Sediments – New Horizons for Brownfields Redevelopment

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BACKGROUND

- Historically, sediment and upland remediations were separated within WDNR
  - Upland addressed by Remediation & Redevelopment (NR 700)
  - Sediment addressed by Water (no rules)
- However, from site/contamination perspective, upland/sediment intertwined
- Brownfields perspective – relationship between land and water remediations developed out of sediment discussions of VPLE
- Issues being looked at
  - What is sediment/what is soil
  - Property rights/public trust
  - Continuing obligations
  - VPLE
SOIL/SEDIMENT

- Currently – no clear line in NR 700 or ch. 292
- However, distinction important – two regulatory programs (R&R/Water)
- Draft legislation
  - Uses ordinary high water mark (OHWM) as the divide
  - OHWM – site-specific determination based on 1914 Wisconsin Supreme Court case
Property Rights/Public Trust

- Wisconsin property law
  - Lake – state owns bed of lake to OHWM
  - Stream/river – riparian landowner owns to center of stream; subject to public trust requirements below OHWM
  - Caveat – prior to 1994, could transfer riparian rights to third party

- Public trust
  - 1787 Northwest Ordinance; incorporated into Wisconsin Constitution
  - Provides for free passage – navigation/transport; broadened to other water-based uses
  - Complex area of law – can complicate remediation (access, capping)
CONTINUING OBLIGATIONS – § 292.12

- Current language assumed upland soil/groundwater remediation
- Language creates difficulties when property considered as a whole
  - Upland owner responsible for sediment cap maintenance
  - What are property owners due care obligations for sediment
  - If “casual” party goes bankrupt, is downstream property owner responsible for downstream cap on downstream owner’s property
- Need to fix language to correctly assign continuing obligations
VPLE

- VPLE is tied to “property,” which includes sediment
- Issues
  - Obligation to investigate “property” to obtain VPLE
  - Scope of VPLE
    - Partial for upland
    - Sediment contamination from upstream source
- Addressing scenarios but some investigation of sediment/potential sources to sediment necessary
- Insurance – question mark
  - Some resistance to accepting groundwater approach
  - Under negotiation
Natural Resource Damages

- Sediment contamination can raise natural resource damages issue
- Consideration being given to a provision that would potentially reduce/eliminate natural resource damages if sediment VPLE issued