

VPLE SUBCOMMITTEE REPORT

November 13, 2020



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Overview of VPLE Committee

- Summary of VPLE study
- Programmatic evaluation – recommended changes
- Remaining issue – unknown/emerging contaminants (PFAS, for example)
 - BSG reviewed options
 - WDNR options
- Emerging contaminants (such as PFAS) – BSG reviewed options
- BSG report to Legislature

BSG – VPLE Program Evaluation

- May 2018 – holistic evaluation of VPLE program to address present/future
 - Economic development realities
 - Insurance changes
 - Unknown/emerging contaminants
- Programmatic evaluation (*Evaluation of VPLE Program, February 2020 Background Paper*)
 - Benefits
 - Impediments
 - Summary of goals for changes to VPLE program
- Subcommittee discussed options to address unknown/emerging contaminants

Why VPLE?

- Created to “level the playing field” between brownfield and greenfield sites
- Transferring residual cleanup risk to state makes brownfield sites competitive with greenfield sites
- Trade-off for state
 - State gets tax revenues, job retention, environmental cleanup, blight removal
 - State accepts residual environmental risk
- To date, state is “winner” – tax revenue, cleanup, no payments to VPLE sites

VPLE Programmatic Evaluation

- Subcommittee final recommendations
 - Amend VPLE statute (Wis. Stat. § 292.15) to address uncertainty regarding timing and costs of investigative/remediation requirements (meetings and charters/timelines)
 - Increased FTEs and fees to implement changes to the program
 - Enhanced statutory authority to enforceable closure requirements at VPLE property
 - Clarify VPLE exemptions and insurance obligations – groundwater (groundwater without ES)
 - Screening of hazardous substances

Policy Considerations

- Additional provisions to address unknown/emerging
 - Understand impact of limiting scope of VPLE
 - Special VPLE subcommittee meeting held October 9, 2020 to identify pros/cons of various big picture policy concepts relevant to limiting scope
 - Properly characterize “known,” “unknown” and “emerging” contaminants
 - Once closure can be granted (all contaminants investigated and remediated), emerging contaminants become “known” contaminants
 - *VPLE Policy Concepts to Address for Amending VPLE Program* summarizes pros/cons of various policy concepts

Options to Address Unknown/Emerging Contaminants

- No specific subcommittee recommendation for changes to scope of program specific to unknown/ emerging contaminants
 - Subcommittee discussed various provisions to address mitigating risks of unknown/emerging contaminants
 - Changing scope of VPLE exemptions is a policy decision for the Legislature
- 3 main categories to address unknown/emerging contaminants
 - Retain existing statutory program
 - Accept WDNR's interpretation
 - Address unknown contaminants with additional provisions (insurance, causer liability, etc.)

Options for Unknown/Undiscovered Contaminants

- Original 1998 VPLE program
- Department's August 2018 re-interpretation
- Limit scope of unknown liability transferred to state through:
 - Causer liability
 - Owner liability
 - Insurance
- NOTE – unknown does **not** include emerging contaminants (like PFAS)

State – Pursue “Causer”

- Carve out “causer” liability protection from VPLE coverage
- Creates incentives to “warehousing property” to limit risk
- Uncertainty on what “cause” means
 - “Active” causation – dumping, pouring, spilling, etc.
 - “Passive” causation – allowing contaminants to mitigate
- May be of limited value
 - Difficult to determine “causer” – historic releases
 - “Causer” bankruptcy, business dissolved, inability to pay

State Pursue Owner

- Carve out “owner” liability protection from VPLE coverage
- Creates incentives to use of LLCs as “liability shield”
- “Warehousing” of property
- Owner – inability to pay
- Discourage developers – liability as owner and inability to sell to new owner
- Discourage financing for project
- NOTE – CERCLA provides “prospective purchaser” protection; other states provide prospective owner protections (Michigan BEA)

Insurance – Mitigate State Risk

- Insurance – similar to current groundwater programmatic insurance
- Insurance – traditionally covers “unknown” events
- Uncertainties not yet able to answer
 - Accept WDNR NR 700 process as sufficient for underwriting purposes
 - Terms of policy/limits
 - Cost

Address “Gaps” for Emerging Contaminants

Technical

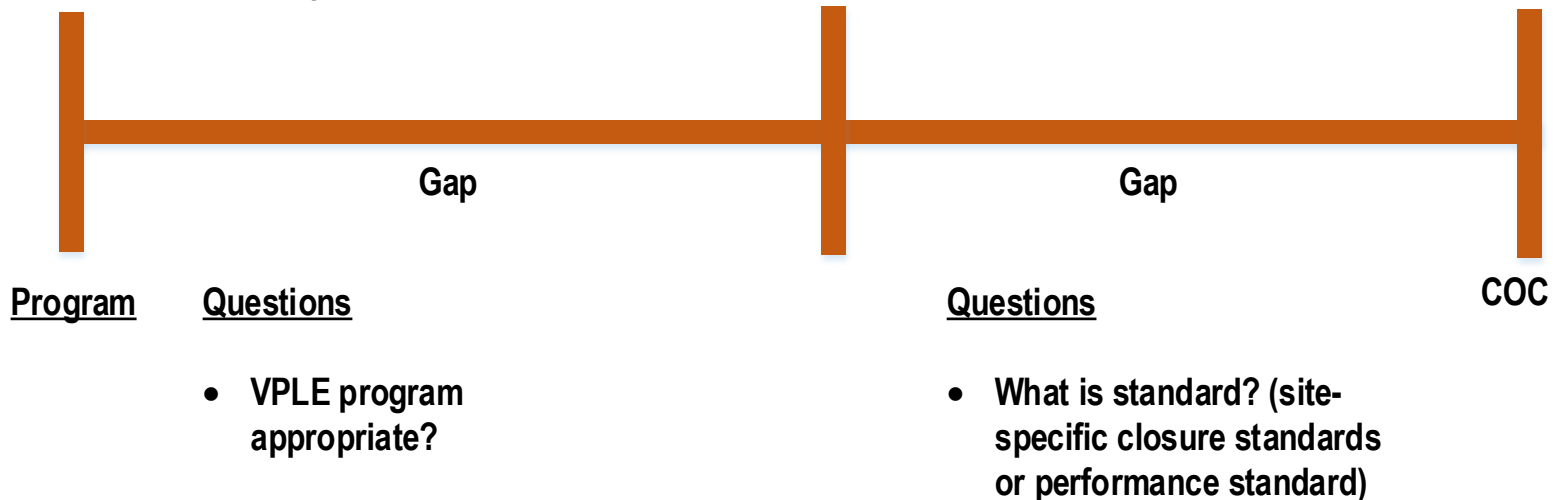
“Emerging”

- Hazardous substance capable of detection
- Closure uncertainty

“Known”

- Closure possible
- Regulatory process begins

- Regulatory process finalized



Policy Considerations – Emerging

- Once COC, properly characterize as “known” – risk to state is of changing regulatory standards
- Should applicants be allowed to withdraw from VPLE if emerging contaminants detected (cannot close)?
 - Limited to prospective purchaser – not liable for cleanup
 - For other applicants
 - Presumably no responsible party with resources to remediate – if other applicants can withdraw, then could perpetuate listing of site without any cleanup
 - Could act as disincentive to “approved investigation” – gaps in investigation could impact programmatic and private insurance
 - Could result in VPLE becoming a revolving door

Policy Considerations – Emerging

- Should applicants be allowed to bifurcate application into partial and full COC based upon contaminants if emerging contaminants found (cannot close site)?
- No policy reason identified for this approach
- Cons
 - Do not want to give impression that remediation can remain and not be remediated
 - Would need to evaluate impact upon insurance
 - Disincentivizes VPLE program

Policy Considerations – Emerging

- Subcommittee comments
 - Goal holistic site remediation and robust “approved investigation” – bifurcating would need to be carefully considered based upon specific site and applicant
 - State addressed emerging contaminants in past (e.g., PCBs) – experience shows low risk to state of undertaking future additional remedial work after completed VPLE remediation
 - Perceived risk to developers and future site owners associated with increased costs or time due to stalled project are high

Options – Emerging Contaminants

- Unwillingness to close – unable to set site-specific standard (lack of credible information)
- Risks to state
 - Contaminated site remains
 - Discourages redevelopment
- Risks to brownfield redevelopment
 - Stalled/lost project
- Potential policy solution
 - Charter agreements
 - Upfront scoping meetings

Path Forward

- Develop comprehensive VPLE report
- Staff to work with BSG Subcommittee members on annotated content outline
- Staff to consolidate materials into draft report for BSG review
- Will address topics such as overview/purpose, background, issues associated with risk of unknown/emerging contaminants and BSG recommendations for implementation of program