



## RECOMMENDATIONS FOR CHANGES TO VPLE PROGRAM FEBRUARY 21, 2020

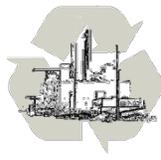
### 1. Amend the VPLE statute to address the uncertainty regarding the timing and costs of investigative/remedial requirements

- *Revise Wis. Stat. § 292.15 to require a meeting with the WDNR after submission of a VPLE application, prior to WDNR confirming eligibility. Provide WDNR authority to develop VPLE charters with applicants to address the timing of various submissions and overall project and substantive requirements.*

Require VPLE applicants to meet with the WDNR after submission of the VPLE application prior to WDNR determining eligibility (allow option for applicant to voluntarily meet with WDNR prior to submission of the application). This meeting could be modeled off of the pre-application meeting required for obtaining wetland/waterway permits. The purpose of this meeting would be for the applicant to submit to WDNR information concerning known or potential issues of environmental concern at the property and to discuss the intended redevelopment project and/or remediation. WDNR would provide the applicant information concerning the expected investigation requirements, cleanup standards, and remedial requirements (*e.g.*, imported fill sampling) in light of the expected project. In addition, WDNR would explain the investigation, remediation and closure requirements associated with emerging contaminants (*e.g.*, whether numerical standards exist or site-specific performance standards could be utilized for closure). WDNR should utilize this meeting as a way to evaluate:

- The seriousness of the applicant's commitment to the VPLE requirements
- Potential WDNR staffing requirements
- The potential future risks to the state associated with any hazardous substances that remain post-development (*e.g.*, if a certain contaminant is expected to be associated with the property, but WDNR does not yet have sufficient scientific information to issue a closure without a reopener)

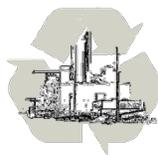
If the applicant desires to proceed, then WDNR and applicant would enter into a VPLE charter outlining specifics of the project. At a minimum, the charter would address (i) investigative requirements in light of specific conditions, (ii) the timing associated with applicant submissions, and (iii) WDNR review. This charter may also outline consequences of failure to meet timing requirements (*e.g.*, loss of expedited review), conditions for withdrawal from the VPLE program, and responsibility for certain components of investigation/remediation (*e.g.*, use of grant funds for certain remedial tasks, municipal involvement, and allocation of remedial tasks among parties, etc.).



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2. **Revise Wis. Stat. § 292.15 to provide for the screening or sampling of all known hazardous substances and to further define WDNR requirements for approved investigations**
  - *The VPLE program should require an “approved investigation” of the property, focusing on all constituents of concern. Sampling would not, however, be required if WDNR approved screening tools support a conclusion that a given hazardous substance or category of hazardous substances are not likely present.*
  - *Require sampling for emerging contaminants if historical use and/or site conditions warrant.*

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### **3. Retain VPLE liability exemptions (all releases prior to date of approved site investigation even if remedy failure, more extensive contamination, or changed standards) but address future risks of known and unknown emerging contaminants. Add “Interim COC.”**

- *Retain Wis. Stat. §292.15 liability exemptions associated with full COC and extend the statutory cites found in Wis. Stat. § 292.15(2)(a) to partial geographic COCs.*
- *Eliminate “partial COCs” on a pollutant-specific basis but retain partial COCs for geographic reasons.*
- *Add a new term “interim COC” – specific to hazardous substances on a VPLE property for which WDNR cannot grant closure (e.g., emerging contaminants).*

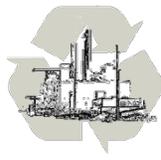
Existing VPLE liability exemptions would apply as under current program to cover all releases prior to the date of the “approved investigation” (i.e., all hazardous substances present or remediated on the property, including those screened or sampled as part of the WDNR “approved investigation”) and a state exemption from future cleanup for remedy failure, changed regulations, and more extensive contamination with respect to those releases.

The specific statutory citations within Wis. Stat. § 292.15(2)(a) would apply to any COC (e.g., subparts (ae) natural attenuation, (ag) off-site exemption, (af) sediment, and (am) partial).

Eliminate partial COCs on a pollutant-specific basis but retain partial COC for geographic remediations. The VPLE Subcommittee is concerned that the partial COC approach negates the value of the approved site investigation (why should an applicant preform a VPLE sampling protocol for a hazardous substance for which WDNR may not grant closure) and is potentially complicated to administer (e.g., what is the regulatory list used, will every COC need to identify the scope of every hazardous substance covered, etc.). Moreover, providing an applicant the option to not sample emerging contaminants, thereby excluding them from coverage, may negatively impact the applicant’s ability to obtain an insurance product due to the resulting lack of extensive site investigation. Also encouraging sampling not to occur potentially allows an environmental problem to affect an area that will be more difficult and expensive to address after redevelopment of the property.

Explore programmatic insurance to address risks to the state of unknown contaminants to provide protections against emerging contaminants. Extend this to all media – water, soil, vapor, and sediments.

Add an “interim COC.” This interim COC would be specific to emerging contaminants detected at a site during the gap between scientific detection of a hazardous substance and the regulatory ability of WDNR to close the site for such pollutants. Interim COCs would be viewed as a “pathway” to a full COC and would be subject to site-specific VPLE charters that outline the unique pathway for that site and any differences with respect to the liability exemptions/protections afforded to those specific pollutants.



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### 4. Enhanced statutory authority to ensure enforceable closure requirements.

- *Amend Wis. Stat. § 292.15 to provide WDNR clear authority to establish closure standards for all hazardous substances detected at a VPLE property within all media, including the ability to provide for performance standards to address closure for hazardous substances detected in groundwater without corresponding enforcement standards.*
- *Provide the Department authority to impose upon any person that has agreed to assume responsibility for, and to directly enforce against such person for compliance with, any requirement, limitation or condition useful or necessary for (i) the site investigation, remediation or redevelopment of the VPLE property, (ii) the general protection of human health and the environment, or (iii) economic development (even if such requirements, limits or conditions are not directly related to the residual contamination).*

In general, the overall cleanup standard for a VPLE property should be to “restore the environment to the extent practicable and minimize harmful effects from the discharge to air, lands or waters of this state.” Wis. Stat. § 292.11(3). Due to the ever-increasing types of hazardous substances capable of being detected at sites at lower concentrations, it is more important than ever to ensure that closure continues to be focused upon a performance-based approach that addresses all hazardous substances detected within all media. Conditions at some VPLE properties may exist, however, that make closure more difficult. These conditions may include detections of hazardous substances without numerical standards that are commonly known as “emerging contaminants.”

The lack of generally applicable numerical standards for all hazardous substances detected within all media at a site, and well-developed methodologies to establish site-specific standards for the hazardous substances without numerical standards, may unnecessarily delay the Department’s determination that a site is remediated to the extent practicable, especially with respect to emerging contaminants undergoing initial regulatory review.

At Brownfields sites, these delays may result in a VPLE project being abandoned and the loss of economic redevelopment opportunities. This may result in the need for the municipality to incur additional costs for security measures to protect the site from vandalism and potentially resulting increase in risks to public health and safety from the continued existence of the unremediated Brownfields and associated site conditions. These delays may take years in light of the requirements associated with the development of cleanup standards through a formalized process. *See, e.g.,* Wis. Stat. ch. 160, which requires the Department of Health Services to establish pollutant-specific standards for groundwater.

Accordingly, the VPLE Subcommittee recommends that WDNR be provided clear statutory authority for VPLE projects to establish site-specific cleanup standards for all hazardous substances detected within all media, even if numerical standards or methodologies are not yet developed. These cleanup standards must be supported by the best scientific evidence currently available, be protective of public health, safety and the environment, and be developed as a result

of a holistic evaluation of site conditions, the final development and uses of the VPLE property and the imposition of any continuing obligations or other requirements, limits or conditions. In other words, WDNR would have the flexibility to establish a cleanup standard to comprehensively address a group of pollutants without focusing on individual numeric standards. This would include establishing a performance standard for the natural attenuation of groundwater substances for which no enforcement standard exists. Any site-specific cleanup standards imposed as part of a VPLE project would be enforceable as the state standards applicable to the hazardous substances on the VPLE property, even if there are conflicts with existing numerical standards. These cleanup standards would also not be subject to any future, changed standards.

In addition, provide WDNR with the ability to impose requirements, limits, or conditions concerning the VPLE property or future occupants upon any person that agrees (does not need to be property owner or occupant) to them as part of the COC (execute or amend). These commitments would be directly enforceable by WDNR, even if such commitments are beyond those identified in Wis. Stat. § 292.12. These requirements, limits, or conditions must be useful and necessary for the site investigation, remediation, or development of the VPLE property, for the general protection of human health and the environment, or for economic development. Examples of such requirements could be sustainability or Act 70 requirements (*e.g.*, enter into Green Tier to achieve beyond compliance performance with respect to future spills) or economic development requirements that would be fulfilled by a third party.<sup>1</sup> This approach is analogous to utilizing a deed restriction or environmental covenant to provide for environmental conditions to run with the land.

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<sup>1</sup> The specific limits, continuing obligations, and other conditions would need to be specifically identified in the COC, the party responsible identified within and executes the COC, the COC is included on the GIS Registry and that these requirements, limitations, and conditions would be directly enforceable by WDNR.



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### 5. Increased FTEs and fees to implement changes to the program.

- *By legislation, provide additional X FTEs to implement the recommended changes to the VPLE program. These FTEs would be dedicated to the VPLE program, responsible for education, and outreach to citizens, prospective applicants and other WDNR staff. They would also be responsible for consistency in administering the VPLE program among the various regions and projects.*
- *Amend Wis. Admin. Code ch. NR 750 to provide additional fees to implement the recommended changes, including fees to negotiate VPLE charters and for WDNR actions such as expedited review of work plans and review and establishment of site-specific numeric or performance standards.*

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