

BROWNFIELDS STUDY GROUP VOLUNTARY PARTY LIABILITY EXEMPTION

VPLE SUBCOMMITTEE

OVERVIEW

In May 2018, the Brownfields Study Group commissioned a review of the VPLE program. This review was intended to address potential program changes to improve the usefulness of the program in promoting brownfield redevelopment. Since commissioning the review, PFAS became a major issue in Wisconsin, and in August 2018, WDNR announced a new interpretation of the VPLE program limiting the scope to only the substances remediated and closed out by listing in the Certificate of Completion (“COC”). After the new interpretation, the focus of the VPLE Subcommittee shifted to address the implications of this new interpretation.

The VPLE Subcommittee is presenting its final work product options to the Brownfields Study Group for consideration. Its work can be classified into two categories – (1) specific recommendations for implementing the VPLE program and (2) evaluating options to address the risks of unknown and emerging contaminants. The risk discussions focused on addressing the risk of finding contamination in the future at a VPLE site not known at the time of remediation and hence not directly addressed in the remediation (“unknown future contaminants”) and options to address the risk of remedy failure, changed standards, or a stalled/canceled redevelopment project due to detection of emerging contaminants (recently identified contaminants for which insufficient scientific information exists to establish remedy and/or cleanup standards). The recommendations involve potential statutory changes, with the understanding the Legislature will make the final policy decisions.

This document summarizes the policy issues associated with changing the scope of the VPLE liability exemption. The specific recommendations concerning implementation of the VPLE program are provided to the Brownfields Study Group for final review and approval.

BACKGROUND

The VPLE program promotes brownfield redevelopment by shifting three risk categories to the state – remedy failure, changed standards and undiscovered contamination. A key component of the original VPLE program is that a thorough investigation is conducted so as to minimize the risk to the state of both the remedy failure and the undiscovered contamination component. Insurance was later added as additional protection to mitigate the risks of remedy failure associated with natural attenuation of groundwater.

In exchange for the state accepting these risks, the VPLE program sought to induce more brownfield projects, adding to local/state tax base and/or improving neighborhoods and generating new income for communities. To date, the state by far is the beneficiary of the program through additional tax revenue, as the state has not spent money to address any VPLE risks over the 22 years of the program.

The current policy options before the Brownfields Study Group are aimed at further limiting the state's future risk at completed VPLE sites through insurance or limiting the scope of the VPLE program. In large part, this proposed retraction in risk shifting is due to concerns over PFAS. However, PFAS is now a known contaminant subject to the VPLE requirement for an approved investigation and capable of remediation (with several new remedial methods coming online). As such, PFAS risk to the state is appropriately characterized as limited to changing standards. (That is, the current site-specific standards may be higher than future promulgated standards.)

Under 2018 interpretation, WDNR issues a COC once remediation is completed for all contaminants identified during the NR 716 approved investigation. (Note – WDNR's recent letter requiring PFAS to be included in an NR 716 investigation.) Since emerging contaminants are required to be investigated (as reflected by WDNR's recent PFAS letter) and a COC cannot issue until closure is obtained for all contaminants investigated (both known and emerging), all contaminants subject to closure are known contaminants. WDNR's approach results in removing the unknown contamination component from the risk accepted by the state. Thus, WDNR's 2018 interpretation essentially addresses "unknown future contaminants" – not emerging contaminants.

While the VPLE Subcommittee discussed numerous approaches to address risk to the state associated with unknown and emerging contaminants, three options emerged as available to the Brownfields Study Group to address post-COC risk:

- Return the VPLE program to its original scope
- Address unknown contaminants with certain additional provisions (insurance, causer liability, for example)
- Accept WDNR's new interpretation

As with all policy items, these involve "tradeoffs." The greater the level of VPLE protections, the greater the brownfield benefit to the state – but the greater possible (or perceived) risks accepted.

VPLE POLICY OPTIONS

INSURANCE

1. Insurance (comparable to the current groundwater natural attenuation remedy failure insurance) is added to address unknown contaminants in all media

Pros

- Department's remedial investigation and remedy selection criteria serve as "underwriting" insurance as long as the "approved investigation" is a thorough review of site conditions – lessens cost and time of obtaining insurance
- Costs of premiums allocated amongst pool of applicants, lessen costs

- Insurance traditionally used to assume risks for “unknown”
- May promote redevelopment of heavily contaminated sites with historical unknown uses (high risk sites for developers entering into program to address higher risk sites)

Cons

- Premium cost may be expensive
- Coverage would not address third-party claims

VPLE Subcommittee Comments

Insurance to mitigate the state’s risk for unknown contamination may be attractive based on cost and policy term.

Costs to add on third-party coverage for the benefit of the property owner should be a separate issue. For example, in the past, evaluated the potential for add-on third-party coverage to benefit the applicant/property owner, but cost was viewed as too high.

Department Comments

Policy term and insurance company willing to underwrite based on WDNR’s NR 700 program.

2. Should VPLE insurance also be expanded to address risks of remedy failure, changed standards and more extensive contamination of known contaminants (including emerging contaminants that attain closure)? Existing insurance policy is limited to remedy failure for natural attenuation in groundwater.

Pros

- Insurance reduces risks to state under the program

Cons

- The more expansive the coverage, the more expensive the premiums
- Insuring a wide range of risks may be cost prohibitive to induce participation in the VPLE program
- Experience to date does not show a need for insurance

VPLE Subcommittee Comments

While insurance reduces risk, the cost is likely to be prohibitively high, which will significantly reduce the use of the VPLE program.

UNKNOWN CONTAMINANTS

1. Should the state bear the risk of unknown, future contaminants?

Pros

- The policy decision made when the VPLE statute was enacted was that the state should assume the risks of unknown, future contaminants in order to encourage brownfield redevelopment and create tax benefits for the state and local governments

Cons

- The risks to the state associated with cleanup of future, unknown contaminants are (by definition) unknown at the time that the state assumes the risk

2. If the VPLE program eliminates the exemption for unknown contaminants discovered in the future, who should bear the risk? (The state would no longer assume the risk of future cleanup for releases prior to the date of the approved investigation.)

- a. Should the party that caused contamination bear the risk of unknown, future contaminants?

Pros

- The state (if it can identify the “causer” and the “causer” exists and has the ability to pay) may be able to recoup the costs of a future cleanup

Cons

- Parties that caused contamination are already responsible for remediating contamination they caused; however, eliminating the exemption for applicants (including responsible parties) that undergo VPLE to remediate contamination acts as a disincentive to brownfields redevelopment and also increases the incentive for causers to “warehouse” property to limit future risk

- b. Should the property owner bear the risk of unknown, future contaminants?

- Could incentivize creative use of LLCs to shield property owner from further liability for unknown, future contaminants; if such a problem arose, it could lead to site becoming another brownfield that the state might need to address anyway
- A party that purchases a brownfield property with completed VPLE remediation without an exemption for unknown contaminants will likely want to address this risk; this could make it less likely for developers to remediate and redevelop brownfields properties (by their nature high risk sites) because the developer cannot be assured that it can make a profit after it invests significant time and energy into the remediation or may not be able to sell the property because of this risk

- Without redevelopment, the state loses tax revenues and increases social costs in the area due to blight
- Other states and federal government exempts owners; see Michigan “BEA” program and U.S. EPA prospective purchaser program

VPLE Subcommittee Comments

The discovery of future contamination on a remediated site is always a risk. However, the VPLE program’s thorough investigation of the entire property for all potential known contaminants (screen or sampling) is intended to significantly mitigate the risk of future unknown contamination costs associated with historical activities. Even the recent experience with PFAS shows major risk is limited to select facilities and is not an issue for the existing VPLE sites.

EMERGING CONTAMINANTS

Note – due to the reality that emerging contaminants will need to be remediated prior to a COC issuing, emerging contaminants should be considered part of the of known contaminants risk (not unknown). The risk to the state is due to changing standards. That is, the case-by-case standard is potentially not as protective as a promulgated standard.

1. Should applicants be allowed to withdraw from VPLE program in the event that emerging contaminants are discovered during the site investigation? If yes, what would be the consequences? This assumes that an applicant has entered into the VPLE program and is undergoing a thorough “approved investigation” that addresses the entire property to address all known contaminants (known and emerging contaminants). If yes, what would be the consequences?

Cons

- Allowing an applicant to withdraw from VPLE due to the detection of an emerging contaminant could act as a disincentive to brownfields development; presumably a site is a brownfield because there is no property owner/causer that can be found with the resources to remediate the property and, thus, allowing an applicant to withdraw from VPLE due to detections of certain contaminants could perpetuate the listing of brownfield sites without any cleanup
- This could also act as a disincentive to performing a thorough “approved investigation,” which requires that an applicant address the potential for the presence of contamination through screening or sampling, and gaps in the approved investigation could impact programmatic and private insurance coverage
- Could result in the VPLE program becoming a revolving door

VPLE Subcommittee Comments

As a practical matter, a responsible party (property owner or one that caused contamination) that is the VPLE applicant would be responsible for cleanup for any contaminants detected.

Allowing an applicant to withdraw from VPLE due to the detection of emerging contaminants should be an extremely limited situation, if at all. The only time this should be allowed is if the VPLE applicant is a prospective purchaser (does not yet own the property and did not cause contamination). The prospective purchaser would not be legally required to remediate any detected contamination.

2. Should applicants be allowed to bifurcate their VPLE applications in the event that emerging contaminants are discovered during the site investigation? For example, should they be allowed to obtain a Partial COC for the emerging contaminants but a full COC for the remaining contaminants?

Pros

- None – there is no policy reason for this approach

Cons

- Do not want to give the impression that remediation can remain and not be remediated
- Would need to evaluate the impact on insurance
- Disincentivizes the VPLE program

VPLE Subcommittee Comments

The goal is to encourage a holistic site remediation and robust “approved investigation” – bifurcating a VPLE application would need to be carefully considered based upon the specific applicant and site at issue.

3. If emerging contaminants are detected as part of a Site Investigation and the site can obtain closure, who should bear the risk of changed standards associated with emerging contaminants – state/responsible party/property owner?

VPLE Subcommittee Comments

The state has addressed emerging contaminants in the past (*e.g.*, PCBs). Experience shows the risks to state of needing to undertake future additional remedial work after a completed remediation at a VPLE property is low. However, perceived risk to developers and future site owners associated with increased costs or time or a stalled development project is high. Therefore, the benefits generated to the state from redevelopment (taxes, productive use of property) outweighs risks to the state.