



ENHANCED STATUTORY AUTHORITY FOR ENFORCEABLE CLOSURE REQUIREMENTS AT A VPLE PROPERTY

TYPE OF PROPOSAL – LEGISLATIVE

BACKGROUND

Wis. Stat. § 292.12 provides for the imposition of certain obligations if residual contamination remains on a property as a condition of a remedial action or case closure. The Department can require maintenance of an engineering control, require investigation if a structural impediment is removed that prevented a complete investigation or remedial action and can impose limitations or other conditions at a site, consistent with Department rules, to ensure the continued protection of public health, safety, and welfare and the environment and to promote economic development (collectively “continuing obligations”). Wis. Stat. § 292.12(2). Owners and occupants of a property are responsible for compliance with continuing obligations imposed by the Department, unless another person has assumed the owner/occupants’ obligations through a legally enforceable agreement that is recorded in the Department’s database. Wis. Stat. § 292.12(5)(c).

Separate provisions outline slightly broader Department authority in the context of residual sediment contamination. The Department can impose requirements, limitations and conditions associated with residual sediment contamination upon owners, occupants and those who are responsible for causing the sediment contamination. Wis. Stat. § 292.12(5m). A third party can assume the responsible party’s residual sediment obligations by way of a legally enforceable agreement and the Department can require a responsible party to submit a compliance schedule to implement certain investigation and maintenance requirements. Wis. Stats. §§ 292.12(5m)(am) and (2)(d)1.

Wis. Stat. § 292.12 provides the Department with an important tool for implementing Wisconsin’s requirement to remediate to the extent practicable. However, Wis. Stat. § 292.12 is limited to approvals of interim or remedial actions and conditions within a case closure letter. In addition, except for sediments, it does not specifically provide authority for the Department to require the party that caused contamination to comply with continuing obligations upon property it does not own or occupy. In practice, this is often addressed by the “causer” agreeing to assume the off-site property owner’s obligations through an enforceable agreement in exchange for the off-site property owner not challenging the closure. Unless the Department is considered a third-party beneficiary, these agreements are likely not enforceable by the Department. Thus, in most situations, the property owner remains responsible vis a vis the State.

The Department’s authority for imposing continuing obligations upon owners/occupants can be a practical problem when addressing residential properties impacted by vapor intrusion from another site. Situations exist where the off-site owner/occupant resists being subject to continuing obligations upon its property or does not have the personal or financial capacity to comply with the continuing obligations.

Moreover, while the provisions for imposing continuing obligations generally focus upon owners/occupants, VPLE projects can involve many parties that may or may-not have a long-term association with the VPLE Property (e.g., municipalities and developers). A VPLE applicant may be “voluntarily” investigating and remediating the property with respect to the State’s remedial

requirements if it does not fall within the definition of a responsible party. Wis. Stat. § 292.15(1)(f). (VPLE applicant is a person who submits an application and pays all fees.) In some projects, it may be beneficial for a municipality to assume a continuing obligation related to a waterfront development due to the municipality's long-term future involvement with the property and its financial abilities. Under current law, a separate, private agreement entered in the Department's database might be required to allow for the municipality to assume continuing obligations.

A final use of continuing obligations authority may be in the context of a redevelopment project tied to manufacturing or other business related reuse of the site. The 2015 BSG Report discusses the benefits of brownfield redevelopment, including increased property values (each dollar of public investment yields a \$5 to \$20 increase in property value) and that a new job is created for every \$10,000 to \$13,000 spent on remediation. See 2015 Brownfields Study Group Report, Investing in Wisconsin, Reducing Risk, Maximizing Return, at p.2 (Benefits of Brownfield Investment). Because brownfields redevelopment is economic development, it is important that Wisconsin law provide the Department the ability to impose continuing obligations within a VPLE Certificate of Completion upon any person that agrees to assume such obligation, especially if such continuing obligation is intended to promote economic development of the property. Examples of this type of continuing obligation could be a manufacturer's agreement to undertake an aggressive spill mitigating program or storm water control program in conjunction with a Green Tier charter.

PROPOSAL

Amend Wis. Stat. § 292.15 to provide the Department the 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 (such obligations need not be directly related to residual contamination).

The VPLE Subcommittee and BSG recommends that this statutory amendment and the Department's implementation of the amendment address the following concepts:

- The "person" need not be the property owner or occupant (*i.e.*, a third party); however, the person must agree to the requirement, limit or condition within the Certificate of Completion or amendment thereto must sign the Certificate of Completion or an amendment thereto.
- The Department would have direct enforcement authority against such "person" by virtue of executing the Certificate of Completion or amendment thereto.
- Consideration should be given to inclusion of such "persons" in any Charter developed under Green Tier.
- This approach is analogous to utilizing a deed restriction or environmental covenant to provide for environmental conditions to run with the land.

COMMENTS

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