BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARING
Natural Resources Board Order RR-04-11

NOTICE IS HEREBY GIVEN That pursuant to ss. 227.16 and 227.17, Wis. Stats, the Department of Natural Resources, hereinafter the Department, will hold a public hearing to consider the proposed revisions of rules relating to the investigation and cleanup of Brownfield’s and other contaminated properties on the date(s) and at the time(s) and location(s) listed below.

Hearing Information

<table>
<thead>
<tr>
<th>Date and Time</th>
<th>Location</th>
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<tr>
<td>May 1, 2012 at 1:00 pm</td>
<td>Room F105, GEF I</td>
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<td>Division of Workforce Development</td>
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<td>201 E. Washington Avenue, Madison, WI 53703</td>
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<td>May 2, 2012 at 1:00 pm</td>
<td>Room 151, State Office Building</td>
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<td>141 NW Barstow Street</td>
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<td>Waukesha, WI 53188</td>
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<td>May 15, 2012 at 1:00 pm</td>
<td>Lake Michigan Room,</td>
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<td>Northeast Region DNR Office</td>
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<td>2984 Shawano Avenue, Green Bay, WI 54313</td>
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<tr>
<td>May 16, 2012 at 10:00 am</td>
<td>Room 1, Northern Region DNR Office</td>
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<td>107 Sutliff Avenue, Rhinelander WI, 54501</td>
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<tr>
<td>May 17, 2012 at 10:00 am</td>
<td>Room 185, West Central Region DNR Office</td>
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<td>1300 W. Clairemont Avenue, Eau Claire, WI 54702</td>
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</table>

Reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Contact Mark Gordon at the Department of Natural Resources, Bureau for Remediation and Redevelopment (RR/5), 101 S Webster, Madison, WI 53703 either by e-mail to mark.gordon@wisconsin.gov or by calling (608) 266-7278. A request must include specific information and be received at least 10 days before the date of the scheduled hearing.

Availability of the Proposed Rules and the Fiscal Estimate and Economic Impact Analysis
The proposed rule and supporting documents, including the fiscal estimate and economic impact analysis, may be viewed and downloaded at: http://dnr.wi.gov/topic/Brownfields/Laws.html. If you do not have Internet access, a printed copy of the proposed rule and supporting documents, including the fiscal estimate and economic impact analysis, may be obtained free of charge by contacting Mark Gordon, Department of Natural Resources, Bureau for Remediation and Redevelopment (RR/5), 101 S. Webster St, Madison, WI, 53703, or by calling (608) 266-7278.

Submitting Comments
Comments on the proposed rule must be received on or before Thursday May 31, 2012. Written comments may be submitted by U.S. mail, fax, E-mail, or through the Internet and will have the same weight and effect as oral statements presented at the public hearing. Written comments and any questions on the proposed rules should be submitted to:

Mark Gordon
Department of Natural Resources
Bureau for Remediation and Redevelopment (RR/5)
101 S Webster St, Madison, WI 53703

Phone: (608) 266-7278
Fax: (608) 267 7646
Analysis Prepared by the Department of Natural Resources

1. Statutes Interpreted: In promulgating these rules, chs. 227, 281, 287, 289, 291 and 292, Stats. have been interpreted as authorizing rule revisions.


3. Explanation of agency authority to promulgate the proposed rules under the statutory authority:
Section 227.11(2)(a) allows the Department to promulgate rules interpreting the provisions of any statute enforced or administered by the agency.
Section 281.19(1) allows the Department to issue orders and to adopt rules for the construction, installation, use and operation of systems, methods and means for preventing and abating pollution of the waters of the state, after an opportunity to be heard has been provided to interested parties.
Section 287.03(1)(a) requires the Department to promulgate rules necessary to regulate solid waste management and disposal.
Section 289.05 requires the Department to promulgate rules establishing minimum standards regarding solid waste facilities and the closure, long term care, and maintenance of such facilities, and establishing standards for the reuse of high volume industrial waste.
Section 289.06 requires the department to promulgate rules that are consistent with and implement the provisions of ch. 289, Wis. Stats. (solid waste facilities), and ss. 292.31 (remedial action – environmental repair) and 292.35 (remedial action – local governmental unit negotiation and cost recovery).
Section 291.05(6)(f) requires the Department to adopt rules which prescribe requirements for corrective actions under s. 291.37, Wis. Stats. (response actions to address hazardous or solid waste).
Section 292.11(5) requires the Department to establish by rule, criteria and procedures for the development, establishment and amendment of a contingency plan for the undertaking of emergency actions in response to the discharge of hazardous substances.
Section 292.11(7)(d) allows the Department to negotiate and enter into agreements for conducting nonemergency actions with a responsible party if the discharge does not endanger public health, and with a local governmental unit in certain cases; and allows the Department to charge fees in accordance with promulgated rules to offset costs of negotiating and entering into agreements, and to refer violations of these agreements to the Department of Justice for enforcement.
Section 292.12(2)(c) requires the Department to promulgate rules to identify limitations or conditions that may be imposed, related to residual contamination at a property, to ensure that conditions remain protective of public health, safety, welfare and the environment, and as applicable to promote economic development. These statutory changes were passed in 2006. The changes repealed the use of deed restriction to enact continuing obligations, replacing deed restrictions with approval letters when continuing obligations were imposed to address residual contamination. These approvals are issued either at the time of closure or remedial action plan approval, or when the department directs an action be taken by a local governmental unit or economic development corporation.
Section 292.13(3) allows the Department to assess and collect fees in accordance with promulgated rules, to offset the costs of issuing determinations concerning liability.
Section 292.15(2)(a) and (ae) define when voluntary parties are exempt from provisions of ss. 289.05 (1), (2), (3) and (4), 289.42 (1), 289.67, 291.25 (1) to (5), 291.29, 291.37, 292.11 (3), (4) and (7)(b) and (c) and 292.31 (8) and rules promulgated under those provisions, with respect to discharges of hazardous substances on or originating from a property, and with respect to the use of natural attenuation, under certain, specified conditions. In order to obtain the liability exemption, the voluntary party must meet certain criteria, including conducting a cleanup in accordance with rules promulgated by the Department, maintaining and monitoring the property as required under rules promulgated by the Department.
Section 292.15(5) allows the Department to assess and collect fees from a voluntary party to offset the cost of the Department’s activities, in accordance with promulgated rules.
Section 292.31(2) requires the Department to promulgate rules relating to investigation and remedial action for sites or facilities and other properties at which the air, land, or waters of the state have been affected by the discharge of a hazardous substance or other environmental pollution.
Section 292.41 requires the Department, in consultation with other affected federal, state and local agencies and private organizations to adopt rules and procedures for the development, establishment and amendment of a contingency plan for the taking of emergency actions in relation to abandoned containers.

Section 292.65(3) requires the Department to promulgate rules to administer the dry cleaner environmental response program.

Section 292.94, Wis. Stats., requires the Department to promulgate rules regarding fee assessment and collection, and allows the Department to assess and collect fees from those subject to an order or other enforcement action for a violation of s. 292.11 or 202.31 to cover costs incurred by the Department in regard to an environmental investigation or cleanup that the party was required to conduct.

Section 299.45(7) requires the Department to adopt rules prescribing the methods and providing or designating sites and facilities for the disposal of PCBs and products containing PCBs. Such rules may require reporting by persons disposing of PCBs and products containing PCBs.

4. Related statute or rules: Chapter NR 169, Dry Cleaner Environmental Response Program, is also being revised, as a result of repealing ch. NR 710.

5. Plain language analysis of the proposed rules: The major policy issues being addressed by these rule revisions are 1) modifying many of the rules to remove references to deed restriction which were replaced with passage of WI Act 418; 2) removal of the simple site process which was originally included to provide responsible parties with the ability to self certify closure as this option is almost never used; 3) eliminating ch. NR 710 because the statutory provisions to inventory sites was repealed and use of the hazard ranking system is no longer needed to inventory sites; 4) consolidating the NR 718 provisions on managing contaminated soil; 5) revising NR 720 to account for EPA’s updated methodology for calculating site specific soil cleanup standards; 6) revising NR 722 on Remedy Selection to require an evaluation of sustainability; 7) simplifying the case closure requirements by splitting NR 726 into 3 separate rules as the current rule is lengthy and complicated; 8) removing many of the provisions in NR 746 dealing with the cleanup of petroleum contaminated sites that are seldom sued or are technically unsound, and 9) increasing the fees in NR 749 to account for increased costs since the rule was originally promulgated in 1998.

6. Summary of and preliminary comparison with any existing or proposed federal regulation: combined with #7.

7. Comparison of similar rules in adjacent states:

Comparison with Federal Rules and Rules in Adjacent States – Since the NR 700 rule series has been in place for over 15 years, this comparison focuses on the 4 most important issues addressed by the proposed rule changes. These include: 1) The Process for Establishing Soil Cleanup Standards, 2) Requirements for Addressing the Vapor Intrusion Pathway, 3) Fees for Review of Cleanup Related Documents, and 4) Regulatory Closure of Contamination Cases. Below is a summary of the issues and a comparison of Wisconsin’s approach to how EPA and the adjacent states address the topic.

a. The Process for Establishing Soil Cleanup Standards – The Department’s rule on soil cleanup standards allows Responsible Parties to use either soil performance standards (i.e. engineering controls) or compound specific soil cleanup values. Both options are being retained as part of the proposed revisions. The Department currently uses a process developed by EPA in the mid 1990’s for determining numeric soil cleanup standards. EPA has since developed a new web calculator for determining soil cleanup standards. The proposed rule revisions utilize the new EPA methodology.

The approach for developing site specific soil cleanup standards is complex and very state specific. All of the surrounding states use EPA’s risk range and compound specific toxicity information in determining soil cleanup levels. Not all states account for cumulative risk from multiple contaminants.

Each of the surrounding states have similar approaches for determining site specific soil cleanup standards although none are exactly the same. For example, all neighboring states provide values for an extensive list of compounds and those values are within the Federal excess cancer risk guidelines of 1:10,000 to 1:1,000,000. Illinois, Michigan and Minnesota rely on their Health Departments to set compound specific toxicity values, while Iowa and Wisconsin use the hierarchy established by EPA’s Superfund Program.
Michigan and Illinois do not account for cumulative risk from multiple contaminants while Minnesota, Iowa and Wisconsin do. Minnesota uses a cumulative risk limit of 1:100,000 for soil exposure. Iowa allows cumulative risk up to 1:10,000 but their approach differs from the other states in that “cumulative” accounts for the aggregated exposures from contaminants in air, water and soil. In Illinois the risk posed by each individual compound can not exceed 1:1,000,000 while in Michigan individual compound risk can not exceed 1:100,000. Wisconsin uses a 1:1,000,000 excess cancer risk for individual compounds with the cumulative risk from all compounds not to exceed 1:100,000.

b. Requirements for Addressing the Vapor Intrusion Pathway – Vapor intrusion occurs when subsurface contaminants volatilize and then migrate through the soil into homes or other buildings. Assessing the vapor intrusion pathway is a relatively new issue for many states. U.S. EPA developed guidance for assessing the vapor pathway in 2002. As experience increased and additional data became available, EPA determined their guidance had several technical problems and it is currently making significant revisions. Wisconsin released draft guidance for external review last year. Feedback indicated that the guidance was technically sound and provided appropriate direction on how to evaluate the vapor intrusion pathway. The guidance was ultimately finalized in December, 2010 and training was provided to interested external parties in March, 2011.

The surrounding states have several different approaches for dealing with vapor intrusion. Michigan and Minnesota use general statutory and/or rule authority along with detailed guidance to address vapor intrusion. Illinois and Iowa don’t have rules or guidance, but Illinois is in the process of developing rules. Currently, both states only address the vapor pathway when the responsible party requests assistance. Wisconsin uses an approach similar to Michigan and Minnesota’s, although Wisconsin has more detailed statutory and rule authority related to vapor intrusion than either of these states.

c. Fees for Review of Cleanup Related Documents – The Department has had authority to charge fees for providing technical assistance since 1998. Fees are paid if the Responsible Party requests DNR review or other technical assistance. Most Responsible Parties request a case closure determination from the Department and pay the associated fees. Otherwise, the rule is largely self-implementing which means Responsible Parties can generally proceed without DNR approval and without paying review fees.

None of the surrounding states or EPA have a flat fee system like Wisconsin. All states have a variety of funding sources including some combination of the following: Federal grants, general purpose revenue (GPR), waste tipping fees, professional registration fees, tank registration fees and generator fees. Several of the states also charge hourly fees for the technical oversight they provide, typically for sites choosing to become part of their voluntary cleanup program. EPA is largely funded directly through the Federal budget although the Superfund Program has the ability to bill Responsible Parties for any oversight costs incurred.

d. Case Closures – The Department has the authority to issue “case closure” decisions when a responsible party has completed an investigation and cleanup in accordance with state rules. Responsible Parties typically want a letter from the regulatory agency to document that the cleanup was completed properly. In addition, case closure letters are important for property transactions so that potential purchasers are aware that any known contamination has been properly addressed.

All four of the surrounding states have authority to issue a letter indicating that cleanup of environmental contamination was completed in accordance with state standards. All of the surrounding states also rely on engineering controls to ensure the remedy remains protective into the future. States apply these controls differently and in some cases use deed restrictions, restrictive covenants or other site specific agreements to impose the necessary controls.

Since a number of the Federal cleanup programs have been delegated to the states to implement, EPA typically doesn’t issue many “no further action letters”. EPA uses restrictive covenants to impose engineering controls and other long-term obligations at sites where it has lead responsibility. This occurs primarily at Federal lead Superfund sites.

Several years ago the Wisconsin legislature approved changes in state law which allowed the case closure letter to be used as the legally enforceable document to impose any necessary on-going requirements such as maintaining engineering controls. This change largely did away with deed restrictions, which were used extensively in Wisconsin prior to that time. The use of GIS mapping that
shows the location of all contaminated sites and our on-line database that contains the status of cleanup provides an easy and comprehensive method for tracking the status of contaminated sites.

8. Summary of factual data and analytical methodologies that the agency used in support of the proposed rules and how any related findings support the regulatory approach chosen for the proposed rules: Since most of the changes are legal and administrative clarifications, the Department did not conduct analysis or use specific data to support these changes to the rule. Analytical changes made include removing references to specific analytical techniques, sample containers and holding times, and replacing them with a requirement that the sampling and analytical techniques used be appropriate for the sample media and type and potential concentration of contaminant.

9. Any analysis and supporting documentation that the agency used in support of the agency’s determination of the rule’s effect on small business under s. 227.114, Stats., or that was used when the agency prepared an economic impact report: Under s. NR 150.03(3), Wis. Adm. Code, an environmental analysis is not needed because this proposal is considered a Type III action. A Type III action is one that normally: 1) does not have the potential to cause significant environmental effects, 2) does not significantly affect energy usage and 3) does not involve unresolved conflicts in the use of available resources.

10. Effects on small business, including how the rule will be enforced: The major purpose of this rule making effort is to incorporate requirements set forth by statutes and to address policy changes that have been implemented over the years. Another major change is to streamline and consolidate the rule language so that out-of-date provisions are removed and the current regulatory requirements are easier to understand and comply with. As such, the promulgation of these rule changes should not have a significant impact on small businesses.

The one area of these rule revisions that have the potential to impact some small businesses is the proposal to increase the fees set out in ch. NR 749. These fees have not been increased since they were originally promulgated in 1998 and the average increase typically ranges from $200 to $300 depending on the type of submittal. The fee increases should not affect a significant number of small businesses for several reasons. First, the NR 700 rule series is largely self-implementing which means that Responsible Parties typically decide whether or not they want agency review of the documents they prepare, and only pay a fee if a written DNR response is requested. Second, the fees are often a one-time expenditure and generally are a small percentage of the overall cost for completing a cleanup.

The Small Business Regulatory Coordinator may be contacted at SmallBusiness@dnr.state.wi.us or by calling (608) 266-1959.

11. Agency Contact Person: Mark Gordon, (608) 266-7278.

Environmental Analysis
The Department has made a preliminary determination that adoption of the proposed rules would not involve significant adverse environmental effects and would not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on comments received, an environmental analysis may be prepared before proceeding. This analysis would summarize the Department’s consideration of the impacts of the proposal and any reasonable alternatives.

Fiscal Estimate and Economic Impact Analysis Summary
The majority of changes being proposed to the existing rules will not result in a new fiscal impact. The portion of the rule that has the potential to fiscally impact businesses, utilities and local governments are the proposed fee increases set out in ch. NR 749. These fees have not been increased since they were originally established in 1998. The proposed increases are based on cost-of-living changes and the additional revenue would be used to ensure that the 9 positions currently funded by fees could be maintained. It is estimated that the increase in fees will result in approximately $170,000/year of additional state revenue being received.

The $170,000/year was calculated by taking the amount of revenue received in FY ’11, reducing it by 10% based on average annual decreases in revenue and then applying a 40% increase to account for the new fees. How these fee increases would potentially affect a typical site was determined by reviewing
past history of fee related requests. This evaluation indicated that most sites do not request DNR review of any documents besides case closure and that most sites have some contamination remaining at the completion of the cleanup. It was therefore assumed that most parties responsible for completing a cleanup would request DNR review of case closure for a site that has both residual soil and groundwater contamination. In this scenario, the total increase in fee related costs would be $500. This example illustrates the most common situation and the actual cost increase will be dependent on the specific needs and requests of the Responsible Party.

The proposed fee increases should not affect most businesses or local units of government for several reasons. First, only those persons that possess or control a hazardous substance which is discharged or who cause the discharge must take action to restore the environment. Most businesses and many local governments do not have to address this situation. Second, the NR 700 rule series is largely self implementing which means that the Responsible Party typically decides whether or not they want regulatory agency review of the documents they prepare and only pay a review fee if DNR assistance is requested. Finally, the fees are often one-time expenditures and generally are only a small percentage of the overall cost for completing the cleanup.

Dated at Madison, Wisconsin:_____________________

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By ____________________
Cathy Stepp, Secretary