



CLARIFY VPLE EXEMPTIONS AND INSURANCE OBLIGATIONS - GROUNDWATER

TYPE OF PROPOSAL – LEGISLATIVE

BACKGROUND

The Wisconsin cleanup requirement is that parties “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). For purposes of closing sites, and thus, determining that cleanup to the extent practicable has occurred, the Department and Responsible Parties generally evaluate each specific (or where allowed “group” of) hazardous substance detected during the site investigation. The methodology for evaluating whether hazardous substances at a site were remediated “to the extent practicable” is determined on a media-specific basis. Both numeric and performance standards are acceptable approaches in demonstrating compliance with the applicable remedial requirements.

Many chemical substances capable of detection in groundwater have NR 140 numeric cleanup standards (referred to as “Enforcement Standards” or “Preventive Action Limits”). Chemical substances without NR 140 numerical groundwater cleanup standards can still be considered “hazardous substances” pursuant to Wis. Stat. § 292.01(5). When this occurs, the Department can use a site-specific performance-based approach to establish the applicable cleanup standard in conjunction with its natural attenuation closure provisions, if technically feasible, or can require other necessary actions such as developing a groundwater standard in cooperation with the Department of Health. Wis. Admin. Code § 722.09(2)(b)2. This situation is expected to occur with emerging contaminants once they are capable of being detected through analytical procedures until NR 140 groundwater standards are established.

The Department noted that the existing VPLE statutory provisions contain a potential ambiguity regarding the exemptions applicable to hazardous substances in groundwater that are addressed through natural attenuation. One section of these provisions, Wis. Stat. § 292.15(2)(ae), refers to a hazardous substance in groundwater in a concentration that *exceeds an enforcement standard* that the Department determines will be restored through natural attenuation, while the remaining provisions in Wis. Stats. §21 292.15(2)(ae)2 and 3m refer to hazardous substances that the department determines will be brought into compliance through natural attenuation without the reference to enforcement standards.

This ambiguity could create confusion with respect to the applicability of the VPLE exemptions to groundwater on or originating from a VPLE Property or with respect to the Department’s ability to require the Voluntary Party to pay for an insurance policy to cover the costs of possible remedy failure in a situation where natural attenuation is being relied upon for closure purposes. *See* Wis. Stat. § 292.15(2)(ae)3. The lack of insurance to mitigate the risk of natural attenuation failure, and the inability of the Department to require payment for an insurance policy, could increase the time and costs associated with the remediation itself, which could also negatively impact the time for redevelopment.

However, the subcommittee understands insurance companies generally will not issue coverage for natural attenuation failure if no underlying regulatory standard (*i.e.*, numeric) exists or a

specific Department approval that the remaining level/concentration of the hazardous substances is acceptable.

PROPOSAL

Amend Wis. Stat. § 292.15 to clarify VPLE requirements and exemptions for hazardous substances detected in groundwater subject to natural attenuation without corresponding enforcement standards.

Wis. Stat. § 292.15(2)(ae) should be amended to delete the reference to “enforcement standard,” clarifying that the VPLE exemptions are applicable to all hazardous substances found in groundwater on or originating from a VPLE Property for which the Department determines that natural attenuation will restore groundwater quality. Additional consideration should be given to establishing site specific standards for hazardous substances in groundwater without an ES and for which natural attenuation is not technically feasible and/or individual Department determinations to address the insurance issue noted above, after consultation with the State’s insurance broker.

Wis. Stat. § 292.15(2)(ae)3m should also be amended to clarify that a voluntary party only needs to “comply with the Department’s insurance requirements.”

COMMENTS

[Insert]