

ISSUE: Rule modifications to clarify rights and responsibilities of owners and occupants at sites with residual contamination consistent with statutory changes included in Act 204

Rule Subgroup: Rights and responsibilities for owners/occupants at sites with residual contamination

BACKGROUND

Following Act 204, which made several changes to the way that continuing obligations are applied, the RR program is assessing whether code is consistent with changes and whether revisions may provide additional clarity.

Act 204, sections 12 through 17, made several changes to the parts of chapter 292 that deal with ongoing responsibilities for continuing obligations (COs) at sites, clarifying the respective limitations or responsibilities of landowners, occupants, and responsible parties. This summary is for the purpose of background and readers should also refer to the statutory language directly. Stated generally, these changes are:

Act 204, sections 12 through 16, made the following revisions to Wis. Stat. § 292.12(5), which relates to the ongoing restrictions and responsibilities for owners and occupants at sites with certain types of continuing obligations (“COs”). The statute was modified to clarify that these requirements do not apply to sites with contaminated sediment that use an engineering control, which are addressed under a new section (see section 17 below).

- Owners and occupants may not interfere with a person that is trying to meet certain COs imposed by the department.
- Where an owner or occupant that is required to comply with CO on a site seeks to transfer the CO responsibilities to another party, the transfer of responsibilities must be done through a “legally enforceable agreement” that is listed on the DNR database. If those conditions are met, the owner or occupant of the property is not required to comply with the requirements, limitations, or conditions included in that agreement.

Act 204, section 17, created a new subsection within § 292.12. The new section, Wis. Stat. § 292.12(5m), deals with ongoing restrictions and responsibilities for continuing obligations at contaminated sediment sites.

- A responsible party (RP) who conducts a cleanup of a contaminated sediment site that includes using an engineering control must comply with COs that are imposed regardless of whether the person owns or occupies the property on which the engineering control is used.
- If the RP does not own or occupy the property on which the engineering control is used, obtain access to the property that allows for the inspection, maintenance, and reinstallation of the engineering control or the removal of the engineering control and contaminated sediment.
 - o Except where another person has entered into and is complying with a legally enforceable agreement to comply and the agreement is included in the database, this person is not required to comply with the requirements included in that agreement.
- A person who owns or occupies property on which an EC is used may not interfere with another person's actions on the property.
- An owner of a property that was the source of a discharge to the sediment is not required to comply with COs with respect to a contaminated sediment cleanup if certain conditions are met, including but not limited to restoration of the environment, transfer of responsibilities by agreement, and having bona fide prospective purchaser status under CERCLA (see the full list at Wis. Stat. § 292.12(5m)(b)).
- The DNR may negotiate and enter into an agreement containing a schedule for COs with any person required to comply with the COs with respect to contaminated sediment.

PROPOSED CHANGES

Some of the statutory changes listed above can be implemented without administrative code changes. The following summarizes the rule changes that may be proposed to clarify procedures and insure the code is consistent with the statutory changes described above. The program may propose rule language that would:

1. Modify NR 708, 722.17 and 726.11 to add a requirement to submit a copy of a signed, legally enforceable agreement to comply with continuing obligations to the DNR. The agreement would be included in the database. This would usually be done when someone other than the property owner has agreed to comply with the continuing obligations. (Some of the rule language changes related to this topic were presented to the external advisory group at the March and April meeting in the rule draft on Act 204 / database listing, fees, notifications; see 2nd draft of rule changes here: <https://dnr.wi.gov/topic/Brownfields/documents/rules/Act204DraftRule2.pdf>).
2. Modify NR 727.05 so that the requirements to not interfere that apply to owners and occupants are clear and consistent with the changes made in Act 204 to Wis. Stats. § 292.12. This section will also be modified to clarify that for contaminated sediment sites, the continuing obligations apply to the responsible party and not the property owner.
3. Add language to ch. NR 727 that allows for a person who owns a property that is the source of a hazardous substance discharge to the sediment to provide documents to meet the requirement in Wis. Stats. § 292.12(5m)(b) so that that person would not be required to comply with related continuing obligations.
4. Add additional modifications to the chapters below after additional review is conducted to determine if any additional areas need updates.

AFFECTED RULE CHAPTERS

Wis. Admin. Code chs. 708, 714, 722, 725, 726 and 727 need to be modified to be consistent with the modifications to the law described above.

OTHER RELATED RULE REVISIONS

NA

COMPARABLE STATE OR FEDERAL POLICIES

NA

DISCUSSION OF POTENTIAL ECONOMIC IMPACTS

No economic impacts are expected.

COMMENTS
