

ISSUE: Potential changes to Voluntary Party Liability Exemption (VPLE) considering risks related to emerging contaminants

BACKGROUND

Recent concerns over emerging contaminants, particularly per- and polyfluoroalkyl substances (“PFAS”) chemicals in Wisconsin and neighboring states have prompted the department to offer a voluntary party a Certificate of Completion (COC) for the individual hazardous substances that are investigated after all the VPLE requirements have been met. The department will only issue a COC that covers all hazardous substances investigated.

The department made this decision in part to protect state taxpayers if PFAS were discovered and posed a health threat and there are no other responsible parties to address the issue. The department would be remiss in its responsibility to protect public health and safety, and serve as good stewards of state taxpayer dollars, if it issued a Certificate of Completion for PFAS contamination that was not sampled or could not be sampled for given lack of scientific methods. This was also based on an evaluation of the research and guidance available about the complex nature and limited understanding of PFAS including the fate and transport and site characterization. The department was also concerned that it may be difficult to determine that there is no risk of PFAS discharges for many industrial facilities without data because of the large number of uses of the chemicals and scientific uncertainty.

Some brownfields stakeholders have raised concerns with this approach because it reduces the benefits of a COC; property owners could be exposed to an additional risk that additional work could be needed in the future if contamination was discovered in the future that was not one of the hazardous substances listed in the COC. As a result, some developers, local governments, investors and others could be less willing to take on brownfield cleanup and redevelopment sites in Wisconsin. Even with this change however, Wisconsin still one of the broadest liability releases in the nation.

PROPOSED CHANGES

This paper outlines statutory options which could be added to Wis. Stat. § 292.15 with the goal to have a program that continues to encourage investment in cleanup and redevelopment of brownfields. These options would also protect state taxpayers from the financial risk of having to fund a large cleanup. Also, encouraging sampling for PFAS contamination should be considered. Statutory changes should also consider who would be obtaining the liability protections. This may include revisiting the ‘Successors and Assigns’ provision in Section 292.15(3) such that a voluntary party would not be able to assign the liability protection to a company who caused the contamination.

The law would be changed to add the following options to the existing VPLE laws in Wis. Stat. § 292.15. The existing partial option under Wis. Stats. § 292.15(2)(am) would remain in place if someone wanted to cleanup only an area of their property or only cleanup certain hazardous substances.

Option 1 - Cover Emerging Contaminants with Insurance - Law would allow a Certificate of Completion (COC) for a standard list of compounds whether sampled for or not. Sampling for some of the substances may not be warranted based on the Phase I. This option would also include liability protection for compounds not on the list (including PFAS and other emerging contaminants) and require that the voluntary party obtain insurance in perpetuity to cover those risks.

- A. What does the Wis. Stat. § 292.15 state liability exemption cover? Wis. Stats. § 292.15(2)(b) provides exemption in situations when there is change in standards, more contamination discovered or remedy failure. Would this apply to:
- all substances on list + other substances if they were sampled for (PFOS, etc.)
 - all substances on list + any and all other substances (all 5,000 PFAS compounds?) (former Full COC)
- B. Who would be covered by the insurance?
- The insurance would name the state as the insured party
 - The voluntary party
 - Both
- C. Structure of insurance - How long would you, the VP, need to provide the insurance? Once VP stops paying for the insurance coverage, would they lose the exemption for things not on list? Would a master policy similar to current VPLE NA coverage be created or would people need to go out and find an individually underwritten policy for their project?
- D. What would the minimum insurance need to cover? What would trigger a claim? The protections in Wis. Stats. § 292.15(2)(b)? change in standards, find more contamination, remedy failure? Would or would not the insurance extend to the voluntary party? For substances sampled or substances not sampled?
- E. Which list do we use and how can the list change in the future without statutory or rule changes? (publish by agency, Natural Resources Board approval, legislative approval)

Option 2 - **Liability Exemption for All Substances on a State List** – Voluntary Party would receive hazardous substance specific COC that is limited to the compounds on a state list. This would provide liability protection for any substance on standard state list. The exemption would apply to all substances on the list if department determined sampling of a substance was or was not warranted (for example, PCBs would be covered by exemption if consultant and department agreed sampling was not warranted). This is similar to how the voluntary cleanup programs in IL and MN work.

Note: under this option, property owners or developers could explore private options to address the risk associated with emerging contaminants through use of private environmental insurance, indemnification agreements, restrictive covenants or other options.

COMPARABLE STATE OR FEDERAL POLICIES

DISCUSSION OF ADVANTAGES/ DISADVANTAGES

Option 1 requires significant staff time to create and implement the new insurance program and additional costs from the party doing the cleanup to pay for this insurance. Monitoring policies “in perpetuity” would be an administrative challenge.

COMMENTS

Other VPLE Issues for Consideration:

1. Timing of Site Investigation and Certificate of Completion

Some sites are in the VPLE program for many years before they are able to qualify for a COC. Also, some sites have had a site investigation conducted and approved before they begin the VPLE program. The current VPLE law says that the liability protection applies to any discharges that occurred prior to the date the SI was approved. There may be situations when new spills or recognized environmental conditions (RECs) may have occurred on the property since the time the Phase I, Phase II and SI were completed and approved. Current law isn't clear about when an updated Phase I and more investigation work can be requested.

Option: Modify VPLE law to clearly allow department to require an updated Phase I and, based on the results of the Phase I, require additional investigation in appropriate situations.

2. Insurance and COC for sites with GW with contamination that doesn't have an Enforcement Standard

Current VPLE law allows for COC if you have groundwater above enforcement standards (ES) if you get insurance. Some compounds do not have an ES and may be cleaning up to a level that was determined for that site. They could achieve closure if they can demonstrate that they will reach the level within a reasonable amount of time using natural attenuation.

Option: Modify Wis. Stats. § 292.15(2)(ae) to allow sites that use a site-specific groundwater cleanup level (and an ES doesn't exist) to obtain insurance and qualify for a COC.

3. Sediment VPLE law changes – Modify Wis. Stats. § 292.15(2)(af)2 regarding cleanup requirements

The new section of VPLE law created by Act 204 that allows for VPLE for sediment remediation includes a section that provides unclear cleanup requirements. The current law includes this requirement for sediment only:

“The voluntary party removes all or part of the contaminated sediment and addresses any remaining contaminated sediment in a manner approved by the department, such that the environment is restored to the extent practicable with respect to the discharges and the harmful effects from the discharges are minimized in accordance with rules promulgated by the department and any contract entered into under those rules, except that with respect to contaminated sediment the environment is restored to the extent practicable with respect to the discharges and the harmful effects from the discharges are minimized as determined by the department by monitoring or sampling and in accordance with any contract entered into with the department's approval.”

The underlined/italics language provides a different requirement for how the department would determine the sediment cleanup is complete. Remove this language so that the sediment cleanup would need to be completed in accordance with rules promulgated by the department. NR 700 rules current apply to sediment cleanups and modifications are underway to the rules that would clarify the pathway for sediment cleanups.