

Remediation and Redevelopment Program – Rule Development Meeting

May 7, 2019 | 10:00 a.m. to 1:00 p.m.

Wisconsin Dept. of Natural Resources
GEF 2 | Room G27A
101 S. Webster St. | Madison, WI 53701

Meeting materials are available at: <https://dnr.wi.gov/topic/Brownfields/RuleChanges.html>.

Attendees:

Jenna Borski, DNR; Margaret Brunette, DNR; Joseph Kelly, EPA; Sharlene TeBeest, WI DOT; John Zordani, Michael Best Strategies; Rodger Miller GEI; Frank Dombrowski, WE Energies; Curtis Hedman, WI DHS Judy Fassbender, DNR; Michael Prager, DNR; Pam Mylotta, DNR; Christine Haag, DNR; Molly Schmidt, DNR; Bill Nelson, DNR; Jenna Soyer, DNR; Carrie Webb, DNR; John Rice, TRC; Kristin Kurzka, The Sigma Group; Jennifer Hagan, OBG Ramboll; Mark Thimke, Foley & Lardner; Chris Valcheff, True North Consultants, Donna Volk, Ramboll; Angela Carey, DNR; Xiaochun Zhang, DNR

Meeting Notes:

1. Welcome and Introductions.

Staff and guests introduced themselves. Staff provided background on rule development meetings, stating that the purpose of holding these meetings was to provide an additional opportunity for rule input during the rule drafting period of the rulemaking process. Rule development meetings are not part of the formal rule making public input process. Subjects from scope statements are divided up and spread out over the drafting period for discussion at public meetings. Rulemaking timeframe is short due to the legislation that passed in 2017 causing scope statements to expire.

2. Introductory white paper regarding draft rule revisions relating to:

- a. **Financial responsibility for engineering control and structural impediment removal at sediment cleanup sites and related requirements (new chapter NR 756) and**
- b. **Insurance or other forms of financial responsibility for VPLE sediment cleanup sites (new chapter NR 758).**

DNR staff member Molly Schmidt stated that she and Michael Prager would provide an overview of the white paper while also referring to a PowerPoint presentation – both are available on the website for those following along on the phone. Staff went through the content of the white paper and presentation [see materials].

Following the discussion of engineering controls, structural impediment removals, and respective new financial assurance requirements and related costs, attendees provided suggestions and questions. An attendee asked whether it may be helpful to include in the white paper or proposed rule draft a specification of situations where the engineering control is more soil-related because it's on edge between water and ordinary high water mark (OHWM) and may not need all of the elements listed in Figure A2 on page 5 of the white paper. This specification would bring attention to a zone that people should address.

An attendee asked how the rule would account for contingency, inflation, and changing rates over a 40-year period? Staff responded that these were issues that the rule would need to address.

Another attendee asked whether there would be different mechanisms for providing FA/FR for sediment sites with bioaccumulating contaminants vs degrading contaminants.

An attendee asked whether, over time, the FA/FR requirement would decrease when DNR is more comfortable with the selected remedy technology and whether the value or costs covered go down over time or whether the cap/construction would be consistent throughout time.

An attendee suggested that DNR consider requiring preplacement costs for only a portion of the cap rather than the entirety of the cap, stating that it would normally be a percentage of a cap.

Following discussion by staff of full cleanup VPLE FA/FR and related costs, attendees provided suggestions and questions. An attendee asked whether the full cleanup of a contaminated sediment site for VPLE would be similar regarding natural recovery (attenuation) in a sediment setting, stating that an example would be a site where a party first dredges sediment and then relies on natural recovery to achieve compliance over time. Would there need to be confirmation that the cap or cover is doing what is necessary?

An attendee asked whether the DNR has yet engaged with any insurance companies willing to provide this kind of coverage. Staff replied that they had discussed with the state risk officer. They are not as interested in a natural attenuation option, but they require individual review of cases to determine premium and length of coverage.

An attendee asked how a deductible would work in this program. Staff replied that this aspect was under consideration; the state pays the deductible for natural attenuation. DNR Waste Program staff added that staff could consider as an example the requirements for hazardous waste facilities. Each facility was required to hold environmental liability insurance, and the owner/operator pays the deductible. There has been no pushback on this requirement.

Following discussion by staff of partial cleanup VPLE FA/FR and related costs, attendees provided suggestions and questions.

An attendee stated that, for this requirement, the party would need to determine the remedial action before determining costs. Staff added that the VPLE program requires full site investigation, so it would be developed to this extent.

An attendee asked whether a remedial action options report (ROAR) ought to be required for consideration. Staff added that EPA project agreement requirements could serve as a model – wherein a 50% design RA for basis of costs calculation is used.

An attendee replied that the remedial design phase based on selected remedy is created by a RI/FS document – if you base it on a 50% design RA, it does not incentivize people to fully look at their sediment because their FA/FR values will go up. Staff stated that Wis. Admin. Code ch. NR 520 policies for adjustments over time may be followed for the engineering control maintenance FR requirement, and the approaches for VPLE requirements are under consideration.

Staff stated that part of the reason the VPLE partial cleanup option was created was to encourage development of waterfront properties

Attendees stated that long term liability would ideally be spelled out to provide assurance to responsible parties to perform the work. If it is well defined, it's easier to sell internally to company leadership.

An attendee asked about cost of completing the remedy AND maintenance/monitoring. A staff member replied that the RCRA model may be followed – funds must be available to complete RA with an opportunity for reassessment after.

Following discussion by staff of FA/FR policies regarding requirements' lengths, termination and successors, attendees provided suggestions and questions.

Regarding the duration of the FA/FR requirement for engineering control maintenance, an attendee stated that, if a control is placed in water, the intent of the FA is to protect against unexpected events – and staff should consider whether the existence of the cap over time would improve the level of risk, similar to a landfill site, or whether it would stay the same on year 5 and year 55. An assessment of technical feasibility might help. Staff added that it would depend on the water body.

An attendee asked whether, in an area with a depositional cap, there may be an exit / off ramp option. Another attendee added that, in a low energy area of river, the RP could "over" armor the cap and then take an exit / off ramp.

An attendee stated that premiums and deductibles will reflect how often one must resubmit, and that it will be expensive. Another attendee suggested a 5-year review to reevaluate FA/FR requirements, for example, if there is a 100-year rainfall event, and the remedy performs perfectly, allow an exit / off ramp.

An attendee stated that the quality of the sediment on top of cap may contain higher contamination than underneath cap. Another added that depositional areas of the river may become erosional.

An attendee stated that, regarding estimated costs for the VPLE requirements, maybe there is a way of back-calculating the costs to come up with a duration of time. Another attendee stated that he would recommend setting a maximum – even if it seems arbitrary -- otherwise insurance company cannot base a policy on "unexpected" amount of time.

An attendee stated that the discussion thus far assumes that a selected remedy was well executed and approved by the DNR. He added that, if a responsible party (RP) has put the agreement for taking on the responsibility for an engineering control at a contaminated sediment site on the BRRTS database, the property owner would no longer be responsible. If the RP then becomes bankrupt, the property owner does not become the RP. He recommended considering property owners that would be wanting to put docks in and take docks out.

Following discussion by staff of white paper content relating to FA/FR policies regarding compliance, use of funds, inspections, and fees, attendees provided input and questions.

An attendee asked, regarding the VPLE full and partial FA requirements, whether the requirements would be specific to new contaminants. An upland VPLE does not cover unknown emerging contaminants, the closure

and VPLE certificate of completion (COC) are specific to the contaminants assessed. In situations where toxicities may change, and standards may increase, an increasing/decreasing duration requirement makes sense.

An attendee stated that reopener was an option – where toxicology data changes or pockets of missed contamination are found. If there is an RP that goes out of business, the insurance is going to go away – and the only way to avoid that scenario is to pay it all up front. In that way, the insurance requirement triggers differently.

An attendee asked which standards would be used, adding that sediment remedies are quite conservative and a 10% contingency may be redundant.

Staff suggested dividing risk into two different buckets and allowing for a maximum amount addressed by insurance. Another staff member added that a similar idea had also been proposed at the subgroup meeting on April 18, 2019.

An attendee stated that funds that were received from FA/FR following nonperformance and deposited to the department for cleanup should be placed in a protective fund so it can't be used elsewhere for unrelated purposes. Staff added that the white paper may state that the environmental fund was being considered, however, staff was now considering administering the funds similar to a settlement with a dedicated account.

Staff discussed portions of the white paper regarding the methods of FA/FR, noting the areas where policies for the new rules may differ from those stated in Wis. Admin Code ch. NR 520.

An attendee stated that staff should consider including the net worth test. Instead of dismissing it as an option altogether, perhaps there is a way of deciding based on past performance and financial disclosures. Tying up funds for unexpected situations is a burden on sediment sites. One way of doing that is by providing for exceptions for a RP with financial wherewithal to address the situations. In the case of utilities, rate payers may carry some burden. DNR Waste Program staff added that for the solid waste facility requirements, a third party, independent CPA audit report was required. DNR needs to have a process to audit that audit report. They consider the net worth test to be the riskiest method of FA/FR.

An attendee stated that one option would be to include a method where an RP can work out an arrangement with a public entity that would also be acceptable with DNR -- with a cash payment to that entity to take on the responsibility. Staff stated that for public entities, the rule may consider different options available to them.

An attendee stated that staff could talk to the state risk manager with the Dept. of Administration about VPLE FA to see whether there'd be similarities to contracting for state's hazardous waste disposal. Staff stated that they had spoken with the state's broker, who works with DOA.

An attendee asked whether staff had checked with EPA Region 5 states regarding FA/FR methods. Staff stated that there were no direct comparisons available in Illinois, Michigan, Minnesota, or Iowa for the specific requirements that would be addressed under rulemaking; however, Michigan requires FA as part of a post-closure agreement for a "no further action" report following an RA, and Iowa can opt to require FA for "technological controls".

3. Introductory white paper regarding proposed rule revisions to ensure adequate guidance within code for sites with contaminated sediments (chapters NR 700, NR 708, NR 716, NR 722, NR 724, NR 725, NR 727, and NR 750).

DNR staff member Judy Fassbender presented an overview of a white paper discussing proposed rule revisions to ensure sufficient direction for those seeking to remediate contaminated sediment sites [see materials]. During and following the presentation, attendees asked questions and provided input.

An attendee asked when closure would occur if a RP or other party performing investigation and cleanup was required to demonstrate that it was not contributing to a current fish consumption advisory. Staff replied that it would be similar to natural attenuation in that they would need to demonstrate adequate source control and testing – demonstrating that the site is on a reasonable path to achieve regulatory standards. Some sites may merit years of fish monitoring whereas others may improve rapidly.

An attendee asked whether other lines of evidence would be used to determine recovery. Staff replied that other lines of evidence might be looked at depending on the site, e.g., if small pocket of contamination exists at a site, it may be more useful to look at the organisms present in the sediment. When asked whether the rule would allow consideration of in-situ bio-assay and toxicity, staff replied that it would, generally. Staff added that the program envisioned a future chapter of rules with sediment-specific assumptions and standards; however, that would not be proposed as part of this rulemaking. When asked whether sediment-related proposed rules would include direct contact levels, staff replied that these proposed rules would not. Staff would be looking at instances where sediment that is not underwater must be assessed. An attendee commented that displaced sediment could be viewed as soil per the definitions of those terms.

An attendee asked how benthic communities and background contaminant levels would be accounted for. Staff replied that a site-specific process would likely be used.

An attendee commented that the language of the proposed rules regarding protection of human health direct contact would be critical.

Pursuant to a question from attendees, staff stated that there would not be a table of values included in the rule; however, future rulemaking efforts may consider this approach.

An attendee asked whether “riparian landowner” was defined. A DNR staff member replied that “riparian” may have a definition elsewhere in statute or rule; however, the key question for rulemaking would be the ownership of the lakebed or riverbed. Riparian ownership did not always follow the center line of a river; lakebeds are state-owned.

An attendee suggested allowing the RP to make the determination with regard to notification and other ownership-related requirements – this approach would avoid unintended interference in establishing ownership rights and making OHWM determinations. Staff responded that this issue was currently being worked on.

An attendee asked whether there would be changes to the 10-day timeframe for notifications sent during site investigation; staff replied that there would be no change to this timing requirement. Pursuant to a question, staff added that RPs providing notification may need to determine ownership for the purpose of notification requirements at the site investigation step. An attendee suggested a package approach to notification of many landowners, with accessibility provided to online maps that do not necessarily rely on property lines to identify locations. Another attendee agreed that this approach would be useful with regard to lab data.

An attendee asked who would be responsible if a landowner that was not the RP removed a sediment cover. Another attendee asked what would occur at an upland site if property owner disturbs a cap or cover. Staff replied that a sediment cover would be subject to dispersion whereas a cap must be fixed.

Attendees asked about fish consumption determinations -- would it be judged on every fish per every contaminant? Would it rely on "indicator" fish? Staff replied that it would be looking at every benchmark depending on the site – a RP may be required to meet standards according to its relative level of responsibility for causing the contamination in fish. Per the statute, the program would be looking at restoring the environment to the extent practicable. An attendee asked whether they'd be looking at requirements on a fish-by-fish basis. Staff replied that they'd look at the full range of information available – media, indicator species, nature of water body, etc., with the goal of getting to a good end point.

An attendee asked where closure would occur for sites with long-term monitoring requirements. Staff stated that one example that they may consider was the landfill closure process, where a spill is addressed, and it goes back into landfill monitoring program.

Staff clarified that the fish species, timing, etc., used for the proposed rules may not be the same as the criteria used by DNR to establish advisories. The rules may provide for the RP to collect and establish this data.

Attendees stated that – with regard to the last chapter covered by the white paper, Wis. Admin. Code ch. NR 750 – staff should consider that establishing the OHWM for the purposes of this program may result in determining other property rights.

4. First draft of proposed rule revisions relating to 2017 Wisconsin Act 70 statutory changes regarding the use of the term "property" and property boundary changes at sites enrolled in the VPLE program (chapters NR 700, NR 750, NR 754, new chapter NR 758).

Michael Prager presented a first draft of rule revisions relating to statutory changes made by 2017 Wis. Act 70.

5. Conclude and Adjourn.