



When Contamination Crosses a Property Line

The Off-Site Environmental Liability Exemption - Wis. Stat. §§ 292.12 and 292.13 Rights and Responsibilities of Off-site, Affected Property Owners

Purpose

This fact sheet summarizes the state's statutory liability exemption for owners of real property affected by environmental contamination migrating from another property. It also explains how contamination from one property can impose health and safety obligations on other properties even when the liability exemption is in effect.

Background

It is relatively common to discover that substances used at an older commercial or industrial property have migrated into the soil, surface water and groundwater and have traveled onto a neighboring property. When this occurs, the party responsible for investigating and cleaning up the source of the contamination is required to take action to address health and safety concerns at both the source property and the off-site property.

When contamination from one property crosses a property boundary, Wisconsin law provides an environmental liability exemption to the affected property owner who meets the conditions in the law. The affected property owner is identified as the "off-site" owner in state law, because environmental contamination has moved beyond the source property's boundaries.

Related Guidance

- [Off-site Liability Exemption Application \(Form 4400-201\)](#)
- [General Liability Clarification Letters \(RR-619\)](#)
- [Continuing Obligations for Environmental Protection \(RR-819\)](#)
- [Environmental Contamination and Your Real Estate \(RR-973\)](#)

The Wisconsin Department of Natural Resources (DNR) will generally not ask off-site, exempt property owners to investigate or remediate contamination that did not originate on their property. A few exceptions to the exemption, related to imminent health and safety threats and long term obligations, are described in the next section.

The statutory off-site exemption is self-implementing and is effective as long as an eligible party meets all the statutory conditions. Property owners and others may request a written exemption determination letter from the DNR for a fee, but this letter is not required to have the exemption protections.

Summary of an off-site property owner's rights and responsibilities

Wisconsin law, Wis. Stat. § 292.11(3), requires anyone who causes, possesses or controls a hazardous substance discharge to the environment (i.e. land, air, water) to take action to restore the

environment to the extent practicable and minimize harmful effects. When contamination from one property migrates and affects another property, however, Wisconsin law provides an exemption for an owner (possessor) of the affected, neighboring property from the requirement to take response actions under Wis. Stat. §§ 292.11(3), (4) and (7)(b) and (c). This statutory provision is known as the "off-site liability exemption," and is authorized by Wis. Stat. § 292.13.

An off-site property owner is someone who owns property affected by soil, groundwater, sediment, soil gas (vapor) or other environmental contamination that originated on another property. The property where the contamination began is known as the source property. An affected off-site property owner is eligible for an off-site liability exemption if all of the following conditions in Wis. Stat. § 292.13 are satisfied, including, but not limited to:

- The off-site property owner did not cause the original discharge of the hazardous substance;
- The off-site property owner did not, and does not, possess or control the hazardous substance that was discharged on the source property;
- The property that contains the source of the migrating contamination is not owned or controlled by the same person or entity that owns the affected off-site property;
- The off-site property owner allows reasonable access to their property, so the DNR and its contractors, along with those responsible for the contamination, can take necessary response actions to protect public health;
- The off-site property owner does not interfere with the response actions of others and does not do anything to make the contamination situation worse;
- The off-site property owner agrees to other conditions that the DNR determines are reasonable and necessary to ensure that response actions are adequate; and
- For soil and sediment contamination, when the responsible party is not responding appropriately to the contamination, the off-site property owner agrees to take actions that the DNR determines are necessary to prevent an imminent threat to human health and safety. For example, taking action to limit public access to the property, installing containment barriers, and addressing fire, explosion and vapor hazards on the property.

No Exemption from Reporting Requirements

The off-site exemption does not exempt an affected property owner from Wis. Stat. § 292.11(2), which requires the immediate notification of identified contamination to the DNR.

Limitations of the Exemption

The off-site exemption is conditional, limited in scope and applies solely to legal responsibilities identified in Wis. Stat. §§ 292.11(3), (4) and (7)(b)(c). The off-site exemption does not exempt a property owner from:

- Wis. Stat. § 292.11(2), which requires the immediate notification of identified contamination to the DNR;
- Wis. Stat. § 292.12, which authorizes the DNR to require continuing public health protection obligations on any property affected by environmental contamination (see page 4 of this fact sheet); and
- Limited, immediate actions, as specified in Wis. Stat. § 292.13(1m)(e). For instance, off-site property owners may be required to address an imminent threat from fire, explosion or vapors if there is not a party responsible for the cleanup who can conduct the actions.

In addition, the off-site liability exemption is not automatically transferable, nor assignable, to future owners of the off-site property. However, it is likely that a new owner could be eligible for the exemption if they meet the conditions in Wis. Stat. § 292.13, including the ability to substantiate that they do not currently, or have ever, owned the source property and did not cause the discharge.

Overview of migrating contamination

Hazardous substances that are spilled or otherwise discharged to the environment can disperse and move around underground. These substances can spread out and migrate, or travel, through the soil into groundwater and nearby lakes and rivers. Gases (vapors) emanating from underground hazardous substances can also make their way upward into houses and other buildings.

When hazardous substances (contamination) move from their starting place (source) and affect the soil, sediment, groundwater or indoor air of an adjacent or nearby property, it is important to accurately determine who is legally responsible for investigating the nature and extent of the contamination, cleaning it up, and mitigating its harmful effects.

Discovering contamination from an off-site source

When a property owner discovers soil or groundwater contamination they believe came from another property, the owner must first notify the DNR of the contamination. The DNR will then work with the owner and potentially responsible parties to ensure appropriate actions are taken to investigate and clean up the contamination to protect health and safety.

Migrating contamination and access to property

Responsible parties are required by state law to investigate and remediate, to the extent practicable, all contamination that migrates within and beyond the boundaries of a source property. If the contamination crosses a property line, the responsible party must investigate where it goes and ask owners of affected, off-site properties for permission to access their properties. Property access is needed so the environmental investigation and cleanup or mitigation work can be completed.

An off-site property owner must allow access to their property to be eligible for the off-site liability exemption. When signing an access agreement, the off-site owners may wish to negotiate with the responsible party on issues such as the work schedule, the restoration of disturbed landscaping, etc.

If the owner of an affected off-site property does not allow the responsible party's environmental consultants or the DNR onto their property, the off-site owner will not qualify for the off-site exemption and the off-site owner may assume legal responsibility for the contamination on their property.

Obtaining an off-site liability determination letter from the DNR

Off-site property owners can request a liability determination letter from the DNR, for a fee, that documents the exemption in writing.

To obtain a letter, the off-site property owner must provide information to demonstrate that there are hazardous substances impacting their property from a source on another property and that all the other conditions for the exemption have been met. The off-site property owner can use the investigation data collected by the responsible party in response to the contamination or an owner of an off-site property may collect their own data to demonstrate the contamination is coming from somewhere else.

Requesting a Determination or Clarification Letter

To obtain an off-site liability determination letter or liability clarification letter, submit the DNR's [Off-site Liability Exemption application, Form 4400-201](#) and the applicable fee. This form includes instructions and describes the information needed by the DNR for a site-specific letter.

Obtaining a liability clarification letter from the DNR

If someone does not meet all the requirements for the exemption, (e.g. a prospective purchaser) and therefore doesn't qualify for an off-site liability determination letter, anyone with an interest in a property that is or may be affected by migrating contamination can still request that the DNR review the site-specific situation and provide a written liability clarification letter for a fee. Liability clarification letters may be helpful when evaluating the potential purchase of a property or when contamination is suspected to be impacting a property.

Continuing obligations for the protection of health and safety at off-site properties

When residual contamination extends across a property line, continuing obligations may also extend onto an affected, off-site property. In these situations, owners of off-site properties may not be legally responsible for responding to the contamination, but they are responsible for complying with the continuing obligations imposed on their property by the DNR or state law to protect health and safety.

Wisconsin, like most states, allows some residual contamination to remain after a cleanup of contaminated soil, vapors, sediment or groundwater has been approved by the state (see Wis. Stat. § 292.12). The removal of all contamination is generally not practicable, nor is it always necessary for the protection of public health and the environment.

When the DNR approves the completion of an interim action, or a remedial action, or issues a case closure letter at a site where residual contamination exists, the DNR may condition or qualify its case closure approval on compliance with continuing obligations at the source property and affected off-site properties to protect public health and the environment.

These continuing obligations are property-specific requirements and restrictions identified in the DNR approval or case closure letter. They are legal responsibilities associated with the source property, and apply to current and future owners of the property. If contamination has migrated off-site, there may be continuing obligations that also apply to off-site, affected properties.

Common Continuing Obligations for Source and Affected, Off-site Properties

One common continuing obligation, for the owners of the source property and affected, off-site properties, is the proper management and disposal of contaminated soil that is excavated. Other continuing obligations and requirements necessary to protect health and safety may include:

- Keeping clean soil and vegetation over contaminated soil;
- Maintaining a cover of pavement, soil, asphalt, etc. over contaminated soil or groundwater;
- Operating and maintaining a vapor mitigation system that is installed by the responsible party;
- Obtaining DNR approval prior to constructing or reconstructing a well at properties with groundwater contamination; and
- Maintaining industrial use for a property that was cleaned up to industrial standards.

Owners of off-site properties are responsible for complying with the continuing obligations imposed on their property by the DNR or state law to protect health and safety, except for those continuing obligations imposed for residual sediment contamination.

Notice to Affected Off-site Property Owners of Case Closure Request and Possible Continuing Obligations

The party responsible for cleaning up contamination must notify affected, off-site property owners of a proposed continuing obligation on their property before the DNR reviews a request for case closure. State law requires this, and it allows the off-site property owners some time to provide the DNR with any technical information that may be relevant to the cleanup approval.

An off-site property owner is, of course, free to discuss responsibility for the proposed off-site continuing obligations with the responsible party. If an off-site property owner enters into a legally enforceable agreement (i.e. a private contract) with the party responsible for the contamination, under which the responsible party assumes responsibility for maintaining a continuing obligation on the off-site owner's property, that agreement must be submitted to the DNR and recorded in the database per Wis. Stat. § 292.12(5)(c).

If the DNR approves a case closure request that includes continuing obligations at an off-site property, the DNR will notify off-site owners of the continuing obligation. A property owner may request modification of a continuing obligation in the future if environmental conditions change. For example, petroleum contamination degrades over time and laboratory test results of new soil, groundwater or vapor samples may support modifying or removing a continuing obligation.

Finding information about continuing obligations

Information about property-specific continuing obligations can be found (as applicable) in the DNR interim action approval letter, the case closure letter for the source property, and in the DNR documents giving notice to off-site property owners. These letters and related documents are available in the DNR database of property cleanup activities.

This database, called [BRRTS on the Web](#), is available at dnr.wi.gov (search "BRRTS"). The documents about affected, off-site properties that are associated with a specific source property can be found in BRRTS when you search the site number or address of the property that is the source of the contamination. Property owners, local government officials, building contractors, well drillers and others may review the database to find out if there are any land-use restrictions or continuing obligations associated with a specific property before beginning work there.

For more information

Questions about the off-site environmental liability exemption and continuing obligations can be directed to the brownfields specialist in your local DNR regional office. To find a specialist in your area, go to dnr.wi.gov and search "brownfields contacts."

For additional information about off-site contamination and liability clarification letters go to dnr.wi.gov and search for "off-site contamination." For additional information about residual contamination and continuing obligations go to dnr.wi.gov and search for "continuing obligations."

This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. This guidance does not establish or affect legal rights or obligations and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

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