

DNR's Guidance on PFAS Remediation Raises More Questions than Answers

On August 17, 2020, the Wisconsin Department of Natural Resources (DNR) sent 3,038 letters to Responsible Parties (RPs) involved in cleanup at remediation sites across Wisconsin.[1] The letter explains DNR's interpretation of statutes and rules related to remediation sites, and insists that RPs assess for emerging contaminants such as PFAS.

PFAS is a broad class of more than 4,000 compounds so ubiquitous they are found in the blood of many adults in the United States. Use of the compounds began in the 1940s. The compounds can be found in many household items and are used for a number of purposes in manufacturing and commerce. The most concerning PFAS compounds, PFOA and PFOS, are found in fire suppression foam and have shown up in water and soil samples around airports and fire fighter training facilities nationwide.

Given the large number of PFAS compounds, the letter from DNR may raise more questions than answers for RPs with both open and closed remediation sites.

First, which compounds should be assessed?

PFAS is a broad class of more than 4,000 compounds. Not all compounds are considered hazardous and, in fact, DNR has not published any hard and fast remediation levels for *any* compound. Instead, the agency's practice seems to be focused on a handful of the compounds; but exactly which compounds and at what levels they are considered hazardous remains a mystery. Although the Wisconsin Department of Health Services has recommended groundwater standards as low as 20 parts per trillion for PFOA and PFOS, the science behind those standards has been challenged and the standards have not been promulgated through the rulemaking process. The DNR has not published a toxicity level for compounds other than PFOA and PFOS, even preliminarily.

So, should RPs evaluate each of the thousands of compounds? Testing for each and every PFAS compound is not only cost-prohibitive, it is likely impossible. There are many compounds for which the testing technology is not fully developed, and many other compounds for which testing cannot detect levels as low as those contemplated by DNR.

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However, DNR's letter to RPs seems to imply the agency can require testing for any compound they deem necessary at any time, giving it full control over when and whether any particular remediation site is considered closed. However, DNR's assertion of full control to determine on a case-by-case basis what is hazardous and at what level rests on legally shaky ground and may be subject to challenge.

Second, what does DNR mean by "assess"?

The purpose of DNR's letter is to "remind RPs to assess emerging contaminants and their potential impacts." The letter goes on to hint that, absent this assessment, the remediation case is not likely to be closed by the agency, and any new information on a closed case may allow DNR to reopen that case.

But, what does DNR mean by "assess"? Can a RP simply claim no knowledge of PFAS ever being used on the site, or must testing be performed in an attempt to prove a negative – that PFAS was not discharged?

DNR's answer to this question seems to change with each site. Even if the RP has no knowledge of PFAS contamination, if information on historical use of the property even suggests that PFAS was present at any point in time, DNR is likely to require testing. For example, in a recent remediation of a property in Edgerton, WI, DNR insisted on elaborate testing and investigation because the facility was once used to manufacture shoes, and the shoe industry sometimes used water-proofing chemicals containing PFAS. In another remediation case for a facility expansion, having a tank of potentially PFAS-containing firefighting foam on-site was enough for DNR to require elaborate groundwater testing throughout the facility.

The definition of "assessment" seems to change with the whim of DNR, but this, too, raises legal questions about the agency's authority. What DNR may and may not require from an RP is certainly ambiguous, but there is cause for legal concern over the breadth of actions being taken at different sites.

Finally, what happens if PFAS is found on your site?

If PFAS is found, it is very likely DNR will require some form of remediation. The problem faced by many RPs is the under-developed technology to treat and remediate these compounds. There is also no published remediation level at which DNR will be satisfied, so each case can turn into a negotiation with the agency, with no certainty on what actions will result in the case being closed.



In many instances, municipalities and other permit holders have refused to test for PFAS because the uncertainty surrounding regulation and remediation are too big of a risk. Absent published toxicity levels that are consistently enforced, it's impossible to know what DNR expects for a remediation case to be closed, or who will ultimately be held responsible for PFAS contamination.

What should RPs do in response to DNR's letter?

DNR's directives are changing quickly, and environmental consultants may not be aware of the legal questions surrounding the agency's requests. An RP determining how to respond to this or a similar letter from DNR should seek legal advice on the many options available. Although you may be certain that no PFAS was "discharged" on the property, it is very likely that at least trace amounts are present. Test results confirming the presence of PFAS can subject a party to a new remediation case, new requirements in an already open case, or other enforcement action by DNR. The regulation may be unpredictable, but with legal guidance it can be navigated in a manner that results in preserving Wisconsin's natural resources without the burden of a prolonged remediation case.

[\[1\] DNR Letter for PFAS remediation](#)

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