

Remediation and Redevelopment Program – Rule Development Meeting

March 5, 2019 | 10:00 a.m. to 1:00 p.m.

Wisconsin Dept. of Natural Resources
GEF 2 | Room G27A
101 S. Webster St. | Madison, WI 53701

Conference call option: 1-855-947-8255 / Passcode: 6612 745#

Meeting materials are available at: <https://dnr.wi.gov/topic/Brownfields/RuleChanges.html>.

Attendees: Dustin Helmenstine, Lynn Morgan, Robert Pearson, Sharlene Te Beest, Mark Thimke, John Zordani, Donald Gallo, Sharon Kozicki, Donna Volk, Alyssa Sellwood, Todd O’Connell, Lori Parsons, Tina Reese, Margaret Brunette, Carrie Webb, Molly Schmidt, Michael Prager, Christine Haag, Bill Nelson, Jenna Soyer, Adrian Herrera, Gena Larson, Judy Fassbender, Steve Ales, Dee Surillo, Steve Martin, Dave Rozeboom, Pam Mylotta, Michelle Norman, Roxanne Chronert, Chris Saari

Agenda:

1. Welcome and Introductions

Staff welcomed attendees and provided an overview of the rule development process, with a reminder that the approved scope statement will direct rule revisions. The rulemaking timeframe is due to legislature within 30 months from the date that they were published – scope statements expire within a certain timeframe. There are roughly 10 months to get through drafting. Authority for rule making will expire if the timelines are not met. The department has organized content for meetings based on topic and complexity, trying to make public meetings as efficient as possible for all. Topics with more complexity will be discussed at multiple meetings to allow time for policy discussion that is needed prior to rule drafting. Straightforward topics will be discussed at fewer public meetings and will likely start with rule draft language.

2. Introductory [presentation](#) and [white paper outline](#) regarding:

- a. **Financial responsibility for engineering control and structural impediment removal at sediment cleanup sites and related requirements (new chapter NR 756) and**
- b. **Insurance or other forms of financial responsibility for Voluntary Party Liability Exemption (VPLE) sediment cleanup sites (new chapter NR 758)**

During and following the presentation, the group discussed various items related to financial assurance and financial responsibility. The group discussed whether state insures itself and whether the state could self-insure for the purposes of these costs. An attendee asked whether the VPLE financial assurance would only apply to restoration of the sediment portion of a cleanup? Staff replied that it would.

Attendees and staff discussed what would be practical to remove at a site where a structural impediment removal is done. The group discussed the removal of specific items, including bulk heads. The group also discussed that the idea behind the requirement is if the impediment is removed then

additional investigation or cleanup would be needed. The dollar value would be something that would need to be worked on as part of rule development.

The group discussed whether insurance be expected for new contaminants in VPLE situations and how it would be determined. This topic is also something that needs further discussion during rule development.

Regarding rule policies for engineering controls, an attendee commented that staff should consider the failure of an engineering control that is being constructed and focus on what's "coverable" in terms of insurance – current VPLE insurance covers natural attenuation only.

When asked what type of insurance is currently available, an attendee replied that there is a market for this type of insurance, where you can assess risk and apply a premium. The insurance industry is working to develop a program. When putting the statute together the idea was that property owners would seek insurance coverage and the department would then determine if that coverage was acceptable.

The group then discussed the white paper outline. An attendee commented that a model for long-term care can be found with CERCLA.

Regarding financial assurance for engineering controls, an attendee stated that the length of coverage would vary. Engineering controls don't last forever despite being designed to last in perpetuity. If the structural impediment is a bridge/box culvert, keep in mind DOT removes/replaces these items every 100 years. This may have an economic impact when roads or access to businesses are closed because construction timeframes are affected. Insurance wouldn't be needed for just a structural impediment, only if an engineering control was also required.

Staff stated that the DNR's Waste program requires annual FR renewals. The idea is that the department could "call in" the money available, if needed. It rarely happens, but it is an option. Examples include bonds, irrevocable trust, net worth test, etc.

An attendee stated that staff could consider adding a required cancellation notice to the department if the insurance is terminated.

An attendee commented that staff should consider a parallel to what the U.S. Army Corps of Engineers does with wetlands, government entities can use an alternative mechanism for financial assurance. Wisconsin DOT has allocated funding for agreements. Consider options for other government entities. For the insurance industry the intent would still be to make sure the funds would be available. Not enough to simply say "we can tax." DNR could allow for submittal of something different if it can be justified.

Attendees discussed that that the language needs to be specific with regard to a list of things the insurance needs to cover. If the insurance isn't maintained the VPLE certification would be revoked – this seems to be the intent of the statute.

Attendees discussed how "other forms" of financial assurance would apply for a VPLE full cleanup at a sediment site and discussed whether it would be solely when insurance isn't obtainable. Regarding full waivers of the requirements, there must be specific criteria because of 2011 Wis. Act 21. VPLE partial completion FA should be a bond or something other than insurance. The waiver was initially intended to

be for low-risk contaminant situations. A person wouldn't need insurance on top of the cleanup because of the nature of the contaminants.

Regarding the VPLE partial cleanup, remediation of the upland shouldn't affect the sediment portion. An attendee asked whether partial cleanup would a party need to obtain both natural attenuation insurance and sediment financial assurance. Staff replied that there could be a scenario where a party might need both, but further research into the statute might be needed to determine the structure.

An attendee asked how are staff would account for situations where sediment is dewatered and brokered and redistributed. Staff stated that sediment management would be discussed with Wis. Admin. Code § NR 718 revisions. The financial assurance piece had not been considered for inclusion, the department will consider it.

Staff stated that a white paper with further breakdown of these topics will be presented May 7th.

3. Introduction of [draft rule changes](#) proposed to address statutory revisions made under 2015 Wis. Act 204, relating to:

- a. Fees and procedures to include interim actions on database (NR 708, NR 714)**
- b. Modify requirement to notify property owners to include sediment cover (NR 725)**
- c. Database listings and notifications at sites with contaminated sediment (NR 722, NR 725, NR 726)**

Attendees provided comments on the draft rule. For Wis. Admin. Code § NR 708.16(4)(c), staff should consider addition the direction the photograph was taken, for reference. Also, for § NR 708.16(4)(d), consider noting how ROW would come off the continuing obligation notification for the private entity. Also, consider how the ROW owner will be aware of a continuing obligation is for an adjacent property without going through and reading the report for each adjacent property.

An attendee stated that the database section is very land-based in its approach and doesn't consider the oddities of water-based contaminant situation. The department should consider how it will deal with these things in a sediment situation for lake, river, and stream property boundaries/ownerships. Also, consider whether staff will need to determine whether a property is a lake or a river and how staff will document this in BRRTS. This may be an implementation issue in addition to or in place of a rule development issue; the department would need to determine how much will be in the rule and how much would be implementation. Others commented that the code doesn't make a distinction land/water elsewhere and that an interim/immediate action in a water body is uncommon.

An attendee stated that the Wisconsin DOT is commonly interacting with coast guard and that other federal agencies are often involved with work in these areas. In WI, this overlap can mean talking to two different offices (Cleveland and St. Louis).

Consider bridge ownership (there is a DOT database to locate owner) and how to notify the correct owners. Also, there is the drainage infrastructure to consider. Keep in mind this in only for interim action and that action requires continuing obligation. There are situations where interim action is taken that doesn't have a continuing obligation.

When listing on database for interim action with an engineering control, consider the implications for property owner when the causer is different from the property owner. Important to define who's

responsible, such that a property owner doesn't become liable under Wis. Stat. § 292.11 because of an engineering control that they weren't responsible for. Ten years from now the department must be able to determine who is responsible for an engineering control that's sitting in a river, these determinations would help avoid "accidental RPs." A purchaser of a property should have access to who is responsible for that financial assurance that they may need to access, also who is responsible and who is taking care of it.

Attendees discussed the long-term existence of the database and the information that is kept in it.

Staff stated that related changes regarding contaminated sediment may occur at a future meetings discussing general contaminated sediment-related rule changes, and that this item (specifically related to financial assurance at certain types of contaminated sediment sites) would be presented again as "rule draft 2" at the next meeting.

4. Conclude and Adjourn

Pursuant to a request from staff, several attendees volunteered to attend and advise at an addition meeting to focus further on the financial assurance items. Michael Prager will follow up with volunteers.

Staff stated that the next meeting topics would include a white paper covering soil standards-related rule revisions, a first rule draft of soil management-related revisions, and a second draft of proposed rules relating to database changes made pursuant to 2015 Wis. Act 204.