

JOINT SUBCOMMITTEE MEETING - DRAFT

VPLE and PFAS Due Diligence
Subcommittees
December 2, 2019




WISCONSIN
BROWNFIELDS STUDY GROUP

Context for Developing Proposals

- Evaluation of VPLE Program
- Program value – underwriting insurance
- Benefits to those willing to cleanup brownfields
- Address “temporary gap” emerging contaminants
 - Known emerging contaminants and future, unknown standards/risk
- Encourage Investigation/Sampling when appropriate
 - Value to Insurance
- Ability to provide site closure for all hazardous substances
- Address timing concerns – existing process and risk of new releases prior to COC issuance
- Provide ability to obtain full COC exemption for changed standards, remedy failure and more extensive contamination

PFAS Due Diligence Proposal

- Augment the standard process by generating supplemental due diligence screening procedures and best practices specific to PFAS
- For interim usage to promote moving forward on brownfield site redevelopment
- Primary “deliverable”:
 - Checklist and standard questions specific to known characteristics, history, manufacture and usage of PFAS at facilities/properties for use as part of Phase I ESAs/ initial site evaluations
- Process for distributing:
 - Review by full BSG & DNR RR leadership
 - Stakeholder input  **WE ARE
HERE**
 - General distribution

Phase I ESA Site Screening Protocol Overview

- **Site type classification**

- Primary producer
- Secondary PFAs users
- Tertiary PFAs receivers

- **What are the manufacturing activities**

- Listing of activities that can be associated with PFAS
- Examples:
 - ✓ coatings (fluoropolymer, textiles, leather, etc.)
 - ✓ product manufacture (Plastic, polymer, composite resins, rubber, surfactant, flame retardant, etc.)
 - ✓ Processes (metal plating, photo/imaging/films, paint/varnishing)

Phase I ESA Site Screening Protocol Overview

- **Product type**
 - e.g. AFFF, waxes, hydraulic fluids, cleaning products, pesticides/herbicides
 - brand names included in listing
- **Use Frequency, Quantity and Management Practices**
 - Material Safety Data Sheets
 - Disposal methods
- **General Question list designed to assess ...**
 - Process flows and areas of potential impact
 - Media of interest (air/ wastewater/ storage areas/ soil/ groundwater/ stormwater / biosolids etc.)
 - Neighboring property influences

Application of Site Screening Protocol

- VPLE Approved Investigation
- NR 700 Site Investigation
- Property Transactions
- At your own risk: not ASTM
- Interim circumstances: Make sound assessments with guidelines and framework reviewed by DNR

Approved Investigation under VPLE- Discussion Topics

- **Full Certificate of Completion**

- How to utilize Phase I/screening tools?
- How much sampling?
- Special approach with emerging contaminants?

- **Partial Certificate of Completion**

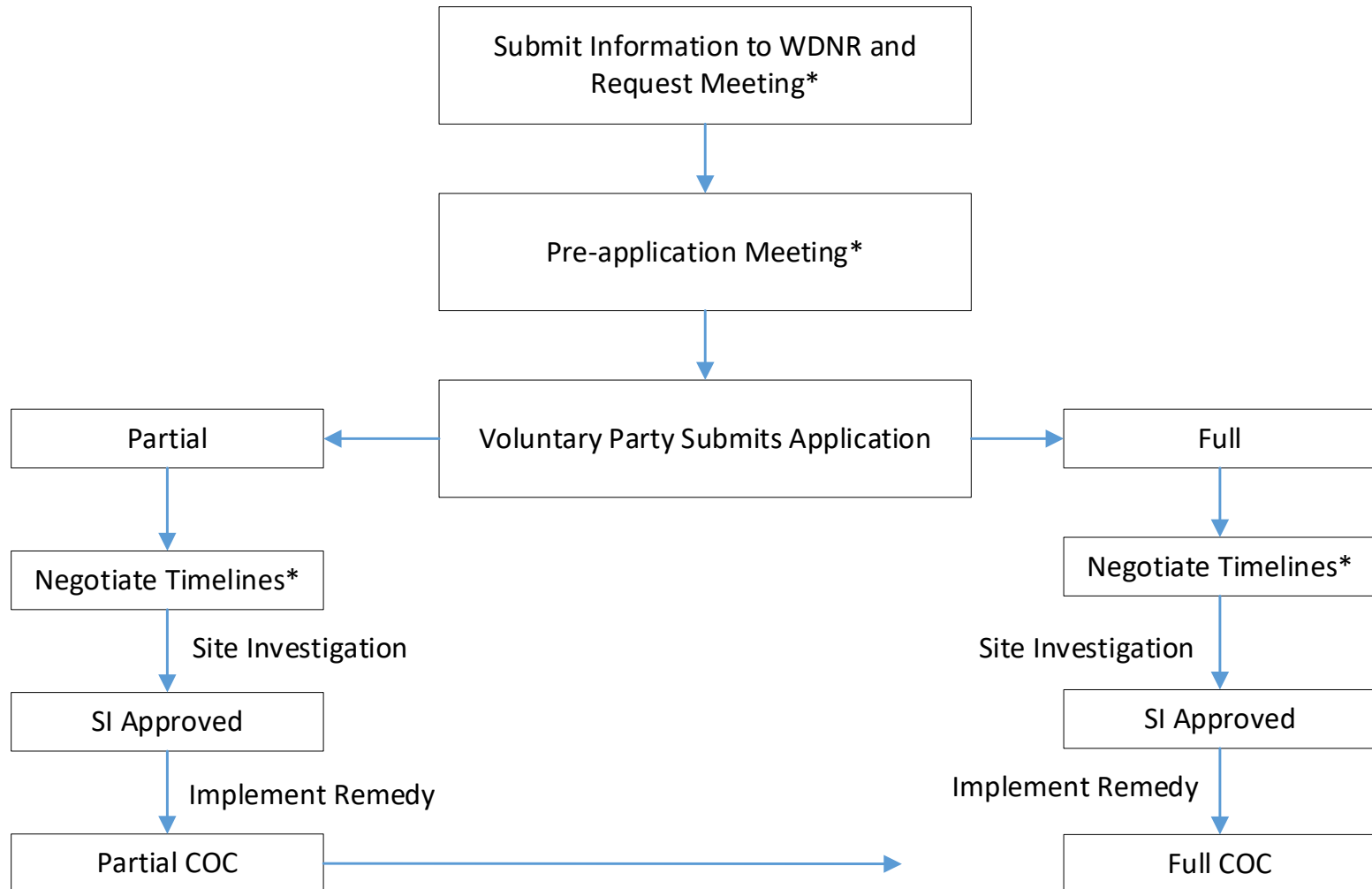
- List of Hazardous Substances (established or site-specific)?
- Ability to add Hazardous Substances/Emerging Contaminants
- Special approach with emerging contaminants?

- **Insurance Implications of Different Scopes**

BSG VPLE Subcommittee

- **Recap from Previous Meetings**
 - Why VPLE used/not used
 - Value of VPLE Program
- **Discussion of different options**
 - Liability exemption for specific list of substances that have been sampled or been ruled out
 - Variations including:
 - protections for parties who didn't cause contamination
 - Insurance
- **BSG Working Draft Proposal to Update VPLE**

Subcommittee – Working Draft Proposal to Update VPLE



Basic Elements of Working Draft Proposal

- Procedural Changes – Pre-Application submittal of information and meeting
- Scope of Site Investigation
- Negotiated Timelines
- Use of Site Specific Performance Standards
- Content of Certificate of Completion
- “Negotiated Agreement” authority

Procedure – Working Draft Proposal

- Pre-Application submittal of information
- Voluntary party submits application
- Pre-Application Meeting/Timelines Negotiated
- Choice of Full/Partial COC
- Content of COC
- Insurance – extend beyond groundwater/sediment?
- Additional fees
 - Expedited review
 - Site-specific cleanup standards
 - Timelines
 - Other needs?

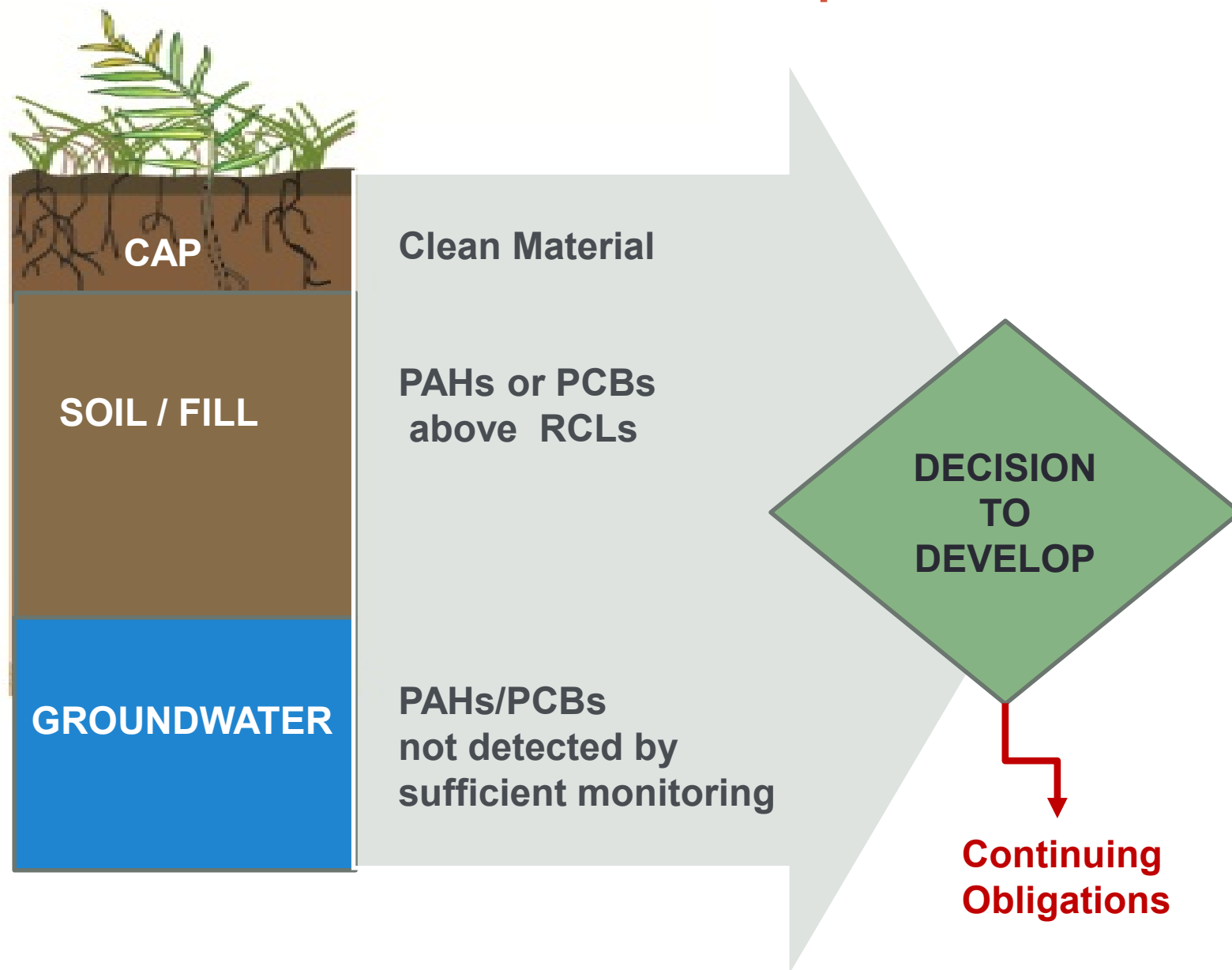
Site-Specific Performance Standard

- Cleanup to the “extent practicable” statutory standard
- All Media
- Aggregate similar hazardous substances
- No generally applicable standard (e.g., no ES for groundwater) – performance or numeric
- Allow performance in place of numeric
- Existing provisions outline methodology
 - Consideration of final development, use and continuing obligations?
- Cannot be superseded by future state standards - VPLE

Site Specific Performance Standard

- Example --- PAHs or PCBs remediated through use of cap and/or demonstrated groundwater monitoring
 - Numerous hazardous substances
 - Some without numeric standards / guidance documents
 - Aggregation of hazardous substances
 - Holistic Risk-Based Approach
 - Addresses soil and groundwater

Performance Standard Example in Profile



“Negotiated Agreement” Authority

- Wis. Stat. § 292.11(7)(d) Authority – “Negotiate and enter into an agreement containing a schedule”
 - Person who possesses or controls discharged hazardous substance
 - Nonemergency actions
 - Does not endanger public health
- Wis. Admin. Code NR § 728.07 “Environmental Agreement”
 - Site or facility description
 - Listing of parties and their roles and responsibilities
 - Schedule for completing response action
 - Stipulated penalties for not completing response action per schedule
 - Method for resolving disputes
 - Method to modify
 - Fees

“Negotiated Agreement” Authority

- Traditionally used as flexible tool to memorialize individual obligations toward a cleanup (allocate liability)
- Incentivizes remediation
- Imposes schedule
- Specific to Responsible Parties/Entity remediating (COC runs with the land)
- Useful for timelines under VPLE
- Applicability to “voluntary parties” under VPLE

Content of Certificate of Completion- Working Draft Proposal

- Site Specific Performance Standards
- Third-Party Obligations
- Negotiated Agreement Authority?

Issues to Address Concerning Working Draft Proposal

Is “negotiated agreement” authority needed to address:

- **COC**

- Contain all applicable State remediation requirements and cleanup standards
- Third party obligations – Wis. Stat. § 292.12 (“promote economic development”)
- Future permitting or other obligations “EDGE”

- **Timelines**

- Investigation/remediation
- Consequences of missed deadlines

Full COC - Working Draft Proposal

- Approved Site Investigation – what should scope be?
- All releases prior to date of approved SI? Partial?
- Current extent of statutory exemptions (remedy failure, changed standards, more contamination)
- Current scope of exemptions in Wis. Stat. § 292.15(2)(a)
- Insurance – present scope, potential difference in deductible or premium structure, extend to soil or other media?

Partial COC – Working Draft Proposal

- **Geographic/Pollutant-based?**
- **Scope of approved SI?**
- **Voluntary party choice or certain situations?**
 - e.g., protectiveness of remedy unknown, emerging contaminants, gap between scientific knowledge and regulations?
- **Current extent of statutory exemptions:**
 - Remedy failure, changed standards, more contamination
- **Scope of hazardous substances**
 - specifically listed in COC, specific list?
- **Scope of statutory exemptions –**
 - current does not include Wis. Stat. chs. 289, 291.25(1)-(5) and .29 and 292.31(8)
- **Insurance Impacts?**
- **Path to Full COC?**

More Work – Next Steps

- Quick fix legislation?
- Homework?