

# Obtaining DNR Approval Prior to Use of Imported Soil and Other Fill Materials on Voluntary Party Liability Exemption Sites, Wis. Stats. §292.15

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## Overview

This guidance document provides an outline of the appropriate practices to follow prior to bringing soil and other fill materials onto a remediation site that is enrolled in the [Voluntary Party Liability Exemption \(VPLE\) program](#), under Wis. Stats. § 292.15. In particular, this applies to VPLE projects that have not yet received a Certificate of Completion (COC) from the Department of Natural Resources (DNR) – the final clean up approval for sites in the VPLE program. Voluntary parties, consultants and developers are encouraged to work as early in the VPLE process as possible to establish materials management approaches for all sites.

If the characteristics and quality of soil and other fill material brought onto a VPLE property are unknown, the DNR assumes the “environmental investigation,” as defined in Wis. Admin. § NR 750.03(2m), is not complete, even if the site investigation has been previously approved. Significant delays resulting from the need for additional site investigation can occur if soil and other fill materials are found to be contaminated after being brought to a VPLE site prior to issuance of the VPLE COC.

Placing contaminated soil or other fill material on a property may be considered a discharge of a hazardous substance or environmental pollution, and can lead to additional liability, time delays and extra costs for the property owner and others involved. It is important to ensure that soil and other fill materials are from a known source and do not contain contaminants that would be a concern if used on the site. Property owners, consultants and contractors that require fill materials should work with a company that has experience obtaining acceptable soil or fill materials, which are accompanied by adequate documentation regarding the presence and concentrations of contaminants in the materials that are planned to be imported onto the property.

## Applicability

This guidance applies when voluntary parties and their consultants are planning to import soil or other materials onto a VPLE property prior to issuance of a COC. This includes use of recycled concrete, bank run gravel, materials purchased from a quarry or commercial contractor or any other material. There are administrative codes and procedures that apply to the management of such solid waste materials, including soil with known contamination. For example:

- Management of contaminated soil or wastes on-site during response actions and management of contaminated soil off-site from a response action – (Wis. Admin. § NR 718);
- Low Hazard Exemptions (Wis. Admin. § NR 500.08(4)); and
- Beneficial use of industrial byproducts (Wis. Admin. § NR 538)



The DNR expects the voluntary party to ensure that all contractors, tenants, owners and others involved with the property follow this guidance and applicable law before bringing soil and/or other fill materials onto the VPLE property. They should be aware that some soil and other types of solid waste materials may:

- be managed as clean fill (e.g., clean soil, brick, building stone, etc.) pursuant to Wis. Admin. §§ NR 500.08(2) and NR 504(3)(c) and (4)(a) through (f), and thus not be subject to site-specific approval from DNR; or
- require site-specific approval from the DNR for its movement and placement at a property, either under a solid waste exemption authorized in the Wis. Admin. § NR 500 administrative rule series or in Wis. Admin § NR 718; or
- need to be properly disposed of in a licensed solid waste facility given the concentrations, volumes and/or the proposed location of disposal.

By testing this material well in advance of the proposed placement on a VPLE site, the DNR can assist you in following the correct laws, procedures and protocol to ensure compliance, limit costs and future liability.

While this guidance is for VPLE sites, responsible parties and their consultants at all environmental response action sites in Wisconsin can also follow the procedures and practices identified in this guidance document. A soil and materials management plan can be submitted to DNR as a request for technical assistance, along with the corresponding review fee, and this guidance will be used to evaluate such plans.

### **Sampling Material Before it is Placed on a VPLE Property**

It is important to obtain information about current and historical uses and possible sources of contamination on land where soil or other material is acquired. A Phase I Environmental Assessment of the source property for imported material can be useful for gathering this information.

Environmental sampling and analysis will most likely be needed because relying solely on a standard Phase I, or similar background information about the imported materials source property, may not be enough due diligence, especially in urban areas. For example, if the soil is from a road construction project, there is the possibility that some contaminants have historically been disposed of atmospherically or migrated through storm or sanitary sewers. Also, relying solely on a Phase I environmental assessment to determine the usability of soil or other fill material could overlook unknown spills or the possibility of contamination impacting the source property from an off-site location, and thus affecting the fill material. It is possible that DNR may approve a soil management plan that does not include sampling, if justified based on the factors below, but most situations will likely require sampling.

### **Step One: Initial Submittal of Soil/Materials Management Plan**

Before bringing soil or other fill materials onto a VPLE property prior to issuance of a COC, voluntary parties and their consultants should submit an initial soil and materials management plan that includes the following information to DNR for pre-approval. The plan may be included with another report, like a Remedial Action Options Report, or can be a stand alone submittal.

An initial soil and materials management plan characterizes the materials you propose to move, and should include:

- Documentation of the characteristics of the soil and/or other proposed fill material from the property of origin. Include information regarding past and current uses of the property of origin, especially in the vicinity of the area from which the fill material will be obtained;
- Maps and diagrams identifying the where the material is coming from, the reason external fill material is needed, and the anticipated final placement areas of the soil and other fill materials on the VPLE property;
- Narrative description, diagrams, and maps of how and where will the material be used on the VPLE property, specifically in relation to the locational requirements listed in Wis. Admin. §§ NR 718.12(1)(c) 1 through 6. The submittal also should contain the information required in Wis. Admin. § NR 718.12(2)(b);
- If the material is being imported from another response action site (i.e., a site listed in Bureau of Remediation and Redevelopment Tracking System), include the information required in Wis. Admin. § NR 718.12(2)(c).
- Available data from any sampling of the material that is being proposed to be moved to the VPLE property (if any sampling has already been done); and
- A proposed sampling plan for the material that will be placed on the VPLE site.

A request to review the VPLE soil and materials management plan must be submitted to the appropriate project manager in the DNR Remediation and Redevelopment RR Program. The RR Program oversees all VPLE property work, and will work with other DNR programs to ensure consistent and timely approvals. Waste determinations or approvals from other DNR programs, or other state or local agencies may also be required, but are not a substitute for final by the RR Program approval of any imported material at VPLE sites.

Voluntary parties and their consultants should propose what parameters of soil and other materials to sample, how many samples to take, and other relevant considerations. The sampling plan should, at a minimum, take into consideration the following factors:

- Past history of the property where the soil and other fill materials are coming from;
- The volume of soil and other fill material to be used;
- Zoning restrictions and planned end uses of the receiving property;
- Purpose of the material and location on the VPLE property where the materials will be placed (e.g. is it fill material to raise site elevation, to be placed under a cap or cover, at depth, and placement in relation to ch. NR 718 locational criteria, etc.); and
- Concentrations and types of contamination on the VPLE property.

## **Step Two: DNR Approves Sampling**

The DNR will review the proposed sampling plan based on the information provided and provide concurrence with the type and number of samples proposed for assessment. Once the analytical data has been collected it should be submitted to DNR.

### Step Three: Determine Waste Handling Protocols

Once the analytical data has been collected and submitted to DNR, a final determination to allow the importation of the material for use on the VPLE site as described in the soil management plan will be issued by DNR. Based on the sampling data and the proposed plan, the DNR may determine the following:

#### Clean Fill

If the material qualifies as “clean fill” (see box below), then the material may be used on the VPLE property consistent with the conditions in the soil and materials management plan. The DNR Project Manager will provide a written approval to proceed with the material placement. When using “clean fill”, the Voluntary Party must follow the requirements in Wis. Admin. § NR 500.08(2)(a) and the locational and performance standards in Wis. Admin. §§ NR 504.04(3)(c) and (4)(a through f), apply.

#### Contaminated Soil or Waste

If the soil contains low levels of contaminants, the material may still be acceptable for placement on the VPLE site. Placement would depend on the type of contaminants and concentrations, the proposed location of placement, the proposed use of the materials, and the proposed end use of the VPLE site. If approved by the DNR, the voluntary party will need to follow Wis. Admin. § NR 718 and be granted an exemption to place the material on the VPLE site. If the material to be imported is solid waste other than contaminated soil, placement may be an option if the appropriate approval process is followed through the Low Hazard Exemption or beneficial re-use of industrial byproducts processes. Requests for an exemption under ch. NR 500 will be submitted to and coordinated through the RR Program for all VPLE sites.

**For the purpose of this guidance “Clean fill,” includes:**

- Clean soil
- Brick\*
- Building stone
- Concrete\*(even if reinforced)
- Unpainted/untreated wood
- Broken pavement (even if it contains asphalt or concrete\*)

**\* Bricks and concrete are not “clean fill” if painted with lead paint or PCB contamination.**

**Clean fill does not include sediments or dredge spoils.**

#### Contaminated soil or waste not suitable for use on the VPLE site

If sampling confirms the material has contamination or waste that would not be appropriate to use on the VPLE site, DNR will assist with determining whether the materials should be left in place at the borrow site, whether it needs to go to a licensed landfill, or if other options are appropriate.

### DNR Review Process

DNR will review VPLE property soil and materials management plans, cognizant of potential locational restrictions in Wis. Admin. § NR 718.

Approval of VPLE property soil and materials management plans is to be based on the factors in this guidance and applicable local, state and federal laws. DNR will apply the relevant provisions of Wis. Admin. §§ NR 500.08(2)(a) (i.e., clean fill), 718 (e.g., locational and sampling criteria for placement of the material onsite) and Wis. Admin. § NR 720 (e.g., land use and RCLs).

## **After Placement Actions**

If soil or other fill materials are placed on a VPLE site without prior sampling or DNR approval, project managers will work with their supervisor to determine what specific actions are necessary. In these situations, voluntary parties should understand that imported soil or other fill material may be considered a recognized environmental condition – a discharge of a hazardous substance or environmental pollution. As such, the voluntary party will generally be expected to sample the soil and other fill materials that were brought to the property. In some limited cases, DNR may grant approval to not sample soil and other fill materials imported onto a VPLE property. These limited situations would be where a voluntary party presents adequate historical use information or sampling results taken at the source property which assure DNR that there was a very low probability that any contaminants were present at concentrations that would significantly impact human health or the environment.

## **Additional Assistance**

Voluntary parties and consultants who have questions about their site should contact the site's [project manager at DNR](#). The project manager will work with their supervisor on unique site-specific issues.

## **Post Certificate of Completion Situations**

If a property owner wants to import material to a property that has already received a Certificate of Completion, project managers should recommend a soil management plan be developed and approved by DNR (with the appropriate review fee) prior to the placement of any fill materials to prevent new contamination (not covered by the existing VPLE COC) and to document that the fill was acceptable. However, the property owner has the right to proceed without following DNR's recommendation. In those situations, property owners should be aware that the COC issued for the property provides an exemption from environmental liability from the date the site investigation was approved and applies to any discharge that occurred before that date. Thus, if a property owner imports contaminated materials on to the property after the issuance of the VPLE COC, the new discharge or environmental pollution would not be covered by the exemption in Wis. Stats § 292.15.