

9/15/11

## Chapter NR 728

### **ENFORCEMENT AND COMPLIANCE AUTHORITIES**

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**NR 728.01 Purpose.** The purpose of this chapter is to describe the enforcement tools that are available to the department to ensure compliance with enforce chs. NR 700 to ~~750~~754 and to implement response actions at sites or facilities with environmental pollution, and sites or facilities where there has been a discharge of a hazardous substance. This chapter is adopted pursuant to ss. 227.11(2), 289.06(1), ~~292.31, 292.11, 292.15 and 292.41~~ and ch. 292, Stats.

**NR 728.02 Applicability.** This chapter applies to enforcement actions taken by the department under the authorities of ~~s. 292.11, 292.15, 292.31 or 292.41~~ chs. 289 and 292, Stats.

**NR 728.03 Definitions.** In this chapter:

(1) "Environmental repair contract agreement" means an agreement entered into by one or more persons and the department pursuant to ~~s. 292.15 or 292.31~~ ch. 292, Stats., which requires the performance of a response action at a site or facility which causes or threatens to cause environmental pollution.

(2) "Consent order" means an administrative order issued by the department which the order recipient stipulates to and waives the right to a contested case hearing on the order.

Note to reader: this definition was moved from ch. NR 714.

(3) "Contested case" has the meaning specified in s. 227.01(3), Stats.

Note: Section 227.01(3), Stats., defines "contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order." A contested case hearing is only conducted by the department in situations where state statutes allow an aggrieved party to request a hearing before an administrative law judge.

**NR 728.05 Referrals for rule violations.** Any person who violates the requirements of chs. NR 700 to ~~750~~ 754 or ch. 292, Stats., may be referred to the office of the attorney general by the department. Any person who is referred to the office of the attorney general by the department shall be given written notice of the referral. Section 299.95, Stats., requires that the attorney general enforce chs. 289 to 292, Stats., and all rules promulgated to implement chs. 289 to 292, Stats.

**Note:** Section 299.99, Stats., provides for forfeitures of not less than \$10 nor more than \$5,000 for each violation of chs. 289 to 292, Stats., any rule promulgated under chs. 289 to 292, Stats., or any plan approval, license or special order issued under chs. 289 to 292, Stats. Each day of continued violation is a separate offense.

NR 728.06 Fees related to enforcement actions. The department may assess and collect fees from a person who is subject to an order or other enforcement action to cover the costs incurred by the department to review the planning and implementation of any environmental investigation or environmental cleanup that the person is required to conduct.

Note: Section 292.94 allows the department to assess and collect fees to cover the costs incurred by the department. Chapter NR 749 specifies the fees that apply to these actions.

**NR 728.065 Interest on Recovered Monies.** (1) The department shall assess and collect interest on the unpaid balance of monies recovered by the department, when payments are made over time.  
(2) The interest rate shall be established at the time of the settlement, and may not be changed during the repayment period. The interest rate shall be based on the amount of the unpaid balance of the monies owed, at the rate specified in s. 71.82 (1) (a), Stats., compounded monthly.  
(3) Interest is to be paid to the department on a monthly basis.  
**Note:** Section 292.11 and 292.31, Wis. Stats., requires the department to assess interest on the unpaid balance of monies required to be reimbursed to the department, when these monies are to be paid over time.

**NR 728.07 Environmental ~~repair contracts~~ agreements.**

(1) **APPLICABILITY AGREEMENTS.** The department may enter into an environmental ~~repair contract~~ agreement with any person for response actions pursuant to ~~s. 292.15 or 292.31~~ ch. 292, Stats., or into intergovernmental agreements with local governments or municipalities pursuant to s. 66.0301, Stats.

(2) **CONTENT.** All environmental ~~repair contracts~~ agreements entered into pursuant to ~~s. 292.15 or 292.31~~ ch. 292, Stats., shall contain at a minimum, all of the following provisions:

- (a) A description of the site or facility, and its location.
- (b) A listing of the parties to the ~~contract~~ agreement.
- (bm)** A description of the roles and responsibilities of the persons who are parties to the agreement.
- (c) A schedule for completing the response action covered by the ~~contract~~ agreement.
- (d) Provision for stipulated penalties if the response action is not completed in accordance with the ~~contract~~ agreement schedule.
- (e) The method for resolving any disputes which may arise during the implementation of the response actions.
- (f) The method for modifying the ~~contract~~ agreement.
- (g)** Fees associated with the department's cost of review and approval as set forth in ch. NR 749.

**NR 728.09 Special orders. (1) EMERGENCY ORDERS.** The department may issue emergency orders without prior hearing, pursuant to s. 292.11(7)(c), Stats., to the person or persons responsible for a hazardous substance discharge, for the purpose of protecting public health, safety or welfare. Such an emergency order shall become effective upon receipt. However, the recipient of the order shall have 10 days after service of the order to file a petition for judicial review pursuant to ss. 227.52 and 227.53, Stats. The emergency order shall remain in effect after the filing of a petition for judicial review unless the reviewing court issues a stay.

**(1m) ORDERS FOR PREVENTION OF A DISCHARGE.** (a) The department may require that preventive measures be taken by any person possessing or having control over a hazardous substance if the department finds that existing control measures are inadequate to prevent discharges.  
(b) The department shall specify necessary preventive measures by order. The order shall be effective 10 days after issuance, unless the person named requests a hearing, in which case no order may become effective until the conclusion of the hearing.

(2) **UNILATERAL ADMINISTRATIVE ORDERS.** The department may issue unilateral administrative orders pursuant to s. 292.11(7)(c), Stats. Such an administrative order shall become effective 30 days after service of the order, unless the order recipient petitions for a contested case hearing within that 30-day period. All such petitions shall be filed in accordance with the requirements of s. NR 2.05.

(3) **CONSENT ORDERS.** The department may, in its discretion, issue a consent order pursuant to s. 292.11(7)(c), Stats., if the order recipient is willing to stipulate to the order's issuance.

**Note:** Section 292.94, Stats. allows the department to assess and collect fees to cover the costs incurred by the department. Chapter NR 749 specifies the fees that apply to these situations.

**NR 728.10 Entry of a property on the department database. (1) GENERAL.** Where the department has information to demonstrate that the source of contamination is on the property and the property owner or other responsible party has failed to take adequate response action, the department may list the properties where contamination from a hazardous substance discharge has been identified on the department database. The department shall notify the property owner in writing of the department's intention to list the property on the department database in order to provide notice to the public of the contamination. If the property owner does not respond within 30 calendar days from the date on the letter

indicating that the property will be promptly investigated and remediated in compliance with applicable statutes and rules or provides information which clearly demonstrates that no further investigation or remediation of environmental contamination is necessary, the department may proceed to list all properties where contamination from a hazardous substance discharge has been identified on the database.

(2) SUBSEQUENT MODIFICATIONS. (a) If the property owner or other responsible party subsequently decides to investigate and remediate the remaining contamination the department shall modify or remove the property from the database in accordance with the provisions in ch. NR 727.

(b) If a deed affidavit was previously recorded for the property and subsequent action was taken that results in the need to modify or supplement the information contained within that affidavit the department shall record a second affidavit at the office of the register of deeds for the county in which the property is located to supersede the current affidavit. If any of the requirements in ch. NR 726 for listing a property on the database are met following completion of the additional investigation and remediation, the department will proceed with listing the appropriate property or properties concurrently with filing the subsequent affidavit

**Note:** Chapter NR 749 specifies the fees that must accompany all requests to add, modify or remove a site or property from the department database.

**NR 728.11 Recording a notice of contamination. (1) GENERAL.** Except for contamination caused by a discharge from a fuel oil tank used solely for residential purposes, the department may, in addition to using the provisions in s. NR 728.10 and after following the procedures in sub. (2), record an affidavit at the office of the register of deeds for the county in which the property is located which specifies the legal description of the property, indicates that contamination from a hazardous substance discharge has been identified on the property which has not been adequately defined or remediated and gives notice to the public, and any prospective purchaser, of the existing contamination and the environmental liability associated with the property.

**(2) PROCEDURE.** Where the department has information to demonstrate that the source of contamination is on the property and the property owner or other responsible party has failed to take adequate response action, the department may record an affidavit at the office of the register of deeds for the county in which the property is located once the following steps have been taken:

(a) The department shall send the property owner a letter, by certified mail, stating the department's intention to record an affidavit at the county register of deeds office giving notice of the contamination, unless the property owner responds by the deadline in the letter indicating that the property will be promptly investigated and remediated in compliance with applicable statutes and rules or provides information which clearly demonstrates that there is no environmental contamination on the property.

(b) If the department receives no response, or an unacceptable response, to the letter sent in par. (a), the department shall send a second letter to the property owner and to any mortgagee of record, by certified mail, indicating the department's decision to record an affidavit at the county register of deeds office unless the property owner responds by the deadline in the letter indicating that the property will be promptly investigated and remediated in compliance with applicable statutes and rules or appeals the department's determination. The deadline in this letter may not be less than 30 days from the date the property owner receives this letter. A copy of the affidavit to be recorded shall be attached to this letter.

(c) If an acceptable response is not received within the time period set forth in the letter sent in par. (b), the department may, as soon as practicable but in no case less than 15 days after the deadline in the letter sent in par. (b), record the affidavit at the office of the register of deeds for the county in which the property is located.

**(3) SUBSEQUENT FILINGS.** If the contamination identified in the affidavit is subsequently remediated or otherwise addressed to the satisfaction of the department, the department shall record a second affidavit at the office of the register of deeds for the county in which the property is located to supersede an affidavit filed under sub. (2), after giving written notice to the property owner. A second affidavit shall specify the legal description of the property and indicate whether or not there is any residual contamination exceeding existing state standards on the property that is inaccessible or otherwise impracticable to remediate.