Delivered via electronic mail

April 4, 2024

Governor Tony Evers
State of Wisconsin
115 East, State Capitol
P.O. Box 7863
Madison, WI 53707-7863

Re: Request to Veto Senate Bill 312; Continued Call to Release PFAS Trust Fund

Governor Evers:

The undersigned organizations write to thank you for your continued work to support Wisconsin communities impacted by PFAS contamination. As you know, exposure to PFAS at even extremely low levels is linked to a wide variety of serious health risks and disproportionately impacts our most vulnerable populations such as expecting mothers and small children. Given these health risks, we appreciate your recent compromise proposal that would immediately release the $125 million set aside in the PFAS Trust Fund to impacted communities without undermining DNR's ability to address PFAS contamination in the long term. Since Senate Bill 312 does not appropriate any money from the PFAS Trust Fund, and since it would undermine DNR's ability to address PFAS contamination, we respectfully request you to veto that measure. Simply put, it is a bad deal for Wisconsinites that you should not take.

Choosing between SB 312 and putting the PFAS Trust Fund to good use presents a false dilemma. Again, SB 312 does not appropriate any money. A veto therefore does not impact the ability of the Republican-controlled Joint Finance Committee to release the $125 million they agreed to during the budget process by authorizing your compromise proposal in the form of DNR's most recent § 13.10 request. By vetoing this bill, you will put the debate over weakening the Spills Law to rest and turn the attention to where it always should have been—getting the PFAS Trust Fund in the hands of the trustees, i.e., the hands of impacted communities that so desperately need it.

The only meaningful thing SB 312 would accomplish by itself is to impose two inappropriate, overbroad enforcement limitations on DNR's authority under the Spills Law, which we discuss in detail below.

Before doing so, it is worth noting the enforcement issues these limitations are supposedly designed to address are not issues at all. At best, these provisions are misguided solutions in search of problems. A recently released report documents that DNR has fairly applied the Spills Law to sites with PFAS contamination. The hypothetical scenarios that have been proffered to justify carving back DNR's authority to help "innocent" parties have never occurred. Instead, the enforcement limitations of SB 312 are overbroad polluter giveaways that will frustrate DNR's

ability to address PFAS contamination in the long term and run the risk of leaving no one responsible for large swaths of PFAS contamination throughout the state, to the detriment of the environment and public health.

"Innocent Landowner" Enforcement Limitation

The first enforcement limitation states that DNR "may not commence any enforcement action against any person that meets the eligibility criteria for an innocent landowner grant under s. 292.34(3) if the person grants permission to the department to remediate the land at the department's expense." The phrase "innocent landowner" sounds benign, but closer inspection of the actual language in Section 292.34(3) makes it clear this enforcement exemption may apply to entities that are neither innocent nor landowners.

For example, the innocent landowner enforcement limitation can apply to industrial entities that discharged PFAS into the environment. Under SB 312, any entity that landspread in compliance with a permit is exempt from DNR's enforcement authority, regardless of the terms of that permit. This may make sense for passive receivers like municipalities, but this is extremely problematic when it comes to entities like industrial dischargers. Industrial entities that profited from discharging these contaminants into the environment are not "innocent," were best positioned to know about and prevent discharges, and are best positioned to absorb costs associated with cleanup. In any event, neither industrial nor municipal dischargers are landowners as relevant in this context, because they typically spread biosolids on lands they do not own.

As another example, one of the eligibility criteria is largely redundant of an existing statutory provision that already protects landowners whose properties are impacted by contamination migrating from neighboring properties. Where that eligible criterion is not redundant, however, it creates a potential loophole where polluters may avoid liability by purchasing properties impacted by their pollution but from where the pollution did not originate. By purchasing such properties, these entities become landowners, but there is no explicit requirement that these entities are "innocent." Rather, SB 312 presumes such innocence if any of the eligibility criteria are met.

Responsibility for cleanup of contaminated sites involving an "innocent landowner" would then be placed on an underfunded and generally understaffed DNR. $125 million is simply not enough to cover the cost of DNR remediating large swaths of PFAS contamination around the state and administering the grant programs SB 312 envisions.

Moreover, innocence, or any consideration of culpability for that matter, has never been a formal part of DNR's administration of the Spills Law. The Spills Law has always been a strict liability statute based on causation, possession, or control of the hazardous substance discharge or the substance itself, regardless of intent. No court has ever considered "innocence" in the context of the Spills Law; injecting that term into Chapter 292 threatens to throw the entire statutory scheme into disarray.

"Promulgated Standard" Enforcement Limitation

The second limitation would prohibit DNR from enforcing the Spills Law to address PFAS contamination for an indefinite period of time. This limitation is remarkably similar to the relief Wisconsin Manufacturers & Commerce is seeking in an ongoing case against DNR over the department's application of the Spills Law to PFAS. There, WMC has convinced a Wisconsin Court of Appeals that DNR's statements to responsible parties that the Spills Law applies to PFAS are unlawful rules, threatening DNR's continued application of that important law to PFAS. In other words, were the Court of Appeals decision to become law, DNR may not be able to meaningfully *apply* the Spills Law until it passes a rule designating specific PFAS as hazardous substances and establishing the circumstances under which they become hazardous if discharged.

Here, SB 312 states: "For persons that are not eligible for an innocent landowner grant under s. 292.34(3), the department may not commence any enforcement action based on the results of PFAS testing on samples taken from lands now owned by the state unless that testing demonstrates that PFAS levels exceed any promulgated standard under state or federal law." Under this provision, the Spills Law could theoretically be applied but not *enforced* until there are standards in place and those standards are exceeded.

The difference between applying and enforcing the Spills Law is largely without distinction—a law that cannot be enforced is not a law. The "promulgated standard" enforcement limitation should therefore be treated as an end run around the courts. DOJ, DNR, and impacted communities participating as friends of the court have fought hard in that case to preserve DNR's authority to apply and enforce the Spills Law to PFAS contamination, and we urge you to reject this legislative attempt to undermine those efforts before the case is appealed to the Wisconsin Supreme Court.

Many of the undersigned organizations and individuals attempted to work with the bill authors to achieve important changes to SB 312, including not only the removal of the enforcement limitations, but also the inclusion of language that would prioritize support for those with private drinking water wells contaminated with PFAS. Ultimately, instead of addressing concerns identified with the bill, key provisions of SB 312 were amended for the worse.

Thank you for your time and attention to this important issue, and for considering our respectful request to veto SB 312.

Sincerely,

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