

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: RR-11-17(E)

Relating to: Financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments; Chapters NR 700, 725, 726, 727, 750, NR 754, NR 756, NR 758, Wis Adm. Code.

Rule Type: Emergency

1. Finding/nature of emergency (Emergency Rule only):

2015 Wisconsin Act 204 (“Act 204”) directs the Department of Natural Resources (“department”) to promulgate an emergency rule under s. 227.24, Wis. Stats. for two statutory provisions created by Act 204, s. 292.12(2)(d)(2) and s. 292.15(2)(af)(3m), Wis. Stats. Section 36 of Act 204 states that the department is not required to provide evidence that promulgating this emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for this rule.

2. Detailed description of the objective of the proposed rule:

The proposed rule changes will address two new sets of requirements created by Act 204.

1. Engineering controls and structural impediments at contaminated sediment sites: Under s. 292.11, Wis. Stats. (“Spills Law”), a person who possesses or controls a hazardous substance is responsible for remediating any discharges of that hazardous substance. Where residual contamination exists at a site after remedial action is taken, the department may impose obligations as part of the department’s approval of an interim action, remedial action, or case closure. At contaminated sediment sites where an engineering control is being used, the department may require submission of a plan and compliance schedule and proof of financial responsibility sufficient to pay the costs of complying with the plan when a person is meeting any of the following requirements: the maintenance of an engineering control, the investigation and remediation of residual contamination following the removal of a structural impediment, or both (s. 292.12(2)(d)(2), Wis. Stats.).

The purpose of the related rule revisions is to clarify the acceptable forms of financial responsibility (*e.g.*, letter of credit, escrow account), the requirements for each form of financial responsibility, and the forms and procedures that the department will use in making determinations regarding proof of financial responsibility under s. 292.12(2)(d)(2), Wis. Stats. The proposed rule will introduce new administrative code chapter NR 756 to address the new requirements and may clarify existing, related rule provisions or add definitions as needed, and may make any other changes reasonably related to the goals stated above.

2. Voluntary Party Liability Exemption (“VPLE”) for contaminated sediment sites: Under the VPLE program, persons that voluntarily complete an environmental investigation and cleanup of hazardous substances discharged on a property become exempt from responsibility under various provisions of state environmental law for historical releases that have occurred on that property. Act 204 amended this law to require that, for contaminated sediment sites, a person seeking a VPLE must maintain insurance to cover the cost of any further remediation that may be necessary after the initial remediation is accomplished.

The department may waive the insurance requirement or accept a form of financial responsibility other than insurance in some cases (s. 292.15(2)(af)(3m), Wis. Stats.).

The objectives of the proposed rule revisions are to clarify requirements, forms, and procedures used by the department to assist persons seeking to meet insurance, insurance waiver, or financial responsibility requirements described under s. 292.15(2)(af)(3m), Wis. Stats., for the VPLE at properties with contaminated sediment. For cases when a form of financial responsibility other than insurance is allowed, the rule will clarify the acceptable forms of financial responsibility (*e.g.*, letter of credit, escrow account) and the requirements for each form. The proposed rule will also:

- Introduce new administrative code chapter NR 758 to address the new requirements;
- Revise the title, purpose and applicability of ch. NR 754, Wis. Adm. Code, to distinguish it from the requirements in this proposed rule;
- Modify administrative procedures for VPLE sites described in ch. NR 750, Wis. Adm. Code, to address contaminated sediment sites; and
- Make any other rule-related changes reasonably related to the goals stated above.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Engineering controls and structural impediments at contaminated sediment sites: Existing policies that have relevant similarities to the proposed rules include s. 289.41, Wis. Stats., and ch. NR 520, Wis. Adm. Code, relating to financial responsibility requirements for owners and operators of solid waste facilities. The department's Waste and Materials Management Program administers these laws. Section 289.41, Wis. Stats., and ch. NR 520, Wis. Adm. Code, contain substantial detail and direction regarding financial responsibility requirements that is not present in ch. 292, Wis. Stats.; therefore, portions of these policies may be considered for inclusion in the proposed rule revisions and additions to chs. NR 700 through NR 754 and the proposed new chapters. Specifically, policies within s. 289.41, Wis. Stats., "Financial responsibility," and policies within ss. NR 520.05 through NR 520.13, Wis. Adm. Code, will be considered for inclusion. Language within s. 292.63, Wis. Stats., relating to proof of financial responsibility required from owners and operators receiving funds under the Petroleum Environmental Cleanup Fund Award program will also be considered.

Voluntary Party Liability Exemption for contaminated sediment sites: The laws allowing VPLE for sediment contamination sites are new; therefore, there are no existing policies directly related to these processes. Current policies that share similarities include ch. NR 754, Wis. Adm. Code, which describes the environmental insurance requirements that a person seeking the VPLE must comply with for sites where the person elects to rely on natural attenuation to achieve compliance with the state's groundwater quality law as a final remedy. This chapter requires people who are seeking a VPLE to obtain environmental insurance through a state program to cover the groundwater cleanup cost of the site should natural attenuation fail. Policies within ch. NR 754, Wis. Adm. Code, in addition to other policies and procedures, will be considered for inclusion. For the portion of the rule relating to financial assurance requirements, the financial responsibility-related policies listed above under "engineering controls" will also be considered.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Section 36 of Act 204 requires the department to promulgate emergency rules for two statutory sections created by the act: s. 292.12(2)(d)(2), Wis. Stats., which relates to proof of financial responsibility requirements for engineering control maintenance and investigation and remediation following structural impediment removals at sites where an engineering control is being used to address contaminated sediments, and s. 292.15(2)(af)(3m), Wis. Stats., which relates to insurance, financial assurance, and insurance waiver requirements for VPLE sites with contaminated sediment. When promulgating emergency rules for these sections, the department is not required to provide a finding of emergency and

is not required to provide evidence that promulgating the rule as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare (2015 Wis. Act 204, s. 36).

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The amount of time necessary to develop the rule is estimated to be about 800 to 1,000 cumulative DNR employee hours over two years, including review as needed from assigned Bureau of Legal Services staff.

6. List with description of all entities that may be affected by the proposed rule:

Engineering controls and structural impediments at contaminated sediment sites: The primary entities that may be affected by the rule are businesses, local governments, utilities, and others that are responsible for remedial actions for sediment contamination.

Voluntary Party Liability Exemption for contaminated sediment sites: The primary entities that may be affected by the rule are businesses, local governments, utilities, developers that may be responsible for sediment contamination, and any others that elect to pursue an exemption through the VPLE Program for a property where contaminated sediment from a hazardous substance discharge exists. VPLE is an optional incentive program; only parties that choose to enter the program will be affected by the rule.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

There are no federal regulations that address the specific activities to be regulated by the proposed rules; however, there are related federal regulations that require financial assurance in some cases for sites that are being processed under federal laws:

- Sites being cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Superfund process or sites using the Superfund alternatives process may be required to provide financial assurance in a settlement agreement or order. There are no federal regulations that apply to this specific subject; however, EPA has issued guidelines.
- The Resource Conservation and Recovery Act (RCRA) requires all hazardous waste treatment, storage and disposal facilities to demonstrate that they will have the financial resources to properly close the facility or unit when its operational life is over, or provide the appropriate emergency response in the case of an accidental release. These financial assurance requirements are found at 40 CFR, parts 264 and 265, subparts H.
- RCRA also has rules that require financial assurance for Corrective Action sites that are found in 40 CFR 264.101(b) and (c).

These federal requirements will be considered as the rule is being developed.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The total economic impacts of the proposed rules are anticipated to be moderate and are estimated to be less than \$4,000,000 per year. No economic impacts on small businesses are anticipated.

Engineering controls and structural impediments at contaminated sediment sites: Companies responsible for contamination that elect to use an engineering control to address contaminated sediments may be required to provide proof of financial responsibility for the cost of maintenance and monitoring of an engineering control used at the site. They may also be required to provide proof of financial responsibility for costs of investigation and remediation prompted by removal of a structural impediment at such a site. The proposed rule will describe the procedures and options for meeting these financial responsibility requirements. Costs incurred by the rule would relate solely to the comparative costs of the financial assurance options provided. The number of contaminated sediment sites is unknown; however, for the

purpose of this estimate, the department estimates that less than 200 sediment remediation sites exist in Wisconsin. A portion of those sites are anticipated to use an engineering control, and a smaller portion may be impacted by removal of structural impediments. The cost of monitoring and maintenance of an engineering control or investigation and remediation following structural impediment removal may vary based on design, size and other factors. The rule will provide a range of financial assurance options (*e.g.*, a bond, a letter of credit, an escrow account) to allow maximum flexibility to parties. A surety bond is estimated to cost between 1% to 3% of the bonded amount; a letter of credit can cost between 1% to 10% of the letter of credit cost.

The department does not anticipate economic impacts on small businesses, which are rarely involved as responsible parties in sediment contamination sites. For all parties that are found to be responsible for contaminated sediment sites, the rule will only apply if the party elects to use an engineering control to address contaminated sediment. The flexibility that the rule will provide to those seeking to meet the statutory requirements would counterbalance any economic impacts that may arise under various parts of the rule.

Voluntary Party Liability Exemption for contaminated sediment sites: Persons that choose to obtain a VPLE at a property with contaminated sediment must maintain insurance for the cost of any further remediation that may be necessary; the department may waive this requirement or accept forms of financial responsibility other than insurance. This proposed rule would describe the procedures, criteria, and options for these requirements; therefore, the rule may have an effect due to the cost differences between the insurance, financial assurance, and insurance waiver options. The department estimates that a one to three businesses, local governments, or individuals may choose to enter the VPLE program annually for properties with contaminated sediment. Based on information obtained from the environmental insurance industry, insurance would have a one-time estimated cost between \$50,000 to \$250,000 per site. The costs of other financial assurance mechanisms would vary depending on the type of financial instrument selected, financial strength of the company, extent of sediment contamination, and other factors. A waiver would incur no costs.

The department does not anticipate economic impacts on small businesses, which rarely undertake sediment remediation projects. Participation would be optional; parties voluntarily choose to participate in VPLE depending upon whether they find the program to be advantageous. The option to obtain VPLE for contaminated sediment sites, enabled by Act 204 and implemented by the new rules, may encourage remediation of contaminated sediment, which may lead to economically beneficial recreational and development activities.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding two public hearings in June 2020 in Milwaukee and either Wausau or Eau Claire. The DNR will hold hearings in these centrally located cities to encourage input from members of the public located across the state.

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