

Issue Paper: RR Program Fees and Funding Sustainability

NR 700 EAG Subgroup

Contributors: Bill Nelson, Mark Rutkowski, Ed Buc, Frank Dombrowski, Ray Tierney, Chris Valcheff, Chris Bonniwell, Ben Vondra, Shelley Fox, Michael Prager, John Sager, Molly Schmidt, Judy Fassbender

TYPE OF RECOMMENDATION

This issue paper includes recommendations for revising DNR administrative rules, creating or revising guidance, and instituting changes to internal DNR processes.

BACKGROUND

The RR program oversees the investigation and cleanup of environmental contamination, provides a broad range and depth of staff expertise, and when requested with an appropriate fee submittal, provides technical reviews of documents. Wis. Stat. ch. 292 authorizes the DNR to collect fees for a variety of submittals that categorically include:

- Negotiated agreements;
- Liability clarification letters;
- Technical assistance (including review of submitted work plans and reports);
- Voluntary party liability exemption oversight; and
- Department database listings.

Responsible parties may submit most required reports without a fee if they do not seek DNR technical review. Fees associated with requested submittal reviews and other assistance range from \$350 for reviewing a construction documentation report to \$1,400 for a negotiated agreement or a lease liability clarification letter for multiple properties. The complete DNR Fee Schedule is provided in Table 1 of s. NR 749.04, Wis. Admin. Code.

Over time the cost of providing these services has continued to increase due to inflation and other factors; however, program revenues from fees are fixed and have remained unchanged for over a decade. This issue paper examines alternatives for providing funding sustainability and program capacity with a focus on DNR technical assistance/services fees under Wis. Admin. Code ch. NR 749.

PROPOSAL

This paper identifies topics for administrative rule development, guidance or template development, and DNR internal process adjustments. This issue paper recommends four (4) topics for future consideration:

1. Increasing current ch. NR 749 Fees
2. Increasing the number of documents that must be submitted with a fee for review
3. Charging a premium for expedited reviews
4. Streamlining the structure of ch. NR 749 fees by reducing fee categories

Attachment A provides full background and detailed proposals on each topic. Additionally, **Attachment B** lists other items considered by the group that were deferred for further consideration.

RESOURCES NEEDED

Items identified within this issue paper for administrative rulemaking are estimated to take approximately 2,000 staff hours as a single rulemaking effort. The rulemaking also involves the support of an appointed rule advisory committee during rule development and public support and involvement during the rule development,

economic impact, and public hearing processes.

Guidance development also involves staff time and public input. The amount of staff time for these activities varies widely based on the type of document (template, form, guidance) and whether the guidance is new or revised.

Changes to internal DNR processes involve staff time and vary depending on the nature/impact of the change.

ENVIRONMENTAL JUSTICE EVALUATION

The changes proposed in this paper are intended to improve the RR Program's financial sustainability, which would support the DNR's ability to carry out statutory duties under the Hazardous Substance Spill Law, Wis. Stat. s. 292.11.

Disadvantaged and underserved communities, including low-income, tribal, indigenous, and communities of color, are more likely to live near contaminated sites. Generally, actions that support the DNR's ability to carry out its duties in administering the Hazardous Substance Spill Law are anticipated to benefit these communities and Wisconsin residents through better protection of human health and the environment.

However, most proposals discussed in this paper include policy changes that would increase fees. Increasing fees may have a disparate impact on certain entities' ability to pay, such as small businesses that are cleaning up a contaminated site under Wis. Admin. Code chs. NR 700-799. During issue paper drafting, the group and/or meeting participants raised concerns regarding the impact of increased fees on smaller entities in disadvantaged and underserved communities.

Additionally, group participants raised equity concerns with the third proposal, *3. Charging a premium for expedited reviews*. Allowing deep-pocketed entities to purchase expedited DNR reviews would not only have a disparate impact on entities that are cleaning up contaminated sites under Wis. Admin. Code chs. NR 700-799 would also have the effect of prioritizing DNR reviews according to the economic circumstance of the regulated party rather than the potential health and environmental impacts from the contamination being addressed. Given the higher likelihood of impact from contamination on disadvantaged and underserved communities, this approach may have a compounding negative impact on environmental justice goals.

COMMENTS

Notable comments from the issue paper draft writing process and alternative approaches included the following comments.

- Regarding the third proposal, *3. Charging a premium for expedited reviews*, group members commented that potential impacts on disadvantaged and underserved communities may be reduced by allowing parties paying the expedited fee to self-select as a disadvantaged or underserved community. The fee would then revert to the standard fee, but the submittal would be treated as expedited. This self-selection is used in other areas (e.g., grant applications) and could be verified. Disadvantaged and underserved communities eligibility criteria could be adopted from an already established source that DNR recognizes, such as the EPA EJScreen Environmental Justice Screening and Mapping Tool. One member noted that an income-based sliding scale fee could be considered.
- Regarding the impact of fee increases, the group commented that large companies may be more capable of adapting to fee increases than small businesses and individuals. Rulemaking that impacts

small businesses in Wisconsin must seek review from the DOA Small Business Regulatory Review Board. A grant program may be an option to help disadvantaged regulated parties; however, legislative action would be required for DNR to implement.

- Generally, proposals with minimal administrative complexity (i.e., low cost to implement) are more likely to achieve the goal of increased funding sustainability for the RR program. The first topic, *1. Increasing current ch. NR 749 fees*, includes multiple proposals for increased fees. A one-time fee increase in fees is simple to implement; however, a sliding-scale fee based on the level of staff effort may be difficult to implement due to the variation in staff expertise and the variability in complexity from one site to the next.

ATTACHMENTS

Attachment A: Topics Proposed for Consideration

Attachment B: Deferred Topics

ATTACHMENT A: TOPICS PROPOSED FOR CONSIDERATION

1. Increasing current ch. NR 749 fees

Issue background:

Chapter NR 749, Wis. Adm. Code, "Fees for Providing Assistance; Remediation and Redevelopment Program," establishes fees for assistance requested by those undertaking cleanup and redevelopment of contaminated properties subject to Wis. Admin. Code chs. NR 700 - 799. The fee amounts under Wis. Admin. Code s. NR 749.04, Table 1, were initially based on the average amount of time necessary to perform reviews. Review times are currently being reassessed. The fees under Wis. Admin. Code ch. NR 749 have not been revised since 2013, meaning that the flat fees for program services listed in the schedule have not increased within the last 10 years. While RR program Wis. Admin. Code ch. NR 749 fees have remained fixed, RR program's costs for providing services have continued to increase due external factors such as inflation and the labor market and is further discussed below. The result is that customers are paying less, relatively, for these services over time while the DNR's costs are steadily increasing.

Additionally, fees are not a stable source of revenue in part because most fees are not required for document submittals unless DNR review is requested. Responsible parties can choose to submit documents without fees at most project milestones and continue without RR staff review. Over the last three years, there has been significant fluctuation in fee revenues each year. Total fiscal Year (FY) 2023 fees were higher than the previous three years. Notably, case closure fees decreased by 40% in FY2023 compared to FY2020, due to legislative changes to program structure (the sunset of the PECFA program in FY2020).

The RR program prioritizes the use of limited funding to meet statutory and administrative responsibilities. Fee-based work, with established deadlines, is a high priority. RR program staff aim to provide timely customer service, clear, helpful, and consistent responses, with a greater amount and diversity of staff expertise. Several reasons exist why RR program's personnel costs have increased for fee-based work. For example, the program has begun using peer review groups to ensure consistency following the initial review by the project manager. Additionally, due to the complexity of some sites as well as the status of emerging contaminants, a staff specialist may become involved as needed for certain impacted media or substances (e.g., vapor intrusion, soil management, PCBs). The fee schedule establishes many of the fees at a flat \$700 or

\$350 for time spent by two to three staff with high levels of experience and expertise. The cost of staff time exceeds the flat fee amount. If, as a matter of policy, customers should pay for the actual cost of services rendered by DNR staff, then an increase in the fee schedule is needed.

DNR input during the investigation, remediation and closure process is beneficial to streamlining and ensuring requirements are not skipped during the NR 700 process. The current fees are a good value, and are significantly less than rates charged by regulators in many other states. Continued quality and timely responses must be delivered by the DNR if rates are increased. When implementing any of the proposals below, DNR should consider the level of staffing needed to maintain quality and timely responses.

Proposal(s):

Increasing Wis. Admin. Code ch. NR 749 fees is one potential path toward improving funding sustainability; fee increases would require administrative rule revisions. Options to explore include:

- An across-the-board one-time increase in fees, either by amount or percentage.
- A built-in percentage increase that is tied to inflation or another directly relevant external factor that increases “automatically” over time (without requiring additional rulemaking). For example, tying an annual increase in fees to the Consumer Price Index.
- Set fees to match the level of effort required for DNR review and response.
- A combination of these approaches.

2. Increasing the number of documents that must be submitted with fee for review

Issue background:

Increasing the number and type of documents that must be submitted with fees for DNR review may improve funding sustainability and may secondarily benefit regulatory efficiency. The cleanup process under Wis. Admin. Code chs. NR 700-799 was designed to be independently implemented (“self-implementing”) by regulated parties. Generally, code does not require regulated parties to pay fees for DNR reviews; however, it does require regulated parties to submit certain reports and information to the DNR.

DNR service fees typically apply only when a DNR technical or liability review is requested by a regulated party. Some DNR reviews may be required under code conditionally/occasionally, for example some remedial actions, if selected by the regulated party, will require a DNR fee-based review and approval. Case closure requests under Wis. Admin. Code ch. NR 726 require a fee and although the code requires regulated parties to meet closure requirements, the code does not require regulated parties to seek case closure.

Code does require regulated parties to submit certain reports regardless of whether regulated parties are requesting DNR review. Code requires the submission of a Site Investigation Workplan (SIWP) and a Site Investigation Report (SIR). Code requires a Remedial Action Plan for all remedial actions. If no review is requested, fees are not required for SIWPs SIRs and certain Remedial Action Plans.

In addition to addressing funding sustainability, adding certain reports to the list of items that must be submitted with a fee may address a frequent issue that impedes timely closure. Often, when sites get to closure, there is a gap in the completeness of the site investigation. Detailed DNR review of SIWP and SIR submittals is not completed unless a fee is submitted with the documents. Requiring a fee review of the SIR may help catch incomplete site investigations early in the process rather than at the end of the process, helping regulated parties avoid unanticipated delays that could have been resolved ahead of the closure request. Alternatively, fees could be required for only submittals involving sites that present an acute risk (for example, a site with residents affected by TCE vapor contamination), or in another way that is proportionately tied to risk. This approach would promote the expenditure of staff time on the sites that present high risk to the public.

Conversely, adding certain reports to the list of items that must be submitted with a fee may reduce the extent to which regulated parties are able to independently implement the cleanup process under code, and regulated parties may have concerns regarding cost and delay experienced while regulated parties wait for DNR review responses.

Proposal:

Administrative rule revisions recommended for consideration include a mix of the following:

- Revise code to require entities that are conducting cleanup under chs. NR 700-799 to pay the fee for DNR review and approval of a Site Investigation Workplan.

- Revise code to require entities that are conducting cleanup under chs. NR 700-799 to pay the fee for DNR review and approval of a Site Investigation Report.
- Revise code to require entities that are conducting cleanup under chs. NR 700-799 to pay the fee for DNR review and approval of all Remedial Action Plans.
- Revise code to allow fees to be charged for subsequent iterations of work plans and reports and/or revise code to limit the number of report iterations allowed per a single review fee, with consideration of any disparate impacts on smaller regulated entities.
- Consider higher fees for more complex sites, with complex criteria to include sites with acute VI risk, groundwater contamination that migrates offsite, contaminant migration in fractured bedrock, free product and similar.
- Consider hourly fees for a very limited number of extremely complex and/or high risk sites if these sites can be determined objectively and if the need for a differing fee structure for these sites outweighs the administrative burden.
- If Site Investigation Work Plans, Site Investigation Reports, and Remedial Action Plans are required to be submitted with fee for review, consider instituting one fee per document that covers all revisions required to obtain approval, and consider identifying which additional documents would be subject to required reviews (to preserve expediency and promote certainty).
- If SIWP, SIR, and RAP are required to be submitted with fee for review, consider instituting one fee per site that covers all revisions required to obtain approval, and consider identifying which additional documents would be subject to required reviews (to preserve expediency and promote certainty).
- Promote the use of technical assistance meetings and develop strategies for allowing these meetings to be held expeditiously.
- Consider clarifying and standardizing the terms used to describe reporting requirements in code, in line with how other states and the federal government use similar terms. Ch. NR 722 requires an evaluation of the remedial options first, then a Remedial Action Plan, but only requires submission of a Remedial Action Options Report. Ch. NR 724 asks for a remedial action Design Report, which may not clearly signal inclusion of excavation and disposal (as activities requiring a “design”).

3. Charging a premium for expedited reviews

Issue background:

Allowing for expedited reviews at an increased rate may provide increased funding sustainability. Allowing for expedited reviews, i.e., a faster review turnaround for a higher fee, would also provide a customer service improvement. Certain time-sensitive submittals that are frequently related to property transactions, such as a No Action Required (NAR) and No Further Action (NFA), could be prioritized for this type of policy and other reviews may also be considered. Factors for consideration prior to implementation include administrative considerations regarding staffing, costs and commensurate expectations, and fairness to responsible parties with limited resources. Implementation should include internal measures and controls to ensure that the prioritization of expedited reviews continues to allow adequate staff time available for non-expedited reviews.

Proposal:

Administrative rule revisions are recommended for consideration:

- Revise code to allow for expedited reviews at an increased rate for certain types of reviews such as NAR, NFA, and other submittals that are required to support time sensitive property transactions and site development actions.

- Require expedited reviews (and increased fees) for sites with acute risk concerns or otherwise based on risk.
- Ensure fair and equitable expedited review of sites in disadvantaged and underserved communities financed partially through these increased rates.

4. Streamlining the structure of ch. NR 749 fees by reducing fee categories

Issue background

The table of fees within Wis. Admin. Code ch. NR 749 (s. NR 749.04, Table 1) establishes over twenty different fees of varying amounts for different types of assistance offered through the DNR RR program. This fee structure contemplates rare and exceptional circumstances, and the values in the chart are based on outdated calculations. Many of the fees could be combined, and the current fee schedule could be simplified and/or streamlined in a way that is easier to understand and administer.

One option for streamlining the fee structure would be to revise the structure of the entire table. A streamlined approach could entail a total of three to four items. One example of a restructure could be for fees to be redistributed into three categories of total value/amount: 1) pre-closure fees, 2) closure fees and liability clarification letter fees 3) post closure fees.

Another option for streamlining fees would be to focus on smaller streamlining adjustments. For instance, Wis. Admin. Code s. NR 749.04, Table 1.(d) lists fees for recording information on the DNR database (BRRTS).

The list provides five fees that must be paid depending on the type of site and the type of database entry; however, four of the five fees are for similar actions and amounts. These fees could be simplified into fewer options, and database fees overall could be streamlined.

In either approach, streamlining fee structure for efficiency may help offset foreseeable concerns related to cost implementation of increasing fees across the board. Other factors to consider prior to implementation include the ease and clarity of tracking and reporting fees, and consistency with other approaches used by the state.

Proposal

Further discussion and examination of feasibility is recommended. Streamlining can be accomplished through administrative rule changes. Guidance development following administrative code changes is recommended.

ATTACHMENT B: DEFERRED TOPICS

This issue paper recommends deferring three topics from further consideration at this time:

1. Restructure fees from flat rate to hourly rate
2. Developing a Long-Term Stewardship Fee
3. Developing an Authorized Environmental Professional Program to decrease staff workload

1. Restructure fees from flat rate to hourly rate

Issue background:

Another option for structuring fees to increase fee revenue is allowing for a system of billing for project manager and/or document reviews directly. This approach may result in more equitable apportionment of costs for sites of varying size and complexity, by determining costs according to staff time spent on a review. The Voluntary Party Liability Exemption (VPLE) program is currently run on this type of system. VPLE allows for quarterly billing under a billing rate that is reviewed each fiscal year (July 1). Staff code time to site work and rates include overhead costs. The VPLE rate as of July 1, 2024, is \$125 an hour.

A similar model could be used where the DNR bills the responsible party and/or applicant on a quarterly basis. Some states use this framework successfully; however, for the RR program, switching to this new system for all sites versus VPLE sites would require a significant change in the administrative structure of the program. Between 2020 and 2022, the VPLE program processed one or fewer VPLE certificates of completion per year, whereas the RR program processed approximately 260 site closures yearly.

Increased administrative workload would include staff time for invoicing, issuing reminders, cost tracking, and more. A cost-benefit analysis is needed prior to implementing this type of approach to ensure that benefits from increased program revenue outweigh the increased administrative costs. Factors that may be considered for changes to an hourly fee structure include billing to reasonable and necessary staff, hourly rates as they may vary by staff level, yearly rate escalators, billing rate multipliers versus raw labor costs, established maximums for services, and methods of estimating review costs.

Changing the fee structure may be achievable through changes in administrative code; however, administrative and staffing changes needed to implement this system may require approval through budgetary/legislative approval processes.

Rationale for deferral:

Further discussion of this approach is not recommended due to high administrative costs and comparatively low benefits.

2. Developing a Long-Term Stewardship Fee

Issue background:

Another option for improving funding sustainability through fees would be the development of long-term stewardship fees. The need to ensure protection for human health and the environment continues past closure for sites with residual contamination; however, the RR program does not impose fees past closure. Long term stewardship fees should be developed to apply to sites that close with residual contamination. Development of a long-term fee may be achieved through administrative rule reviews in most cases; however, some approaches may also require legislative approval (e.g., the liability protection approach).

Administrative rule revisions are recommended for consideration that could structure a post closure fee for sites closed with residual contamination. Several options for structuring this type of fee could include:

- Establish a five-year review/audit/assessment structure using a funding agreement, up-front payments on five-year increments, and an invoicing system for labor costs.
- Require financial assurance such as insurance – similar to the approach for the VPLE program.
- Require financial assurance similar to the engineered control contaminated sediment model (Wis. Admin Code ch. NR 756).
- Raise soil and groundwater database/GIS fees to cover the post closure audits/long-term site monitoring.
- Develop a liability protection approach in which the state provides a “covenant not to sue” in exchange for the regulated party’s payment of a one-time fee for site that will have residual impacts. North Carolina allows for this type of covenant through a “Brownfields Agreement” with a developer, with the cost of the agreement tailored to the site conditions, the existing site data, and the proposed land use.
- Develop/implement a Risk Management Program (RMP) similar to the U.S. EPA’s for sites that have residual contamination left in place. Fees paid for review and long term maintenance would be based on the degree of risk using U.S. EPA risk models or similar evaluation of risk (both human health and environmental).

Rationale for deferral:

Further discussion of this approach is deferred to allow the RR Program EAG Funding Sustainability Subgroup an opportunity to further develop this issue and provide an analysis of costs and benefits affecting all stakeholders, including responsible parties.

3. Developing an Authorized Environmental Professional Program to decrease staff workload

Issue background:

The group looked at the option of developing an Authorized Environmental Professional Program to approach funding sustainability through decreasing staff workload. An Authorized Professional Program would allow environmental professionals to administer certain reviews that are currently done by DNR staff after completing training and certification, similar to how the DNR Waterways Program allows private professionals to become Assured Wetland Delineators. Consultants could pay a fee and meet certain established professional requirements to be granted the authority to perform certain regulatory tasks, such as soil management plan approvals, historical fill approvals, and some types of site investigation approvals. This approach to funding sustainability benefits customers by expediting the affected regulatory processes. The DNR would provide peer review and oversight to ensure that decisions are consistent and statutory goals are met.

Further evaluation of this approach is needed, including evaluation of whether this program would present its participants (professional) with conflicts of interest and/or liability. Further research on the efficacy of similar programs in other states and consideration of costs to responsible parties is recommended prior to implementation.

This proposal would require a statutory change and an administrative rule change for implementation. The Wisconsin State Legislature has designated the Department of Natural Resources as the state agency responsible for the state’s duties under Wis. Stat. ch. 292. Many responsibilities are further delegated to the RR program under Wis. Admin. Code chs. NR 700-799.

Rationale for deferral:



Further discussion of this approach is not recommended due to the necessity of legislative changes prior to implementation and due to the low likelihood of improved funding sustainability outcomes for the RR program.