

- Owner of the off-site property, according to 292.12, Wis. Stats, unless:
- The RP for the source property and the off-site owner enter into a legally enforceable (i.e., contractual) agreement. DNR is not a party to and may not enforce such an agreement. However, DNR can recognize such an agreement, and work with both parties if issues arise. The DNR has authority to take appropriate actions, as defined in ss. 292.11, 292.12, and 292.13, Wis. Stats., but not to enforce such an agreement between two other parties. Such an agreement would not automatically transfer to the new owners of either property.

In developing s. 292.12, Wis. Stats., it was recognized that there may be situations where the RP may choose to enter into a legally enforceable document (e.g., a contract) to maintain the LUC after closure, even for the off-site property. This was recognized in s. 292.12(5)(a), which reads "*A person who owns property...shall comply with requirements...imposed by an agency with administrative authority... without regard to when the person obtained the property, unless another person has a legally enforceable responsibility to comply with the requirements.*" The underlined language in the statute is the *exception* to the general rule that the property owner has the long-term obligation to maintain and comply with any land use controls placed on the property as a condition of case closure.

b. What if the off-site property owner and the RP for the source property disagree over the remedy selected, especially one involving an LUC?

- The new law requires that when a person is undertaking a remedial action at a property they do not own, that they provide notice to the property owner if the closure will involve a land use control. This will hopefully result in adequate time to work out any concerns, but not always.
- Where there is a disagreement over the proposed remedial action, the RR project manager should attempt to get both parties to reach a mutually agreeable solution, within the limits of our authority under ch. NR 700, Wis. Admin. Code, Chapter 292, Wis. Stats., and our staffing resources.
- It should be noted that to maintain their off-site exemption under s. 292.13, Wis. Stats., the off-site property owner has a responsibility to agree to any condition that the Department determines is reasonable and necessary to ensure that the Department or RP can adequately respond to the discharge. Determining what a "reasonable and necessary" condition is becomes prominent in a situation where there is a disagreement over the type of condition (e.g., type of remedial action) needed to address the off-site discharge.
- In turn, the RP has certain obligations, and those include proposing a remedial action that can be considered by the Department to be "reasonable and necessary" to adequately respond to a discharge, while minimizing the conditions to be imposed at an off-site property.

Black's Law Dictionary defines the terms "reasonable" and "necessary" as:

- o "*Reasonable*" means " fair, proper or moderate under the circumstances," and
- o "*Necessary*" means "whatever is reasonably needed."

In sum, the RP should propose and the impacted property owner should accept as part of the remedial action, an off-site condition (e.g., an engineering control) that is meant to adequately respond to the discharge and that is fair, proper and moderate given the site-specific circumstances. Thus, if the Department determines that the remedial action is reasonable and necessary, the off-site property owner is responsible for maintaining the LUC.

Where an RR staff person believes that one or more of these parties are failing to propose or accept an off-site condition (e.g., remedial action) that is reasonable and necessary to adequately address the discharge, the RR Team Supervisor should be briefed on the situation. That team supervisor may elect to share the issue with the other team supervisors for guidance/program consistency before moving ahead on the site. Legal should be consulted regarding our authority and options, as appropriate.

Options to consider, given the site-specific circumstances, include:

- (1) Sending the off-site owner a letter reminding them of the conditions associated with maintaining their off-site exemption, and that the department believes that the condition of requiring an engineering control to respond to the discharge is "reasonable and necessary" given the site-specific circumstances;
- (2) Sending a letter to the RP explaining that the department does not believe their recommended remedial action, specifically the response to address the off-site discharge, is "reasonable" given the site-specific circumstances, and asking them to propose another way to adequately address the off-site impact, given the circumstances;
- (3) Informing both parties of the department's closure reconsideration process, entitled "Process for Reconsideration of Case Closure Requests" (located on the RRMT intranet web page and the guidance index). This memo outlines the process that a person should follow if they disagree with the department's original closure recommendation.
- (3) Initiating our stepped-enforcement process; and/or
- (4) Referring the case to the Department of Justice.

c. If the remedy fails at a closed "site" and it meets the criteria to "reopen" the closure per ch. NR 726 – even though the LUC was properly maintained – who is responsible for work under s. 292.11, Wis. Stats?

- If there is a contract in place to fulfill the obligations under s. 292.12, Wis. Stats., DNR would first approach the person that is under a contract to maintain the LUC.
- If there is no such agreement, then RR staff should use the program's responsible party guidance to determine the ability to pursue the causer of the original discharge, or the person in "possession" of the closed source property. In either situation, the Department will need to determine if there is a supportable enforcement case prior to proceeding. The BRRTS data base should also be consulted to determine if the source property was issued a certificate of completion under s. 292.15, Wis. Stats. Legal services should be consulted in these cases.
- With respect to the off-site property owner, the off-site exemption protects them from a failed remedy, assuming that they: (1) fulfilled their obligations under s. 292.12; and (2) met all the conditions of s. 292.13, Wis. Stats. (e.g., conducted maintenance, provided access, documented that the discharge is not originating from their property, etc). The level of effort needed to document an off-site property owner's compliance with the applicable portions of s. 292.13, Wis. Stats., will be proportionate to the complexity of the site-specific circumstances.

Scenario 2: Closure of two adjacent properties, with contamination on the off-site property that is inaccessible (i.e., under a structure).

a. In this case, what does it mean to be responsible for the LUC on the off-site property, since more work is likely required if the structure is removed?

Where contamination has migrated from the source property to an off-site property, and a structural impediment prevents the completion of an SI, remedial action, or both, on the off-site property, a land use control via s. 292.12, Wis. Stats., will apply to the off-site property. While the off-site owner is afforded the liability protections specified in s. 292.13, Wis. Stats., (assuming they meet the off-site conditions), the obligations of ss. 292.12 and 292.13, Wis. Stats., still apply to them. The off-site property owner will be required to:

- Maintain the structure that is there;
- Notify the DNR if the structure is going to be removed;
- Grant access to DNR or RP, or their contractors;
- Manage any residual contamination or debris in accordance with applicable state and federal laws;
- Avoid interference with response actions;
- Avoid actions that make the contamination worse (e.g., demolishing a structure and causing or worsening the discharges to the environment); and
- Agree to any other reasonable and necessary condition.

Chapter NR 726 is being amended to clarify these 292.13, Wis. Stats., obligations. In the interim, the letters sent to impacted property owners by the department should reference these obligations, and cite our legal authority in s. 292.13(1) (d)

through (g) for groundwater and s. 292.13(1m)(d) through (g) for soil contamination to request that the off-site owner comply with these site-specific obligations.

b. If the structure will be or has been removed, who is responsible for the environmental work?

- The DNR will utilize its responsible party guidance and enforcement discretion to determine the party responsible for addressing the remaining contamination under the structural impediment, where the source property has received closure. Due to the complexity of such cases, Department legal counsel should be consulted on the ability to pursue the source property owner, the causer or the off-site property owner.
- When these situations arise, it should be made clear to the off-site owner that he or she must satisfy certain conditions in s. 292.13, Wis. Stats., in order to preserve their limited protections. In particular, one of the conditions is to “not make the situation worse.” If they plan to or do remove a building’s foundation and expose highly contaminated soils, they must take any necessary and reasonable actions to address at least the direct contact and groundwater pathways. They can be held responsible if they should cause a new discharge or make an existing hazardous substance discharge worse through their actions. Also, the property owner would be responsible for properly managing any solid waste generated through their actions at the property.

Scenario 3: Closure of two adjacent properties, with contamination on the off-site property closed out using industrial clean-up levels. The off-site property owner - 5 years later - wants to change the use to non-industrial.

a. Who is responsible for the environmental work in the situation where the land use changes from industrial to non-industrial land use?

- The current property owner who is undertaking the change in land use is responsible for any additional investigation or remedial actions that are necessary to ensure that the residual contamination at the property is protective of public health, safety, welfare and the environment given the new use. For example, a developer purchases a property that was closed by the DNR as an “industrial closure.” The developer approaches the DNR and requests that we issue the former property owner an RP letter to address the historical, residual contamination that remains safely in place after the closure. It would be the new owner’s (i.e., developer’s) responsibility to address the pathways of exposure due to changing the land use.

Scenario 4: Closure of a site, where the property owner (e.g., strip mall owner) was not the causer, but the tenant was.

a. Who is responsible for maintaining the engineering control at the closed property?

In order of preference, based on the Department's enforcement discretion:

- The causer, if that person entered into a contract with the property owner to maintain the LUC.
- The property owner, who is responsible under ss 292.11 and 292.12, Wis. Stats.

b. If the remedy fails at the "site" and further work is needed per s. NR 726.09 – even though LUC was properly maintained and the site meets the re-opener criteria in ch. NR 726 – who is responsible for work under 292.11?

In order of preference, based on our enforcement discretion:

- The person that caused the discharge, if they can be located and are able and willing to conduct the response actions.
- The property owner, who is responsible under s. 292.11 and 292.12, Wis. Stats.

Implementation issues:

Based on this guidance, the following implementation issues need to be addressed to adequately document and notify the source and off-site property owners of their legal obligations.

- Amend ch. NR 726 to ensure that:
 - The responsibilities of the impacted, off-site property owners are listed. In the interim, we have authority under 292.13, Wis. Stats., to ask for notification and access on a case-by-case basis. See items listed in Scenario #2(a).
 - Property owners will need to notify DNR in advance of any land use/zoning changes or removal of a structural impediment or engineering control.
- Creation of new letters to be issued at closure, that:
 - Are sent directly to the source property owner regarding their long-term responsibility under 292.12, Wis. Stats., when they are not the person undertaking the remedial action. These letters would be placed on the GIS Registry, along with the closure letters.
 - Are sent directly to the off-site property owner regarding their long-term responsibility under 292.12 and 292.13. These letters would be placed on the GIS Registry, along with the closure letters. See items listed in Scenario #2(a).
 - Clarify in both sets of letters that a "legal agreement" between two parties regarding responsibility for an LUC under s. 292.12, Wis. Stats.,

does not automatically transfer to any new owner of the source or off-site property. If a new contract cannot be offered, then the responsibilities for the LUC reside with the respective property owners.

- Ensure that closure letters and maintenance agreements are more generic in nature, as they should specify the responsibility of property owners over time, rather than the responsibility of one individual property owner at the moment the closure letter is signed. In other words, the requirements to maintain the LUC apply to the property, and are the responsibility of the current owner of the property, not necessarily to the person who was issued closure and no longer owns the property.

If you have additional questions regarding this memo, please contact Darsi Foss, at 608 267 6713 or Darsi.Foss@Wisconsin.gov.

Cc:

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