
Wisconsin Legislative Council

Anne Sappenfield
Director



TO: SENATOR DIANNE HESSELBEIN

FROM: Anna Henning, Principal Attorney, and Steven McCarthy, Senior Staff Attorney

RE: Joint Committee on Finance Authority to Transfer Appropriated Funds

DATE: May 28, 2024

You asked whether the Joint Committee on Finance (JCF) can release certain state funds relating to: (1) per- and polyfluoroalkyl substances (PFAS) contamination; and (2) hospital services grants. The short answer is that JCF could do so, although doing so may involve some legal risk.

As described in greater detail below, the relevant funds are currently deposited in a “PFAS trust fund” and in JCF’s “supplemental” appropriation account, respectively. An affirmative vote by JCF is needed to authorize the appropriate state agencies to spend either set of funds. Procedurally, to be “released,” the funds must be: (1) transferred from the PFAS trust fund to an existing appropriation account (with respect to PFAS); or (2) supplemented from JCF’s supplemental appropriation account (with respect to hospital services grants).

The statutes authorize JCF to transfer and supplement funds, subject to certain limitations. This memorandum provides background information regarding that statutory authority and JCF’s past practice. The memorandum then summarizes the legal framework that may apply with respect to JCF’s exercise of its statutory authority in the two specific contexts of interest.

JCF’S STATUTORY AUTHORITY TO TRANSFER OR SUPPLEMENT FUNDS

Among other powers and responsibilities, the statutes authorize JCF to approve state entities’ requests for supplemental or transferred funding, subject to specified conditions. Like other matters that require an affirmative vote by JCF to take effect, such approvals follow procedures set forth in s. 13.10, Stats. All actions under s. 13.10, Stats., must be determined by a roll call vote and may be approved in whole or in part by the Governor. If the Governor objects to all or part of a JCF action under s. 13.10, Stats., JCF may then override the Governor’s objection by a two-thirds vote.

Supplemental Funding

JCF may supplement the appropriation of any department, board, commission, or agency, using funds from a supplemental appropriation created for the purpose of such JCF actions. That authority applies when an appropriation is insufficient because of unforeseen circumstances or is insufficient to accomplish the purpose for which it was made, if the conditions below are satisfied. Any such supplemental funding only extends to the fiscal biennium in which it is approved.

JCF may supplement an appropriation if it finds all of the following:

- An emergency exists.
- No funds are available for the relevant purposes.
- The purposes for which the supplemental appropriation is requested have been authorized or directed by the Legislature.

[s. 13.101 (3) (a), Stats.]

Transfers of Funds

Alternatively, JCF may transfer funds between existing appropriations and programs, if it finds all of the following:

- One of the following will occur because of the transfer: (1) unnecessary duplication of functions can be eliminated; (2) more efficient and effective methods for performing programs will result; or (3) legislative intent will be more effectively carried out.
- Legislative intent will not be changed as a result of the transfer.
- The purposes for which the transfer is requested have been authorized or directed by the Legislature.

[s. 13.101 (4), Stats.]

RECENT PRACTICE

JCF's statutory authority to transfer or supplement funds was likely originally intended to address unforeseen circumstances necessitating changes to appropriation amounts. However, the Legislature's recent approach of enacting appropriations and authorizing programs in separate enactments has made requests for such transfers and supplemental funding more routine. Legislative history for those two-step enactments demonstrates that the separate enactments have been introduced with an anticipated need for JCF to approve an agency's request for transferred or supplemental funds to implement certain programs.

In various instances, JCF has modified an agency's request for a transfer or supplemental funds before approving it. As one example relevant to PFAS, the 2021-23 Biennial Budget Act provided an appropriation line within the Department of Natural Resources' (DNR) budget for the collection of firefighting foam but did not directly appropriate any funding for the program. Instead, the budget summary prepared by the Legislative Fiscal Bureau indicated that \$1 million of the JCF supplemental appropriation was intended to be used for that purpose. Thus, DNR submitted a request to JCF for those supplemental funds.

Although JCF approved DNR's request, it limited the use of funds to contract costs associated with a collection program.¹ JCF directed DNR to enter into a memorandum of understanding with the Department of Agriculture, Trade, and Consumer Protection (DATCP) to jointly do all of the following:

- Establish a process and criteria for awarding a contract to administer the program.
- Select a winning third-party contractor to collect and dispose of PFAS-containing firefighting foam.

¹ For a summary of the relevant motion and vote, see item XII in the minutes for JCF's February 9, 2022 meeting, available here: <https://doa.wi.gov/budget/SBO/13.10%20Minutes%202022%2002%2009.pdf>.

- Determine, and make publicly available, the procedures for handling data collected in administering the program.
- Maintain any records created in administering the program.

JCF has similarly included conditions that are not provided by the statutes when approving agency requests to transfer or supplement funds in other contexts, including some that have the effect of reviving a requirement that had been removed from an enactment through a partial veto. To date, Wisconsin courts have not addressed whether such conditions are statutorily authorized or constitutional.²

APPLICATION TO FUNDS TO ADDRESS PFAS CONTAMINATION

The 2023-25 Biennial Budget Act (2023 Wisconsin Act 19) established a PFAS trust fund.³ The act also created an appropriation from the PFAS trust fund for the purpose of “addressing and preventing [PFAS] contamination in this state.” [s. 20.370 (4) (mw), Stats.] However, this appropriation was left unfunded in the act’s schedule of appropriations. For that reason, JCF action (or new legislation) is required to transfer funds from the PFAS trust fund to the new appropriation.

To date, DNR has submitted two requests to JCF for the transfer of those funds. DNR submitted an [initial s. 13.10 request](#) to JCF in December 2023. That initial request proposed a transfer of funds from the PFAS trust fund for purposes of providing grants to local units of government and expending certain other funds for a range of activities related to addressing PFAS contamination.

In February 2024, DNR withdrew its initial request and submitted a [revised s. 13.10 request](#). The revised request proposed to utilize funds transferred from the PFAS trust fund to implement the two major grant programs set forth in 2023 Senate Bill 312, a bill that was passed by both the Senate and Assembly and enrolled, but which was vetoed by the Governor on April 9, 2024.

Briefly, JCF could exercise its statutory authority to transfer funds as requested by DNR, but doing so may be subject to a legal challenge. The degree of legal risk likely depends in part on the specific purposes for which DNR proposes to use the transferred funds in a given request.

Because it proposes to use transferred funds to implement programs that were proposed in vetoed legislation, JCF approval of DNR’s February 2024 request could be especially subject to challenge. If JCF’s action were challenged on statutory grounds, a court could hold that JCF approval of such a request fails to satisfy the statutory criteria, discussed above, that the purposes for which funds would be used have been “authorized or directed by the Legislature” and do not change “legislative intent.” The potential for such a judicial decision arises in part because Wisconsin courts tend to look to enacted law to determine legislative intent. [*State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44.] As noted, JCF has recently modified agency requests to add conditions that not expressly authorized in the statutes, and even some that could be characterized as overriding a partial veto, but whether that practice would withstand a court challenge is an open question.

² For more detailed analysis regarding possible statutory and constitutional arguments regarding JCF’s authority to transfer or supplement funds, see the memorandum prepared by Legislative Council staff for your office on April 5, 2024.

³ The fund was primarily supported through a \$110 million transfer from the state’s general fund and a \$15 million transfer from the environmental management account of the segregated environmental fund. In addition, the act provided for various other deposits to the fund, including funds received under settlement agreements related to PFAS, a transfer of the unencumbered balance from an existing PFAS-related appropriation, and income and interest earned by the trust fund.

In contrast, a transfer of funds for purposes supported by express statutory authority would likely be on relatively firm legal footing, at least with respect to JCF's statutory authority to transfer funds. Such purposes might include, for example, emergency remedial actions the DNR is authorized to take under s. 292.11 (7) (a), Stats., or increasing funds available for grants provided under existing environmental loan programs, such as the Clean Water Fund or State Drinking Water Loan programs. A court may more readily view a transfer of funds for those purposes as effectuating a purpose that is "authorized or directed by the Legislature" and comports with legislative intent.

APPLICATION TO FUNDS FOR HOSPITAL SERVICES GRANTS

In February 2024, the Legislature passed 2023 Senate Bills 1014 and 1015, which related generally to funding for grants to support hospital emergency department services. More specifically, Senate Bill 1014 created nonstatutory provisions that required the Department of Health Services (DHS) to award grants in an amount up to \$15 million to fund one or more health systems that apply for a grant and meet the following two requirements:

- The health system commits to providing hospital emergency department services in Chippewa County or Eau Claire County.
- The health system agrees to use any grant moneys received to fund capital expenditures to aid in providing hospital emergency department services in Chippewa County or Eau Claire County.

The bill also explicitly required DHS to prioritize grant awards to support hospital emergency department services in Chippewa County, and included various reporting requirements.

Senate Bill 1015 transferred \$15 million from the state building trust fund to the general fund and eliminated a \$15 million appropriation for a Building Commission grant in the 2021-22 fiscal year that was not used by a health system for the purpose of expanding psychiatric bed space.

The bill also increased the appropriation to JCF for supplemental appropriations by \$15 million general purpose revenue for fiscal year 2023-24 for "grants to support hospital emergency department services," and created a new DHS biennial appropriation account, s. 20.435 (1) (bd), Stats., for "hospital emergency department services grants" with \$0 appropriated to the new account in both fiscal years 2023-24 and 2024-25.

Though no provision in either bill directly cited the other, it appears the cumulative effect of Senate Bills 1014 and 1015, as enrolled, would have been that DHS could request that JCF transfer \$15 million to DHS so that DHS could award hospital emergency department services grants, subject to the requirements for awardees outlined in Senate Bill 1014.

However, the Governor [vetoed](#) Senate Bill 1014 in its entirety, and [exercised a partial veto](#) with respect to Senate Bill 1015 (2023 Wisconsin Act 97). Specifically, the enrolled version of Senate Bill 1015 contained numerous references to "hospital emergency department services," but the Governor partially vetoed the enrolled bill to delete the words "emergency department" in each instance, thereby enacting a transfer of \$15 million to JCF for "grants to support hospital services," and creating an appropriation for DHS for "hospital services grants" with \$0 appropriated.

In his veto message, the Governor stated that DHS had simultaneously submitted a request to JCF to transfer the \$15 million for hospital services grants added to the JCF supplemental appropriation account by Act 97 to the new DHS appropriation account for hospital services grants.

DHS' s. [13.10 request](#)⁴ to JCF proposes that DHS conduct a competitive grant application process for the funds provided under Act 97. Generally speaking, DHS's proposal contemplates a wider pool of eligible applicants and uses for the hospital services grants than were vetoed by the Governor in Senate Bill 1014.

Much like the PFAS context addressed above, JCF could exercise its statutory authority to transfer funds from its supplemental appropriation account to the DHS appropriation account created in Act 97 for "hospital services grants," as requested. However, again, because DHS proposes to use transferred funds to implement programs that were proposed in vetoed legislation, JCF approval of DHS's request could be especially subject to challenge. Regardless of whether JCF would apply the criteria under s. 13.101 (3) or (4), Stats., to support such a transfer, a court might invalidate JCF's approval of DHS's request, if the court finds that the statutory language in Act 97 creating the DHS appropriation account under s. 20.435 (1) (bd), Stats., "for grants to support hospital services" without any other directing language is insufficient legislative "authorization or direction" given that the detailed limits on use of the funding passed by the Legislature were vetoed by the Governor. In some contrast to the PFAS context, it may be difficult for DHS to identify express statutory authority other than s. 20.435 (1) (bd), Stats., that DHS could instead cite to request a JCF transfer of \$15 million for a different authorized use.

Please let us know if we can provide any further assistance.

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⁴ In the request, DHS asked JCF to approve its s. 13.10 request pursuant to the provisions of s. 13.101 (4), Stats. Specifically, DHS wrote that "This request for transfer of funds meets the statutory criteria of s. 13.101 (4) in that 'legislative intent will be more effectively carried out,' as it enables DHS to award grants as directed under 2023 Act 97."

However, given that Act 97 transfers the relevant funds to the JCF supplemental appropriation account under s. 20.865 (4) (a), Stats., arguably JCF has authority to approve the request only pursuant to s. 13.101 (3), Stats., which explicitly applies to JCF's authority to supplement appropriations from its appropriations under s. 20.865 (4), Stats., and instead requires findings by JCF that an emergency exists, no funds are available for the relevant purposes, and the purposes for the supplemental appropriation have been authorized or directed by the Legislature.