



WISCONSIN DEPARTMENT OF NATURAL RESOURCES NOTICE OF FINAL GUIDANCE & CERTIFICATION

Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.

DOCUMENT ID

RR-19-5545-C

DOCUMENT TITLE

Negotiated Agreement Template

PROGRAM/BUREAU

Remediation and Redevelopment

STATUTORY AUTHORITY OR LEGAL CITATION

Wis. Stats. ch. 292; Wis. Admin. Code ch. NR 700

DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS)

26-Aug-19

DATE FINALIZED

02-Sept-19

DNR CERTIFICATION

I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

Signature

September 4, 2019

Date

**DNR – Remediation and Redevelopment
RR-5545, Template Negotiated Agreement
October 2018**

PURPOSE: This template is intended to assist RR staff in drafting negotiated agreements with parties that are completing non-emergency response actions at contaminated sites. Wis. Stat. § 292.11(7)(d) authorizes the DNR to enter negotiated agreements with:

- a person who possesses or controls a hazardous substance that was discharged or who caused the discharge of a hazardous substance if the discharge does not endanger public health;
- a local governmental unit that is acting on behalf of owners of contaminated property in the manner specified in Wis. Stat. § 292.11(7)(d)(1m).

For further guidance on negotiated agreements, please see: RR-664, *Negotiated Agreements: Contracts for Non-Emergency Remediation of Contaminated Properties*.

INSTRUCTIONS: This template contains only the basic provisions needed for most negotiated agreements and it includes the provisions that are required by Wis. Admin. Code § NR 728.07. Each negotiated agreement will need to be customized because of site-specific considerations, parties, remedies, and schedules. Staff may view previous agreements for examples of additional provisions that are not included in this template, or may consult Bureau of Legal Services staff.

Draft negotiated agreements must be reviewed and approved by Bureau of Legal Services staff prior to external distribution and/or signature.

Instructions and notes are included within the template in **yellow** highlighted text. Text that is meant to be replaced is included in **gray** highlighted text. Prior to finalizing, delete the highlighted instructions and add page numbers in “Page 1 of 3” format.

EXAMPLES: Below is a list of previous negotiated agreements and characteristics of each agreement that may be helpful for drafting relevant portions of new agreements:

- HARP (draft form – contact NER)
 - o Contaminated sediment site
 - o Consultant is party to parts of the agreement
 - o Insurance required
- Connell (final form; dated July 2017 – BRRTS # 07-41-550625)
 - o VPLE (Wis. Stat. § 292.15)
- Burnham (draft form; dated March 13, 2017 – contact SER)
 - o Superfund Alternative Site
 - o Financial assurance required
- Hurd Merrill (draft form; undated – contact CO)
 - o Local government unit exemption (Wis. Stat. § 292.11(9)(e)(1m))
 - o Development corporation is third party to agreement
 - o Ready for Reuse involvement

NOTE: A different format applies to agreements that involve Knowles-Nelson Stewardship funds. Please contact the Central Office Brownfields and Outreach Section Chief prior to drafting.

This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

DRAFT
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

IN THE MATTER OF:

NEGOTIATED AGREEMENT

Project Title
BRRTS #00-00-000000

No. _____

Instructions for recitals (the “whereas” clauses): The “whereas” clauses state the facts at the time the contract is entered into. Use them to explain the context of the agreement, to help avoid misunderstandings, and to explain the intentions of the parties entering into the agreement.

Do not include any of the actual terms or conditions of the agreement into this section.

Do include recitals (in addition to the ones listed) if they will meet the purposes above. Following are some examples of items that could be included as recitals, if they apply:

- federal hazardous substance-related statutes that apply to the site/property (CERCLA, TSCA, RCRA); the federal law citation; and any details relating to the RP’s intended plan/method for compliance
- any consent orders, agreements, decisions, or other compliance-related documents that have been issued for the RP for this site/property, including the title, number and date of the order/agreement/etc. and a brief summary of the of the order/agreement/etc.
- any work that has been done under Wis. Admin. Code chs. NR 700 through NR 754, listing the legal authority/mandates/agreements that the work was done under, dates, who did it, where done, current status, whether approved, etc.
- any work that is still required under orders/mandates/agreements, including who must do it, where it must be done, dates, and to what standard,
- any work that is still required under Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700 through NR 754, including who must do it, where it must be done, dates,
- whether other contamination exists on the property and whether the parties to the agreement are responsible for it
- whether the RP has previously purchased insurance or other forms of financial assurance for the site/property
- whether the RP and the DNR intend to terminate any previous legal agreements or orders through this agreement
- whether the RP intends to seek (or has achieved) any liability exemptions or programs (*e.g.*, VPLE) for the site, and the relevant statute and rule citations
- whether any state funding programs are intended for involvement (*e.g.*, Ready for Reuse, Stewardship funds) and what the funding status is (applied for/awarded/expended), amount, purpose, etc.
- whether the RP requested the agreement and the date of the request

WHEREAS, Title or Name of Responsible Party (“Person”) is a name of state where corporation is organized/incorporated corporation with its corporate offices located at full mailing address of official corporate headquarters. Person formerly owned/currently owns and operated a facility located at address of facility/site that is the subject of this agreement (“Property Name”) more particularly described in **Exhibit A** attached hereto.

WHEREAS, the Wisconsin Department of Natural Resources (“Department”) is an administrative agency of the State of Wisconsin created and charged by the Wisconsin legislature with the enforcement of certain state statutes concerning the protection of the environment and natural resources of the State, in particular Wisconsin Statutes (“Wis. Stat.”) chapter (“ch.”) 292 and Wisconsin Administrative Code (“Wis. Admin. Code”) chapters (“chs.”) NR 700 through NR 754.

WHEREAS, the site, as that term is defined in Wis. Admin. Code section (“§”) NR 700.03(56), generally resides specific description of site and is generally known as the Title of Site (“Site name”). The Site name is describe whether the site has been divided into units, parcels, etc., as depicted on the map(s) at **Exhibit B**.

WHEREAS, Wis. Stat. § 292.11(7) authorizes the Department, under certain circumstances, to enter into a negotiated agreement with a person who possesses or controls a hazardous substance that was discharged into the environment or who caused the discharge of the hazardous substance.

WHEREAS, Person has provided the Department the fee of \$1,000.00 required under Wis. Admin. Code § NR 749 to enter into a negotiated agreement.

NOW THEREFORE, Person and the Department hereby agree as follows:

Instructions: Include all parties to the agreement and the core/general agreement provisions below. For example, include a provision that terminates a previous order or agreement, if applicable, or a provision stating that the agreement addresses responsibilities outlined in other agreements or orders, if applicable. Per Wis. Admin. Code § NR 728.07(2)(b), a negotiated agreement must include a provision listing the parties to the agreement.

I. PARTIES BOUND AND GENERAL CONDITIONS

- A. The Department and Person each consent to the following Negotiated Agreement (the “Agreement”) pursuant to Wis. Stat. §§ 292.11 and 292.31, and Wis. Admin. Code chs. NR 700 through NR 754 and, more specifically, Wis. Stat. § 292.11(7)(d), which authorizes the Department to negotiate and enter into an agreement containing a schedule for conducting non-emergency actions required under Wis. Stat. § 292.11(3).
- B. This Agreement shall apply to and be binding upon the undersigned parties. The undersigned representative of each party certifies that he or she is fully authorized by the party whom he or she represents to enter into this Agreement and to execute and legally bind such party to the terms of this Agreement.
- C. The Person agrees to undertake all actions required by the terms and conditions of this Agreement and consents to and will not contest or legally challenge the validity of this Agreement, or the Department’s authority to enter into this Agreement. Nothing in this section prohibits the use of the Agreement or the attachments to it, which are specifically incorporated herein by reference, as evidence of the Agreement’s existence by any party to enforce the obligations, rights or defenses afforded by the Agreement.
- D. All activities to be undertaken pursuant to this Agreement shall be performed in accordance with the requirements of all applicable federal, state and local laws and regulations.

- E. As delineated in this paragraph, Person shall be responsible for ensuring that all contractors, consultants, firms and other persons or entities (“Contractors”) acting under or for it with respect to matters included herein comply with the terms of this Agreement. Person shall provide a copy of this Agreement to the Contractors.

Instructions: include additional definitions that will help readers understand the agreement and/or the work outlined in the agreement, or help prevent misunderstandings. Definitions that have recently been modified by law (e.g., “engineering control” was modified by 2015 Wis. Act 204) may be included.

II. DEFINITIONS

For purposes of this Agreement, the definitions in Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700 through NR 754 rule series shall apply, and:

- A. “BRRTS” means the Bureau of Remediation and Redevelopment Tracking System, a Department database that provides information about contaminated properties and other activities related to the investigation and cleanup of contaminated soil or groundwater in Wisconsin.
- B. “Contractors” means any contractor, consultant or other persons or entities under contract to Person to perform any Work under this Agreement.
- C. “One Cleanup Program Memorandum of Agreement” (OCP MOA) means the document dated June 2011, implemented via Publ-RR-786 and revised in October 2011 and March 2013 that sets forth the procedures to be used when addressing PCB response action cases through the Wis. Admin. Code §§ NR 700 through 754 process.
- D. “Property” has the meaning defined in Wis. Admin. Code § NR 700.03(45e).
- E. “Property name” means the property or properties located at the address described in Exhibit A.
- F. “Response Action” means any action taken to respond to a hazardous substance discharge or environmental pollution, including emergency and non-emergency immediate actions, investigations, interim actions and remedial actions, as defined in Wis. Admin. Code § NR 700.03(50).
- G. “Site” has the meaning defined in Wis. Admin. Code § NR 700.03(56), which includes any area where a hazardous substance has been discharged.
- H. “Site Name” means the Site designated under BRRTS Activity No. 00-00-000000 (ERP/VPLE/LUST).
- I. “Work” means any response actions, as defined in Wis. Admin. Code § NR 700.03 and called for in this Agreement, in accordance with Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700 through 754 rule series.

Instructions: see below. Note: per Wis. Admin. Code § NR 728.07(2)(a), a negotiated agreement must include a provision with a description of the site or facility, and its location.

III. SITE/FACILITY DESCRIPTION AND LOCATION

- Site Name: Full name of Site (shortened name of site)
- Site Location: Include: Site Address (all caps); any other location description of the site; the source of the contamination and location of other contaminated areas, if applicable, including streams, ponds, etc.; BRRTS Activity No.
- Site History and Physical Conditions: Describe: the type of facility; the actions of the facility that led to contamination and the general dates thereof; the type(s) of contamination and locations of discharges; the movement, if any, of contamination from the original location of the discharge; the media (e.g., soil, groundwater) contaminated; the size of the area contaminated; the current physical conditions of the site.
- Summarize: investigation cleanup history and actions taken, with respective dates; enforcement actions, orders, agreements, etc., entered into and actions taken thereunder along with dates; parties involved in the cleanup; current status of cleanup activities.
- Known Substance(s) of Concern: Describe: human health hazards/impacts and characteristics of the substances; concentrations found at the site (for each contaminated media); environmental risks from the substances; potential and actual routes of exposure (e.g., public access ways).

Instructions: include provisions relating to how work that is to be performed by the RP should be done. Per Wis. Admin. Code § NR 728.07(2)(bm), a negotiated agreement must include a description of the roles and responsibilities of the persons who are parties to the agreement.

IV. WORK TO BE PERFORMED BY PERSON

- A. General. All Response Actions shall be done in compliance with Wis. Admin. Code chs. NR 700 through NR 754, Wis. Stat. ch. 292, the Department's One Cleanup Program Memorandum of Agreement and all other applicable local, state and federal statute and regulations.
- B. Consultant Qualifications. All Response Actions to be performed by Person pursuant to this Agreement shall be under the direction and supervision of a qualified hydrogeologist and a qualified professional engineer, as defined in Wis. Admin. Code ch. NR 712. The qualifications of the qualified consultants are attached as Exhibit C. A copy of this Agreement shall be provided to each consultant hired to perform the Response Actions required by this Agreement shall be provided to each contractor hired to perform the Response Action required by this Agreement and shall assure that any contracts are conditioned so as to require performance of the Response Actions in conformity with the terms of this Agreement.

- C. Reporting. Person shall provide progress reports to the Department on the status of the Response Actions, in accordance with the requirements in the Wis. Admin. Code chs. NR 700 through NR 754 rule series. The Department may, at its discretion, change the time period for reporting or direct that no further reporting is required.
- D. Approvals. Any Response Actions to be conducted pursuant to this Agreement are subject to approval by the Department. Such Response Actions shall employ sound scientific, engineering and construction practices and shall be consistent with and performed in accordance with applicable federal and state statutes and administrative rules in accordance with the One Cleanup Program.
- E. Continuing Obligations. Person shall comply with Wis. Stat. § 292.12 and undertake the Response Actions necessary to have the Site listed on the Department database as required under Wis. Stat. § 292.12.

Instructions: include provisions for responsibilities of the Department here; change title if the Department will have responsibility for items in addition to approvals. Per Wis. Admin. Code § NR 728.07(2)(bm), a negotiated agreement must include a description of the roles and responsibilities of the persons who are parties to the agreement.

V. DEPARTMENT APPROVALS

- A. After review of any plan, report or other deliverable that is required to be submitted for approval pursuant to this Agreement or if the Person requests that the Department review and approval, the Department shall (i) approve, in whole or in part, the submission, (ii) approve the submission upon specified conditions, (iii) disapprove, in whole or in part, the submission or (iv) any combination of the foregoing.
- B. Upon receipt of a notice of disapproval, or if required by an approval upon specified conditions, the Person will correct the deficiencies and resubmit the plan, report or other deliverable for approval.

VI. PROJECT COORDINATORS

- A. The Department and the Person shall each designate a respective Project Coordinator under Section VII., Submission of Documents and Correspondence.
- B. To the extent possible, communications between Person and the Department concerning the Property Name or Work shall be directed through the appropriate Project Coordinator. Each Project Coordinator shall be responsible for assuring that communications are properly disseminated and processed among the respective parties.
- C. Any party may change its designated Project Coordinator by notifying the other parties, in writing, at least ten (10) business days prior to the change.

VII. SUBMISSION OF DOCUMENTS AND CORRESPONDENCE

Documents, including reports, plans, approvals, conditional approvals, disapprovals and correspondence to be submitted pursuant to this Agreement shall be sent to the following address or alternate address as Person or the Department may hereafter designate in writing:

- A. Documents and correspondence to be submitted to the Department shall be sent to the Department Project Coordinator:

Name of Project Coordinator
Address

- B. Documents to be submitted to Person shall be sent to:

Name of Project Coordinator
Address

and if pertaining directly to this Agreement, a copy to:

Name/title of CEO, Person
Address

and

Add other Person representatives, if appropriate (e.g., Person attorney, CFO, VP)
Address

- C. All reports, plans, notices and other documents required to be submitted under this Agreement shall be deemed to be submitted on the date they are date-stamped at the Department, if mailed, or sent by messenger, or on the date they are received, if delivered by electronically. Person shall provide to the Department electronic versions of any reports, plans, notices or other documentation in addition to a paper version, consistent with the Wis. Admin. Code chs. NR 700 through NR 754 rule series and recommend that this be done so in accordance with Department publication RR-690, *Guidance for Submitting Documents to the Remediation and Redevelopment Program*.

VIII. ACCESS

- A. The employees and authorized representatives of the Department shall have the authority to enter the Property Name at all reasonable times for the purpose of inspecting records, operating logs, contracts and other documents relating to the implementation of this Agreement; reviewing the progress of Person in implementing this Agreement; conducting tests; documenting activities being conducted or conditions at the Site using a camera, sound or video recording, or other documentary type equipment, and verifying the data submitted to the Department by Person. Person shall permit such authorized representatives to inspect and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, which pertain to this Agreement. Person shall honor all reasonable requests for such access by the Department conditioned only upon presentation of proper credentials.

- B. Nothing herein shall be construed as restricting the inspection or access authority of the Department under any statute or rule.
- C. In the event the **Property Name** is transferred to a third party before the completion of all response action work on the **Property Name**, **Person** shall provide, in any such transfer agreement, provisions allowing access to the site for **Person**, any identified responsible parties and the Department and their consultants, contractors and representatives. In the event that the Department objects to the transfer, the Department may terminate the Agreement.

Note: Per Wis. Admin. Code § NR 728.07(2)(c), a negotiated agreement must include a schedule for completing the response action covered by the agreement.

IX. SCHEDULE OF RESPONSE ACTIONS

Pursuant to Wis. Stat. § 292.11(7)(d), **Person** has provided a schedule for undertaking and completing the non-emergency Response Actions in Exhibit E. **Person** shall be responsible for taking the Response Actions at the Site consistent with the schedule.

Note: Per Wis. Admin. Code § NR 728.07(2)(d), a negotiated agreement must include stipulated penalties if the response action is not completed in accordance with the agreement schedule.

X. STIPULATED PENALTIES FOR FAILURE TO COMPLY WITH SCHEDULE OF RESPONSE ACTIONS

Pursuant to Wis. Admin. Code § NR 728.07(2), which requires that this Agreement include a provision for stipulated penalties if the response action is not completed in accordance with the Agreement schedule, **Person** agrees to the following penalties for failure to complete the non-emergency Response Actions in Exhibit E: for failure to complete a scheduled response action by a respective deadline, **Person** shall forfeit **not more than \$5,000** for each violation. Each day of continued violation is a separate offense.

Note: Per Wis. Admin. Code § NR 728.07(2)(e), a negotiated agreement must include the method for resolving any disputes which may arise during the implementation of the response actions.

XI. DISPUTE RESOLUTION

Any dispute regarding this Agreement shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed forty-five (45) days from the time the dispute arises, unless it is extended by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute. An informal resolution of the dispute shall be documented in writing by the parties and provided to the project coordinators.

XII. VIOLATIONS

Pursuant to Wis. Stat. § 292.11(7)(e), the Department may refer violations of this Agreement to the Wisconsin Department of Justice for enforcement under Wis. Stat. § 299.95.

XIII. EFFECTIVE DATE

This Agreement is effective on the date the document is signed by the last of the parties herein.

XIV. CHOICE OF LAW

The laws of the State of Wisconsin shall govern the interpretation and performance of this Agreement.

XV. VENUE

The venue for any judicial action arising from this Agreement shall be state or federal court of competent jurisdiction located in Dane County, Wisconsin.

Note: Per Wis. Admin. Code § NR 728.07(2)(f), a negotiated agreement must include a provision for the method for modifying the agreement.

XVI. SUBSEQUENT AMENDMENT

This Agreement may be amended by mutual agreement by Person and the Department. Any amendment of this Agreement shall be in writing, signed by the Department and Person and shall have as the effective date that date on the Department signed such amendment.

Notes: Per Wis. Admin. Code § NR 728.07(2)(g), a negotiated agreement must include a provision for the fees associated with the department's cost of review and approval as set forth in Wis. Admin. Code ch. NR 749. Under Wis. Admin. Code § NR 749.05, RPs may agree to pay the department an hourly fee for the project oversight as determined by the provisions set forth in Wis. Admin. Code ch. NR 750. If this option will be pursued, it should be agreed to in the negotiated agreement.

XVII. FEES

Person shall obtain any necessary permits or approvals that may be required for the Response Actions and shall pay to the Department review fees for all Response Actions performed under this Agreement, in compliance with Wis. Stat. § 292.94 and Wis. Admin. Code ch. NR 749. **Optional:** On a quarterly basis, the Department will send the Person an invoice for the hourly costs incurred, which will be calculated as described in Wis. Admin. Code § NR 750.07(2).

XVIII. TERMINATION AND SATISFACTION

The provisions of this Agreement shall be deemed satisfied upon receipt by Person of written notice of completion from the Department that Person has demonstrated that the Response Actions, including any modified or additional Response Actions, or amendments, was completed in accordance with applicable local, state and federal statutes and regulations and the terms of this Agreement to the satisfaction of the Department. The termination and satisfaction of this Agreement shall be provided to Person in writing

upon the Department issuing case closure of the entire Site under the appropriate provisions of Wis. Stat. ch. 292 and the Wis. Admin. Code chs. NR 700 through NR 754 rule series.

The written notice of completion and termination and satisfaction of this Agreement may exclude those provisions which, by their express terms, provide rights to the Department or impose obligations on the Person beyond such date. Person may request a determination from the Department that the Work is complete under Wis. Admin. Code ch. NR 749. Any such request shall contain supporting documentation necessary to support such a determination along with the required fee. If the Department determines that the Work is not complete, the Department shall specify the actions necessary to be undertaken by Person to complete the Work. A determination by the Department that the Work is not complete shall be subject to the Dispute Resolution provision of Section XI.

The Department reserves the right to terminate any approval issued under this Agreement in the event the Department determines that Person obtained the approval by fraud, misrepresentation or a knowing failure to disclose material information. The Department further reserves the right to terminate this Agreement if the Department determines that Person failed to make reasonable progress in undertaking the Response Actions or Response Action required under the terms of this Agreement.

XIX. EXHIBITS

The following exhibits are attached to and incorporated into this Agreement:

“Exhibit A” is Property Description

“Exhibit B” is Map of Site

“Exhibit C” is Consultant Qualifications

“Exhibit D” is Insurance Certificate

“Exhibit E” is Schedule of Response Actions A template for this Exhibit is attached.

“Exhibit F” is [insert additional attachments/exhibits as needed].

XX. EXECUTION IN COUNTERPARTS

This Agreement may be executed in separate counterparts, each of which shall be deemed an original. Each party to this Agreement shall execute insert number of signing parties duplicate original counterparts and shall circulate the same to all other parties identified in this Agreement.

By signing below, the below authorized representatives of each party agree to be so bound:

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

By: Name of Bureau Director
Bureau Director
Remediation and Redevelopment Program

Date

PERSON

By: Name of Person
FULL TITLE

Date

Instructions: To use this template for Exhibit E, "Schedule of Response Actions", cut and paste to a separate document; then alter as needed and fill.

EXHIBIT E

SCHEDULE OF RESPONSE ACTIONS	
A. Site Investigation Work Plan	
Insert time frame <i>Examples:</i>	Insert specific activities and code citations where applicable <i>Examples:</i>
Year 1, Quarter 1	Revisions to work plan completed (NR 716)
April 2019 through July 2019	RP initiates and completes field investigation (NR 716)
B. Site Investigation	
C. Remedial Action Options Report	
D. Remedial Action Design and Construction	
E. Closure	

F. Continuing Obligations