

**Private Cause of Action –
Draft White Paper on Cost Recovery in Wisconsin
March 28, 2007**

Background:

- Until the Aviall Supreme Court case, parties in Wisconsin had at their discretion the ability to recover clean up costs using CERCLA ss. 113 and 107, even if the clean up was conducted using the state's process.
- The state has a cost recovery statute for clean ups conducted by local governments at properties acquired in compliance with s. 292.11(9)(e). In 1999, some members of the study group advocated that a companion, private party statute be created.
- Presently, private parties have left the state's clean up program, and entered the EPA's "off-the-NPL" program to ensure federal cost recovery ability.
- The US Supreme Court will revisit Aviall in April 2007.

Proposal:

Create a private cause of action statute, in response to the Aviall court case and the lack of a Wisconsin cost recovery option for private parties.

Options or considerations:

New Statute?

- Create new statute or
- Amend 292.35, to make the existing statute more useable for spill sites.

Persons subject to the cost recovery statute?

- Causer, including persons that fail to respond to a known, pre-existing discharge of a hazardous substance
- Would apply to any hazardous substance discharge, including petroleum.

What costs are recoverable?

- Proportional liability – based on contribution to the contamination
- NR 700 response costs

- Legal fees
- Recoverable costs would be adjusted by taking the difference between the purchase price of the property and the assessed value. For example, the property was purchased for \$200,000, but the official assessed value was 500,000. There was \$1 million in clean up and other eligible costs. Thus, the recoverable costs are \$700,000.
- Must enter into a negotiated agreement with the DNR, have the SI, RAP and closure approved, at a minimum, by the DNR.
- Should current or future land use be taken into consideration?
- Should a party be allowed to cost recover for a “clean closure” (i.e., total removal of all contaminants)?

Exceptions?

This statute would not be available for the following situations or costs:

- Cannot recover from a person that is in compliance with a consent order or agreement with respect to the discharge that is the subject of the action.
- At a property or portion of property where the state has been issued a closure letter, with respect to the discharge that is the subject of the action.
- Eligible costs that are reimbursed or paid by the local, state, or federal government, such as by grants, tax incentives, TIFs or other financial tools.
- Act of God, war, or omission of a third party.