v. Mauthe, 123 W (2d) 288, 366 NW (2d) 871 (1985).

Section 144.76 (11) (b) allows the imposition of both a monetary penalty and an administrative clean−up order against a violator of this section. Where another regulatory statute is implicated the penalty imposed may be the penalty under this section or the other section, but not both. State v. Block Iron & Supply Co. 183 W (2d) 357, 515 NW (2d) 332 (Ct. App. 1994).

292.15 Remediated property; purchaser liability.

(1) DEFINITIONS. In this section:

(b) "Owner of a business or entity" means any person who owns or who receives direct or indirect consideration from the operation of a business or entity regardless of whether the business or entity remains in operation and regardless of whether the person owns or receives consideration at the time any discharge of a hazardous substance occurs. "Owner of a business or entity" includes a subsidiary or parent corporation.

(c) "Purchaser" means a person who acquires property in an arm's−length, good faith transaction and to whom all of the following apply:

1. The person did not participate in the management of, and was not the owner of, a business or entity that caused the release of a hazardous substance on the property.

2. The person did not own the property at the time a hazardous substance was released.

3. The person did not otherwise cause the release of a hazardous substance on the property.

(d) "Release" means the original discharge.

(e) "Subsidiary or parent corporation" means any business entity, including a subsidiary, parent corporation or other business arrangement that has elements of common ownership or control or uses a long−term contractual arrangement with any person that has the effect of avoiding direct responsibility for conditions on a parcel of property.

(2) EXEMPTION FROM LIABILITY. (a) A purchaser is exempt from the provisions of s. 292.11 (3), (4) and (7) (b) and (c) with respect to the existence of a hazardous substance on the property the release of which occurred prior to the date of acquisition of the property, if all of the following occur at any time before or after the date of acquisition:

1. The purchaser conducts a thorough environmental investigation of the property that is approved by the department or the person from whom the purchaser acquires the property conducts a thorough environmental investigation of the property under a contract with the purchaser and the investigation is approved by the department.

2. Except as provided in sub. (4), the purchaser cleans up the property by restoring the environment and minimizing the harmful effects from a release of a hazardous substance in accordance with rules promulgated by the department and any contract entered into under those rules.

3. The purchaser obtains a certification from the department that the property has been satisfactorily restored and that the harmful effects from a release of a hazardous substance have been minimized.

4. The purchaser maintains and monitors the property as required under rules promulgated by the department and any contract entered into under those rules.

5. The purchaser does not engage in activities that are inconsistent with the maintenance of the property.

6. The purchaser has not obtained the certification under subd. 3. by fraud or misrepresentation, by the knowing failure to disclose material information or under circumstances in which the purchaser knew or should have known about more environmental pollution than was revealed by the investigation conducted under subd. 1.

(b) The exemption provided in par. (a) continues to apply after the date of certification by the department under par. (a) 3. notwithstanding the occurrence of any of the following:

1. Statutes, rules or regulations are created or amended that would impose greater responsibilities on the purchaser than those imposed under par. (a) 2.

2. The purchaser fully complies with the rules promulgated by the department and any contract entered into under those rules under par. (a) 2. but it is discovered that the cleanup fails to fully restore the environment and minimize the effects from a release of a hazardous substance.

3. The contamination from a hazardous substance that is the subject of the cleanup under par. (a) 2. is discovered to be more extensive than anticipated by the purchaser and the department.

(c) The department of justice may not commence an action under 42 USC 9607 against any purchaser meeting the criteria of this subsection to recover costs for which the purchaser is exempt under pars. (a) and (b).

(3) SUCCESSORS AND ASSIGNS. The exemption provided in sub. (2) applies to any successor or assignee of the purchaser who complies with the provisions of sub. (2) (a) 4. and 5. unless the successor or assignee knows that a certification under sub. (2) (a) 3. was obtained by any of the means or under any of the circumstances specified in sub. (2) (a) 6.

(4) LIMITED RESPONSIBILITY. The responsibility of a purchaser under sub. (2) (a) 2. may be monetarily limited by agreement between the purchaser and the department if the purchaser pur-

chased the property from a municipality that acquired the property in a way described in s. 292.11 (9) (e) 1m. a. or b. The agreement shall stipulate all of the following:

(a) That the purchaser may cease the cleanup when the cost of the cleanup equals 125% of the anticipated expense of the cleanup.

(b) That the purchaser will continue to receive the benefit of the exemption under sub. (2) (a) after cessation of the cleanup if the purchaser complies with sub. (2) (a) 4. and 5.

(c) That, if the purchaser ceases the cleanup, the purchaser shall use reasonable efforts to sell the property in accordance with rules of the department that define "reasonable efforts" in a manner substantively equivalent to 40 CFR 300.1100 (d) (2) (i).

(5) FEES. The department may, in accordance with rules that it promulgates, assess and collect fees from a purchaser to offset the cost of the department's activities under subs. (2) and (4). The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under subs. (2) and (4).

History: 1993 a. 453; 1995 a. 225; 1995 a. 227 s. 712, 714, 715.

The Land Recycling Act. Borchert & Burke. Wis. Law. Aug. 1994.

292.21 Responsibility of lenders and representatives.

(1) RESPONSIBILITY OF LENDERS; LENDING ACTIVITIES; ACQUISITION OF PROPERTY. (a) *Lending.* 1. Subject to subd. 2. and par. (b), for purposes of this chapter, a lender does not possess or control a hazardous substance or cause the discharge of a hazardous substance as a result of engaging in lending activities.

2. Subdivision 1. does not apply in any of the following situations:

a. A lender physically causes a discharge.

b. The lender through tortious conduct with respect to lending activities causes a discharge of a hazardous substance or exacerbates an existing discharge of a hazardous substance.

3. The department may, by rule, designate as lending activities other activities, in addition to those listed in s. 292.01 (9), that are related to undertaking appropriate actions to preserve and protect property or are related to the advancing of funds or credit or the collecting of funds.

(b) *Preacquisition inspections of real property.* For purposes of this chapter, a lender does not possess or control a hazardous substance or cause the discharge of a hazardous substance as the result of inspecting real property for compliance with environmental laws, conducting any portion of an environmental assessment of the property in the manner specified in par. (c) 2., conducting an investigation to determine the degree and extent of contamination or performing remedial action to clean the discharge of a hazardous substance. This paragraph applies to a lender only if all of the following conditions are satisfied:

1. The activities described in this paragraph occur before the date on which the lender acquires title to, or possession or control of, real property through enforcement of a security interest.

2. The lender notifies the department, in accordance with s. 292.11 (2), of any discharge of a hazardous substance identified as the result of activities described in this paragraph.

3. If the lender conducts an investigation or performs remedial action, the lender does so in accordance with department rules.

4. The lender does not physically cause a discharge.

5. The lender through tortious conduct with respect to the activities described in this paragraph does not cause a new discharge of a hazardous substance or exacerbate an existing discharge of a hazardous substance.

(c) *Acquisition of real property.* 1. A lender that acquires title to, or possession or control of, real property through enforcement of a security interest is not subject to s. 292.11 (3), (4) and (7) (b) and (c) and is not liable under this chapter or chs. 281, 285, 289, 291 or 293 to 299 for a discharge of a hazardous substance on that real property if all of the following conditions are satisfied:

a. The lender, through action or inaction, does not intentionally or negligently cause a new discharge of a hazardous substance or exacerbate an existing discharge of a hazardous substance.

b. Any discharge of a hazardous substance was not from an underground storage tank regulated under 42 USC 6991 to 6991i.

c. The lender notifies the department, in accordance with s. 292.11 (2), of any known discharge of a hazardous substance.

d. The lender conducts an environmental assessment of the real property in accordance with subd. 2. not more than 90 days after the date the lender acquires title to, or possession or control of, the real property and files a complete copy of the environmental assessment with the department not more than 180 days after the date the lender acquires title to, or possession or control of, the real property.

e. For a hazardous substance released on or after the date on which the lender acquires title to, or possession or control of, the real property, the lender is not engaged in the operation of a business at the property, completion of work in progress or other actions associated with conducting the conclusion of the borrower's business.

f. If the discharge of a hazardous substance occurs on or after the date on which the lender acquires title to, or possession or control of, the real property, the lender implements an emergency response action in response to the discharge of the hazardous substance.

2. The environmental assessment under subd. 1. d. shall be performed by a qualified environmental technician or consultant and shall include all of the following:

a. A visual inspection of the real property.

b. A visual inspection and description of the personal property located on the real property that may constitute a hazardous waste or hazardous substance or that has a significant risk of being discharged.

c. A review of the ownership and use history of the real property, including a search of title records showing prior ownership of the real property for a period of 80 years previous to the date of the visual inspection under subd. 2. b.

d. A review of historic and recent aerial photographs of the real property, if available.

e. A review of the environmental licenses, permits or orders issued with respect to the real property.

f. An evaluation of the results of any environmental sampling and analysis that has been conducted.

g. A review to determine if the real property is listed in any of the written compilations of sites or facilities considered to pose a threat to human health or the environment, including the national priorities list under 42 USC 9605 (a) (8) (B); the federal environmental protection agency's information system for the comprehensive environmental response, compensation and liability act, 42 USC 9601 to 9675, (CERCLIS); the department's most recent Wisconsin remedial response site evaluation report, including the inventory of sites or facilities which may cause or threaten to cause environmental pollution required by s. 292.31 (1) (a); and the department's registry of abandoned landfills.

h. The collection and analysis of representative samples of soil or other materials in the ground that are suspected of being contaminated based on observations made during a visual inspection of the real property or based on aerial photographs, or other information available to the lender, including stained or discolored soil or other materials in the ground and including soil or materials in the ground in areas with dead or distressed vegetation. The collection and analysis shall identify contaminants in the soil or other materials in the ground and shall quantify concentrations.

i. The collection and analysis of representative samples of unknown wastes or potentially hazardous substances found on the real property and the determination of concentrations of hazardous waste and hazardous substances found in tanks, drums or other containers or in piles or lagoons on the real property.

3. An environmental assessment filed under subd. 1. d. does not constitute notice required under s. 292.11 (2).

(d) *Personal property and fixtures.* A lender that enforces a security interest in personal property or fixtures at a particular location, filed under ch. 409, and that does not acquire title to, or possession or control of, the real property at that location, except for purposes of protecting and removing personal property or fixtures, is not subject to s. 292.11 (3), (4) and (7) (b) and (c) and is not liable under this chapter for a discharge of a hazardous substance on that real property if all of the following conditions are satisfied:

1. Not more than 30 days after entry onto the real property where the personal property or fixtures are located, the lender notifies the department and the borrower of any decision not to accept specific personal property or fixtures.

2. Not more than 30 days after entry onto the real property where the personal property or fixtures are located, the lender provides the department with a written general description of the personal property or fixtures, the location of the personal property or fixtures on the real property and the location of the real property by street address.

3. The lender, within its ability to do so, permits reasonable access to the personal property or fixtures to the department or the borrower or others acting on the borrower's behalf.

4. The lender does not engage in the operation of a business at the location of the personal property or fixtures, completion of work in progress or other actions associated with conducting the conclusion of the borrower's business except for actions that are undertaken to protect the property and are approved by the department in writing.

(e) *Rules; approvals.* The department may promulgate rules further specifying the activities to be carried out by a lender for the environmental assessment required under par. (c) 1. d. The department may not, by rule, require a lender to undertake sampling and analysis beyond that required under par. (c) 2. h. and i. in order to determine the degree and extent of contamination or require a lender to perform any remedial action to clean any discharge. The department may approve, by rule or in a site−specific approval, the use of reliable methods of identification other than the collection and laboratory analysis of samples.

(2) RESPONSIBILITY OF REPRESENTATIVES. (a) A representative who acquires title to, or possession or control of, real or personal property is not personally liable under this chapter for a discharge of a hazardous substance if all of the following circumstances apply:

1. The representative acquires title to, or possession or control of, the real or personal property in the capacity of a representative.

2. The representative, through action or inaction, does not knowingly, wilfully or recklessly cause a discharge of a hazardous substance.

3. The representative does not physically cause a discharge of a hazardous substance.

4. The representative does not have a beneficial interest in a trust, estate or similar entity that owns, possesses or controls the real or personal property.

5. The representative does not knowingly, wilfully or recklessly fail to notify the department in accordance with s. 292.11 (2) of the discharge of a hazardous substance.

(b) Paragraph (a) does not apply to any of the following:

1. A representative that knew or should have known that the trust, estate or similar entity for which the representative is acting as a representative was established, or that assets were transferred to the trust, estate or similar entity, in order to avoid responsibility for a discharge of a hazardous substance.

2. A representative that fails to act in good faith to cause the trust, estate or similar entity for which the representative is acting as a representative to take the actions described in s. 292.11 (3) or to reimburse the department under s. 292.11 (7) (b). It is not a lack of good faith for a representative to resign as representative, to seek a court order directing the representative to act or refrain from acting or to challenge the department by any legal means.

(c) This subsection does not limit the responsibility of any trust, estate or similar entity to take the actions required under s. 292.11 (2), (3), (4) or (7) (c) or any other provision of this chapter or to reimburse the department under s. 292.11 (7) (b).

History: 1995 a. 227 s. 708, 709, 993.

292.31 Environmental repair. (1) INVENTORY; ANALYSIS; HAZARD RANKING. (a) *Inventory.* 1. The department shall compile and maintain an inventory of sites or facilities which may cause or threaten to cause environmental pollution. In compiling the inventory, the department shall collect all relevant information about a site or facility which is or may become available. No later than January 1, 1992, the department shall publish the initial inventory of sites or facilities. Every 4 years, beginning no later than January 1, 1996, the department shall publish a revised inventory of sites or facilities.

2. The department shall publish the initial inventory and each revised inventory as a class 1 notice under ch. 985 in the official state newspaper under s. 985.04 or, if none exists, in a major newspaper with statewide circulation. The notice shall include a statement that the list is not subject to judicial review.

3. The decision of the department to include a site or facility on the inventory or exclude a site or facility from the inventory is not subject to judicial review.

4. Notwithstanding s. 227.01 (13) or 227.10 (1), the list of sites or facilities which results from the inventory is not a rule.

(b) *Investigation; analysis.* 1. The department may take direct action under subd. 2. or 3. or may enter into a contract with any person to take the action. The department may take action under subd. 2. or 3. regardless of whether a site or facility is included on the inventory under par. (a) or the hazard ranking list under par. (c).

2. The department may conduct an investigation, analysis and monitoring of a site or facility and areas surrounding the site or facility to determine the existence and extent of actual or potential environmental pollution from the site or facility including, but not limited to, monitoring by means of installing test wells or by testing water supplies. The department may conduct an investigation to identify persons who are potentially responsible for actual or potential environmental pollution from a site or facility. If the department conducts an investigation to identify persons who are potentially responsible for actual or potential environmental pollution from a site or facility, the department shall make a reasonable effort to identify as many persons as possible responsible for the environmental pollution.

3. The department may determine whether a site or facility presents a substantial danger to public health or welfare or the environment and evaluate the magnitude of the danger.

(c) *Hazard ranking.* 1. The department shall promulgate by rule criteria for determining the ranking of sites and facilities which are included in the inventory under par. (a), based on the degree to which sites or facilities present a substantial danger to public health or welfare or the environment and the potential urgency of taking remedial action. To the extent applicable, the criteria shall be based on the population at risk, the potential for contamination of drinking water supplies, the potential for other direct human contact, the potential for destruction of sensitive ecosystems, the hazard potential of the hazardous substances which may be released and other appropriate factors. The department is not required to use hazard ranking criteria promulgated by the federal environmental protection agency under 42 USC 9601, et seq.

2. From time to time, the department shall issue documents, consistent with the criteria in subd. 1., which list the hazard ranking of sites and facilities which are included in the inventory under par. (a). The hazard ranking list shall include in a single category those sites or facilities determined by the department to present a

substantial danger to public health or welfare or the environment. The department may include subcategories in the hazard ranking list which group together, without assigning a specific degree of risk and without establishing an individual hazard ranking, sites or facilities which do not present a substantial danger to public health or welfare or the environment. No later than January 1, 1994, the department shall complete the hazard ranking of all sites or facilities which are included in the initial inventory compiled under par. (a). Notwithstanding s. 227.01 (13) or 227.10 (1), documents issued under this subdivision are not rules.

3. The department shall publish the hazard ranking list and any amendments to the hazard ranking list as a class 1 notice under ch. 985 in the official state newspaper under s. 985.04 or, if none exists, in a major newspaper with statewide circulation. The notice shall invite the submission of written comments within the 30−day period after the notice is published. The notice shall include a description of the procedure for requesting a public hearing and a statement that the list is not subject to judicial review.

4. Within 30 days after the hazard ranking list or any amendments to the hazard ranking list are published, any person may submit to the department a request for a public hearing. If a hearing is requested within the 30−day period, the department shall publish a notice of the hearing, at least 10 days prior to the hearing, as a class 1 notice under ch. 985 in the official state newspaper under s. 985.04 or, if none exists, in a major newspaper with statewide circulation. The department shall conduct the public hearing within 90 days after the hearing is requested. The department may publish a notice and conduct a public hearing if a request is received after the 30−day period. Notwithstanding s. 227.42, the hearing under this paragraph shall not be conducted as a contested case.

5. The decision of the department concerning the hazard ranking assigned to a site or facility is not subject to judicial review.

(d) *Access to information.* Upon the request of any officer, employe or authorized representative of the department, 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 the department shall provide the officer, employe or authorized representative access to any records or documents in that person's custody, possession or control which relate to:

1. The type and quantity of waste generated, transported, treated or stored which was disposed of at the site or facility and the dates of these activities.

2. The identity of persons who generated, transported, treated or stored waste which was disposed of at the site or facility.

3. The identity of subsidiary or parent corporations, as defined in 292.31 (8) (a) 3., of persons who generated, transported, treated or stored waste which was disposed of at the site or facility.

(2) ENVIRONMENTAL RESPONSE PLAN. The department shall promulgate by rule a waste facility environmental response plan. The plan shall contain the following provisions:

(a) Methods for preparing the inventory and conducting the analysis under sub. (1).

(b) Methods for remedial action under sub. (3).

(c) Methods and criteria for determining the appropriate extent of remedial action under sub. (3).

(d) Means of ensuring that the costs of remedial action are appropriate in relation to the associated benefits over the period of potential human exposure to substances released by the site or facility.

(e) Appropriate roles and responsibilities under this section for federal, state and local governments and for interstate and nongovernmental entities.

(f) Means of making the most effective use of the grant program under s. 292.61 so as to encourage the greatest number of political subdivisions to undertake remedial action on property that they own.

(3) ENVIRONMENTAL REPAIR. (b) *Department authority.* 1. The department may take direct action under subds. 2. to 9. or may enter into a contract with any person to take the action.

2. The department may take action to avert potential environmental pollution from the site or facility.

3. The department may repair the site or facility or isolate the waste.

4. The department may abate, terminate, remove and remedy the effect of environmental pollution from the site or facility.

5. The department may restore the environment to the extent practicable.

6. The department may establish a program of long−term care, as necessary, for a site or facility which is repaired or isolated.

7. The department may provide temporary or permanent replacements for private water supplies damaged by a site or facility. In this subdivision, "private water supply" means a well which is used as a source of water for humans, livestock, as defined in s. 95.80 (1) (b), or poultry.

8. The department may assess the potential health effects of the occurrence, not to exceed $10,000 per occurrence.

9. The department may take any other action not specified under subds. 2. to 8. consistent with this subsection in order to protect public health, safety or welfare or the environment.

(c) *Sequence of remedial action.* In determining the sequence for taking remedial action under this subsection, the department shall consider the hazard ranking of each site or facility, the amount of funds available, the information available about each site or facility, the willingness and ability of an owner, operator or other responsible person to undertake or assist in remedial action, the availability of federal funds under 42 USC 9601, et seq., and other relevant factors. The department shall give the highest priority to remedial action at sites or facilities which have caused contamination of a municipal water system in a town with a population greater than 10,000. If any such site or facility is eligible for federal funds under 42 USC s. 9601 to 9675, but the federal funds will not be available before January 1, 2000, the department shall proceed with remedial action using state funds.

(cm) *Remedial action schedule.* The department shall commence remedial action as required under this paragraph for sites or facilities which are included on the hazard ranking list and are determined to present a substantial danger to public health or welfare or the environment. The department shall commence remedial action at no less than 2 of the sites or facilities by January 1, 1989. The department shall commence remedial action at all of the sites or facilities by January 1, 2000. After January 1, 1989 and before January 1, 2000, the department shall annually commence remedial action at no less than 2 of the sites or facilities.

(d) *Emergency responses.* Notwithstanding rules promulgated under this section, the hazard ranking list, the considerations for taking action under par. (c) or the remedial action schedule under par. (cm), the department may take emergency action under this subsection and subs. (1) and (7) at a site or facility if delay will result in imminent risk to public health or safety or the environment. The department is not required to hold a hearing under par. (f) if emergency action is taken under this paragraph. The decision of the department to take emergency action is a final decision of the agency subject to judicial review under ch. 227.

(e) *Access to property.* Any officer, employe or authorized representative of the department may enter onto any site or facility and areas surrounding the site or facility at reasonable times and upon notice to the owner or occupant to take action under this section. Notice to the owner or occupant is not required if the delay required to provide this notice is likely to result in an imminent risk to public health or welfare or the environment.

(f) *Notice; hearing.* The department shall publish a class 1 notice, under ch. 985, prior to taking remedial action under this subsection and subs. (1) and (7), which describes the proposed remedial action and the amount and purpose of any proposed expenditure. Except as provided under par. (d), the department shall provide a hearing to any person who demands a hearing within 30 days after the notice is published for the purpose of determining whether the proposed remedial action and any expenditure is within the scope of this section and is reasonable in relation to the cost of obtaining similar materials and services. The department is not required to conduct more than one hearing for the remedial action proposed at a single site or facility. Notwithstanding s. 227.42, the hearing shall not be conducted as a contested case. The decision of the department to take remedial action under this section is a final decision of the agency subject to judicial review under ch. 227.

(4) MONITORING COSTS AT NONAPPROVED FACILITIES OWNED OR OPERATED BY MUNICIPALITIES. Notwithstanding the inventory, analysis and hazard ranking under sub. (1), the environmental response plan prepared under sub. (2) or the environmental repair authority, remedial action sequence and emergency response requirements under sub. (3), the department shall pay that portion of the cost of any monitoring requirement which is to be paid under s. 289.31 (7) (f) from the appropriation under s. 20.370 (2) (dv) prior to making other payments from that appropriation.

(5) MUNICIPAL INCINERATOR ASH TESTING. Notwithstanding the inventory, analysis and hazard ranking under sub. (1), the environmental response plan prepared under sub. (2), the environmental repair authority, remedial action sequence and emergency response requirements under sub. (3), or the monitoring costs under sub. (4), the department shall pay the cost incurred by a municipality after June 30, 1986, and before January 30, 1988, for testing required to determine whether the ash from a municipally owned incinerator is hazardous. The department shall make payments under this subsection from the appropriation under s. 20.370 (2) (dv) prior to making other payments from that appropriation.

(6) PAYMENTS FROM THE INVESTMENT AND LOCAL IMPACT FUND. The department may expend moneys received from the investment and local impact fund for the purposes specified under sub. (3) only for approved mining facilities and only if moneys in the environmental fund that are available for environmental repair are insufficient to make complete payments. The amount expended by the department under this subsection may not exceed the balance in the environmental fund that is available for environmental repair at the beginning of that fiscal year or 50% of the balance in the investment and local impact fund at the beginning of that fiscal year, whichever amount is greater.

(7) IMPLEMENTING THE FEDERAL SUPERFUND ACT. (a) The department may advise, consult, assist and contract with other interested persons to take action to implement the federal comprehensive environmental response, compensation and liability act of 1980, 42 USC 9601, et seq., in cooperation with the federal environmental protection agency. These actions include all of the actions under subs. (1) to (3). The department may enter into agreements with the federal environmental protection agency.

(b) The department may expend moneys from the appropriations under ss. 20.370 (2) (dv) and 20.866 (2) (tg) as required under 42 USC 9601, et seq. The department shall promulgate by rule criteria for the expenditure of moneys from the appropriations under ss. 20.370 (2) (dv) and 20.866 (2) (tg). The criteria shall include consideration of the amount of moneys available in the appropriations under ss. 20.370 (2) (dv) and 20.866 (2) (tg), the moneys available from other sources for the required sharing of costs, the differences between public and private sites or facilities, the potential for cost recovery from responsible parties and any other appropriate factors.

(c) 1. The department may require a municipality to pay a reasonable share of the amount expended by the department for a project under par. (b). The department shall base any share charged to a municipality for a project under par. (b) on the following factors:

a. The municipality's responsibility for the site or facility affected by the project.

b. The benefit that the municipality receives from the project.

c. The municipality's ability to pay for the project.

2. The total amount charged to all municipalities who are charged for the project may not exceed 50% of the amount expended by the department under par. (b) for the project.

3. The department shall promulgate rules establishing criteria for determining the responsibility, for the purposes of this subsection, of a municipality for a site or facility affected by the project under par. (b); the benefit a municipality receives from a project under par. (b); and the ability of a municipality to pay for a project under par. (b).

4. All moneys received under this paragraph shall be credited to the environmental fund for environmental repair.

(8) RECOVERY OF EXPENDITURES. (a) *Definitions.* In this subsection:

1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.

3. "Subsidiary or parent corporation" means any business entity, including a subsidiary, parent corporation or other business arrangement which has elements of common ownership or control or uses a long−term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility.

(b) *Applicability.* 1. This subsection does not apply to the release or discharge of a substance which is in compliance with a permit, license, approval, special order, waiver or variance issued under this chapter or ch. 30, 31 or 283, or under corresponding federal statutes or regulations.

2. This subsection applies to an owner who purchases the land where a site or facility is located only if the owner knew or should have known of the existence of the site or facility at the time of purchase.

3. This subsection does not apply to the release or discharge of high−volume industrial waste used in a highway improvement project under s. 84.078.

(c) *Persons responsible.* 1. An owner or operator is responsible for conditions at a site or facility which presents a substantial danger to public health or welfare or the environment if the person knew or should have known at the time the disposal occurred that the disposal was likely to result in or cause the release of a substance into the environment in a manner which would cause a substantial danger to public health or welfare or to the environment.

2. Any person, including an owner or operator and including a subsidiary or parent corporation which is related to the person, is responsible for conditions at a site or facility which present a substantial danger to public health or welfare or the environment if:

a. The person violated any applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation caused or contributed to the condition at the site or facility; or

b. The person's action related to the disposal caused or contributed to the condition at the site or facility and would result in liability under common law in effect at the time the disposal

occurred, based on standards of conduct for that person at the time the disposal occurred.

(d) *Right of action.* A right of action shall accrue to the state against any person responsible under par. (c) if an expenditure is made for environmental repair at the site or facility or if an expenditure is made under sub. (7).

(f) *Action to recover costs.* The attorney general shall take action as is appropriate to recover expenditures to which the state is entitled.

(g) *Disposition of funds.* If the original expenditure was made from the environmental repair fund, under s. 25.46, 1987 stats., or the environmental fund, the net proceeds of the recovery shall be paid into the environmental fund for environmental repair. If the original expenditure was made from the investment and local impact fund, the net proceeds of the recovery shall be paid into the investment and local impact fund.

(h) *Cleanup agreements; waiver of cost recovery.* The department and any person who is responsible under par. (c) may enter into an agreement regarding actions which the department is authorized to take under sub. (3). In the agreement, the department may specify those actions under sub. (3) which the responsible person may take. As part of the agreement, the department may agree to reduce the amount which the state is entitled to recover under this subsection or to waive part or all of the liability which the responsible person may have under this subsection.

(i) *Lien.* Any expenditures made by the department under sub. (1), (3) or (7) shall constitute a lien upon the property for which the expenses are incurred, as provided in s. 292.81.

(9) RELATION TO OTHER LAWS. The department shall coordinate its efforts under this section with the federal environmental protection agency acting under the comprehensive environmental response, compensation and liability act, 42 USC 9601, et seq. The department may not duplicate activities or efforts of the federal environmental protection agency if such duplication is prohibited under 42 USC 9601, et seq.

(10) LIABILITY. (a) No common law liability, and no statutory liability which is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(b) If a person takes any remedial action at a site or facility, whether or not an agreement is entered into with the department under sub. (8) (h), any agreement and the action taken are not evidence of liability or an admission of liability for any potential or actual environmental pollution.

History: 1995 a. 227 ss. 605 to 610, 612; 1995 a. 378 s. 45.

292.35 Political subdivision negotiation and cost recovery. (1) DEFINITIONS.

In this section:

(b) "Generator" means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(c) "Owner or operator" means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.

2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(d) "Political subdivision" means a city, village, town or county.

(e) "Responsible party" means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) "Site or facility" has the meaning given in s. 292.61 (1) (b).

(g) "Transporter" means a person who accepts or accepted a hazardous substance for transport to a site or facility.

(2) APPLICABILITY. This section only applies to a site or facility if the site or facility is owned by a political subdivision. This section does not apply to a landfill until January 1, 1996.

(2g) IDENTIFICATION OF RESPONSIBLE PARTIES. (a) A political subdivision that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the political subdivision regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employe or authorized representative of the political subdivision, or pursuant to a special inspection warrant under s. 66.122, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employe or authorized representative access to any records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.

2. The identity of any person who may be a responsible party.

3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

(c) The political subdivision shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

(2r) PRELIMINARY REMEDIAL ACTION PLAN. (a) The political subdivision shall, in consultation with the department, prepare a draft remedial action plan.

(b) Upon completion of the draft remedial action plan, the political subdivision shall send written notice to all responsible parties identified by the political subdivision, provide public notice and conduct a public hearing on the draft remedial action plan. The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the political subdivision shall solicit testimony on whether the draft remedial action plan is the least costly method of meeting the standards for remedial action promulgated by the department by rule. The political subdivision shall accept written comments for at least 30 days after the close of the public hearing.

(c) Upon the conclusion of the period for written comment, the political subdivision shall prepare a preliminary remedial action plan, taking into account the written comments and comments received at the public hearing and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications.

(3) OFFER TO SETTLE; SELECTION OF UMPIRE. (a) Upon receiving the department's approval of the preliminary remedial action plan, the political subdivision shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the political subdivision, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served. The political subdivision shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.

2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the political subdivision.

3. The location and availability of documents that support the claim of the political subdivision against the responsible party.

4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.

5. A description of the procedures under this section.

(b) The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). None of the umpires may be employes of the department. Upon receiving notice from a political subdivision under par. (a), the secretary or his or her designee shall select an umpire from the list and inform the political subdivision and responsible parties of the person selected.

(c) Within 10 days after receiving notice of the umpire selected by the department under par. (b), the political subdivision may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. (b), a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is unacceptable shall be considered acceptance. If all responsible parties identified by the political subdivision indicate that they do not intend to participate in the negotiation, the department shall inform the political subdivision and the political subdivision shall cease further action under this section.

(d) Upon receiving notice under par. (c) that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the political subdivision and responsible parties of the persons selected.

(e) Within 10 days after receiving notice of the umpires selected by the department under par. (d), the political subdivision or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the political subdivision or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

(4) NEGOTIATION PROCESS. (a) The umpire, immediately upon being appointed, shall contact the department, the political subdivision and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the political subdivision and the responsible parties to attempt to reach an agreement on the design and implementation of the remedial action plan and the contribution of funds by the political subdivision and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The political subdivision and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

(5) AGREEMENT IN NEGOTIATION. The political subdivision and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the political subdivision and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION. (a) If the political subdivision and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the design and implementation of the remedial action plan and the contribution of funds for investigation and remedial action by the political subdivision and all responsible parties that were identified by the political subdivision and that did not reach an agreement under sub. (5), whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the recommendation to the department for its approval within 20 days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the political subdivision and all responsible parties identified by the political subdivision.

(b) The political subdivision and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the political subdivision rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION. A responsible party that enters into an agreement under sub. (5) with a political subdivision or that accepts the umpire's recommendation under sub. (6), if the political subdivision does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the political subdivision for any additional costs of the investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING WITH AN AGREEMENT OR RECOMMENDATION. (a) In this subsection:

1. "Interest" means interest at the annual rate of 12%, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A political subdivision is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The political subdivision accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the political subdivision recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The political subdivision and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the political subdivision recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a political subdivision if the responsible party accepts the recommendation of an umpire under sub. (6), the political subdivision rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the political subdivision institutes an action under sub. (9) against the responsible party and the political subdivision recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) LIABILITY FOR REMEDIAL ACTION COSTS. (a) 1. This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) 1. Except as provided in pars. (bm), (br) and (e), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred by a political subdivision for remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall accrue to a political subdivision against the responsible party for costs listed in this subdivision.

2. Except as provided in pars. (bm), (br) and (e), sub. (7) and s. 292.21, a responsible party is liable for a portion of any unreimbursed costs, as determined under pars. (c) to (e), incurred by this state in approving and supervising a remedial action funded under s. 292.61 (3) and for the costs of a grant under s. 292.61 (3). A right of action shall accrue to this state against the responsible party for costs listed in this subdivision.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph.

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.

2. The amount of hazardous substances involved.

3. The degree of toxicity of the hazardous substances involved.

4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.

5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.

6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employe or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under subd. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

History: 1995 a. 227 s. 613 to 616.

292.37 Confidentiality of records. (1) RECORDS. Except as provided under sub. (2), any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35 are public records subject to s. 19.21.

(2) CONFIDENTIAL RECORDS. (a) *Application.* An owner or operator of a solid waste facility may seek confidential treatment of any records or other information furnished to or obtained by the department in the administration of ss. 292.31 and 292.35.

(b) *Standards for granting confidential status.* Except as provided under par. (c), the department shall grant confidential status

for any records or information received by the department and certified by the owner or operator of the solid waste facility as relating to production or sales figures or to processes or production unique to the owner or operator of the solid waste facility or which would tend to adversely affect the competitive position of the owner or operator if made public.

(c) *Emission data; analyses and summaries.* The department may not grant confidential status for emission data. Nothing in this subsection prevents the department from using records and other information in compiling or publishing analyses or summaries relating to the general condition of the environment if the analyses or summaries do not identify a specific owner or operator or the analyses or summaries do not reveal records or other information granted confidential status.

(d) *Use of confidential records.* Except as provided under par. (c) and this paragraph, the department or the department of justice may use records and other information granted confidential status under this subsection only in the administration and enforcement of ss. 292.31 and 292.35. The department or the department of justice may release for general distribution records and other information granted confidential status under this subsection if the owner or operator expressly agrees to the release. The department or the department of justice may release on a limited basis records and other information granted confidential status under this subsection if the department or the department of justice is directed to take this action by a judge or hearing examiner under an order which protects the confidentiality of the records or other information. The department or the department of justice may release to the U.S. environmental protection agency, or its authorized representative, records and other information granted confidential status under this subsection if the department or the department of justice includes in each release of records or other information a request to the U.S. environmental protection agency, or its authorized representative, to protect the confidentiality of the records or other information.

History: 1995 a. 227 s. 993.

292.41 Abandoned containers. (1) DEFINITION. In this section, "abandoned container" means any container which contains a hazardous substance and is not being monitored and maintained.

(2) APPLICABILITY. (a) This section does not apply to abandoned containers which are located in an approved facility or a nonapproved facility.

(b) Action by the department under this section is not subject to s. 292.31.

(3) CONTINGENCY PLAN. (a) After consultation with other affected federal, state and local agencies and private organizations, the department shall establish by rule criteria and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

(b) The contingency plan shall establish procedures and techniques for locating, identifying, removing and disposing of abandoned containers.

(4) REMOVAL OR OTHER EMERGENCY ACTION. The department or its authorized representative may contain, remove or dispose of abandoned containers or take any other emergency action which it deems appropriate under the circumstances.

(5) ACCESS TO PROPERTY AND RECORDS. Any officer, employe or authorized representative of the department, upon notice to the owner or occupant, may enter onto any property, premises or place at any time for the purposes of sub. (3) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to abandoned container management for the purpose of ascertaining the state of compliance with this section and the rules promulgated under this section. Notice to the owner or occupant is not required if the delay in providing the notice is likely to result in imminent risk to public health or welfare or the environment.

(6) ABANDONED CONTAINERS; APPROPRIATIONS. (a) The department may utilize moneys appropriated under s. 20.370 (2) (dv) and (my) in taking action under sub. (4). The department shall utilize these moneys to provide for the procurement, maintenance and storage of necessary equipment and supplies, personnel training and expenses incurred in locating, identifying, removing and disposing of abandoned containers.

(b) No more than 25% of the total of all moneys available under the appropriation under s. 20.370 (2) (dv) and (my) may be used annually for the procurement and maintenance of necessary equipment during that fiscal year.

(c) The department is entitled to recover moneys expended under this section from any person who caused the containers to be abandoned or is responsible for the containers. The funds recovered under this paragraph shall be deposited into the environmental fund for environmental repair.

(d) Any expenditures made by the department under sub. (4) shall constitute a lien upon the property for which the expenses are incurred, as provided in s. 292.81, if the department is entitled to recover the expenditures from the property owner under par. (c).

History: 1983 a. 410; 1985 a. 29 ss. 1957, 3202 (39); 1987 a. 27, 384; 1989 a. 31; 1991 a. 39; 1993 a. 453; 1995 a. 27; 1995 a. 227 s. 716; Stats. 1995 s. 292.41; 1995 a. 378 s. 46.

292.51 Cooperative remedial action. (1) In this section, "costs of remedying environmental contamination" means costs determined by the department to be necessary to reduce or eliminate environmental contamination and restore the environment, including costs of investigation and of providing public information and education related to reducing or eliminating environmental contamination and restoring the environment.

(2) The department may seek and receive voluntary contributions of funds from a municipality or any other public or private source for all or part of the costs of remedying environmental contamination if the activities being funded are part of a cooperative effort, by the department and the person providing the funds, to remedy that environmental contamination.

(2m) Any person engaged in a cooperative effort with the department that is described in sub. (2) may seek and receive voluntary contributions of funds on behalf of the effort.

(3) Provision of funding under sub. (2) or (2m) is not evidence of liability or an admission of liability for any environmental contamination.

(4) In carrying out its regulatory and enforcement duties, the department may not base its treatment of a person on whether the person did or did not provide funding under sub. (2).

History: 1995 a. 27; 1995 a. 227 s. 824; Stats. 1995 s. 292.51.

292.61 Grants to political subdivisions for investigations and remedial action. (1) DEFINITIONS. In this section:

(a) "Political subdivision" means a city, village, town or county.

(b) "Site or facility" means an approved facility, an approved mining facility, a nonapproved facility, a waste site or a spill site.

(c) "Spill site" means any site where a hazardous substance is discharged on or after May 21, 1978.

(2) GRANTS FOR INVESTIGATIONS. (a) The department may make investigative funding grants from the appropriations under s. 20.866 (2) (tg) to political subdivisions for the investigation of any site or facility owned by a political subdivision in which the soil or groundwater is contaminated by environmental pollution.

(b) The department by rule shall establish the application requirements and grant conditions for an investigative funding grant.

(c) The department may not approve the application for an investigative funding grant for a site or facility that is not a landfill if the political subdivision caused the environmental pollution.

(d) An investigative funding grant shall equal 25% of the cost of the investigation. The political subdivision's share of the costs may include contributions of equipment and labor. No political

subdivision may receive more than 35% of the total amount of funds available for investigative funding grants in any fiscal year.

(e) If sufficient funds are not available to make investigative funding grants to all political subdivisions that are eligible for investigative funding grants, the department shall give a higher priority to investigations with the potential of leading to remedial action resulting in all of the following:

1. The greatest reduction of environmental pollution and of threats to public health.

2. The greatest avoidance of development of currently undeveloped land by making the site or facility available for redevelopment after remedial action.

(f) A political subdivision may use the investigative funding grant funds for any of the following:

1. Investigation to determine the nature and scope of environmental pollution and the appropriate remedial action.

2. Planning the remedial action.

3. Identifying and negotiating with persons responsible for the environmental pollution, in order to obtain cooperation in or payment for the investigation and any remedial action.

4. Conducting interim remedial action approved by the department.

(3) GRANTS FOR REMEDIAL ACTION. (a) The department may make remedial action grants from the appropriations under s. 20.866 (2) (tg) to political subdivisions for remedial action on any site or facility owned by a political subdivision in which the soil or groundwater is contaminated by environmental pollution.

(b) The department by rule shall establish the application requirements and grant conditions for a remedial action grant. The department shall require the political subdivision to include in its application all of the following:

1. The results of the investigation to determine the nature and scope of environmental pollution at the site or facility.

2. A remedial action plan.

3. Comprehensive plans for the redevelopment of the property after the remedial action is completed.

4. A statement of whether the political subdivision intends to use the cost recovery procedure in s. 292.35. If the political subdivision indicates in its application that it intends to use the cost recovery procedure in s. 292.35, the department may not approve the application for a remedial action grant until the political subdivision completes the procedures under s. 292.35 (2g) and (2r).

(c) The department may not approve the application for a remedial action grant for a site or facility that is not a landfill if the political subdivision caused the environmental pollution.

(d) The department shall require the political subdivision to do all of the following as a condition of receiving a remedial action grant:

1. Make a commitment to seek contribution of funds from persons legally responsible for the environmental pollution.

2. Make a commitment to redevelop the property or to sell or lease it for the purposes of redevelopment, if appropriate.

(e) Upon reviewing the application, if the department determines that the political subdivision is eligible to receive a remedial action grant and that funds are available to make a remedial action grant, it shall notify the political subdivision.

(f) A remedial action grant shall equal 25% of the eligible costs of the remedial action. The political subdivision's share of the costs may include contributions of equipment and labor. No political subdivision may receive more than 35% of the total amount of funds allocated for remedial action grants in any fiscal year.

(g) If sufficient funds are not available to make remedial action grants to all political subdivisions that are eligible for remedial action grants, the department shall give a higher priority to remedial actions that will result in all of the following:

1. The greatest potential to reduce environmental pollution and threats to public health.

2. The greatest avoidance of development of currently undeveloped land by making the site or facility available for redevelopment after remedial action.

(4) AMOUNT OF FUNDING. In each fiscal year, the department shall submit to the joint committee on finance a proposal for the total amount of grants to be made in each of the following categories: investigative funding grants for waste sites; investigative funding grants for landfills; remedial action grants for waste sites; and remedial action grants for landfills. The department may not issue a determination of grant eligibility under this section in any fiscal year until the joint committee on finance has approved the proposal for that fiscal year and may not issue a determination of grant eligibility under this section under an amendment to the proposal until the joint committee on finance has approved the amendment.

(5) SUBROGATION. The state is subrogated to the rights of a political subdivision that obtains an award under this section in an amount equal to the award. All moneys recovered under this subsection shall be credited to the environmental fund for environmental repair.

History: 1995 a. 227 s. 611.

292.81 Notice; lien. (1) In this section, "valid prior lien" means a purchase money real estate mortgage that is recorded before the lien is filed under this section, including any extension or refinancing of that purchase money mortgage, or an equivalent security interest, or a 2nd or subsequent mortgage for home improvement or repair that is recorded before the lien is filed under this section, including any extension or refinancing of that 2nd or subsequent mortgage.

(2) (a) Before incurring expenses under s. 292.11, 292.31 (1), (3) or (7) or 292.41 (4) with respect to a property, the department shall provide to the current owner of the property and to any mortgagees of record a notice containing all of the following:

1. A brief description of the property for which the department expects to incur expenses under s. 292.11, 292.31 (1), (3) or (7) or 292.41 (4).

2. A brief description of the types of activities that the department expects may be conducted at the property under s. 292.11, 292.31 (1), (3) or (7) or 292.41 (4).

3. A statement that the property owner could be liable for the expenses incurred by the department.

4. A statement that the department could file a lien against the property to recover the expenses incurred by the department.

5. An explanation of whom to contact in the department to discuss the matter.

(b) The department shall provide notice under par. (a) by certified mail, return receipt requested, to the property owner and to each mortgagee of record at the addresses listed on the recorded documents. If the property owner is unknown or if a mailed notice is returned undelivered, the department shall provide the notice by publication thereof as a class 3 notice under ch. 985.

(c) The failure to provide the notice or include information required under this subsection does not impair the department's ability to file a lien or to seek to establish the property owner's liability for the expenses incurred by the department.

(d) No notice under this subsection is necessary in circumstances in which entry onto the property without prior notice is authorized under s. 292.11 (8) or under s. 292.41 (5).

(3) Any expenditures made by the department under s. 292.11 or 292.31 (1), (3) or (7) or, subject to s. 292.41 (6) (d), under s. 292.41 (4) shall constitute a lien upon the property for which expenses are incurred if the department files the lien with the register of deeds in the county in which the property is located. A lien under this section shall be superior to all other liens that are or have been filed against the property, except that if the property is resi-

dential property, as defined in s. 895.52 (1) (i), the lien may not affect any valid prior lien on that residential property.

(4) (a) Before filing a lien under sub. (3), the department shall give the owner of the property for which the expenses are incurred a notice of its intent to file the lien, as provided in this subsection.

(b) The notice required under par. (a) shall provide all of the following:

1. A statement of the purpose of the lien.
2. A brief description of the property to be affected by the lien.
3. A statement of the expenses incurred by the department.
4. The date on or after which the lien will be filed.

(c) The department shall serve the notice required in par. (a) on the property owner at least 60 days before filing the lien. The notice shall be provided by certified mail, return receipt requested, to the property owner and to each mortgagee of record at the addresses listed on the recorded documents. If the property owner is unknown or if a mailed notice is returned undelivered, the department shall provide the notice by publication thereof as a class 3 notice under ch. 985.

(d) In the foreclosure of any lien filed under this subsection, ch. 846 shall control as far as applicable unless otherwise provided in this subsection. All persons who may be liable for the expenses incurred by the department may be joined as defendants. The judgment shall adjudge the amount due the department, and shall direct that the property, or so much of the property as is necessary, be sold to satisfy the judgment, and that the proceeds be brought into court with the report of sale to abide the order of the court. If the sum realized at the sale is insufficient after paying the costs of the action and the costs of making the sale, the court shall determine the liability of the defendants for the remaining unreimbursed expenses and costs.

(e) This subsection does not apply if the lien is filed after the department obtains a judgment against the property owner and the lien is for the amount of the judgment.

History: 1995 a. 227 s. 711.

SUBCHAPTER III

ENFORCEMENT; PENALTIES

292.93 Orders. The department may issue orders to effectuate the purposes of ss. 292.31 and 292.35 and enforce the same by all appropriate administrative and judicial proceedings.

History: 1995 a. 227.

292.95 Review of alleged violations; environmental repair and cost recovery. Any 6 or more citizens or any municipality may petition for a review of an alleged violation of s. 292.31 or 292.35 or any rule promulgated or special order, plan approval, license or any term or condition of a license issued under those sections in the following manner:

(1) They shall submit to the department a petition identifying the alleged violator and setting forth in detail the reasons for believing a violation occurred. The petition shall state the name and address of a person within the state authorized to receive service of answer and other papers in behalf of the petitioners and the name and address of a person authorized to appear at a hearing in behalf of the petitioners.

(2) Upon receipt of a petition under this section, the department may:

(a) Conduct a hearing in the matter within 60 days of receipt of the petition. A hearing under this paragraph shall be a contested case under ch. 227. Within 60 days after the close of the hearing, the department shall either:

1. Serve written notice specifying the law or rule alleged to be violated, containing findings of fact, conclusions of law and an order, which shall be subject to review under ch. 227; or
2. Dismiss the petition.

(b) Initiate action under s. 292.98.

(3) If the department determines that a petition was filed maliciously or in bad faith, it shall issue a finding to that effect, and the person complained against is entitled to recover expenses on the hearing in a civil action.

History: 1995 a. 227.

292.98 Violations and enforcement; environmental repair and cost recovery. (1) (a) If the department has reason to believe that a violation of s. 292.31 or 292.35 or any rule promulgated or special order, plan approval, or any term or condition of a license issued under those sections occurred, it may:

1. Cause written notice to be served upon the alleged violator. The notice shall specify the law or rule alleged to be violated, and contain the findings of fact on which the charge of violation is based, and may include an order that necessary corrective action be taken within a reasonable time. This order shall become effective unless, no later than 30 days after the date the notice and order are served, the person named in the notice and order requests in writing a hearing before the department. Upon such request, the department shall after due notice hold a hearing. Instead of an order, the department may require that the alleged violator appear before the department for a hearing at a time and place specified in the notice and answer the charges complained of; or
2. Initiate action under s. 299.95.

(b) If after such hearing the department finds that a violation has occurred, it shall affirm or modify its order previously issued, or issue an appropriate order for the prevention, abatement or control of the problems involved or for the taking of other corrective action as may be appropriate. If the department finds that no violation has occurred, it shall rescind its order. Any order issued as part of a notice or after hearing may prescribe one or more dates by which necessary action shall be taken in preventing, abating or controlling the violation.

History: 1995 a. 227.

292.99 Penalties. (1) Any person who violates this chapter or any rule promulgated or any plan approval, license or special order issued under this chapter shall forfeit not less than $10 nor more than $5,000 for each violation. Each day of continued violation is a separate offense. While an order is suspended, stayed or enjoined, this penalty does not accrue.

(2) In addition to the penalties provided under sub. (1), the court may award the department of justice the reasonable and necessary expenses of the investigation and prosecution of the violation, including attorney fees. The department of justice shall deposit in the state treasury for deposit into the general fund all moneys that the court awards to the department or the state under this subsection. Ten percent of the money deposited in the general fund that was awarded under this subsection for the costs of investigation and the expenses of prosecution, including attorney fees, shall be credited to the appropriation account under s. 20.455 (1) (gh).

History: 1995 a. 227.