

## **DRAFT rule revisions for 10/1/2019 Rule Development Meeting**

Comments on this draft may be sent to [DNRRNR700input@wisconsin.gov](mailto:DNRRNR700input@wisconsin.gov).

Subject matter (group/subgroup): Act 204 – Financial Responsibility at Contaminated Sediment Sites with Engineering Controls

Author(s): Molly Schmidt, Program and Policy Analyst, Remediation and Redevelopment

Changes (include treatment, list in order of rules):

### **NR 708.11 (4m) is created to read:**

NR 708.11 (4m) Plan and compliance schedule and proof of financial responsibility. The department may, as a condition of approving the interim action, require a plan and compliance schedule and proof of financial responsibility pursuant to chapter NR 756 at sites where a person takes an interim or remedial action under ch. 292, Stats., and uses an engineering control to address contaminated sediment.

### **NR 708.17 (2) (am) is created to read:**

NR 708.17 (2) (am) Require a plan and compliance schedule and proof of financial responsibility under ch. NR 756.

### **NR 722.15 (2) (e) 1m. is created to read:**

NR 722.15 (2) (e) 1m. Require a plan and compliance schedule and proof of financial responsibility under ch. NR 756, where an interim or remedial action using an engineering control is selected to address contaminated sediment.

*Note to readers: Rule revisions regarding documentation requirements at closure were addressed by revisions included as part of "Act 204 – database, fees, notifications" [rule](#) draft 2, which was presented as a second draft at the April 9, 2019, Rule Development Meeting.*

*Note to readers: Revisions within ch. NR 749 regarding fees for review of the plan and compliance schedule will be addressed along with other ch. NR 749 rule changes.*

### **NR 726.15 (2) (dm) is created to read:**

NR 726.15 (2) (dm) Engineering control to address contaminated sediment. For sites at which an engineering control is used to address contaminated sediment, the closure letter shall reference any plan and compliance schedule or proof of financial responsibility, or both, that are required for the maintenance of the engineering control pursuant to ch. NR 756.

### **NR 726.15 (2) (f) is amended to read:**

NR 726.15 (2) (f) Structural impediment. For sites or facilities where a ~~building or other structural impediment~~ structure or other impediment, including buildings, at a site or facility has prevented the completion of an investigation to determine the degree and extent of residual contamination, or the completion of a remedial action, the closure letter shall include a description of the general location of the residual contamination and shall require the property owner to notify the agency and then conduct ~~an investigation of the degree and extent of contamination~~ any necessary response actions at such time that the removal of structural impediments makes the formerly inaccessible contamination accessible. Where

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applicable, the closure letter shall reference any plan and compliance schedule, proof of financial responsibility, or both, that are required pursuant to ch. NR 756.

*Note to readers: Revisions within ch. NR 726 regarding language for continuing obligations in closure letters for sites with contaminated sediment will also be addressed under rule changes relating to contaminated sediment sites. The changes above may be modified.*

### Chapter NR 756 is created to read:

#### **Chapter NR 756; Financial Responsibility at Contaminated Sediment Sites with Engineering Controls**

- NR 756.01 Purpose.**
- NR 756.02 Applicability.**
- NR 756.03 Definitions.**
- NR 756.04 Plan and compliance schedule; financial responsibility; fees.**
- NR 756.05 Responsibility at contaminated sediment sites.**
- NR 756.06 Methods of providing proof of financial responsibility.**
- NR 756.07 Cost estimates.**
- NR 756.08 Calculating the amount of the proof of financial responsibility.**
- NR 756.09 Changing methods of proof of financial responsibility.**
- NR 756.10 Adjustment of financial responsibility.**
- NR 756.11 Access and default.**
- NR 756.12 Authorization to release funds.**
- NR 756.13 Bankruptcy notification.**
- NR 756.14 Compliance**

**NR 756.01 Purpose.** The purpose of this chapter is to establish planning, compliance, and financial responsibility requirements for sites or facilities with contaminated sediment that rely on an engineering control to protect public health, safety welfare and the environment from the contaminated sediment. This chapter is adopted pursuant to ss. 227.11 (2) and ch. 292, Stats.

**NR 756.02 Applicability.** Except as otherwise provided, this chapter applies to all sites or facilities where a person who is required to take action under ch. 292, Stats., with respect to contaminated sediment, takes an interim or remedial action that includes the use of an engineering control to address the contaminated sediment.

**NR 756.03 Definitions.** In this chapter:

(1) "Contaminated sediment engineering control" is an engineering control used to address contaminated sediment.

(2) "Events" and "weather events" means occurrences that may negatively affect the completion of the goals established in the plan and compliance schedule that are induced by either weather, or the combination of human activity and weather, including, but not limited to, significant flood events, increased flow rates, anthropogenic induced scour, an increase in event frequency or other erosional events.

(3) "Proof period" means the amount of time for which the proof of responsibility requirements are applicable.

(4) "Third-party actions" means activities that may affect the completion of the goals established in the plan and compliance schedule that are taken by persons other than the person required to submit a plan and compliance schedule or proof of responsibility under this chapter NR 756.04.

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### **NR 756.04 Plan and compliance schedule; financial responsibility; fees.**

**(1) General.** As a condition of approving an interim action, a remedial action, or of granting case closure, the department may require a person who is required to take action under s. 292.11 (3), (4), or (7) (b), Stats., with respect to contaminated sediment, and who takes action that includes the use of a contaminated sediment engineering control, to:

(a) Maintain any contaminated sediment engineering controls on the site.

(b) Investigate the extent of residual contamination and perform of any necessary remedial action if a structural impediment is removed that had prevented a complete investigation or remedial action at the site.

(c) Submit a plan and compliance schedule for satisfying the requirements under par. (a) and par. (b) to the department for approval.

(d) Submit proof of financial responsibility sufficient to pay the costs of complying with the plan and compliance schedule under par. (c).

**(2) Plan and compliance schedule and proof of financial responsibility.** The responsible party shall provide to the department a plan and compliance schedule that provides scheduled actions that lead to the completion of any applicable requirements under par. (a) and (b) for the purposes of ch. 292, Stats.

(a) Minimum requirements; plan and compliance schedule. Unless otherwise directed by the department, persons required to submit a plan and compliance schedule shall include in the plan and compliance schedule, at minimum:

1. Scheduled actions that will be taken to attain the goals established, pursuant to sub. (1) (a) and (b), in the plan and compliance schedule and dates for completion of these actions. These actions may include items required in ss. NR 724.13, NR 724.15, and NR 724.17, as applicable, in addition to items required for other actions, as applicable. Verification of sufficient legal access to conduct all scheduled actions shall be included.

2. An engineering analysis certified by a licensed professional engineer, as defined in s. NR 712.03, including the duration and ongoing efficacy of any engineering controls or structural impediments, or both, and assessment of the vulnerability of any engineering controls or structural impediments, or both, to any events or third-party actions, or both, that may occur and affect completion of the goals established in the plan and compliance schedule.

3. Inspection and reporting criteria and post event monitoring. Inspection and reporting criteria shall include an inspection schedule that, when implemented, includes, at a minimum, an inspection and a report every five years or more frequently. The inspection report shall provide an engineering analysis of the current conditions of the engineering control or structural impediment, or both, with respect to ongoing efficacy, vulnerabilities, events or actions identified in NR 756.04 (2) (a) (2). The inspection report shall be certified by a licensed professional engineer as defined in s. NR 712.03. Report conclusions shall include identification of issues, recommendations and follow up actions, and a determination of whether the remedy is protective of human health and the environment.

(b) Requirements; financial responsibility. Unless otherwise directed by the department, persons required to submit proof of financial responsibility shall submit, at minimum, proof of financial responsibility where applicable for:

1. The costs of planned engineering control maintenance for each year of the proof period.

2. The costs of any additional engineering control maintenance that may be needed following events or third-party actions, or both, that may occur during the proof period.

3. The cost of an inspection, an investigation of the extent of residual contamination, and the performance of any necessary response actions following the removal of a structural impediment that had prevented a complete investigation or remedial action at the site.

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4. The costs of any additional investigation and remediation necessary if the building or other structural impediment is removed pursuant to any events or third-party actions, or both, that may occur during the proof period.

### **(3) Length of requirements.**

(a) Except as otherwise approved by the department, a person required to submit proof of financial responsibility under sub. (1) shall maintain proof of financial responsibility for the time specified in the approved plan and compliance schedule, unless the obligation is extended under par. (2).

(b) If the department determines that it is necessary to protect human health or the environment, the department may require a person that is required to submit a plan and compliance schedule and proof of financial responsibility under sub. (1) to add further scheduled actions to the plan and compliance schedule and provide proof of financial responsibility for an extended period of time. The department shall notify the owner of the extended obligation to provide proof of financial responsibility before the expiration of the original period.

**(4) Submittal.** The department may require persons subject to requirements under sub. (1) to submit the plan and compliance schedule and proof of financial responsibility simultaneously with the plans, reports, and specifications required under ss. NR 708.15, NR 708.17, NR 722.13, and chs. NR 724 and NR 726.

**(5) Department response.** When reviewing for approval, the department may elect to do any combination of the following in regard to the entire plan or a part of the plan:

1. Deny a request.
2. Request that additional information be supplied as part of the plan and compliance schedule.
3. Require adjustments to actions, timeframes, and analyses presented in plan and compliance schedule.
4. Approve the plan and compliance schedule.

### **(6) Fees and inspections.**

(a) Plan and compliance schedule review fees shall be submitted in accordance with ch. NR 749.

(b) Reports, including inspection reports, required under s. NR 756.04 (2)(a)(3) must be submitted with a fee in accordance with ch. NR 749.

(c) The department may enter property to determine compliance with this chapter and any plan and compliance schedule required under this chapter, as specified in the approved plan and compliance schedule under this chapter. The department may require the responsible party to provide access agreements that secure access for the department as part of the plan and compliance schedule.

### **NR 756.05 Responsibility at contaminated sediment sites; access.**

(1) Requirements of this chapter shall be met pursuant to s. 292.12 (5m), Stats, and any rules promulgated under that subsection.

(2) Any person acquiring responsibility for the requirements of this chapter pursuant to s. 292.12 (5m), Stats., shall provide any required proof of financial responsibility to the department in accordance with this section. Proof of financial responsibility shall be maintained by the responsible party during responsibility transfer until the person acquiring responsibility pursuant to s. 292.15 (2m), Stats., obtains department approval of proof of financial responsibility.

(3) The length of any requirement imposed under s. NR 756.04 does not limit the responsibilities of a person under ch. 292, Stats, and any other rules promulgated under ch. 292, Stats.

(4) Access shall be provided to persons subject to any of the requirements at s. NR 756.04 (1) in accordance with s. 292.12 (5m), Stats.

**NR 756.06 Methods of providing proof of financial responsibility.** The person required to submit financial assurances under s. NR 756.04 (1) must establish proof of financial responsibility made payable to or established for the benefit of the department. A person submitting financial assurances for a plan and

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compliance schedule shall specify, as part of the plan and compliance schedule, which methods of providing proof of financial responsibility will be used. To provide proof of financial responsibility, the person required to submit financial assurances under s. NR 756.04 (1) may use up to two the following methods for each of the types of costs listed under s. NR 756.04 (2) (b):

### **(1) Performance or forfeiture bond.**

(a) If the person required to submit financial assurances under s. NR 756.04 (1) chooses to submit a bond, it shall be in the amount determined according to s. NR 756.08 and conditioned upon faithful performance by the person required to submit financial assurances under s. NR 756.04 (1) and any successor in interest of all requirements of the approved plan and compliance schedule or subsequent remedial actions required by the department. Bonds shall be delivered to the department for approval. All bonds shall be established using forms supplied by the department.

(b) Bonds shall be issued by a surety company among those listed as acceptable sureties for federal bonds in Circular 570 of the U.S. department of the treasury. At the option of the owner, a performance bond or a forfeiture bond may be filed. The department shall be the obligee of the bond. Surety companies may have the opportunity to complete the respective requirements of the plan and compliance schedule in lieu of cash payment to the department if the person required to submit financial assurances under s. NR 756.04 (1) or any successor in interest fails to carry out the respective requirements of the approved plan and compliance schedule. The department shall mail notification of the department's intent to use the funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

Note: Copies of Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" can be obtained from surety bond branch, financial management service, department of the treasury, Washington D.C. 20227, phone (202) 874-6850. Copies are available for inspection at the offices of the department of natural resources, the secretary of state, and the legislative reference bureau.

(c) Each bond shall provide that, as long as any respective obligation of the plan and compliance schedule remains, the bond may not be canceled by the surety, unless a replacement bond or other proof of financial responsibility under this section is provided to the department by the person required to submit financial assurances under s. NR 756.04 (1). If the surety proposes to cancel such a bond, the surety shall provide notice to the department and to the owner in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration of the 90-day notice period, the owner shall deliver to the department a replacement bond or other proof of financial responsibility under this section, and the bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule. The surety may discharge its obligation under the bond at any time by paying the unused portion of the bond to the department.

(d) If the surety company becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit financial assurances under s. NR 756.04 (1) shall, within 30 days after receiving written notice, deliver to the department a replacement bond or other proof of financial responsibility under this section, and the bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule.

**(2) Deposit with the department.** If the person required to submit financial assurances under s. NR 756.04 (1) chooses to deposit cash, certificates of deposit or U.S. government securities with the department, the amount of the deposit shall be determined according to s. NR 756.08 and deposits shall be submitted to the department for approval. Cash deposits placed with the department shall be segregated and invested in an interest-bearing account. All interest payments shall be accumulated in the account. The department shall have the right to use part or all of the funds to carry out the respective requirements in the plan and

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compliance schedule if the owner fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

### **(3) Escrow account.**

(a) An established escrow account may include the following assets:

1. Cash
2. Securities issued by the federal government.
3. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.
4. State bonds issued under subch. I of ch. 18, Stats.
5. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If the person required to submit financial assurances under s. NR 756.04 (1) establishes an escrow account, the amount shall be determined according to s. NR 756.08, if required, and the account shall be with a bank or financial institution located within the state of Wisconsin which is examined and regulated by the state or a federal agency. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the person required to submit financial assurances under s. NR 756.04 (1) in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the amount of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall accumulate in the account. A duplicate original of the escrow agreement for closure or long-term care, with original signatures shall be submitted to the department for approval. Escrow account forms shall be supplied by the department. The department shall be a party to the escrow agreement, which shall provide that there shall be no withdrawals from the escrow account except as authorized in writing by the department. The escrow agreement shall further provide that the department shall have the right to withdraw and use part or all of the funds in the escrow account to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit financial assurances under s. NR 756.04 (1) fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

### **(4) Irrevocable trust.**

(a) The corpus of the irrevocable trust may include the following:

1. Securities issued by the federal government.
2. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.
3. State bonds issued under subch. I of ch. 18.
4. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If the person required to submit financial assurances under s. NR 756.04 (1) creates an irrevocable trust, it shall be exclusively for the purpose of ensuring that the person required to submit financial assurances under s. NR 756.04 (1) or any successor in interest will comply with the requirements of the approved plan and compliance schedule. The trust agreement shall designate the department as sole

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beneficiary. The trustee shall be a bank or other financial institution located within the state of Wisconsin which has the authority to act as a trustee and whose trust operations are regulated and examined by the state or a federal agency. The trust corpus shall consist of cash, certificates of deposit, or U.S. government securities in the amount determined according to s. s. NR 756.08, if required. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the owner in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall accumulate in the account. A duplicate original of the trust agreement with original signatures shall be submitted to the department for approval. Trust forms shall be supplied by the department. The trust agreement shall provide that there shall be no withdrawal from the trust fund except as authorized in writing by the department. The trust agreement shall further provide that sufficient monies shall be paid from the trust fund to the beneficiary in the event that the person required to submit financial assurances under s. NR 756.04 (1) or any successor in interest fails to complete the respective requirements of the approved plan and compliance schedule. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

### **(5) Irrevocable letter of credit.**

(a) If the person required to submit financial assurances under s. NR 756.04 (1) chooses to submit a letter of credit, it shall be in the amount determined according to s. NR 756.08, and available exclusively for the purpose of assuring that all respective requirements of the approved plan and compliance schedule will be complied with. The original letter of credit shall be delivered to the department for approval. Letter of credit forms shall be supplied by the department.

(b) Letters of credit shall be issued by a bank or financial institution which has the authority to issue letters of credit and whose letter of credit operations are examined and regulated by a federal agency, or in the case of a bank or financial institution located within the state of Wisconsin, which is examined and regulated by the state or a federal agency. The department shall be the beneficiary of the letter of credit.

(c) The letter of credit shall provide either that the unused portion of the letter of credit shall be payable in full to the department upon the expiration of the letter of credit or that as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule, the letter of credit may not be canceled by the bank or financial institution, unless a replacement letter of credit or other proof of financial responsibility under this section is provided to the department by the person required to submit financial assurances under s. NR 756.04 (1). If the bank or financial institution proposes to cancel a letter of credit, the bank or financial institution shall provide notice to the department and the person required to submit financial assurances under s. NR 756.04 (1) in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration date of the 90-day notice period, the person required to submit financial assurances under s. NR 756.04 (1) shall deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, in the absence of which either the letter of credit shall remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule or the unused portion of the letter of credit shall be payable in full to the department.

(d) If the bank or financial institution becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit financial assurances under s. NR 756.04 (1) shall, within 30 days after receiving written notice, deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, and the letter of credit shall either remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule or be payable in full to the department.

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(e) The letter of credit shall further provide that the department has the right to withdraw and use part or all of the funds to carry out the respective requirements of the plan and compliance schedule if the person required to submit financial assurances under s. NR 756.04 (1) fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

### **(7) Insurance.**

(a) If the person required to submit financial assurances under s. NR 756.04 (1) chooses to submit an insurance policy, it shall be issued for the maximum risk limit determined according to s. NR 756.08. A certificate of insurance shall be delivered to the department for approval. Certificate of insurance forms shall be submitted on a form supplied by the department.

(b) Except for captive insurance companies, the insurer shall be licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states. The department, after conferring with the Wisconsin insurance commissioner, shall determine the acceptability of a surplus lines or captive insurance company to provide coverage for proof of financial responsibility. The department shall ask the insurance commissioner to provide a financial analysis of the insurer including a recommendation as to the insurer's ability to provide the required coverage. The department shall be the beneficiary of the insurance policy. The department may require a periodic review of the acceptability of a surplus lines or captive insurance company.

(c) The insurance policy shall provide either that the unused proceeds of the policy shall be payable in full to the department upon expiration of the policy or that, as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule, the insurance policy may not be canceled by the insurer unless a replacement insurance policy or other proof of financial responsibility under this section is provided to the department by the person required to submit financial assurances under s. NR 756.04 (1). If the insurer proposes to cancel an insurance policy, the insurer shall provide notice to the department and to the person required to submit financial assurances under s. NR 756.04 (1) in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration of the 90-day notice period, the person required to submit financial assurances under s. NR 756.04 (1) shall deliver to the department a replacement insurance policy or other proof of financial responsibility under this section, and either the policy shall remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule or the proceeds of the policy shall be payable in full to the department.

(d) If the insurance company becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under s. 618.41 (6) (d), Stats., the person required to submit financial assurances under s. NR 756.04 (1) shall, within 30 days after receiving written notice, deliver to the department a replacement insurance policy or other proof of financial responsibility under this section and the policy shall either remain in effect as long as any respective obligation of the person required to submit financial assurances under s. NR 756.04 (1) remains under the plan and compliance schedule or be payable in full to the department.

(e) The insurance policy shall further provide that funds, up to an amount equal to the maximum risk limit of the policy, will be available to the department to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit financial assurances under s. NR 756.04 (1) fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit financial assurances under s. NR 756.04 (1).

(f) Each insurance policy shall contain a provision allowing assignment of the policy to a successor person required to submit financial assurances under s. NR 756.04 (1). Assignment may be conditioned upon the consent of the insurer, provided consent is not unreasonably refused.

Note: These forms may be accessed at <http://dnr.wi.gov/topic/Brownfields/Pubs.html>.



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**(8) Other methods.** The department may consider other methods of financial responsibility that the department finds satisfactory to ensure that the person required to submit financial assurances under s. NR 756.04 (1) will comply with the respective requirements specified in the plan and compliance schedule. The department may consider other financial commitments made payable to or established for the benefit of the department to ensure the person required to submit financial assurances under s. NR 756.04 (1) will comply with the respective requirements of the approved plan and compliance schedule. The department shall review the request of any person required to submit financial assurances under s. NR 756.04 (1) to establish proof of financial responsibility to determine whether the proposed method provides a degree of assurance that is at least equal to that provided by the methods listed in this section. The department shall not review such a request unless the person required to submit financial assurances under s. NR 756.04 (1) submits a complete request and all supporting information as part of the plan and compliance schedule.

### **NR 756.07 Cost estimates.**

**(1) General.** For the purpose of determining the amount of proof of financial responsibility that is required in s. NR 756.06, the person required to submit financial assurances under s. NR 756.04 (1) shall submit the estimated costs together with all necessary justification and documentation to the department for approval as part of the initial request for approval of the plan and compliance schedule. The costs shall be based on a third party performing the work and reported on a per unit basis, where applicable. The source of estimates shall be indicated.

(a) For the planned costs under s. NR 756.04 (2) (b) (1) and (3), estimate the annual cost in current dollars for each year of the plan and compliance schedule proof period.

(b) For the additional costs under s. NR 756.04 (2) (b) (2) and (4), estimate costs as if occurring in the last year of the proof period and multiply it by a percentage that is determined by the department, based on the following criteria, where applicable:

1. The cost of response actions taken to address contaminated sediments at the site and the cost of response actions that are part of any approved plan to address contaminated sediments for the site.
2. The assessment of the vulnerability of any engineering controls and structural impediments to any occurrences, including third-party actions and events, that may affect completion of the goals established in the plan and compliance schedule.
3. The types and amounts of bioaccumulative elements and substances, volume of contaminated material, degree of contamination, cap complexity including use of geosynthetics, armoring, amendments, hydrologic and hydraulic, outstanding resource waters, exceptional resource water, design factor of safety, dissolved phase contaminants/chemical characteristics, fish advisory, navigation, drinking water sources.

Note: Costs are estimated based on the assumption that they will occur in the last year of the proof period. This assumption is used to provide a consistent method for estimating costs for which the timing of occurrence cannot be determined.

(c) For the additional costs under s. NR 756.04 (2) (b) (2) and (4), the department may approve a reduction in the total costs required by a percentage up to 50%.

**(2) Adjustments.** The person required to submit financial assurances under s. NR 756.04 (1) shall prepare and submit to the department a new cost estimate during the proof period as follows:

(a) Once every 10 years using current dollars, unless the costs are revised within the 10-year period as required under par. (b); and

(b) Due to a change in site design or operation or both approved by the department in writing.

**(3) Costs for engineering control maintenance.** At a minimum, costs for engineering control maintenance shall include, where applicable:

(a) Sampling, surveying, and monitoring, including: bathymetry survey, core sampling, pore water measurements, poling, surface water sampling, event-based monitoring, regular monitoring, and comparison with previous monitoring events. For the purposes of preparing cost estimates, all regular monitoring

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requirements specified in the plan and compliance schedule shall be assumed to apply over the entire period.

(b) Modeling, including transport modeling, conceptual site modeling.

(c) Chemical and physical analysis.

(d) Repair, replacement of engineering controls. The expected operating life of all engineering controls shall be specified in the plan and compliance schedule. As each of these features reach the end of their anticipated operating life, the cost of their replacement shall be added to the estimate for the appropriate year of the proof period.

(e) A 10% contingency.

**(4) Costs for site investigation and remediation following structural impediment removal.** At a minimum, costs for inspection, the investigation of the extent of residual contamination, and performance of any necessary response actions if a structural impediment is removed that had prevented a complete investigation or remedial action at the site shall include, where applicable:

(a) Site investigation.

(b) Remedial action, including remedial action planning, design, and permitting. The length of time necessary to complete the remedial action shall be estimated and the cost of remedial actions for each year shall be presented.

(c) Full dredge including disposal.

(d) Regular annual monitoring and event monitoring.

(e) The expected life of any structural impediments shall be specified in the plan and compliance schedule, where practicable. As each of these features reach the end of their anticipated life, the cost of the investigation and remediation following the removal of the structural impediment shall be added to the estimate for the appropriate year of the proof period. If the expected life of a structural impediment cannot be determined at the time of the plan and compliance schedule, the investigation and remediation following removal shall be planned to occur in the last year of the proof period and the costs shall be added to the estimate for the last year of the proof period.

(f) A 10% contingency

Note: The costs of inspection and response actions following a structural impediment removal may be either based on the actual estimated date of inspection and response actions, under par. (e), or based on a hypothetical date of inspection and response actions, under par. (f). The option for using a hypothetical date is intended to apply in situations where a responsible party is unable to determine a removal date based on currently available data.

**(5) Additional costs of events and third-party actions.** Where an assessment of the vulnerability of any engineering controls and structural impediments to any events or third party actions, or both, that may occur indicates that events or third party actions, or both, may affect attainment of the goals established in the plan and compliance schedule, costs shall include damage, destruction, deterioration, and failure of any engineering controls and structural impediments following an event, including, where applicable:

(a) The costs of repair or replacement of any engineering controls used to address contaminated sediment;

(b) The costs of site investigation and remedial action plan and design, including permitting, following the removal of any structural impediments;

(c) Dredging and disposal for the area that may be affected by the unplanned event; and

(d) The costs of post-event monitoring, operation, and maintenance.

**(6) Duplicative costs.** The department shall not impose financial responsibility costs under par. (5) that are duplicative of those required under par. (3) and (4).

Note: The department may impose all or any combination of the financial responsibility requirements under s. NR 756.04 (2) (b); however, in situations where costs under (5) are required in addition to costs under (3) or (4), or both, any costs required under (5) may not be duplicative of those

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required under par. (3) or (4). For example, if financial assurance is required for the cost of replacement of an engineering control under par. (3), then the costs of replacement of an engineering control may only be required under (5) to the extent that they are more expensive due to the nature or timing of the event or third party action.

**(7) Inflation rate.** The rates of inflation applied to cost estimates approved by the department in previous years shall be derived from the most recent implicit price deflator for gross domestic product published by the U.S. Department of Commerce in its *Survey of Current Business*. The inflation rate is the result of dividing the latest published annual deflator by the deflator for the previous year. The projected rate of inflation to be applied in proof of financial responsibility calculations for all future years shall be equal to the rate of inflation for the last full calendar year.

**NR 756.08 Calculating the amount of the proof of financial responsibility.** The person required to submit financial assurances under s. NR 756.04 (1) shall, as part of the initial request for approval of the plan and compliance schedule, calculate the necessary amounts of proof of financial responsibility based on the chosen methods of providing proof of financial responsibility.

(1) For the planned costs under s. NR 756.04 (2) (b) (1) and (3):

(a) For escrow, trust or department accounts, proof of financial responsibility shall, at minimum, be equal to the sum of all estimated planned action expenditures for the entire proof period where the expenditure for each year has first been expressed in future dollars and then brought to present value using a discount rate equal to the projected rate of inflation plus 1%. Future earnings shall either be calculated based on a projected rate of return equal to the projected rate of inflation plus 1%, or, the department may require that, when estimating future earnings on these accounts, the weighted average rate of return of the investments held in the account be used for a period of time not to exceed the weighted average maturity of the investments held in the account rounded to the nearest whole year. Earnings for years beyond the weighted average maturity of the investments in the account shall be calculated based on a projected rate of return equal to the projected rate of inflation plus 1%.

(b) For bonds, letters of credit or insurance, proof of financial responsibility shall be equal to the sum of the costs in current dollars of performing the requirements for each year for all of the years of the proof period.

(2) For the additional costs under s. NR 756.04 (2) (b) (2) and (4):

(a) For escrow, trust or department accounts, proof of financial responsibility shall, at minimum, be equal to the estimated costs expressed in future dollars for the last year of the proof period and then brought to present value using a discount rate equal to the projected rate of inflation plus 1%. Future earnings shall either be calculated based on a projected rate of return equal to the projected rate of inflation plus 1%, or, the department may require that, when estimating future earnings on these accounts, the weighted average rate of return of the investments held in the account be used for a period of time not to exceed the weighted average maturity of the investments held in the account rounded to the nearest whole year. Earnings for years beyond the weighted average maturity of the investments in the account shall be calculated based on a projected rate of return equal to the projected rate of inflation plus 1%.

(b) For bonds, letters of credit or insurance, proof of financial responsibility shall be equal to the sum of the costs in current dollars of performing the requirements for each of the years of the proof period.

**NR 756.09 Changing methods of proof of financial responsibility.** The person required to submit financial assurances under s. NR 756.04 (1) may change from one method of providing proof of financial responsibility under s. NR 756.06 to another with written department approval, but not more than once per year. A change may only be made on the anniversary of the submittal of the original method of providing proof of financial responsibility, unless otherwise approved by the department. The amount of the new

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method of providing proof of financial responsibility shall be in the amount that is equal to the amount that would have accumulated had the new method been used as the original method.

**NR 756.10 Adjustment of financial responsibility.** The person required to submit financial assurances under s. NR 756.04 (1) shall submit to the department proof of the adjustment of the amounts of the proof mechanisms on a form supplied by the department. Proof mechanisms shall be adjusted as follows:

(1) All proof mechanisms shall be adjusted annually to account for increases in cost estimates based on adjustments for inflation. The annual proof mechanism adjustments shall be submitted to the department by December 31.

(2) Adjusted proof mechanisms shall be within 60 days after a new cost estimate submitted in accordance with s. NR 756.07 is approved by the department. The adjusted proof mechanisms shall be in an amount adequate to cover the most recently approved cost estimate.

(3) For persons using trust accounts, escrow accounts or deposits with the department to demonstrate proof of financial responsibility, revised proof of financial responsibility calculations shall be performed in accordance with s. NR 756.08 and submitted to the department by March 1 of the year succeeding the calendar year in which the weighted average annual rate of return of any trust or escrow account has fallen by 1% or more.

**NR 756.11 Access and default.** Whenever on the basis of any reliable information the department determines that a person required to submit financial assurances under s. NR 756.04 (1) is in violation of any of the requirements specified in the plan and compliance schedule or this chapter, the department and its designees shall have the right to enter upon the site or facility and carry out the approved actions or plan and compliance schedule requirements. The department may use part or all of the money deposited with it, or the money deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, insurance, or funds accumulated under other approved methods to carry out the approved actions or plan and compliance schedule requirements.

### **NR 756.12 Authorization to release funds.**

(1) **Planned actions.** For costs under s. NR 756.04 (2) (b) (1) and (3), one year after the issuance of the interim action, remedial action, or closure approval that is the subject of the financial responsibility requirement, and annually thereafter for the proof period, the person required to submit financial assurances under s. NR 756.04 (1) who has carried out all required actions and response actions under the approved plan and compliance schedule during the preceding year may make application to the department for reimbursement from an escrow account, trust account, deposit with the department, or other approved methods, or for reduction of the bond, insurance or letter of credit equal to the estimated costs for long-term care for that year. The application shall be accompanied by an itemized list of costs incurred. Upon determination that the expenditures incurred are in accordance with the long-term care requirements anticipated in the approved plan of operation, the department may authorize in writing the release of the funds or approve a reduction in the bond, insurance or letter of credit. Prior to authorizing a release of the funds or a reduction of the bond, insurance or letter of credit, the department shall determine that adequate funds exist to complete required actions under the plan and compliance schedule for the remaining proof period. Determinations shall be made within 90 days after the application. For persons using escrow accounts, trust accounts or deposits with the department, the department may authorize the release and return of up to 75% of the expected cost of planned actions for the current year. Any funds remaining in an escrow account, trust account, or on deposit with the department at the termination of the proof period shall be released to the person required to submit financial assurances under s. NR 756.04 (1).

(2) **Events.** When a person required to submit financial assurances under s. NR 756.04 (1) has completed all respective requirements under the plan and compliance schedule, the person required to

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submit financial assurances under s. NR 756.04 (1) may apply to the department for release of the bond, insurance or the letter of credit or return of the money held on deposit, in escrow, or in trust. Upon determination by the department that requirements under the plan and compliance schedule have been accomplished, the department shall authorize in writing the release and return of all funds accumulated in such accounts or give written permission for cancellation of the bond, insurance or letter of credit. Determinations shall be made within 90 days of the application.

### **NR 756.13 Bankruptcy or receivership notification.**

(1) The person required to submit financial assurances under s. NR 756.04 (1) shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding under the bankruptcy code, 11 USC 101, et seq., naming the person required to submit financial assurances under s. NR 756.04 (1) as debtor, within 10 days after commencement of the proceeding.

(2) The person required to submit financial assurances under s. NR 756.04 (1) shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding within a state circuit court under ch. 128, Stats., naming the person required to submit financial assurances under s. NR 756.04 (1) as debtor, within 10 days after commencement of the proceeding.

### **NR 756.14 Compliance**

(1) Failure to comply with approved plan and compliance schedule. If the person required to submit financial assurances under s. NR 756.04 (1) fails to comply with any requirements in any approved plan and compliance schedule:

(a) The department may require the forfeiture or convert any standard method of establishing proof of financial responsibility. All moneys received from the forfeiture or conversion of any standard method of establishing proof of financial responsibility shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund.

(b) The department may request the department of justice to initiate court action against the person required to submit financial assurances under s. NR 756.04 (1) to recover moneys sufficient to pay the cost of complying with the plan and compliance schedule. Any moneys recovered in this type of action or as a settlement in anticipation of this type of action shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund.

(2) If the person required to submit financial assurances under s. NR 756.04 (1) fails to comply with any requirements in any approved plan and compliance schedule, the department may take action or contract with a person to take action to comply with these requirements from moneys obtained for that purpose under par. (a).

### Plain language explanation/analysis:

The rule changes presented in this draft implement statutory changes to Wis. Stat. s. 292.12 made by 2015 Wis. Act 204. Please see the [white paper](#) for this topic, presented at the May 7, 2019, Rule Development Meeting, for an overview of the purpose of this rule.

### Comparable state or federal rules or policies:

Please see the [white paper](#) for this topic, presented at the May 7, 2019, Rule Development Meeting, for a discussion of comparable policies.

### Economic impact comments:

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Please see the [white paper](#) for this topic, presented at the May 7, 2019, Rule Development Meeting, for a discussion of economic impacts.

### Other comments:

Please note that the program is considering whether to include the reimbursement of funds spent for planned actions taken at a site (currently included under Wis. Admin. Code s. NR 756.12(1)). Landfill caps have virtual “countdown” clocks because the waste typically becomes less of a concern over time as it breaks down. Sediment capping may not result in the same reduction in potential hazards to human health and the environment as the waterway is typically not stable and the bioaccumulating compounds do not reduce in toxicity over time.