

BROWNFIELDS STUDY GROUP VPLE SUBCOMMITTEE EVALUATION OF VPLE PROGRAM FEBRUARY 2020

BACKGROUND PAPER

In May 2018, the Brownfields Study Group (“BSG”) commissioned the VPLE Subcommittee (“Subcommittee”) to undertake a comprehensive review of the VPLE program and recommend changes to the program to increase the effectiveness, reduce delays and reform the program to address conditions in 2020 as opposed to those existing in the late 1990s when the initial VPLE program was enacted.

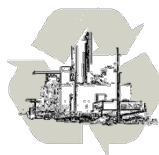
During the deliberations of the Subcommittee, numerous developments occurred with respect to “emerging chemicals.” While the Subcommittee incorporated recommendations to address “emerging chemicals,” this issue was not the sole focus of the Subcommittee. Consistent with the BSG mandate, the Subcommittee took a broad view of the VPLE program, and as such, its recommendations are aimed at making the program a more robust tool to be used in Brownfields redevelopment projects in the next decade.

The Subcommittee met on a periodic basis from July 2018 to the present to holistically evaluate the VPLE program, Wis. Stat. § 292.15. This evaluation addressed the historical basis for the program, present use and future circumstances in light of changes in science or newly discovered hazardous substances (*e.g.*, emerging contaminants).

The Subcommittee is comprised of a diverse group of individuals representing municipalities, private consultants and attorneys, and public citizen groups. Representatives of the Wisconsin Department of Natural Resources (“WDNR”) R&R Program also participated.

As a general premise, not every site is appropriate for VPLE. The expected present and future environmental risks are easier to quantify at some sites than others (*e.g.*, sites without a long history of industrial use or sites for which development will not change an industrial use). For these easier types of sites, the time and expense of VPLE may not be necessary to redevelopment. For such sites, there may be only modest risk of a future reopener for more extensive contamination or changed standards requiring a more stringent, future cleanup. Sites with a long history of industrial use, however, are in a different category, as are landfill sites being repurposed for sports fields and related recreational uses. Waterfront redevelopments, with the complex interaction between soil, groundwater and sediment, are also candidates for the VPLE program.

It is helpful to think of the VPLE program as being analogous to the state’s Green Tier program (rewards “beyond compliance.”) *See* Wis. Stat. § 299.83. Applicants that voluntarily investigate



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beyond the requirements of Wis. Admin. Code ch. NR 700 should be rewarded with a transferable liability exemption.¹

Over the course of several meetings, the Subcommittee identified the value and benefits of the VPLE program and the associated challenges to use of the VPLE program:

Value of VPLE Program – Investigation and Exemptions

VPLE requires an approved site investigation beyond the investigative requirements of Wis. Admin. Code ch. NR 700 and, in exchange, provides exemptions from further investigation or cleanup for all hazardous substance releases prior to the date of the approved investigation resulting from changed regulations, discovery of more extensive contamination or remedy failure (collectively known as “VPLE Exemptions”). In general, it is the Subcommittee’s opinion that the approved site investigation and VPLE exemptions provide significant value to VPLE applicants and successor property owners of brownfield redevelopment projects. Further, the state obtains the value of a complete investigation and long-term cleanup approach aimed at returning contaminated property to the tax base and removing a blighted zone from the local community.

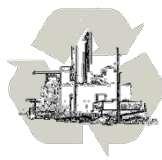
One can “monetize” the “applicant value” by considering the cost of obtaining an environmental insurance policy to cover government-mandated cleanup costs on a previously-closed site under the Wis. Admin. Code ch. NR 700 closure process (without a VPLE investigation/remediation). Generally, the cost of such an insurance policy runs in excess of \$100K, is limited to a 5-10 year time policy period and subject to policy limits and deductibles, none of which are applicable to the protections from a site reopener afforded an applicant receiving a VPLE COC.

The Subcommittee believes the VPLE program provides the following specific benefits:

Benefits to VPLE Program

- Requirement for an “approved investigation” – this “beyond NR 700 process” essentially results in WDNR underwriting the environmental insurance policy, which to date allowed for a programmatic insurance policy to cover future risks to the state. It is the Subcommittee’s understanding that insurers would continue to find such an approved

¹ While CERCLA’s cleanup exemptions for innocent landowners and bona fide prospective purchasers do not result in the actual remediation of a property, Wisconsin’s VPLE exemptions are only granted after an extensive investigation and actual property cleanup. Successful completion of the VPLE program provides additional protection to an applicant and successor landowner from a future referral to the Superfund. See Wis. Stat. § 292.15(2)(c). See also One Cleanup Program Memorandum of Agreement between United States Environmental Protection Agency Region 5 and the Wisconsin Department of Natural Resources, November, 2006 (addressing Wis Admin. Code ch. NR 700 cleanups and Superfund).



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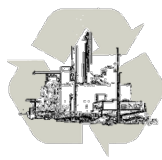
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investigation to be attractive for underwriting future insurance policies to the benefit of VPLE applicants and successor property owners.

- WDNR’s oversight, extensive investigation requirements, and VPLE Exemptions help facilitate brownfields redevelopment that can transform a former industrial use or landfill into a residential or commercial/industrial use or recreational facility.
- The VPLE program is attractive as a risk mitigation tool for national debt/equity financing due to the protection from future reopeners.
- Promotes brownfield development – the VPLE Exemptions reward assuming the risks associated with investing potentially more time and money into the investigation, cleanup and redevelopment of a brownfield property.
- Economic benefits extend to municipalities from brownfields redevelopment beyond the remediation of a given property:
 - Increased property values/tax base
 - Reduced municipal costs for public safety
 - The values extend beyond a typical “cost-benefit” analysis
 - Prevention of deterioration of neighborhoods

Impediments to Use of VPLE

- The program over time has become less attractive to municipalities due to the unknown approval timeframe and costs associated with VPLE’s extensive investigation requirements.
- The unknown investment of time and money required to complete the VPLE process can also make the program less attractive to projects with longer timeframes and sites which may have extensive, unknown uses.
- Inconsistent or changed administrative processes when a project is underway can impact timing and costs (*e.g.*, requiring sampling imported fill that was unknown at time of budgeting).
- Some municipalities indicate that they do not have sufficient staffing to pursue or be actively involved in VPLE projects due to the perceived increased complexity of the program.
- Lack of WDNR staff dedicated to VPLE oversight of individual projects and for internal state-wide consistency (WDNR R&R staff are currently tasked with ch. NR 700 remediation projects, expedited review for those projects and VPLE).



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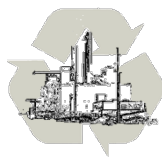
- The recent WDNR approach of only providing an exemption for the hazardous substances sampled for, without the ability to close-out the project if emerging contaminants are detected, is a significant impediment to use of the program and risks delay of brownfields redevelopment or withdrawal of sites from the VPLE program.

The VPLE Subcommittee recommends that any changes to the VPLE program address and be consistent with the following principles:

VPLE Subcommittee – Goals for Changes to VPLE Program

- Cleanup should focus less on numeric standards and more on “restor[ing] the environment to extent practicable and minimize harmful effects to air, land, water” – Wis. Stat. § 292.11(3).
- The WDNR should have clear statutory authority to establish specific site closure conditions utilizing a holistic approach at VPLE properties that takes into account the risks associated with the hazardous substances detected at a property, exposure pathways, risks to human health and the environment, performance standards to achieve remedial goals and flexibility and creativity associated with continuing obligations in light of the property’s final uses and expected occupants.
- Preserve the ability to obtain Private/Programmatic Insurance to address unknown risks from all hazardous substances released prior to date of approved investigation (those known and unknown, existing and future) even if not detected or remediated:
 - Retain the requirement for a WDNR “approved investigation” to underwrite insurance
 - Provide Site Closure and the VPLE Exemptions for all hazardous substances detected/screened as part of the investigation²
- Address temporary regulatory gaps in site closure for emerging contaminants:
 - When toxicity and remediation of an emerging contaminant is unknown such that Site Closure for such emerging contaminants is uncertain (*e.g.*, unknown whether remedy will remediate to extent practicable and minimize harmful effects) – the applicant should be informed that VPLE may be premature prior to undertaking

² Programmatic and private insurance will not likely be available for known contaminants which are not addressed as part of the site investigation at a site, or are investigated and detected, but for which no numeric cleanup standard has been established, or for which evidence exists that the regulatory scheme may change or impact existing numeric standards and those contaminants are subject to a reopener for future cleanup to address changed standards.



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any analysis of specific constituents of concern that might be present at the property

- Provide clear authority that WDNR can grant site closure for emerging contaminants that lack promulgated numerical standards or methodology to develop such standards, provided the WDNR uses best scientific judgement and the WDNR can argue that the site has been remediated to the extent practicable and harmful effects minimized.
- Ensure that WDNR can establish closure standards for all hazardous substances investigated as part of the “approved investigation” – in other words, a party that takes the risk to sample for a hazardous substance in VPLE should be rewarded with closure without a reopener.
- Allow screening instead of sampling as part of the “approved investigation” in certain circumstances (focus sampling on “constituents of concern”).
- Encourage and reward undertaking an “approved investigation” under VPLE by awarding a COC substantially similar to the scope of the existing Full COC – *i.e.*, exemption from cleanup for all releases prior to the date of the “approved investigation” (known and unknown) and no reopener for remedy failure, changed regulations, or more extensive contamination.
- Retain Partial COC on a geographic basis only (useful for sediment remediation).
- Consistently apply VPLE statutory and regulatory requirements throughout the state.
- Greater education by WDNR afforded to VPLE applicants with respect to specific timing, investigation and remedial requirements prior to the filing of an application or prior to the WDNR’s eligibility determination.
- Extend programmatic insurance to all media (water, air, soil and groundwater) or contract with state insurer to offer private insurance policy to final COC with specific coverages granted.