Jeff Mursau

STATE REPRESENTATIVE • 36TH ASSEMBLY DISTRICT

Assembly Committee on Environment
AB 44– Discharge of a Hazardous substance
January 10, 2024

Chairperson Oldenburg and Committee Members:

Thank you for the opportunity to testify in support of Assembly Bill 44, which relates to the responsibility of a property owner for discharge of hazardous substance. I appreciate your willingness to bring this bill forward.

I first became aware of this issue in 2017 when it was referred to a committee I was chairing and I held a public hearing on the bill. I found the testimony compelling and I sympathized with the parties whose properties had been contaminated by a previous owner, and who now find themselves responsible for the cleanup. You will hear from one of these individuals, Mr. Koeppler, today. It's for these reasons that I agreed to join Senator Jacque in bringing this bill forward again this session.

In 1992, Wisconsin implemented mandatory disclosure laws which requires a property owner to disclose on a real estate condition report any defects "...that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises". Unfortunately, in the case of Mr. Koeppler, he bought his residential property in 1987, before this law went into effect.

Mr. Koeppler remained unaware that his property was contaminated until the DNR informed him in 2015 (nearly 30 years after he bought his property) that he was responsible for remediation efforts because of hazardous soil vapor contamination occurring under his residence. It turns out, that at one point in time his property had once been a dry cleaning business.

This bill is pretty simple. It exempts a residential property owner from being forced into remediation if they meet 3 criteria:

1. They acquired the property prior to Wisconsin's mandatory disclosure law (September 1, 1992)
2. They can prove that the discharge was caused by another person and the property owner did not know and had no reason to know of the discharge when the owner acquired the property
3. The property was not listed in the database of contaminated properties maintained by the DNR when the owner acquired the property.

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The bill also exempts a county that takes a tax deed on property contaminated by a hazardous substance, or any person who subsequently acquires the property from the county and meets certain requirements, from responsibility relating to the discharge of the hazardous substance. This provision will assist economic development efforts in local communities that want to redevelop abandoned properties, but are hesitant to do so because of potential liability.

Once again, thank you for holding a public hearing on this piece of legislation. I'm happy to answer any questions you may have.

ANDRÉ JACQUE
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Testimony before the Assembly Committee on Environment

Senator André Jacque
January 11, 2024

Chairman Oldenburg and Committee Members,

Thank you for holding this hearing and the opportunity to testify before you today in support of Assembly Bill 44, the Innocent Purchaser Act.

This bi-partisan legislation is identical to 2021 SB 568 /AB 579, which passed the Assembly Committee on Environment on an 8-1 vote last session, and would make sure individual property owners around the state aren't forced to clean up contamination they aren't responsible for causing. This legislation will also assist local governments with the redevelopment of both contaminated properties and those perceived as potentially contaminated when the responsible party has abandoned the property.

Individual property owners, including the example of Ken Koeppler, who unbeknownst to him, purchased a contaminated property before mandatory disclosure laws, are facing financial ruin by being mandated by the DNR to remediate contamination they knew nothing about. Mr. Koeppler purchased contaminated property years before disclosure was required and has spent many thousands of dollars and counting to remediate.

In *State v. Mauthe*, the Wisconsin Supreme Court held that the owner of a property containing contamination is responsible for remediation. This is true even if the owner is not responsible for the contamination and had no reason to know it existed upon purchasing the property prior to mandatory disclosure laws passed in 1992.

Assembly Bill 44 provides a much-needed exemption from remediation in these cases where the property owner is not a corporate entity if the following three conditions apply:

1. The owner purchased the property prior to September 1, 1992 (when mandatory disclosure laws went into effect);
2. The owner demonstrates that the discharge was caused by another person without the owner's knowledge;
3. The property was not listed in the database of contaminated properties maintained by the DNR when the owner purchased the property.

This legislation is meant to ensure individual property owners, who had no knowledge of property contamination and no way to find out about contamination, aren't held liable for contamination remediation efforts. Another very important aspect of the bill is its ability to significantly assist local economic development efforts by exempting entities that acquire a tax deed from a property contaminated by a hazardous substance, or any person who subsequently acquires the property from the county and meets certain requirements, from responsibility relating to the discharge of the hazardous substance.

One of the largest hurdles to the redevelopment of brownfields and blighted property in our communities, or properties like Mr. Koeppler's, is that before investment in those sites can begin, you have to find someone willing to assume the risk of the full spectrum of what they might find on the land, even before they have the ability to perform a thorough assessment themselves, and to accept the

potential for astronomical costs in so doing.

Even when it is likely that significant contamination would not be found, the mere possibility that more could be discovered than is publicly known is often enough to have a chilling effect on the redevelopment of the site, and many times its adjacent properties as well. When the owner of a contaminated, or potentially contaminated, property becomes financially insolvent and stops paying taxes, an eyesore which may or may not be Pandora's Box is dumped in the laps of our communities.

Assembly Bill 44 ensures that the DNR can still offer grants for cleanup or pursue the parties actually responsible for contamination. But by properly extending a liability exemption for cleanup to those who did not cause the contamination and could not have stopped it, this proposal would grant greater leverage to ensure solvent polluters keep current on their property taxes and grant greater flexibility to local governments in how to fix up these properties.

This common-sense legislation has been supported by a number of municipalities, Wisconsin Economic Development Association (WEDA), Wisconsin Realtors Association, and Wisconsin Commercial Real Estate Development Association (NAIOP).

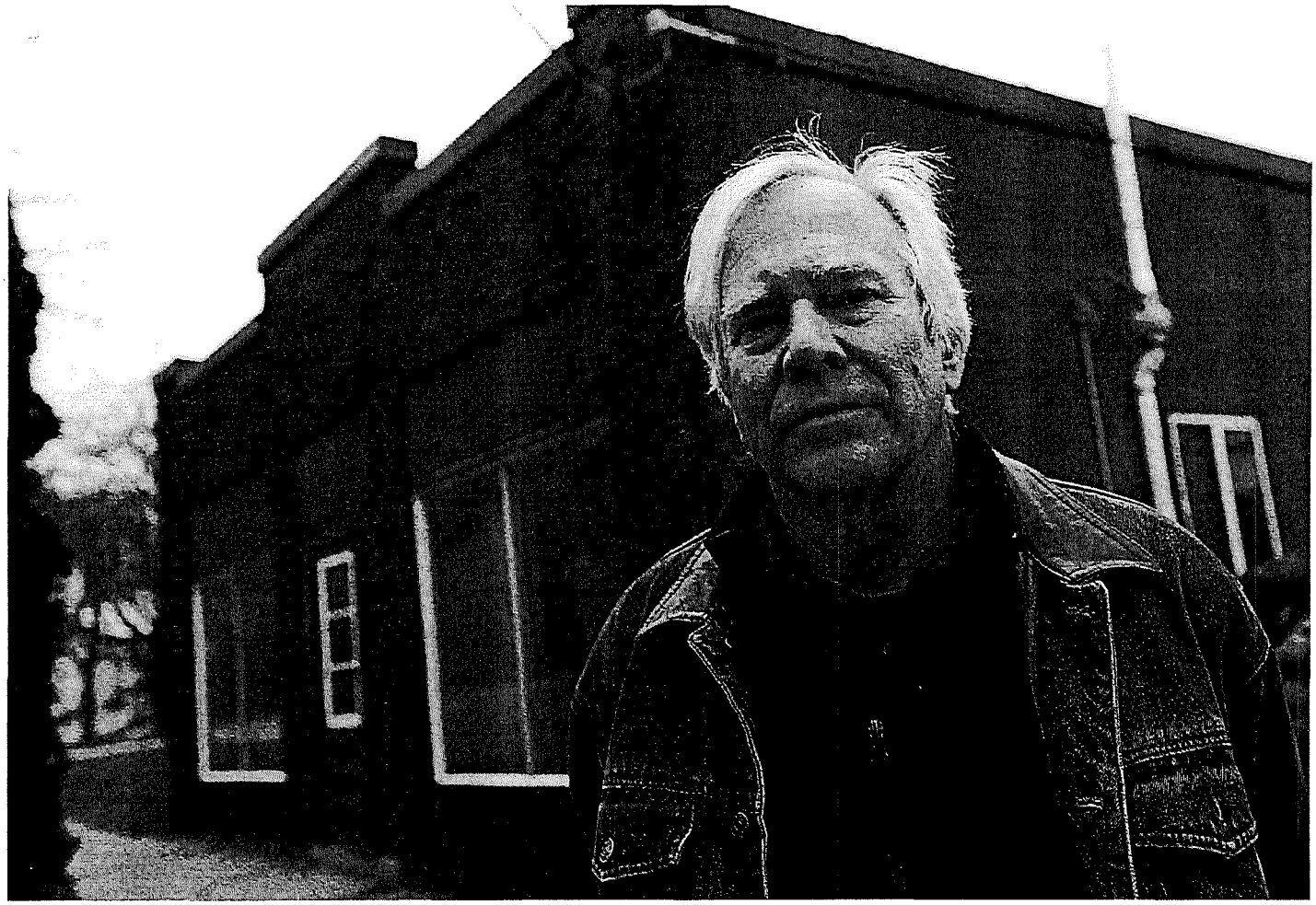
Thank you for your consideration of Assembly Bill 44. I'd be happy to answer any questions.

https://captimes.com/news/local/environment/ken-koeppler-didnt-know-he-bought-a-former-dry-cleaner-but-now-he-owns-all/article_c91377e3-e23e-5751-a382-8832142ff7dc.html

Ken Koeppler didn't know he bought a former dry cleaner, but now he owns all of its problems

STEVEN ELBOW | The Capital Times | selbow@madison.com

Dec 7, 2016



Ken Koeppler, in front of the building at 351 Russell St. on Madison's east side. He purchased the property in 1987, five years before state law obligated sellers to disclose environmental problems to buyers.

PHOTO BY MICHELLE STOCKER

Ken Koeppler figured he'd be retired by now. With a medical resume that includes two heart attacks, the 65-year-old musician and recording engineer has painstakingly amassed a modest portfolio that includes three rental properties and a retirement account that belonged to his late wife.

But after the Wisconsin Department of Natural Resources discovered contaminated soil underneath one of those properties — left over from its former incarnation as a dry cleaning business — retirement now looks like a pipe dream. The DNR's demands that he test, engineer and remediate the site have already cost him tens of thousands of dollars, and he expects those costs to balloon into six digits in the coming months.

He's spent hundreds, if not thousands, of hours researching the problem, contacting engineers, state and federal representatives, lawyers, DNR regulators and owners of other contaminated sites.

"I've got a new full-time job," he said without a hint of humor.

It was in March of 2015 that Koeppler got a letter telling him that the DNR was investigating former dry cleaning sites for hazardous "vapors intrusion" from chemicals used in the industry. The agency asked for his cooperation in gathering soil samples from beneath his property, located on Russell Street near Schenk's Corners, and sampling the air inside.

He signed a consent form and mailed it in, and his life hasn't been the same since.

The DNR sent a crew to bore holes through the concrete slab under the building, where Koeppler had lived for 17 years until buying another residence nearby and renting out his old home. An analysis of the soil turned up contamination, and further testing revealed unsafe levels of hazardous vapor in the home.

Then the agency told Koeppler he needed to hire an engineer to take care of the problem.

He did, and as a result he installed two air pumps to channel the air away from the building, at a cost of $3,500. He had hoped that eventually the chemicals would dissipate, taking care of the problem.

Then the DNR informed him that the groundwater was at risk. Now he's installing three monitoring wells, at a cost of $13,000. Add $600 a year for the city easement for the wells, nearly $1,000 a year for the insurance the city required him to purchase, nearly $10,000 for commissioning investigation plans, work plans and other engineering and testing costs, more than $3,000 in lawyer fees, as well as a few other miscellaneous costs, and he's spent more than $30,000 to date.

And that could be just the start.

A recent letter from Robert Langdon, a hydrologist with SCS Engineers, the firm Koeppler hired, warned of crippling expenses if the DNR determines that Koepler's efforts haven't been enough.

If the agency demands more groundwater sampling, he can expect to cough up another $25,000. If those tests show that nearby residences need vapor testing and mitigation measures, that's another $5,000 per home.

"If we assume all of the above are required, but no soil excavation, capping or other remedial actions are necessary," reads the Sept. 29 letter, "that might put you $100,000 of additional work."

In addition, chemicals that had traveled underground were responsible for elevated vapor readings in an uninhabited storage shed next door, a property that's currently on the market. And Koeppler fears that if the new neighbors make an issue of it he could be on the hook for more remediation costs.

He's contacted his state representatives, who have counseled him to contact his federal representatives, all to no avail. He's contacted the children of the now-deceased Lars and Norma Hanson, who had run Vogue Cleaners on the Russell Street property from 1960 to 1978, hoping to find out if the couple had insurance that might cover the cost of the cleanup.

"Their children didn't want to speak to me," he said. "They just wanted to get off the phone."

He's explored federal and state funds that have either dried up or for which he is not eligible. He's applied for financial help from the DNR — no dice.

To resist is not an option. The DNR has made it clear that any non-compliance could be met with an "enforcement action," resulting in possibly tens of thousands of dollars in fines and legal fees.

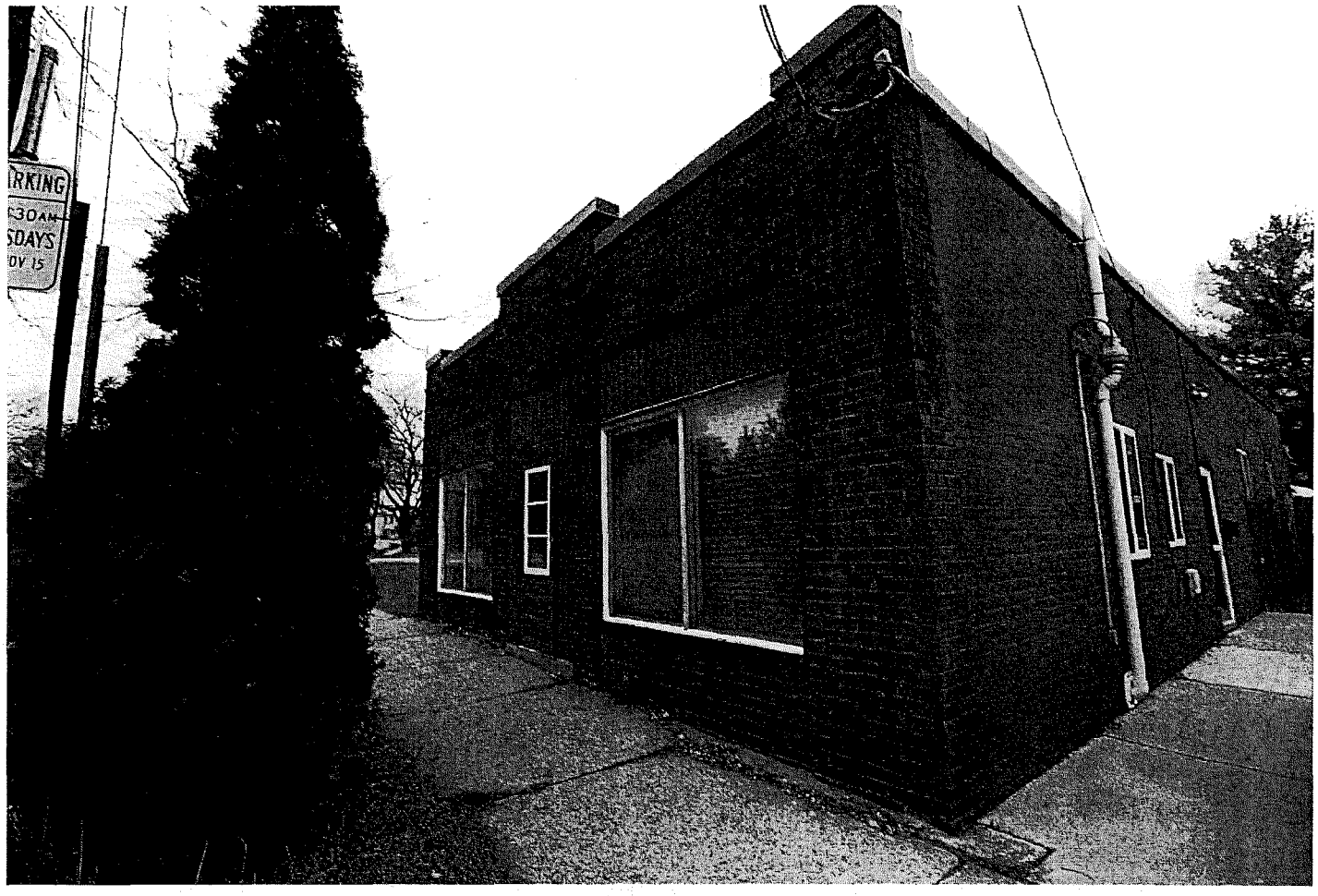
It's an ironic predicament: a Republican-run state that has jettisoned regulatory rules for mining interests, shoreline homeowners and agricultural operations forcing a property owner to pay a small fortune to clean up contamination caused by others, even while the DNR has authorized vast sums to help dry cleaners clean up their own contaminated properties.

After nearly two years of fighting the system and watching his retirement plans go up in smoke, the gray-haired musician cut a forlorn figure as he paced the kitchen of his Atwood Street residence, his hunched shoulders appearing to bow with the weight of it all. With a cracked voice, he issued an impotent plea:

"When is somebody going to get an idea of what this is doing to me?"

The chemical at the root of Koeppler's woes is perchloroethylene, often called "perc." It's the most common solvent used by dry cleaners, and exposure among dry cleaning employees has been known to cause dizziness, mild memory loss, vision problems, slow reaction times and redness and blistering of the skin.

Since it's located in the ground underneath the residence, concentrations of perc at Koeppler's rental property aren't likely to reach levels high enough to cause those types of maladies.



An air pump on the side of Koeppler's building pulls vapor out of the subfloor and discharges it into the air via a pipe.
PHOTO BY MICHELLE STOCKER

But because it's a very volatile organic solvent, perc emits a vapor that moves through groundwater and soil, finding its way into structures in a process known as "vapor migration." And long-term exposure to those vapors heightens the lifetime risk for certain cancers, including bladder cancer, multiple myeloma and non-Hodgkin's lymphoma.

With the air pumps, the perc concentration has been kept below the safe level of 6.2 parts-per-billion level. It previously had been at 33 parts per billion.

Koeppler has kept his tenants up to date on the developments. In fact, he said, they "actually knew something was up before I did. The DNR went knocking on doors in the neighborhood asking permission to drill through the slabs for gas samples and to take indoor air samples."

They have remained at the property despite the situation.

Nick Barnes, a University of Wisconsin-Madison graduate student who has lived there off and on since 2011, said he isn't worried.

"Overall, I am unconcerned about the health risks posed after looking at the research on the levels of the contaminants deemed safe and seeing the results of the tests," he said in an email.

Another tenant family, a young couple with a small daughter, had previously lived there for nine months.

"I lived there for 17 years," Koeppler said. "If anybody suffered any ill effects from it, it would be me."

But Koeppler is finding little sympathy at the DNR.

Koeppler's lawyer, Paul Kent, informed Koeppler late last year that the DNR official overseeing remediation of his property had become "more aggressive about moving forward than he had been in the past."

In the Nov. 12, 2015, letter, Kent said Mike Schmoller, a DNR spill coordinator, told him that if Koeppler didn't act promptly, "they would do so and seek recovery costs from you. He also indicated that they were seriously

considering an enforcement action."

He characterized the conversation with Schmoller as "rather unpleasant."

Kent informed Koeppler of his options, which included seeking state grants or loans, which were ultimately found to be unavailable, applying for financial aid from the DNR because of his financial situation, exploring whether the insurance carried by the dry cleaner could be found liable — Koeppler couldn't locate the insurer — declaring bankruptcy, or doing nothing and fighting the DNR.

The latter course, he said, could result in liens on his assets and thousands of dollars in penalties.

His advice: Inform the DNR that because his "assets are modest," he needed time to explore potential funding alternatives, but that ultimately he needed to do what the DNR told him to do.

"That's why I guess it's buyer beware," said Linda Hanefeld, supervisor of the DNR's south central Wisconsin region remediation and redevelopment team.

"We still see people buying and selling properties without doing their due diligence," she said.

But Koeppler maintained that he had no way of knowing about the contamination.

Koeppler said the couple that owned the dry cleaning operation sold the property in 1979 to an engineer who converted the building to a residence and then sold it. Koeppler, unaware of the environmental issues, bought the property in 1987, five years before the state adopted a law requiring the disclosure of environmental hazards to property buyers.

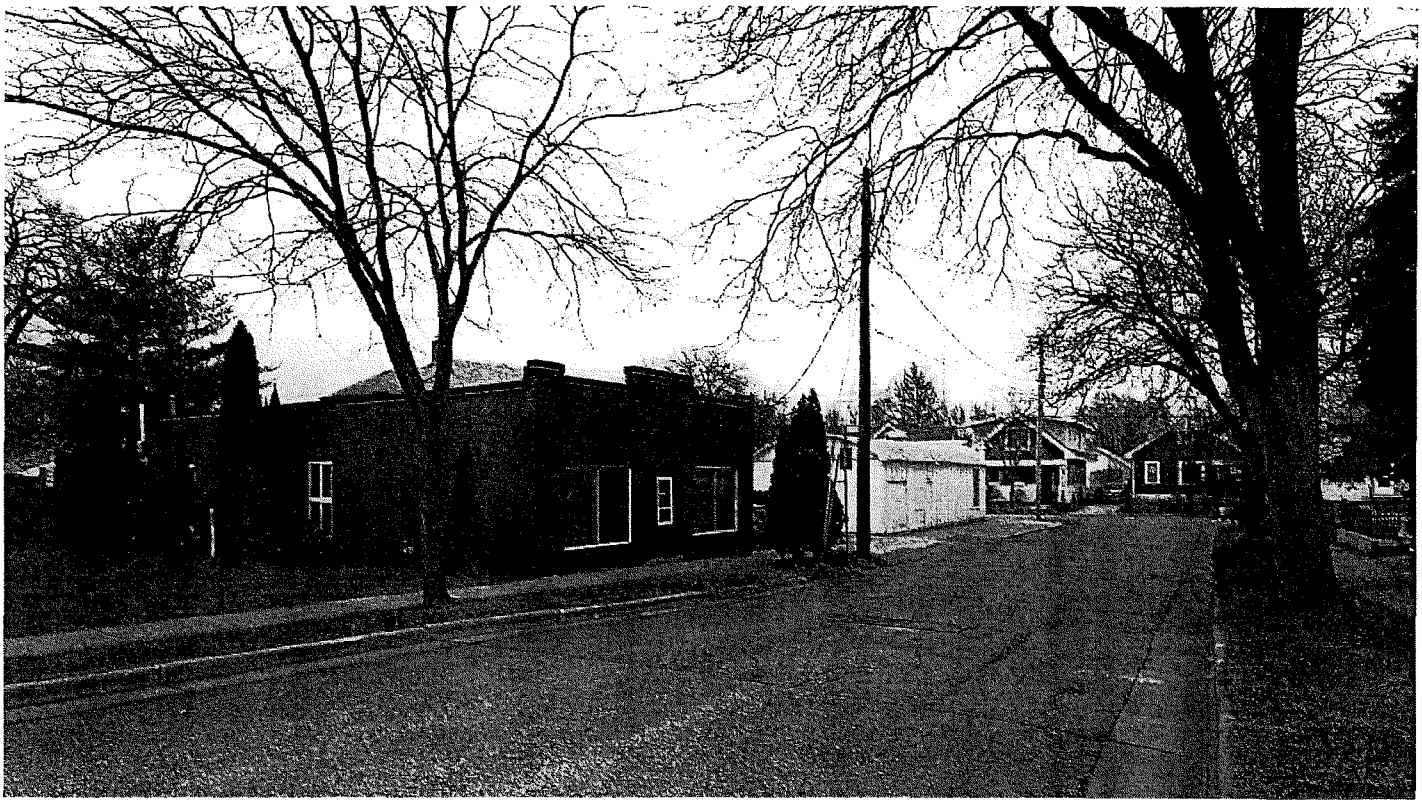
"I bought that property in this little donut hole of time when they didn't have to tell me anything about it," he said.

Koeppler said he never had any inkling of the problem until regulators informed him of it in March of 2015. A few weeks later it sunk in that cleaning up the site was his responsibility.

"Since Mr. Koeppler owns the property, according to state statute, he is responsible for the cleanup of that property," said DNR spokesman James Dick in an email.

That statute reads: "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."

The court cases cited by regulators include Wisconsin vs. Chrysler Outboard Corp., which operated a manufacturing plant in Hartford between 1965 to 1984. In the early 1970s, the corporation hauled several 55-gallon drums of toxic chemicals to a landfill, where they eventually leaked, producing a plume of groundwater contamination at least a half-mile long.



"I bought that property in this little donut hole of time when they didn't have to tell me anything about it," said Koeppler.
PHOTO BY MICHELLE STOCKER

Discovered by the DNR in 1992, the chlorinated solvents in the drums were over 10 times the safe drinking water standard. The state Supreme Court found Chrysler on the wrong side of state law.

And in a 1985 state Supreme Court case, the court sided with the state against N.W. Mauthe Company in Appleton, which was contaminated with chemicals from a chrome electroplating operation. The court ruled that Mauthe was responsible for the cleanup.

State Rep. Chris Taylor, D-Madison, who counts Koeppler among her constituents, called his predicament "horrible," but she concedes that state law is working against him.

"It really stinks for him, the way the law is," she said. "There's no remedy for him."

"This is a person who the DNR should be helping," Taylor said. "Not giving high-capacity well permits that are about giving our public waters away for free. This is a perfect example of an inequity that the DNR has shown little interest in addressing."

State law left Koeppler in the cold on another front.

Since 1997, the DNR has administered a Dry Cleaner Environmental Response Fund, funded through license fees for dry cleaners and fees on the sale of dry cleaning solvents.

In the past, the state has shelled out millions from the fund to help dry cleaners investigate and remediate contamination. For instance, Klinke Cleaners stores have received more than $269,000 in reimbursement costs from the fund. Paul's Classic Cleaners in Monona has been reimbursed for $500,000 in cleanup costs, the maximum amount allowed under the program.

But because of funding shortfalls, since 2008 that program has been closed to new applicants.

Regardless, Koeppler wouldn't qualify anyway. The fund was specifically created to benefit dry cleaners. There's no similar fund for people who inherit a dry cleaner's contaminated properties.

Koeppler looked at getting help from the federal Superfund, which pays for the cleanup of hazardous waste sites. (The fund eventually bailed out the Mauthe Company in Appleton.) But that program is aimed at abandoned industrial sites that pose a health risk to the public.

Koeppler sought financial help by submitting an "ability to pay" form with the DNR, which required him to provide a detailed accounting of his assets.

"They said, based on the forms, 'He can pay for it. He has over a million dollars in rental property alone,' which was patently false," Koeppler said.

Koeppler is not poor. But he doesn't have the kind of wealth that allows for a six-figure outlay without a lot of pain.

Over the years he's accumulated two rental properties in Baraboo, the Russell Street property, 10 acres of rural land with a barn in North Freedom, and his current residence and recording studio on Atwood Avenue. The total value of his properties is about $725,000.

"I owed $110,000 on one, and I had over $20,000 in loans on (the contaminated) property," he said, describing the information on his ability-to-pay form. "This property was the highest assessed one of any of them, and it's bleeding me dry."

He sought a break on his city taxes, arguing that the contamination has all but wiped out the value of the property.

"I said, 'I can't give this property away,'" he said.

In his first break since the beginning of the saga, the city agreed last year to lower the property's assessed value by $35,000.

While Koeppler has left few rocks unturned, there is one lawmaker that Koeppler never contacted: Republican U.S. Sen. Ron Johnson, who in 2013 launched a "Victims of Government" project to highlight the plights of citizens who have been subjected to the regulatory hammer of "a very large, growing and abusive government."

Asked for comment on Koeppler's case, Johnson spokeswoman Paige Alwood issued the following statement:

"Now that Mr. Koeppler's situation has been brought to the attention of Sen. Johnson's staff, we are working with him directly to help him understand and navigate the current regulations that may be threatening his financial future."

But Koeppler said he hasn't heard from Johnson's office. And, at any rate, he thinks he probably knows the current regulatory atmosphere surrounding his situation better than Johnson's staffers do.

"The Victims of Government Project sounds nice but this is still a state of Wisconsin issue," he said. "Unless it gets kicked up to the EPA it's not under federal jurisdiction."

There are several states, among them Texas and Arizona, that have "innocent landowner" laws to protect buyers from liability if their properties are found to be contaminated.

Taylor plans to introduce such a law in Wisconsin, but in a Republican controlled Legislature, any proposal from a Democrat will likely face partisan scrutiny. She hopes she can generate bipartisan interest in the issue.

"This could happen to anybody," she said. "It doesn't seem like it should be partisan at all. But so many of the things I work on don't seem like they should be partisan and sometimes they end up being partisan. But I'll certainly try to get some interest on the other side."

How many people it would help is uncertain. Koeppler's predicament appears to be unusual. A list of 407 sites listed on the DNR's database that are contaminated with perc shows that the vast majority of owners are businesses that contaminated the sites or commercial interests that bought them. Koeppler stands out as a small-scale property owner who has to uncork his personal resources to pay for the remediation.

But there could be more. In the DNR's original letter to Koeppler, the agency said it was in the process of reviewing other former dry cleaning properties, which number about 200 in Madison.

"You probably have a lot of residents who are on those sites and people just don't know that they're contaminated," Taylor said.

Relief can't come soon enough for Koeppler, who has struck out at every attempt to get out from under a pile of bills from the government. But he's trying to stay optimistic.

"Hopefully, if the monitoring wells bring good news, I can start on whatever the process is for closure," he said. "Which is still thousands of bucks in more fees."

Share your opinion on this topic by sending a letter to the editor to tctvoice@madison.com. Include your full name, hometown and phone number. Your name and town will be published. The phone number is for verification purposes only. Please keep your letter to 250 words or less.

Steven Elbow

Steven Elbow joined The Capital Times in 1999 and has covered law enforcement in addition to city, county and state government. He has also worked for the Portage Daily Register and has written for the Isthmus weekly newspaper in Madison.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Ken's Copy

Testimony; Assembly Committee on Environment

Good morning Representative Kitchens and members of the Assembly Committee on Environment. My name is Kendall Koeppler, I live at 2725 Atwood Ave. in Madison and
I am here in support of Assembly Bill 579.

In March of 2015 I was contacted by the Wisconsin DNR asking permission to test for possible contamination relating to a former dry cleaners in the area of my property at 351 Russell St. I assumed they were referring to my building and asked if I could be held responsible for anything they found. The case manager verbally assured me the DNR would pursue the persons who had caused any contamination found. That didn't turn out to be the case.

I had nothing to do with contaminating this property and had no reason to think there was an issue when I bought the property in 1987. I was a first time home buyer. It was a small converted commercial building zoned residential by the city of Madison almost a decade earlier. At the time, it was a residential rental with out-of-state owners. I conducted all the due diligence one could expect under those circumstances. Real estate condition reports were not required by law until 1992. I hired a lawyer and a building inspector to review the purchase. If there was any lack of due diligence, I contend it was in 1979 and committed by the redevelopers and the city of Madison when they zoned the property residential.

In 2015 I allowed the DNR to conduct their testing. On the same day I received the results of that testing the DNR named me the Responsible Party, informing me I had to pay for all subsequent testing and remediation both of my property and any of my neighbors affected. This would not be the last time DNR representatives misrepresented the facts of my situation in their attempts to get me to comply with their orders. They lied about when I submitted documentation, inflated my assets to misrepresent my ability to pay, took credit for research I conducted, and in my opinion have overestimated the number of sites which would be affected by the passage of innocent buyer protection legislation, all in the name of protecting their one-size-fits-all enforcement practices.

In 1997 Wisconsin set up the DERF fund to pay for the cleanup of dry cleaners but made no accommodations for innocent property owners who

had nothing to do with the contamination. Millions of dollars have been paid out through DERF to clean up the sites of active dry cleaners while the innocent owners of former dry cleaning sites have been hung out to dry. Due to insufficient revenues, the legislature closed the fund to new applicants in 2008, seven years before the state ever got around to looking at former dry cleaner sites like mine. Let me repeat, the state paid to clean up the sites of the actual polluters but demands that those who had nothing to do with the contamination pay to clean it up on their own.

I have spent in excess of $55,000 dollars in legal fees and attempts to comply with the DNR's demands pertaining to this issue. I am attaching a 2016 future costs estimate ($100,000 over the next three years) prepared by the engineer that performed the work done to date.

I am being singled out and punished for doing the right thing. I let the DNR in to conduct their tests because I am an environmentalist. Unknown to me at the time, the DNR had been taking soil borings offsite around various former dry cleaners in the city. This was not revealed to me at the time. Another site on the 1200 block of Williamson St. in Madison had even higher levels of contamination than mine. Because the owners did not respond to the DNR's outreach, no further testing was ever conducted. Despite me calling attention to this disparity, to both the DNR and multiple elected officials, that property was put up for sale last year with no mention of any contamination issues and subsequently sold. I, on the other hand, will never be able to sell my property. Any closure of my site will always remain conditional and no prospective buyer is going to assume that liability.

One aspect of AB 579 that I feel needs to be addressed is the ability to pass immunity on to subsequent buyers. The Bill currently exempts counties that take a tax deed on properties and passes that exemption on to subsequent buyers of that property even though in most cases counties are already eligible for federal Brownfields funds to investigate and remediate properties they own. In the case of individuals such as myself, while I would gain immediate protection from investigation and remediation costs, I could not pass that protection on to subsequent buyers. Closures of these sites are conditional, subject to reopening at the DNR's discretion. It is unlikely I will ever be able to divest myself of my property and will be forced to continue owning and managing it until I die.

Whoever I bequeath it to will immediately become subject the DNR's enforcement whims.

I am 70 years old and since the DNR entered my life, the added stress has contributed to my needing three heart surgeries, the most recent being a quadruple bypass on December 9th. COVID 19 has decimated my ability to continue working as a musician or recording engineer. Presently it seems I will never have a normal retirement. If the state does not correct this injustice my existing retirement funds will always be in jeopardy and even if AB 579 passes in its present form, I won't be able sell the property or safely leave it to my heirs.

The DNR's representatives are fond of saying saying thousands of properties would be suddenly orphaned if AB 579 passes. I urge you to read the bill closely. How many individuals have owned their properties over 30 years, had nothing to do with creating the contamination and didn't know there was an issue when they purchased them. Even then, what is the justification for making innocents pay for it, regardless of the cost.

Arguments will be made that this bill can't move forward without a funding element. Presently that lack of funding is the only objection listed in the League Of Women's Voters objection to this bill. The lack of funding is what derailed the original bill, authored by then Reps. Chris Taylor, Andre Jacque and Sen. Fred Risser in 2017. I am attaching the recommendations of the 2018 Brownfields Study Group to which the 2017 bill was referred for study. The bill was amended in 2019 to include modest funding to be earmarked for these cases but was never reconsidered. Not having funding included in the present bill does not justify ruining innocent people's lives to correct problems that has been ignored for over 60 years. I lived in my building for over 17 years. The state was not concerned about me or my family during any of that time .

In my case, I believe the state could already do the right thing regardless of passage of AB 579. The state is uniquely qualified to find the original insurers of the operators of the dry cleaners. They would still be liable for the cleanup. The DNR simply doesn't have any personnel assigned to such work.

Let me also say this is and should remain a bipartisan bill, I have been told the DNR has contacted every Democratic supporter of this bill trying to characterize AB 579 as part of the partisan battle in the Capital focused on various aspects of the DNR's role in regulating Wisconsin's environmental efforts. I believe this can be a rare moment when both parties can work together to do the right thing. A first step would be to put aside their differences and allocate modest funding to implement AB 579. Fully half of the rest of the 50 states and the federal government have some protection for innocent buyers. Wisconsin needs to catch up.

Finally, I don't believe the Wisconsin Supreme Court envisioned this application of the spills law when they decided Mauthe vs. the State of Wisconsin in 1985. Their decision was the result of decades of legal maneuvering by big corporations to avoid cleaning up contamination they originally caused. The court's intent was to give the state wide latitude in addressing imminent dangerous levels of pollutants in our environment. It wasn't a mandate that the state steamroll innocent property owners into paying for contamination they had nothing to do with creating. The DNR has explicit enforcement discretion which they presently refuse to apply in a just, reasonable manor.

I believe the DNR fears losing the enforcement powers Wisconsin's spill law gives them but I don't believe this bill would actually do that. It would only force them to consider what is the fair and right thing to do when applying those enforcement powers. One-size-fits-all enforcement is not the right thing to do here. I'm here today asking for financial relief.

Thank you for the opportunity to tell my story.

Kendall Koeppler

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Assembly Committee on Environment

2023 Assembly Bill 44

The Responsibility of a Property Owner for Discharge of a Hazardous Substance by Another

January 11, 2024

Good morning, Chair Oldenburg, and members of the Committee. My name is Christine Sieger, and I am the Bureau Director overseeing Remediation and Redevelopment with the Wisconsin Department of Natural Resources. Thank you for the opportunity to testify, for informational purposes, on 2023 Assembly Bill 44 (AB 44), relating to the responsibility of a property owner for discharge of a hazardous substance by another.

This bill proposes to amend § 292.11, Wis. Stat., more commonly known as Wisconsin's Spill law. The proposed changes may result in hundreds of millions of dollars in costs to Wisconsin taxpayers and hundreds of new brownfields in our state.

Background

The Spill law requires persons who caused environmental contamination or who own property that is contaminated to clean it up to the extent practicable. The Spill law was enacted in May of 1978, over 45 years ago. The DNR has overseen the clean- up of over 14,000 properties and seen the successful redevelopment of thousands of sites using this authority. Many property owners over the years have efficiently investigated and cleaned up environmental contamination under the Spill law – we have issued over 28,000 cleanup approval letters. The Spill law is designed to protect the public from exposures to hazardous substances, and our public natural resources, like drinking water, from contamination from spills and other chemical discharges.

The Spill law has been a fundamental component of our nationally recognized brownfields program. The Spill law, along with its existing liability exemptions, has provided the state with the ability to successfully balance the clean-up of our environment with protecting public health and promoting economic redevelopment where many other states have struggled. Other Midwest states have dedicated hundreds of millions of state tax payer dollars to facilitate brownfields redevelopment. In contrast, Wisconsin has relied on more modest infusions of state and federal funds because of the strength of the liability provisions in the Spill law. In Wisconsin, the private sector has successfully incorporated the underpinnings of the Spill law into the real estate market by factoring the costs associated with environmental contamination at a property into the purchase price of such properties. In essence, we have allowed the marketplace to factor the Spill law into real estate transaction without costly infusions of taxpayer dollars.

Public Policy Implications

There are four main exemptions from liability that currently exist in the Spill law – for voluntary parties, local units of government, lenders, and off-site property owners. These existing exemptions require the

persons eligible for the exemption to conduct certain actions in return for an exemption from liability. These exemptions are earned and can be forfeited. AB 44 introduces new exemptions that effectively provide an economic benefit to certain entities but do not provide any clear public benefits, unlike the existing exemptions in state law. These proposed exemptions do not ensure that the public is protected from exposure to contamination, and likely would result in the creation of more brownfield sites, many of which may expose people to unsafe contamination. This proposal could result in substantial costs to Wisconsin's taxpayers to clean up these contaminated sites. They also could create or worsen conditions in our rural and disadvantaged communities, by allowing these properties to be used for housing or businesses without thought to public health effects.

Public Health and Environmental Implications

This proposed bill would authorize 3 exemptions from the Spill law: (1) one exemption is for persons who are "not a corporate entity;" and (2) another exemption applies both to a county that takes title to a contaminated property, as well as (3) any person who acquires that property from the county through the tax foreclosure process. The existing exemptions in the Spill law require notification of a discharge to the public, thus allowing the public to be aware of known contamination. This bill lacks that notification requirement. Further, there is no requirement to ensure that the future use of these properties is protective of the public, tenants, neighbors or the environment. These proposed exemptions would very likely result in more properties with contamination that would not get cleaned up and therefore may harm human health and the environment.

Economic Implications

This cleanup work would likely become an obligation of the state, and therefore a cost to Wisconsin taxpayers. Given the fact that the contamination of many of these sites occurred decades ago - before strong environmental laws were in place to prevent contamination from occurring – many of those persons or businesses who caused the discharge are no longer available to address the contamination. The DNR estimates that these new exemptions would apply to between five to ten percent of open and closed contaminated properties in the DNR database – out of a total universe of 16,600 known sites. Depending on the complexity of environmental and public health issues, the estimated cost of this exemption to taxpayers could range from $62.3M to $416M. Presently, there is not enough state funding available to assess, investigate, and clean up the newly exempt properties this legislation would create, or even ensure a minimal level of protection. Without additional state funds, these properties will likely stay contaminated and not returned to the tax rolls if the proposed exemptions go into effect.

Human Health Implications

If this exemption becomes law, it will intensify the health threats to low- and moderate-income people, including vulnerable children, pregnant women, and people living in Wisconsin's disadvantaged and rural communities. If property owners do not have the legal obligation to address the risks from exposure to contamination at properties, the people living in and working on those properties will continue to be exposed to contaminated groundwater, soil, and chemical vapors in the buildings. The contaminated properties affected most by this new exemption are in older, struggling parts of cities, towns, and rural areas, and often within the most economically distressed communities. If the owner of an older apartment building that once housed a dry cleaner is not required to follow the Spill law, they may not evaluate and mitigate the chemical vapors that could be affecting the health of the families who

live in the building or at the day care next door. The same hard-hit neighborhoods will continue to be on the receiving end of these negative consequences.

Lessons Learned from Other States

Other states have modified their liability standards, either partially or significantly. Most of those states still require notification and assessment of a property to determine imminent health exposures and requirements of the current property owner to mitigate those exposures so the property can be safely used, something AB 44 would not require. In 2020, the Michigan Department of Environment, Great Lakes and Energy (EGLE) estimated that Michigan has 14,000 contaminated sites, an estimated 10 percent of which pose immediate health threats, where there is no responsible party given Michigan's liability standard that was changed in its state cleanup law in 1995. The Michigan legislature utilized $1.3B in bonding to pay for environmental cleanups, once in 1988 and again in 1998. These funds helped address sites with no responsible party because the causer was long gone. Those funds have been expended. Since then, between 2018 and 2022, Michigan funded an additional $50 million plus in cleanup costs from the state budget. Michigan's inventory of "orphaned" sites continues to grow, despite state investment that is more than 10 times what Wisconsin makes available annually to reduce health risk at orphaned sites.

Other Concerns:

- The proposed bill uses an undefined term, "property owner that is not a corporate entity," in the exemption. The term may have unintended consequences in that it could provide exemptions to a broad group of entities including individuals, trusts, interstate agencies, associations, local governments, the federal government, as well as non-corporation companies such as partnerships, limited partnerships, limited liability companies, and sole proprietorships.
- Determining which persons would be eligible for the "not a corporate entity" exemption would be a significant policy, technical and legal implementation challenge for the DNR.
- The bill provides no funds to address the numerous sites that would, upon enacting this bill, become the responsibility of the state or federal government.
- The DNR database referenced in this bill did not exist in 1992 - it was created by state law in 2005. Therefore, it cannot be used to evaluate whether a property was on the DNR database prior to September 1, 1992.
- There is no requirement to assess or sample these sites or notify the DNR as a condition of obtaining the exemptions, thus compromising the public's right to know about contaminated sites in their community or if the site they reside on has public health risks.
- It creates an unintended double standard for properties acquired by local governments. If a property is acquired through an existing exemption by virtue of slum clearance, blight elimination, stewardship funds, bankruptcy court order or escheat, or tax foreclosure, there are obligations on the local government to ensure the DNR is notified, and the property is safe to put to intended use. With the new exemption, properties acquired by a county through tax foreclosure and the subsequent private owner would have no obligation to do anything.

Considerations for addressing concerns:

If the intent of the bill is to provide relief for persons who purchased properties decades ago that were later discovered to be contaminated, the legislature could consider the following:

- Provide funding to offset the costs of cleanup for a targeted group of property owners;
- Utilize terminology with existing statutory definitions;

- Ensure the beneficiaries of a new exemption are limited and focused (e.g., only residential property owners);
- Ensure protectiveness to human health through minimal requirements (e.g., evaluate and mitigate exposures from contaminated vapors and drinking water);
- Require property owners to maintain and report on the condition of systems installed to mitigate exposures and replacing them if ineffective;
- Ensure the public has access to information about environmental conditions of the properties; and
- Ensure that tenants are informed about the environmental conditions at the properties.

It is noteworthy that an exemption for counties that acquire a property via tax foreclosure already exists in state law.

As currently written, AB 44 provides benefits to a broad class of persons that, if adopted as currently written, likely will have detrimental consequences to public health and our natural resources, would add cost to the public taxpayer, and would increase the health threats in our rural and disadvantaged communities. An alternate solution would be to establish a fund to assist innocent purchasers to investigate and clean up contamination and significantly narrow the exemption from liability.

On behalf of the DNR, I would like to thank you for your time today. I would be happy to answer any questions you may have.

MEMORANDUM

TO: Members of the Assembly Committee on Environment

FROM: Jordan Lamb, The Welch Group

DATE: January 11, 2024

RE: **Support for AB 798, Aboveground Storage of Petroleum Products**

On behalf of the Wisconsin Potato and Vegetable Growers Association, the Wisconsin Pork Association, the Wisconsin State Cranberry Growers Association, the Wisconsin Cattlemen's Association, the Wisconsin Soybean Association, and the Wisconsin Farm Bureau Federation, I provide the following comments in **support** of AB 798, storage of petroleum products.

Currently, aboveground farm fuel storage tanks under 5,000 gallons are exempted from regulation by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). This is, in part, due to an administrative ruling.

In July 2019, DATCP notified affected Local Program Operators that it would cease to regulate all flammable and combustible liquid aboveground storage tanks that are less than 5,000 gallons on October 1, 2019. This notification resulted from a statutory mandate in which DATCP identified that a portion of administrative rule ATCP 93 conflicted with state statute chapter 168, which regulates aboveground storage tanks. As a result, DATCP inspections of aboveground tanks less than 5,000 gallons for compliance with NFPA standards are currently suspended.

There was also a specific regulation for dispensing and storing fuel at farms prior to 2019. *See* Wis. Admin. Code. s. ATCP 93.630. The regulation provided different requirements for farm tanks based on size including a registration exemption, plan review exemption and other provisions.

This legislation aims to correct the July 2019 administrative ruling but, importantly, also preserves the special provisions for farm aboveground fuel storage tanks that existed prior to 2019. Under AB 798, aboveground fuel storage tanks on farms must register with DATCP. This will provide information about the tank to fire departments and other emergency responders. However, the bill does not subject farm tanks under 5000 gallons to most of the expensive and rigorous requirements. This preserves their treatment under current law and under the provisions in effect prior to 2019.

Accordingly, the agricultural groups listed above support AB 798 and appreciate the authors' attention to this issue.

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