

State of Wisconsin



2015 Senate Bill 545

Date of enactment: **March 1, 2016**
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2015 WISCONSIN ACT 204

AN ACT to renumber and amend 292.12 (1) (c) and 292.15 (2) (am); **to amend** 289.31 (10), 292.12 (1) (a), 292.12 (2) (intro.), 292.12 (3) (a), 292.12 (3) (b) 1., 292.12 (4), 292.12 (5) (title), 292.12 (5) (a), 292.12 (5) (b), 292.12 (6), 292.15 (2) (a) (intro.), 292.15 (2) (b) (intro.), 292.15 (2) (b) 1., 292.15 (2) (b) 2., 292.15 (2) (b) 3., 292.15 (2) (b) 5., 292.15 (2) (c), 292.15 (2) (e), 292.25 (1) (e) and 292.68 (1) (b); and **to create** 292.01 (1s), 292.01 (17g), 292.01 (17m), 292.12 (2) (d), 292.12 (5) (c), 292.12 (5) (d), 292.12 (5m), 292.15 (2) (af), 292.15 (2) (am) 2m., 292.15 (2) (d), 292.15 (6m), 292.15 (7) (f) and 292.25 (1) (f) of the statutes; **relating to:** action required to be taken in response to a discharge of hazardous substances, exemption from liability for certain hazardous substance discharges, providing an exemption from emergency rule procedures, and granting rule-making authority.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 289.31 (10) of the statutes is amended to read:

289.31 (10) VOLUNTARY PARTY CERTIFICATE OF COMPLETION. When the department issues a certificate of completion under s. 292.15 (2) (a) 3., (ae) 3., (af) 3., or (ag) 2. for all or a portion of a solid waste facility with an operating license under this section, the operating license for the solid waste facility or the portion of the solid waste facility covered by the certificate of completion is terminated.

SECTION 2. 292.01 (1s) of the statutes is created to read:

292.01 (1s) "Contaminated sediment" means sediment that contains a hazardous substance.

SECTION 3. 292.01 (17g) of the statutes is created to read:

292.01 (17g) "Sediment" means particles in the bed of a navigable water up to the ordinary high-water mark that are derived from the erosion of rock, minerals, soil,

and biological materials and from chemical precipitation from the water column and that are transported or deposited by water.

SECTION 4. 292.01 (17m) of the statutes is created to read:

292.01 (17m) "Sediment cover" means a layer of uncontaminated sand or similar material that is deposited on top of contaminated sediment.

SECTION 5. 292.12 (1) (a) of the statutes is amended to read:

292.12 (1) (a) "Agency with administrative authority" means the department of agriculture, trade and consumer protection with respect to a site over which it has jurisdiction under s. 94.73 (2) or the department of natural resources with respect to a site over which it has jurisdiction under s. ~~292.11 (7)~~ ch. 289, 291, or 292.

SECTION 6. 292.12 (1) (c) of the statutes is renumbered 292.01 (3m) and amended to read:

292.01 (3m) "Engineering control" means an object or action designed and implemented to contain contamination or to minimize the spread of contamination,

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

including a cap or soil cover, or in-place stabilization, but not including a sediment cover.

SECTION 7. 292.12 (2) (intro.) of the statutes is amended to read:

292.12 (2) AGENCY AUTHORITY. (intro.) The agency with administrative authority may do any of the following as a condition of approving an interim action, as defined by the agency with administrative authority by rule, or a remedial action or of issuing a case closure letter if residual contamination remains on a site after the conclusion of an interim action or a remedial action at the site:

SECTION 8. 292.12 (2) (d) of the statutes is created to read:

292.12 (2) (d) If the site is one for which a person is required to take action under sub. (5m) (a), require submission to the agency with administrative authority of any of the following:

1. A satisfactory plan and compliance schedule for satisfying any requirements imposed under par. (a) or (b).
2. Proof of financial responsibility, as determined by the agency with administrative authority by rule, sufficient to pay the costs of complying with a plan approved under subd. 1.

SECTION 9. 292.12 (3) (a) of the statutes is amended to read:

292.12 (3) (a) The department shall maintain a database listing sites for which an interim action that includes the use of an engineering control or a remedial action has been approved or a case closure letter has been issued and that have residual contamination and listing sites for which the department has directed that action be taken under s. 292.11 (9) (e) 4. The department shall make the database available to the public. The department shall include any requirements, limitations, or conditions imposed under sub. (2) (a) to (c), and any information required under sub. (2) (d), in the database, subject to modification under sub. (6), and shall include any action that the department has directed to be taken under s. 292.11 (9) (e) 4.

SECTION 10. 292.12 (3) (b) 1. of the statutes is amended to read:

292.12 (3) (b) 1. If residual contamination remains on a site after the conclusion of an interim action that includes the use of an engineering control or a remedial action at the site, the agency with administrative authority shall request the department to list the site, and any requirements, limitations, or conditions imposed under sub. (2) (a) to (c), and any information required under sub. (2) (d), in the database maintained by the department under par. (a) and, as a condition of approving remedial action or of issuing a case closure letter, shall require the person requesting approval of remedial action or case closure to provide the information necessary for the listing and to pay a fee established by the department for the listing.

SECTION 11. 292.12 (4) of the statutes is amended to read:

292.12 (4) NOTIFICATION OF RESIDUAL CONTAMINATION. Before a person applies for case closure for a site that includes any property that has residual contamination and is not owned by the person, the person shall provide written notification of the residual contamination to the owner of that property. The person shall include in the notice, at a minimum, a description of the type of residual contamination and the location and description of any engineering control or sediment cover on the site.

SECTION 12. 292.12 (5) (title) of the statutes is amended to read:

292.12 (5) (title) COMPLIANCE WITH REQUIREMENTS AND LIMITATIONS AND PROHIBITION ON INTERFERENCE.

SECTION 13. 292.12 (5) (a) of the statutes is amended to read:

292.12 (5) (a) ~~A~~ Except as provided in par. (c) and sub. (5m) (a) and (b), a person who owns property, including a property or site that is listed under sub. (3) (b), shall comply with the requirements described in sub. (2) (a) ~~or~~ and (b) that are imposed by an agency with administrative authority without regard to when the person obtained the property, unless another person has a legally enforceable responsibility to comply with the requirements.

SECTION 14. 292.12 (5) (b) of the statutes is amended to read:

292.12 (5) (b) ~~A~~ Except as provided in par. (c) and sub. (5m) (a) and (b), a person who owns or occupies property, including a property or site that is listed under sub. (3) (b), shall comply with the limitations or conditions described in sub. (2) (c) that are imposed by an agency with administrative authority without regard to when the person obtained or occupied the property.

SECTION 15. 292.12 (5) (c) of the statutes is created to read:

292.12 (5) (c) If another person has entered into and is complying with a legally enforceable agreement to comply with any of the requirements, limitations, or conditions described in sub. (2) (a) to (c) that are applicable to the property and the agreement is included in the database maintained under sub. (3), the person who owns or occupies the property is not required to comply with the requirements, limitations, or conditions included in that agreement.

SECTION 16. 292.12 (5) (d) of the statutes is created to read:

292.12 (5) (d) A person who owns or occupies property, including a property or site that is listed under sub. (3) (b), may not interfere with another person's actions on the property that are required under sub. (2) (a) to (c).

SECTION 17. 292.12 (5m) of the statutes is created to read:

292.12 (5m) COMPLIANCE WITH REQUIREMENTS AND LIMITATIONS RELATED TO CONTAMINATED SEDIMENT AND

PROHIBITION ON INTERFERENCE. (a) Notwithstanding the requirements under sub. (5) (a) and (b), and except as provided in par. (b), a person who is required to take action under s. 292.11 (3), (4), or (7) (b) with respect to contaminated sediment and who takes action that includes the use of an engineering control shall do all of the following:

1. Except as provided in par. (am), comply with the requirements, limitations, and conditions described in sub. (2) (a) to (d) that are imposed by an agency with administrative authority without regard to whether the person owns or occupies the property on which the engineering control is used.

2. If the person does not own or occupy the property on which the engineering control is used, obtain access to the property that allows for the inspection, maintenance, and reinstallation of the engineering control or the removal of the engineering control and contaminated sediment.

(am) If another person has entered into and is complying with a legally enforceable agreement to comply with any of the requirements, limitations, or conditions described in par. (a) 1. and the agreement is included in the database maintained under sub. (3), the person who is required to take action under par. (a) is not required to comply with the requirements, limitations, or conditions included in that agreement.

(ar) A person who owns or occupies property on which an engineering control is used may not interfere with another person's actions on the property that are required under par. (a).

(b) A person who owns property from which a hazardous substance was discharged is not required to comply with sub. (2) (a) to (d) with respect to any other property containing contaminated sediment as a result of that discharge if all of the following apply:

1. The agency with administrative authority determines that the environment, including sediment, has been satisfactorily restored to the extent practicable with respect to the discharge and the harmful effects from the discharge have been minimized.

2. The person is a bona fide prospective purchaser under 42 USC 9601 (40).

3. Another person has entered into and is complying with a legally enforceable agreement to comply with any of the requirements, limitations, or conditions described under sub. (2) (a) to (d) with respect to any other property containing contaminated sediment as a result of that discharge.

4. The agreement under subd. 3. is included in the database maintained under sub. (3).

5. The person submits information that the agency with administrative authority determines is adequate to substantiate that subds. 1. to 4. are satisfied.

(c) The agency with administrative authority may negotiate and enter into an agreement containing a schedule for conducting actions required under sub. (2) with

any person required to take action under sub. (2) with respect to contaminated sediment.

SECTION 18. 292.12 (6) of the statutes is amended to read:

292.12 (6) MODIFICATION OF REQUIREMENTS. A person may request the agency with administrative authority over a site to change or eliminate a requirement, limitation, or condition that it imposed under sub. (2) (a) to ~~(e)~~ (d) with respect to a site. If the agency with administrative authority agrees to change or eliminate a requirement, limitation, or condition imposed under sub. (2) (a) to ~~(e)~~ (d), it shall provide written approval to the person, shall request the department to change the listing under sub. (3) (b) for the site accordingly, and shall require the person to pay a fee established by the department for changing the listing.

SECTION 19. 292.15 (2) (a) (intro.) of the statutes is amended to read:

292.15 (2) (a) *General.* (intro.) Except as provided in sub. (6) or (7), and subject to pars. (ae) to (ag), a voluntary party is exempt from the provisions of ss. 289.05 (1), (2), (3) and (4), 289.42 (1), 289.67, 291.25 (1) to (5), 291.29, 291.37, 292.11 (3), (4) and (7) (b) and (c) and 292.31 (8), and rules promulgated under those provisions, with respect to discharges of hazardous substances on or originating from a property, if the release of those hazardous substances occurred prior to the date on which the department approves the environmental investigation of the property under subd. 1. and if all of the following occur at any time before or after the date of acquisition:

SECTION 20. 292.15 (2) (af) of the statutes is created to read:

292.15 (2) (af) *Contaminated sediment.* Except as provided in sub. (6), (6m), or (7), if there exists contaminated sediment on a property from a release of a hazardous substance on or originating from a property, the voluntary party is exempt from ss. 289.05 (1), (2), (3), and (4), 289.42 (1), 289.67, 291.25 (1) to (5), 291.29, 291.37, 292.11 (3), (4), and (7) (b) and (c), and 292.31 (8) and rules promulgated under those provisions, with respect to discharges of hazardous substances on or originating from the property, if the release of those hazardous substances occurred before the date on which the department approves the environmental investigation of the property under subd. 1., and if all of the following occur at any time before or after the date of acquisition:

1. An environmental investigation of the property is conducted that is approved by the department.

2. The voluntary party removes all or part of the contaminated sediment and addresses any remaining contaminated sediment in a manner approved by the department, such that the environment is restored to the extent practicable with respect to the discharges and the harmful effects from the discharges are minimized in accordance with rules promulgated by the department and any contract entered into under those rules, except that with

respect to contaminated sediment the environment is restored to the extent practicable with respect to the discharges and the harmful effects from the discharges are minimized as determined by the department by monitoring or sampling and in accordance with any contract entered into with the department's approval.

3. The voluntary party obtains a certificate of completion from the department stating that the environment has been satisfactorily restored to the extent practicable with respect to the discharges and that the harmful effects from the discharges have been minimized.

3m. The voluntary party obtains and maintains insurance to cover the cost of complying with s. 292.11 (3) with respect to the contaminated sediment in the event that additional remedial action is necessary, unless additional action is not required under par. (b). The insurance shall conform with rules promulgated by the department and shall name the state as the insured. The department may waive the requirement to obtain and maintain insurance or accept a form of financial responsibility other than insurance if the hazardous substance contained in the contaminated sediment is not mercury, PCBs, as defined in s. 299.45 (1) (a), or dioxin and the department determines that insurance is not necessary.

4. If the voluntary party owns or controls the property, the voluntary party maintains and monitors the property in a manner required by the department and any contract entered into with the department's approval.

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

6. The voluntary party has not obtained the certificate under subd. 3. by fraud or misrepresentation, by the knowing failure to disclose material information or under circumstances in which the voluntary party knew or should have known about more discharges of hazardous substances than were revealed by the investigation conducted under subd. 1.

7. If the voluntary party owns or controls the property, the voluntary party allows the department, any authorized representative of the department, a representative of a company that has issued insurance required under subd. 3m., any party that possessed or controlled the hazardous substance or caused the discharge of the hazardous substance, and any consultant or contractor of those persons to enter the property to determine whether additional remedial action is necessary, subject to par. (b), and to take the necessary remedial action.

SECTION 21. 292.15 (2) (am) of the statutes is renumbered 292.15 (2) (am) 1m., and 292.15 (2) (am) 1m. (intro.), as renumbered, is amended to read:

292.15 (2) (am) 1m. (intro.) The Except as provided in subd. 2m., the department may approve a partial cleanup and issue a certificate of completion as provided in par. (a), (ae), (af), or (ag) that states that not all of the property has been satisfactorily restored or that not all of

the harmful effects from a discharge of a hazardous substance have been minimized. Approval of a partial cleanup exempts a voluntary party from ss. 291.37 (2) and 292.11 (3), (4) and (7) (b) and (c) with respect to the portion of the property or hazardous substances cleaned up under this paragraph. In addition to meeting the requirements of par. (a), (ae), (af), or (ag), a certificate for a partial cleanup under this paragraph may be issued only if:

SECTION 22. 292.15 (2) (am) 2m. of the statutes is created to read:

292.15 (2) (am) 2m. If there exists contaminated sediment in addition to a hazardous substance in soil or soil and groundwater on a property from a release of a hazardous substance on or originating from a property, the department may only approve a partial cleanup of the property or discharge with respect to the soil or soil and groundwater. The department may approve the partial cleanup only if, in addition to the requirements under subd. 1m., all of the following apply:

a. An environmental investigation of the property or discharges is conducted in a manner approved by the department.

b. The voluntary party, or a person who has entered into a legally enforceable agreement with the department, agrees to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment.

c. The voluntary party or the person who has entered into a legally enforceable agreement under subd. 2m. b. provides financial assurance to the department, in the manner required by the department, in the event that the voluntary party or the person who has entered into a legally enforceable agreement under subd. 2m. b. fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment.

SECTION 23. 292.15 (2) (b) (intro.) of the statutes is amended to read:

292.15 (2) (b) *Extent of exemptions.* (intro.) The exemptions provided in pars. (a), (ae), (af), (ag) and (am) continue to apply after the date of certification by the department under par. (a) 3., (ae) 3., (af) 3., or (ag) 2., or approval by the department under par. (am), notwithstanding the occurrence of any of the following:

SECTION 24. 292.15 (2) (b) 1. of the statutes is amended to read:

292.15 (2) (b) 1. Statutes, rules or regulations are created or amended that would impose greater responsibilities on the voluntary party than those imposed under par. (a) 2., (ae) 2., (af) 2., or (ag) 1.

SECTION 25. 292.15 (2) (b) 2. of the statutes is amended to read:

292.15 (2) (b) 2. The voluntary party fully complies with the rules promulgated by the department and any contract entered into under those rules under par. (a) 2., (ae) 2. or (ag) 1., or fully complies with the requirements imposed by the department and any contract entered into with the department's approval under par. (af) 2., but it is discovered that the cleanup fails to fully restore the environment and minimize the effects from a discharge of a hazardous substance.

SECTION 26. 292.15 (2) (b) 3. of the statutes is amended to read:

292.15 (2) (b) 3. The contamination from a hazardous substance that is the subject of the cleanup under par. (a) 2., (ae) 2., (af) 2., or (ag) 1. is discovered to be more extensive than anticipated by the voluntary party and the department.

SECTION 27. 292.15 (2) (b) 5. of the statutes is amended to read:

292.15 (2) (b) 5. If the voluntary party does not own or control the property, the person who owns or controls the property fails to allow the department, any authorized representative of the department, any representative of a company that has issued insurance required under par. (ae) 3m. or (af) 3m., any party that possessed or controlled the hazardous substance or caused the discharge of the hazardous substance, or any consultant or contractor of any of those persons to enter the property to determine whether natural attenuation has failed and to take action to respond to the discharge if natural attenuation has failed, or to determine whether additional remedial action is necessary and to take the necessary remedial action, unless additional action is not required under this paragraph.

SECTION 28. 292.15 (2) (c) of the statutes is amended to read:

292.15 (2) (c) *Prohibition on action.* The department of justice may not commence an action ~~under 42 USC 9607,~~ against any voluntary party meeting the criteria of this subsection, under 42 USC 9607 to recover costs for which the voluntary party is exempt or under 43 CFR Part 11 to recover damages to natural resources resulting from a discharge for which the party is exempt under pars. (a), (ae), ~~(af)~~, (ag), (am), and (b).

SECTION 29. 292.15 (2) (d) of the statutes is created to read:

292.15 (2) (d) *Prohibition on requiring additional action to comply with a total maximum daily load.* If a voluntary party is exempt from liability under par. (af), the department may not require the voluntary party to take additional action in relation to the discharge for which the voluntary party is exempt under par. (af) for the purpose of complying with a federally approved total maximum daily load under 33 USC 1313 (d) (1) (C), unless otherwise required under this section or s. 292.12.

SECTION 30. 292.15 (2) (e) of the statutes is amended to read:

292.15 (2) (e) *Contract with insurer.* If the department requires insurance under par. (ae) 3m. or (af) 3m., the department may contract with an insurer to provide insurance required under par. (ae) 3m. or (af) 3m. and may require voluntary parties to obtain coverage under the contract.

SECTION 31. 292.15 (6m) of the statutes is created to read:

292.15 (6m) **LIMITATION ON ELIGIBILITY.** A voluntary party is not eligible for the exemption provided in sub. (2) (af) if the remedial action taken by the voluntary party relating to contaminated sediment includes an engineering control.

SECTION 32. 292.15 (7) (f) of the statutes is created to read:

292.15 (7) (f) A property that is listed or proposed to be listed on the national priorities list under 42 USC 9605 (a) (8) (B).

SECTION 33. 292.25 (1) (e) of the statutes is amended to read:

292.25 (1) (e) The number of sites for which a claim was made against an insurance policy required under s. 292.15 (2) (ae).

SECTION 34. 292.25 (1) (f) of the statutes is created to read:

292.25 (1) (f) The number of sites for which a claim was made against an insurance policy required under s. 292.15 (2) (af).

SECTION 35. 292.68 (1) (b) of the statutes is amended to read:

292.68 (1) (b) “PCB contaminated sediment” means sediment that contains polychlorinated biphenyls in a concentration of 50 parts per million or greater and that is dredged from ~~the bed or bank of~~ a navigable water in this state.

SECTION 36. Nonstatutory provisions.

(1) Using the procedure under section 227.24 of the statutes, the department of natural resources shall promulgate rules required under sections 292.12 (2) (d) 2. and 292.15 (2) (af) 3m. of the statutes, as created by this act, for the period before the effective date of the permanent rules promulgated under sections 292.12 (2) (d) 2. and 292.15 (2) (af) 3m. of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) of the statutes, subject to extension under section 227.24 (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a

finding of emergency for a rule promulgated under this subsection.
