

**Brownfield Study Group
VPLE Subcommittee Meeting Notes**

June 5, 2019 | 10:00 a.m. – 12:00 p.m.
Wisconsin DNR Building - GEF 2 | 101 S. Webster St., Room G09
Conference Call: 1-855-947-8255 | Passcode: 98631#

AGENDA

Attendees:	<u>In Person</u>	<u>By Phone</u>
	Jennifer Buzecky	Laurie Parsons – OBG
	Mark Thimke – Foley & Lardner	Ned Witte – Godfrey and Kahn
	Kenn Anderson – Aon	Bill Honea – Ayres
	Chris Valcheff – True North	Janet DiMaggio – DNR
	Josh Neudorfer – Sigma	Tauren Beggs – DNR
	Kristin Kurzka – Sigma	Jeff Ramey – TRC
	Michael Prager – DNR	
	Margaret Brunette – DNR	
	Christine Haag – DNR	
	Bill Nelson – DNR	
	Maria Powell – MEJO	
	Bridget Kelly – DNR	
	Marita Stollenwerk – TRC	

Note: Issue paper titled “ISSUE: Potential changes to Voluntary Party Liability Exemption (VPLE) considering risks related to emerging contaminants” was on the [Brownfield Study Group \(BSG\) web page](#) (see Meetings tab) and available at the meeting. Slides were also used at the meeting and are available on the BSG web page. Many of the comments in the notes were made by attendees during open discussion and do not represent agreement by all parties or items that will be included in a recommendation.

1. Welcome, Introductions and Agenda Repair

- Intent of this group is to look at VPLE Program and ways to improve the program, not all about PFAS.

At a VPLE site you have:

- Known contaminants with standards
- Unknown contaminants
- Known contaminants without standards

2. Status of Legislative Efforts/Timing to Address VPLE Scope Issues

- See below

3. Recap of Prior Two Meetings

- See below and slides

4. Potential changes to VPLE related to emerging contaminants (see issue paper) – Group Discussion

- See below
- Brownfields Study Group discussed this at last meeting, asked subgroup to work on this; need to move ahead quickly, budget to be approved approx. August.
- Scope: Changes due to emerging contaminants, implementation of program, and possibly legislative changes.
- Hammer out legislative changes that subgroup would recommend. BSG would approve recommendations from BSG VPLE subgroup to take to legislature.
- Two main options
- Insurance is a large focus of VPLE.
- Issue paper primarily describes ideas from Mark Thimke, Christine and Darsi on how to modify VPLE.
- Combining future risk and insurance
- Scope of COC and liability exemption

Jennifer –

At previous VPLE subgroup meetings we talked about why we used VPLE:

- Municipalities, out of state companies/developers utilize the most.
- In-state companies/developers may be more comfortable with redeveloping without VPLE.

Reasons given for not using VPLE:

- Imported fill
- Projects with short timelines v regulatory timeframe
- Cost vs. Benefit
- Concerns of not being able to get a property redeveloped.

Areas of uncertainty:

- Where insurance fits in
- Cost involved in obtaining COC
- Vapor issues
- Emerging Contaminants

What should program look like moving forward?

- Should it be different and how do we address it?

How much risk is the state willing to undertake?

- Trade-off of risk state would take vs. party doing cleanup.
- Bridge gaps to provide assurance in legislation that we won't be taking too much risk with state taxpayer money.

Many on BSG subgroup had a preference to include as much scope of a liability exemption with insurance that runs through the DNR. Have a fixed cost so you know the monetary payments and have a renewal every five years or fixed timeframe.

- Someone enters VPLE, does Phase I and II, and SI, tests for known contaminants with and without standards

Kenn Anderson –

- Generally insurance currently covers additional remedy that may be needed if what was done was not effective enough. This is what environmental insurance has done for 30 years. Insurance could be used to address this risk for VPLE sites.
- Discussed in general what insurance has traditionally covered – known contaminants with standards (reopeners for remedy failure and more extensive contamination) and unknown contaminants. For known contaminants without standards, insurance would need some sort of “ok” determination to cover these.
- Nuances of COC/liability exemption would need to be figured out:
 - What does the COC actually do? Gives exemption to responsible party.
 - How can you release the RP from liability then make them responsible later on. Because for insurance to be used, usually there is a reopener to trigger a claim. Claim validates DNR’s decision making. Insurance company has a cap on what it will cover, policy limit. Looking at reopeners for all cases in the state is a very low number.
 - Risks: Remedy failure, unknown chemical risk, failed SI risk – state would take that risk.

DNR

- Interim program on PFAS by DNR was established by past and current administrations to not put all risk on state for emerging contaminants.

Discussion:

- Is there an insurance product available that would put a limit on the financial risk to the state for that would be acceptable to the legislature?
- Currently insurance covers a million dollars per site with a 10 million aggregate. What would we feel comfortable with moving forward?

Kenn –

- How do you get through an SI for approval in the NR 700 process? Have DNR walk insurance people through this process for their understanding.
- Macro issues vs. micro issues have a much different perspective from an insurer.
- In the future we all know there will be more emerging contaminants, so need to look at the VPLE process from a holistic perspective for what insurers would be comfortable with. How to integrate this into the VPLE program. May need to broaden insurance beyond just for remedy failure for natural attenuation.
- Environmental insurance varies a lot from one insurance coverage to another, policies are written differently, unlike other insurance types (such as car insurance).

Some discussion around potential changes to insurance, such as that after a certain timeframe if the voluntary party does not renew their coverage after 5, 10, 15, 20 years, etc., then the RP could become liable again.

DNR recognizes that what we are dealing with now is beyond the scope of just natural attenuation failure. If insurance program was changed, insurance company would need understanding of how the investigation process works under NR 716.

Should VPLE SI include all contaminants on a list that needs to be investigated no matter if it is a REC or not? In this type of scenario, if the party chooses not to sample for all the contaminants, then DNR wouldn't provide a COC/liability exemption.

Could we explore various options that an insurer would consider? Referring to Kenn looking into this. Kenn explained that if the DNR has a rigorous process for approval for sites, insurance would like that because they won't be insuring sites unless they get DNR approval. VPLE program uses NR 700 process.

Comment that developers aren't going to want to continually pay for insurance over time, especially when they are usually only involved during development, then the property is often taken over by a different party.

Discussion on whether an option would be to make the insurance on a fixed timeframe (such as 25 or 30 years) instead of in perpetuity. Comment that the real risk for the insurance company is when the developer breaks ground and for the first three years after COC issues. DNR states that risk is not just right away. Due to emerging contaminants, risk is based on when certain regulations or processes change based on the emerging contaminants or upon finding chemicals in drinking water.

Easier to sell a fixed fee instead of dumping unknown costs. One option discussed is that developer may be ok paying some kind of upfront fee rather than unknown future premiums

Basis of this program is to promote urban redevelopment.

Is insurance the way to go? Should we have a developer fund or some other mechanism? DNR does not understand the risk associated with emerging contaminants to be able to underwrite this.

Cost of insurance can be cheaper than cost for sampling in some scenarios.

- Option 1 – Cover Emerging Contaminants with Insurance
Future risk is an insurance issue. Insurance could cover risk for emerging contaminants. DNR involved in insurance tool that introduces nuances of how insurance is structured and what would trigger a claim. Discussion

Far more valuable for private sector than option 2.

- Option 2 – Liability Exemption for All Substances on a State List
Look at a fixed list that VP would be protected for whether they sample for the contaminant or not

This option is similar to what is currently available if a party looks to get their own private environmental insurance. One difference is that DNR now issues exemption for

substances that were sampled for and this proposal would include standard list for every site and if DNR and consultant agree some substance doesn't need to be sampled for based on Phase I, the exemption would still include that chemical (as long as it is on the list).

If there is a list or structure that is the same for every VPLE site, it is much easier for DNR to implement.

Other possible legislative issues to evaluate

- Timing of SI and COC
- Insurance and COC for Sites with GW Contamination that doesn't have an Enforcement Standard
- Sediment VPLE Law Changes – Modify Wis. Stat. § 292.15(2)(af)2 Regarding Cleanup Requirements

5. Status of Insurance – Kenn Anderson, Aon

- Ken will set up call with current insurer to discuss the options and bring back information to subgroup about how a program like option 1 could work. Also asked Kenn to look into insurance to include coverage for natural attenuation for substances without groundwater standards.

6. VPLE Long-term Solution – Group Discussion

7. Next Steps / homework

Next meeting is July 23 from 2:00 to 4:00 p.m.

Jennifer will try to capture the ideas from the meeting and prepare a paper with recommendations to share with subgroup using and will use parts of the issue paper.