



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Current Law Relating to Water Quality

Water quality<sup>1</sup> concerns have increased throughout Wisconsin in recent years, partly as a result of reports of groundwater contamination. Examples of pressing issues include high nitrate concentrations and contamination from per- and poly-fluoroalkyl substances (PFAS). Existing state and federal laws address water quality, but new reports have prompted interest in additional state-level responses. On February 11, 2019, Assembly Speaker Robin Vos created the Speaker's Task Force on Water Quality. The governor's proposed 2019-21 biennial budget and bills introduced by individual legislators in the 2019-20 legislative session also address water quality. This information memorandum provides an introductory survey of this complex area of law.

#### ***INTRODUCTION***

The basic regulatory structure for surface water pollution has been in place for more than four decades, and the state's groundwater protection laws for more than three. However, water pollution continues to be a concern. In its 2018 Water Quality Report to Congress, Wisconsin reported 242 waterbodies on its list of impaired waters, although the report included some positive trends.<sup>2</sup> In its 2018 report to the Legislature, the Groundwater Coordinating Council<sup>3</sup> estimated that 10 percent of private wells in the state and 47 municipal water systems have high

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<sup>1</sup> For an overview of state law relating to water **quantity**, see Legislative Council, *Wisconsin Law Relating to Groundwater Withdrawals*, Information Memorandum (July 2016). On January 16, 2019, the Wisconsin Court of Appeals certified questions of constitutional law and statutory interpretation affecting groundwater quantity regulation in Wisconsin. [*Clean Wisconsin, Inc. v. DNR*, No. 2018AP59, unpublished certification (Wis. Ct. App.).] That certification is currently pending before the Wisconsin Supreme Court.

<sup>2</sup> Wisconsin Department of Natural Resources, *Water Quality Report to Congress – 2018*, <https://dnr.wi.gov/topic/SurfaceWater/IR2018.html>. An example of a positive trend in the report is the removal of more waterbodies from the impaired waters list than had been removed in any year since 2010.

<sup>3</sup> The Groundwater Coordinating Council comprises the secretaries (or their designees) of various departments with responsibilities relating to water resources management, the president of the University of Wisconsin System, the state geologist, and a representative of the governor. It advises and assists relevant state agencies and submits an annual report to the Legislature. [ss. 15.347 (13) and 160.50, Stats.] Its fiscal year 2018 report is available at: <https://dnr.wi.gov/topic/Groundwater/GCC/>.

nitrate concentrations, which correlate with birth defects and cancer. New data showing antibiotics, PFAS, and bacteria in water supplies has also heightened concern.

Groundwater and surface waters are often hydrologically connected, and the laws that regulate their quality interrelate.<sup>4</sup> However, they are governed by legally distinct bodies of law. In general, state regulation of surface water pollution derives from the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act). Some aspects of groundwater regulation are mandated under federal laws, such as the Safe Drinking Water Act, but other groundwater quality standards and enforcement are established under state law.

## **SURFACE WATER QUALITY**

Surface<sup>5</sup> water quality is primarily regulated under the Clean Water Act.<sup>6</sup> Although the U.S. Environmental Protection Agency (EPA) develops national criteria for certain pollutants and retains an oversight role, the state Department of Natural Resources (DNR) exercises “delegated authority” to implement many Clean Water Act requirements.

As required by the Clean Water Act, Wisconsin establishes surface water quality standards according to the designated use for a given body of water, and the water quality criteria required to maintain that use. In other words, the law recognizes that different standards may be required for different waterbodies. State law requires water quality standards to protect the public interest, including the protection of the public health and welfare and the present and prospective future use of such waters for public and private water systems, propagation of fish and aquatic life and wildlife, domestic and recreational purposes, and agricultural, commercial, industrial and other legitimate uses. [s. 281.15, Stats.]

### ***DISCHARGES FROM POINT SOURCES***

Under state law implementing the federal Clean Water Act, any discharge to a navigable water from a point source<sup>7</sup> must be authorized by a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. A WPDES permit includes a compliance schedule, under which certain

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<sup>4</sup> For example, the state generally may not grant a permit for discharging a pollutant into a surface water unless the permit includes a condition ensuring that state groundwater protection standards will be satisfied. [s. 283.31 (3) (f), Stats.] Likewise, administrative rules regarding the land application of sewage sludge include pollutant limits and testing requirements intended to protect groundwater quality. [See s. NR 204.07 (3), Wis. Adm. Code.]

<sup>5</sup> Various federal court cases have addressed whether, or in what circumstances, the Clean Water Act should be interpreted to apply to discharges to groundwater, particularly if the impacted groundwater resource has a direct hydrological connection to a navigable surface water. Although federal courts have reached differing conclusions regarding that question, for Wisconsin, the Clean Water Act has been interpreted as generally not extending to groundwater. [*Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 930 (1994).]

<sup>6</sup> Other laws, not discussed in this information memorandum, also address surface water quality. For example, federal, state, and local regulation of wetlands, shoreland zoning, solid waste management, sewage treatment, invasive species, and boating may affect surface water quality.

<sup>7</sup> A “point source” is any discernible, confined, and discrete conveyance from which pollutants are or may be discharged. [33 U.S.C. s. 1362 (14).]

pollution control levels must be achieved, and effluent limitations. [ss. 283.31 (3) and (4) and 283.55, Stats.]

Effluent limitations limit the specific pollutants that may be discharged. Effluent limitations are expressed as “technology-based” limits, which are based on the level of pollution control achieved using treatment technology that is reasonably available for limiting the discharge of the pollutant, and “water quality-based” limits, which are based on the quality of the stream or lake receiving the wastewater discharge. Water quality-based effluent limitations may be narrative (describing the characteristics the water should have) or numeric (specifying the maximum concentration of a pollutant). A WPDES permit contains either technology-based limitations or water quality-based limitations, whichever are most stringent. A WPDES permit issued by the DNR may not be for a term of more than five years. [s. 283.53 (1), Stats.]

A special WPDES permitting process applies to large concentrated animal feeding operations (CAFOs).<sup>8</sup> [s. NR 243.13, Wis. Adm. Code.]

A WPDES permit is also required before sewage sludge (also known as “municipal biosolids”) may be applied to land in the state. [s. NR 204.05 (1), Wis. Adm. Code.] DNR administrative rules set forth operational requirements and limitations for metal pollutants, pathogens, and nitrogen in such sludge. [s. NR 204.07, Wis. Adm. Code.]

### ***NONPOINT SOURCE POLLUTION***

The Clean Water Act also requires states to address nonpoint source<sup>9</sup> pollution. Nonpoint sources contribute to many of the contaminants creating impaired surface waters and groundwater pollution. For example, agricultural activities, including fertilizer application, runoff, and manure spreading, are a primary source of high nitrate contamination.

The DNR, in consultation with the Department of Agriculture, Trade, and Consumer Protection (DATCP), must establish performance standards and prohibitions “designed to achieve water quality standards by limiting nonpoint source water pollution” from agricultural sources. For nonagricultural sources, the DNR must establish such standards and prohibitions independently. [s. 281.16 (2) (a) and (3) (a), Stats.] For agricultural sources, the standards and prohibitions must, at a minimum, prohibit a livestock operation<sup>10</sup> from having any of the

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<sup>8</sup> “CAFO” is a lot or facility where a specified minimum number of animals have been, are, or will be stabled or confined. CAFOs are classified as small, medium, or large, depending on their size. [s. NR 243.03 (12), (31), (39), and (59), Wis. Adm. Code.] For more information regarding the WPDES program as applied to CAFOs, see Legislative Council, *Wisconsin Pollutant Discharge Elimination System (WPDES) Permits for Large Livestock Facilities*, Information Memorandum (November 2016).

<sup>9</sup> A “nonpoint source” is “a land management activity which contributes to runoff, seepage or percolation which adversely affects or threatens the quality of waters of this state and which is not a point source.” [s. 281.65 (2) (b), Stats.] Nonpoint sources are typically diffuse in nature, without a single, well-defined point of origin. Examples of pollutants from nonpoint sources include fertilizers, nutrients, oil, and sediment from agricultural, urban, and residential areas.

<sup>10</sup> A “livestock operation” is a feedlot or other facility or a pasture where animals are fed, confined, maintained, or stabled. [s. 281.16 (1) (c), Stats.]

following: direct runoff from a feedlot or stored manure into the waters of the state; overflow of manure storage structures; unconfined manure piles in certain areas; and unlimited access by livestock to waters of the state. [s. 281.16 (3) (a), Stats.]

## ***POLLUTION CONTROL STRATEGIES***

### ***Total Maximum Daily Loads***

The Clean Water Act requires states to develop total maximum daily loads (TMDLs) for all impaired surface waters. [33 U.S.C. s. 1313 (d) (1).] A TMDL is generally the amount of a pollutant that a waterbody (or waterbody segment) can assimilate and not exceed water quality standards. Once a TMDL is developed and approved by the EPA, Wisconsin implements the TMDL by regulating both point sources and nonpoint sources. For point sources, the establishment of a TMDL may prompt revisions to a WPDES permittee's effluent limitations. Typically, the state regulates nonpoint source pollution in a TMDL area through the strategies described below.

### ***Nutrient Management***

“Nutrient management” is one part of a system of conservation practices related to nonpoint source pollution. Nutrient management conservation practices seek to limit runoff of nutrients such as potassium, phosphorus, and nitrogen into waters of the state while maximizing farm cost effectiveness. Local units of government may also enact ordinances that are consistent with the state standards. Agricultural landowners satisfy performance standards set forth in DNR administrative rules, and any applicable ordinances, by implementing these practices. [s. 92.15, Stats.; chs. ATCP 50 and NR 151, Wis. Adm. Code.]

### ***Water Quality Credit Trading***

Although the Clean Water Act does not specifically mention water quality trading, EPA policy allows states to develop water pollution trading programs.<sup>11</sup> Wisconsin first created a pilot program for trading water pollution credits as part of the 1997 biennial budget act. [1997 Wisconsin Act 27.] The program, now available statewide, authorizes a WPDES permittee to exceed otherwise applicable effluent limitations if the permittee negotiates an agreement with another permittee or nonpoint source that will result in an overall improvement in water quality within a given basin. [s. 283.84, Stats.] In February 2019, the EPA issued a letter announcing a more flexible approach to approving states' credit trading programs.<sup>12</sup>

### ***Adaptive Management***

Adaptive management allows a WPDES permittee to reduce phosphorus discharges from other sources, including nonpoint sources, if doing so is more cost-effective than reducing its own discharge. Under current law, the DNR may authorize a permittee to use adaptive management

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<sup>11</sup> Office of Water, EPA, *Water Quality Trading Policy* (Jan. 13, 2003).

<sup>12</sup> The EPA letter is available at: <https://www.epa.gov/sites/production/files/2019-02/documents/trading-policy-memo-2019.pdf>.

if the permittee has met certain conditions, including the submission of an adaptive management plan. An adaptive management plan must include specified analyses, goals, and demonstrations. A reissued permit authorizing adaptive management must include monitoring and reporting requirements, and water quality-based effluent limitations or a TMDL approved by the EPA. [s. NR 217.18 (3) (e), Wis. Adm. Code.]

### ***Stormwater Management***

The DNR must promulgate a state stormwater management plan, in consultation with the Department of Safety and Professional Services (DSPS). The DNR also must establish uniform state standards relating to stormwater management at construction sites. Subject to certain exceptions, local stormwater ordinances must strictly conform to those state standards. [s. 281.33, Stats.]

### **GROUNDWATER QUALITY**

Groundwater quality is regulated under state and federal drinking water laws; general requirements regarding water quality; and the state's comprehensive groundwater protection law. The DNR must comply with the requirements of the state groundwater protection law, described below, as it administers any program, responsibility, or activity within the department's jurisdiction. [s. 299.31, Stats.]

#### ***GENERAL AUTHORITY***

The DNR has several sources of statutory authority to establish groundwater quality standards. The DNR's general duty to establish water quality standards for the waters of the state, discussed above, applies to groundwater. [ss. 281.01 (18) and 281.15, Stats.] In addition, the DNR is authorized to establish, administer, and maintain a safe drinking water program no less stringent than the requirements of the federal Safe Drinking Water Act. [s. 281.17 (8) (a), Stats.]

The Safe Drinking Water Act establishes maximum contaminant levels for drinking water supplied from "public water systems," which includes all systems that provide the public with water for human consumption through pipes and which have at least 15 service connections or regularly serve at least 25 individuals. [42 U.S.C. ss. 300f (4) (A) and 300g; s. 281.61 (1) (c), Stats.] Differing levels of federal regulation apply to a public water system depending on its number of service connections, the number of people served, and the portion of a year for which a person receives service. The strictest regulations apply to "community water systems," which are public water systems that serve at least 15 service connections used by year-round residents of the area, or which regularly serve at least 25 year-round residents. [42 U.S.C. s. 300f (15); s. 281.62 (1) (a), Stats.]

State law also requires the DNR to prescribe, publish, and enforce minimum reasonable standards and methods in order to obtain pure drinking water for human consumption and to establish all safeguards necessary to protect public health against the hazards of polluted sources of impure water supplies intended or used for human consumption, including minimum reasonable standards for the construction of wells. In addition, the DNR exercises general supervision and control over all methods of obtaining groundwater for human consumption including sanitary conditions surrounding the same, and the construction or reconstruction of wells and generally may prescribe, amend, modify, or repeal any rule or regulation prescribed

and must do and perform any act deemed necessary for the safeguarding of public health. [s. 280.11 (1), Stats.]

### ***GROUNDWATER PROTECTION LAW***

Wisconsin's groundwater protection law, codified in ch. 160, Stats., resulted from a 1982 Legislative Council study committee. The stated intent of the law is to minimize the concentration of polluting substances in groundwater through the use of numerical standards in all groundwater regulatory programs. The groundwater quality law supplements all regulatory authority found elsewhere in the statutes.

The DNR establishes by rule standards and limits for each substance identified by state agencies, defined as "regulatory agencies"<sup>13</sup> for purposes of ch. 160, Stats. Each state agency continues to exercise the powers and duties of the regulatory programs under its control, consistent with the standards and limits. [s. 160.001, Stats.; ch. NR 140, Wis. Adm. Code.]

#### ***Identification of Substances***

The first step in establishing groundwater protection standards is identifying substances that may affect groundwater quality. Under this process, each regulatory agency is required to submit to the DNR a list of substances which either have been detected in, or have a reasonable probability of entering, the groundwater of the state and are related to activities within the agency's authority to regulate. In addition, any person may petition a regulatory agency to include a substance on its list. [s. 160.05 (1) and (2), Stats.]

The DNR places each substance into one of three categories for purposes of determining the priority in which standards will be established. Category 1 substances are those which have been detected in groundwater in concentrations in excess of a "federal number"<sup>14</sup> for that substance; Category 2 substances are those which are of public health or welfare concern and have been detected in groundwater, but not in concentrations in excess of an existing federal number; and Category 3 substances are those which are of public health or welfare concern and have a reasonable probability of being detected in groundwater. Each substance is ranked within its category, with the highest rankings given to those substances which pose the greatest risk to human health or welfare, taking into consideration certain characteristics, including carcinogenicity, teratogenicity, and mutagenicity. The DNR designates which of the substances

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<sup>13</sup> A "regulatory agency" includes DATCP, DSPS, the Department of Transportation, the Department of Health Services (DHS), and any other state agency which regulates activities, practices, or facilities related to substances which have been detected in or have a reasonable probability of entering groundwater. [s. 160.01 (7), Stats.]

<sup>14</sup> A "federal number" is a numerical expression of the concentration of a substance in water, established as a drinking water standard or maximum contaminant level, by the EPA; a suggested no-adverse-response level, by the EPA; or for oncogenic substances, a concentration based on a risk level determination by the EPA or a concentration based on a probability of risk model determined by the national academy of sciences. [s. 160.01 (3), Stats.]

in each category are of public health concern and which are of public welfare concern.<sup>15</sup> [s. 160.05 (3), (4), and (6), Stats.]

### ***Establishing Enforcement Standards and Preventive Action Limits***

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

The DNR and DHS share responsibility for establishing enforcement standards for substances of public health concern.<sup>16</sup> For each substance of public health concern submitted to it, DHS is required to recommend an enforcement standard to the DNR.<sup>17</sup> [s. 160.07 (2) and (3), Stats.]

State law requires DHS to recommend existing “federal numbers” as enforcement standards. If more than one federal number exists for a substance, the most recently established number must be used. However, if no federal number exists for a substance, an existing state drinking water standard must be used. If no state standard exists, DHS must develop a numerical standard by using a risk assessment methodology. [ss. 160.07 (4) and 160.13, Stats.]

Within nine months of sending DHS the name of a substance identified and categorized as a public health concern, the DNR must propose rules establishing the DHS recommendations as the enforcement standard for that substance. [s. 160.07 (5), Stats.] However, there is no specified timeframe by which DHS must provide a requested public health standard to the DNR.

State law also provides a procedure to develop groundwater protection standards for substances of public welfare concern. For these substances, the DNR alone formulates the enforcement standard. The development of public welfare standards is similar to the process DHS utilizes to develop public health standards. However, in determining a public welfare standard, if neither a federal nor state standard exists, the DNR must establish a standard using all relevant and

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<sup>15</sup> In determining whether a substance is a public health concern, the DNR must take into account the degree to which the substance may cause or contribute to short- or long-term adverse human health impacts. In determining whether a substance is of public welfare concern, the DNR must take into account whether the substance may influence aesthetic suitability of water for human use, influence the suitability of water for uses other than human drinking water, or have a substantial adverse effect on plant or animal life. [s. 160.05 (6), Stats.]

<sup>16</sup> The agencies are required to have a memorandum of understanding regarding the procedures and responsibilities of each agency in establishing enforcement standards, including the standard the DNR uses to designate substances of public health concern under s. 160.05 (6), Stats. [s. 160.07 (1), Stats.] Public health-related enforcement standards are provided in s. NR 140.10, Wis. Adm. Code.

<sup>17</sup> Recently, the DNR sent a letter to DHS requesting recommendations for state health-based groundwater quality standards for 27 different substances, including PFAS.

scientifically valid information available, and if necessary, by comparison to similar compounds. [s. 160.09, Stats.; s. NR 140.12, Wis. Adm. Code.]

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

When the DNR promulgates an enforcement standard or preventive action limit for a substance, each state agency is required to review its existing rules regarding activities, practices, or facilities which are related to that substance. If necessary, state agencies are required to revise their rules so that regulated activities achieve compliance with the groundwater protection law.<sup>18</sup> [s. 160.19, (1), Stats.]

### ***MONITORING***

Each state agency responsible for regulating an activity, practice, or facility must submit to the DNR a list of substances related to such regulation that have entered or might enter the groundwater. The DNR has primary responsibility for monitoring and sampling groundwater for the presence of those substances, although other regulatory agencies may also engage in these activities. [s. 160.27 (1) and (5), Stats.] For example, DATCP monitors groundwater for the presence of agricultural chemicals.

### ***AGENCY ENFORCEMENT***

Each regulatory agency is required to adopt rules setting forth the range of responses which it may require when an enforcement standard or preventive action limit is attained or exceeded. Compliance with the preventive action limit or the enforcement standard is measured at the “point of standards application.”<sup>19</sup> When a preventive action limit is attained or exceeded at a specific location, the relevant regulatory agency must assess the cause, evaluate the significance of the concentration, and implement responses for a specific site. In some instances, an agency must prohibit the activities or practices that are the cause of the relevant substance. However, before prohibiting a practice or activity, an agency must determine “to a reasonable certainty, by

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<sup>18</sup> A state agency’s administrative rules regulating the design and management practices for activities, practices, and facilities affecting groundwater must be crafted to result in compliance with the preventive action limits, if feasible. [s. 160.19 (2), Stats.]

<sup>19</sup> A “point of standards application” is the specific location, depth, or distance from a facility, activity, or practice at which the concentration of a substance in groundwater is measured for purposes of determining whether a preventive action limit or an enforcement standard has been attained or exceeded. [s. NR 140.05 (15), Wis. Adm. Code.]



the greater weight of the credible evidence,” that no other response would prevent the violation of the enforcement standard. [ss. 160.21, 160.23, and 160.25, Stats.]

In evaluating options to respond to noncompliance with an enforcement standard, agencies typically must consider the existence of background concentrations of naturally occurring substances. If nitrates or any substance of only aesthetic concern attains or exceeds an enforcement standard, an agency is not required to impose a prohibition or close the facility if the agency determines the standard was attained or exceeded, in whole or in part, because of high background concentrations of the substance, and the additional concentration from the facility does not represent a public welfare concern. [s. 160.25 (3) and (4), Stats.]

#### ***EXCEPTION FOR PRIVATE ON-SITE WASTEWATER TREATMENT SYSTEMS***

An agency is not required to have either general or site-specific responses in administrative rules if the preventive action limit or the enforcement standard for nitrate is met or exceeded at the point of standards application, and the source of the nitrate is a private on-site wastewater treatment system (POWTS).<sup>20</sup> In addition, agency administrative rules that define design or management criteria for POWTS are not required to minimize the amount of nitrate in groundwater or maintain compliance with the preventive action limit for nitrate, and may permit the enforcement standard for nitrate to be attained or exceeded at the point of standards application. [s. 160.255, Stats.]

#### **PUBLIC PARTICIPATION, LIABILITY, AND REMEDIATION**

Various state and federal laws provide for public participation, liability, and remediation regarding water pollution. Whereas public participation provisions may require public input before a standard is established or a permit is issued, liability and remediation answer the question of how to address existing contamination.

#### ***PUBLIC TRUST DOCTRINE***

Wisconsin statutes and court decisions allow a citizen to bring a legal action, pursuant to the public trust doctrine,<sup>21</sup> directly against a private party for abatement of a public nuisance when the citizen believes that the DNR has inadequately regulated the private party. [s. 30.294, Stats.; *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998).]

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<sup>20</sup> A “private on-site wastewater treatment system” is a sewage treatment and disposal system serving a single structure with a septic tank and soil absorption field located on the same parcel as the structure. This term also means an alternative sewage system approved by the DNR including a substitute for the septic tank or soil absorption field, a holding tank, a system serving more than one structure or a system located on a different parcel than the structure. A POWTS may be owned by the property owner or by a special purpose district. [s. 145.01 (12), Stats.]

<sup>21</sup> The public trust doctrine, as developed and interpreted by the courts, provides that navigable waters are held in trust by the state for the benefit of the public. The doctrine has been interpreted to require the Wisconsin Legislature to serve as trustee for the citizens’ rights to navigate and enjoy recreational activities in the waters of the state.

### **CLEAN WATER ACT**

The Clean Water Act provides various opportunities for public participation relating to surface water discharge permits. For example, members of the public typically have several means by which to object to or challenge a WPDES permit. Members of the public may submit written comments during a required 30-day public comment period or request a public hearing for any proposed WPDES permit. [ss. 283.39 and 283.49, Stats.]

The Clean Water Act also authorizes “citizen suits” as one method for enforcing effluent limitations in a WPDES permit. After giving a 60-day notice to the state and the EPA, any person may bring such a suit challenging an effluent limitation or an order issued by the state or the EPA with respect to such a limitation. [33 U.S.C. s. 1365.]

State law similarly authorizes any five or more persons to file a petition for DNR review of the reasonableness of any term or condition of an issued, reissued, or modified WPDES permit. Such a petition must be filed within 60 days of the department action that is the subject of the challenge. Upon receipt of a verified petition for review, the DNR must provide notice of a public hearing. At the public hearing, all interested persons must be afforded an opportunity to present facts, views, or arguments relevant to the issues raised in the petition. [s. 283.63 (1), Stats.]

### **CERCLA**

A primary federal mechanism for environmental remediation and liability is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>22</sup> With regard to the release of a hazardous substance onto the land and into the water, including groundwater, this law assigns liability to any party that was responsible for the release of the substance, and requires that the contaminated resource be restored to beneficial use.

In the case of groundwater that is a current or potential source of drinking water, remediation might include satisfying any applicable standard under the Safe Drinking Water Act. For groundwater that may impact surface water quality, remediation might include satisfying a water quality standard under the Clean Water Act. EPA guidance should be consulted for current remediation parameters.

CERCLA casts a wide net of liability, including to a current or former owner of the land or facility where the release occurred or to a party who transported the substance to the place where it was released. The law, however, provides a defense in the case of an “innocent purchaser” who is able to prove that the release of the substance was caused by a third party with whom the purchaser had no contractual relationship. If the third party is the seller of the property, a contractual relationship exists. In this case, the purchaser must show that the purchaser did not know and had no reason to know of any contamination or potential contamination at the time of purchase. In order to claim not to have had a “reason to know,” the purchaser must have carried out “all appropriate inquiries” and have taken specified “reasonable steps” prior to purchasing the property. [42 U.S.C. ss. 9601 (35) and 9607 (b) (3).]

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<sup>22</sup> 42 U.S.C. s. 9601, *et seq.* This law is also known as the “Superfund” law.

## ***HAZARDOUS SUBSTANCE DISCHARGE LAW***

One primary state mechanism for preventing and remediating environmental contamination, including contaminants that may migrate to the groundwater, is the Hazardous Substance Discharge Law, commonly referred to as the “Spill Law.” [ch. 292, Stats.] The law identifies a “hazardous substance” in extremely broad terms with regard to its potential to cause harm to human health or the environment.<sup>23</sup> Under this law, any unauthorized<sup>24</sup> discharge<sup>25</sup> of a hazardous substance—whether solid, semisolid, liquid, or gaseous—must immediately be reported to the DNR, which maintains a 24-hour hotline to receive such notifications. [s. 292.11 (2) (a) and (c), Stats.] Information obtained from such a notification may not be used against the reporting party in a criminal proceeding.<sup>26</sup> [s. 292.11 (2) (b), Stats.]

The responsible party, which may be either the party possessing or controlling the hazardous substance or the party causing the discharge, must then restore the environment and minimize any harmful effects of the discharge. [s. 292.11 (3), Stats.] Even after remediation, a responsible party retains liability with regard to any future contamination resulting from the past discharge. In addition, the responsible party may be liable for remediation of hazardous substance spills which, although initially caused by actions preceding enactment of the Spill Law, continue to discharge after that date. [*State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130 (1998).]

If the hazardous substance is discovered in groundwater, the owner or occupant of the property may be able to obtain an exemption from liability if the party can show that the discharge did not originate on the property and that the party did not possess or control the hazardous substance or cause the discharge. In addition, the party must agree to allow third parties to enter the property for purposes of remediation. [s. 292.13 (1), Stats.]

A party may also avoid liability by participating in the remediation as a “voluntary party.” Under this program, a party who pays the appropriate fees and conducts environmental remediation to the satisfaction of the DNR may obtain a certificate of completion (“COC”) which shields that party from future liability for past releases on the entire property. This COC also transfers to future owners of the property. However, the DNR may opt to issue an interim or partial COC in situations where the remediation is only partially completed or where the type of contamination

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<sup>23</sup> For example, the statute includes substances that are toxic, corrosive, flammable, irritants, strong sensitizers, or explosive. [s. 292.01 (5), Stats.] The DNR, however, has excluded natural gas as a hazardous substance for purposes of the notification under this law. [s. NR 706.05 (1) (b) (note), Wis. Adm. Code.]

<sup>24</sup> A discharge is not considered “unauthorized” if it is conducted in accordance with certain permitting terms or other approved application, such as with fertilizer or pesticide. [s. 292.11 (9), Stats.; s. NR 706.07 (1), Wis. Adm. Code.]

<sup>25</sup> For purposes of the Spill Law, “discharge” includes spilling, leaking, pumping, pouring, emitting, emptying, or dumping. [s. 292.01 (3), Stats.] Discharge, however, does not include a situation where the hazardous substance enters a “secondary containment structure” where it can be recovered without entering the environment, or where the discharge does not rise above a certain minimum threshold established by the DNR. [ss. NR 706.05 (1) (a) and 706.07 (2), Wis. Adm. Code.]

<sup>26</sup> This type of immunity is known as “use immunity.” It protects the party only from the use of the information in a criminal proceeding, not from criminal liability altogether (known as “transactional immunity”).

is not yet fully understood. For instance, concerns over the emergence of PFAS prompted the DNR on January 3, 2019, to decide to award only partial COCs. A partial COC will shield the party from liability only for the specific contaminants mentioned in the partial COC. [s. 292.15, Stats.]

In order to alert the public to potential groundwater contamination, the DNR maintains a database of property on which a groundwater standard has been exceeded. [s. 292.57, Stats.]

### ***WELL COMPENSATION GRANT PROGRAM***

Approximately 40% of Wisconsin households derive drinking water from a private well. In the event the groundwater accessed by such a well becomes contaminated, the owner of the well may be eligible for certain compensation. The program covers wells that are either contaminated or have been or may be ordered to be abandoned by the DNR for certain health or safety reasons.

A well is considered contaminated if it either: (1) produces water that exceeds either a national drinking water standard established by the EPA pursuant to the Safe Drinking Water Act or a groundwater protection standard established by the DNR; or (2) is the subject of a written DNR human health advisory opinion. [s. 281.75 (1) (b), Stats.]

A well may be ordered to be abandoned by the DNR on several bases, including contamination that has not been eliminated by three chlorination treatments, nonconforming construction, or a threat it poses to groundwater.

A landowner or lessee of property on which a qualifying well is located may apply for compensation under the program, provided that the applicant's annual income does not exceed \$65,000. Compensation may be used for any of the following activities:

- Water tests to determine if the well is contaminated.
- Reconstruction of a contaminated well.
- Construction of a new well.
- Connection to an existing private or public water supply.
- Installation of a new pump.
- Proper abandonment of a contaminated well.
- Equipment for water treatment (if no other option is feasible).
- Providing a temporary bottled or trucked water supply.

### ***BROWNFIELDS GRANTS***

The Wisconsin Economic Development Corporation (WEDC) operates a program that includes financial assistance for the remediation of groundwater issues associated with brownfield sites or facilities. A "brownfield" is defined as an abandoned, idle, or underused commercial or industrial site with actual or perceived environmental contamination that hinders its expansion or redevelopment. Under this program, WEDC may award grants for, in part, the restoration of soil or groundwater at a brownfield, provided that the party responsible for the contamination

either is unknown, cannot be located, or cannot pay for the remediation. In addition, the recipient of the assistance must contribute to the cost of the remediation. [s. 238.13 (1) (a) and (2) (a) 2. and 3., Stats.] At present, these grants are generally no more than \$500,000 per brownfield.

### ***REPLACEMENT OF LEAD SERVICE LINES***

Lead is commonly introduced to the public water supply by leaching from lead-containing pipes, solder, and plumbing fixtures. The federal Safe Drinking Water Act, discussed above, generally prohibits the use of pipes and materials that contain more than a specified amount of lead.<sup>27</sup> [42 U.S.C. s. 300f (4).] However, it generally does not require public water systems or property owners to remove previously installed lead-containing plumbing systems.

Public water systems are generally required to install and operate optimal corrosion control treatment in order to reduce lead and copper concentrations at consumers' taps and take water samples on a periodic basis. If more than 10 percent of the tap water samples collected during a particular monitoring period exceed established lead levels, then the public water system must take certain actions to reduce the lead level and to provide public education about the risks of lead. [40 C.F.R. ss. 141.80 to 141.91; subch. II, ch. NR 809, Wis. Adm. Code.]

2017 Wisconsin Act 137 created a process by which a water public utility may provide a grant, a loan, or both to a property owner for the purpose of assisting the property owner in replacing the portion of a lead-containing water service line that is owned by the property owner. It also authorized local units of government to provide loans or facilitate owner-arranged financing to replace lead-containing water service lines. The act also authorized a political subdivision to use its own workforce to perform, on private property, certain work that is ancillary to replacing the portion of a water service line that is owned by a public utility.

### ***COMMON LAW REMEDIES***

Several common law theories exist with regard to civil liability for groundwater contamination that migrates to the groundwater of a neighboring property, including negligent damage to property, private nuisance, and trespass. For example, chemicals from a landfill seeping or percolating through groundwater can constitute an invasion of another's property rights. [*Fortier v. Flambeau Plastics*, 164 Wis. 2d 639, 676 (Ct. App. 1991).]

These cases, however, are complicated. First, a plaintiff must prove negligence by the defendant in allowing the groundwater contamination to occur **and** that the negligence was the cause of damage to the neighbor's property. [*Dyer v. Waste Management of Wisconsin*, 2011 Wis. App. LEXIS 571 (July 21, 2011).] Second, the scientific complexity of groundwater migration makes it difficult for a plaintiff to prove causation of damages, even where the contamination in the well

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<sup>27</sup> The EPA establishes Maximum Contaminant Level Goals (MCLG), which are aspirational goals for the amounts of contaminants in drinking water, and Maximum Contaminant Levels or "action levels," which are enforceable contaminant levels. Under current law, the MCLG for lead in drinking water is zero, but the "action level" for lead is 15 parts per billion (ppb) (also expressed as 15 µg/L or 0.015 mg/L). [40 C.F.R. s. 141.80; s. NR 809.54, Wis. Adm. Code.]

is the same as the contaminant on the defendant's property. [*Kinnick v. Schierl*, 197 Wis. 2d 855 (Ct. App. 1995).]

The state's groundwater quality standards statutory scheme does not affect any common law remedy that might be available. Certain actions taken by the DNR or by direction of the DNR in response to contamination are not evidence of liability for environmental pollution. [s. 160.32, Stats.]

The general six-year statute of limitations for civil actions in Wisconsin begins to run only when a landowner "discovers" that a company is causing groundwater contamination, not when the landowner merely "suspects" it. [*Jacobs v. Nor-Lake*, 217 Wis. 2d 625 (Ct. App. 1998).] In addition, in the event a party submits an application under the well compensation grant program (discussed above), any statute of limitations that might be running on a potential action regarding remedies for the well contamination is tolled while the DNR considers the grant application. [ss. 281.75 (15) and 893.52, Stats.]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Rachel Letzing, Principal Attorney, Anna Henning, Senior Staff Attorney, and Ethan Lauer, Staff Attorney, on March 14, 2019.

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