

ISSUE: Proposed rules for implementing 2015 Wis. Act 204 statutory requirements for financial responsibility and financial assurance for certain types of contaminated sediment cleanup sites

Rule Subgroups: Act 204 - Financial responsibility for engineering controls and structural impediment removals and related requirements; Act 204 - Voluntary Party Liability Exemption (VPLE) sediment

BACKGROUND

I. Introduction

Act 204 amended ch. 292, Wis. Stat., by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Three of these new requirements relate to financial assurance and financial responsibility at certain types of contaminated sediment sites and for sites using engineered controls to address contaminated sediments. Following these statutory changes, revisions to rules are required for consistency and to ensure clear direction is available for department staff and people affected by the new requirements. This paper discusses the statutory changes and the respective rule revisions required and summarizes the RR program's proposed policy direction for these rules.

II. Background: Statutory changes under 2015 Wis. Act 204 and rules needed

In this paper, the terms "financial assurance" (FA) and "financial responsibility" (FR) refer, generally, to the process or methods of demonstrating that an entity has financial resources available to address a certain cost, often required as condition of regulatory approvals. The new requirements created by Act 204 that relate to financial assurance and financial responsibility apply at contaminated sediment sites in three sets of circumstances:

A) Financial responsibility for engineering controls, structural impediment removals. 2015 Wis. Act 204 ("Act 204") created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, DNR may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control and/or the investigation and remediation of residual contamination following the removal of a structural impediment (Wis. Stat. § 292.12(2)(d)).

Under statute, at sites where a person is using an engineering control to address contaminated sediment, DNR may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control and/or the investigation and remediation of residual contamination following the removal of a structural impediment. The proposed rule would provide guidance, requirements and procedures for the following:

- A plan and compliance schedule for either a structural impediment removal, engineering control maintenance, or both; and
- Financial responsibility for cost of complying with an approved plan and schedule.

B) Complete cleanup at VPLE sites with contaminated sediment. Act 204 created the opportunity for persons to obtain the Voluntary Party Liability Exemption (VPLE) for sites with contaminated sediments, and imposed insurance and financial assurance requirements on contaminated sediment sites enrolled in the VPLE (Wis. Stat. § 292.15(2)(af)(3m)).

At sites where a person seeks a VPLE certificate of completion (COC) for a site with contaminated sediments, the person must remediate contaminated sediments in accordance with department rules and shall meet other conditions listed in the statute, including obtaining and maintaining insurance to cover the cost of compliance

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with Wis. Stat. § 292.11(3) with respect to the contaminated sediment if additional remedial action is necessary. Under the statute, the insurance shall name the state as the insured, and the department may waive the requirement to obtain and maintain insurance or accept a form of financial responsibility other than insurance, if the hazardous substance contained in the contaminated sediment is not mercury, PCBs, or dioxin, and the department determines that insurance is not necessary (Wis. Stat. § 292.15(2)(af)).

The proposed rule would provide guidance, requirements and procedures for the following:

- Insurance and other forms of financial assurance
- Waiver of requirement to maintain insurance

The rule may also address other language that 2015 Wis. Act 204 created at Wis. Stat. § 292.15(2)(af).

C) Partial cleanup at VPLE sites with contaminated sediment. The act outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment, including financial assurance conditions that must be met (Wis. Stat. § 292.15(2)(am)(2m)).

At a site where contaminated sediment exists in addition to a hazardous substance in soil or soil and groundwater on a property from a release of a hazardous substance on or originating from a property, the department may only approve a partial cleanup of the property or discharge with respect to the soil or soil and groundwater only if the voluntary party, or “a person who has entered into a legally enforceable agreement with the department”, agrees to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment, and the person provides financial assurance to the department in the event that the person fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment (Wis. Stat. § 292.15(2)(am)(2m)).

The statute does not provide further detail; therefore, the proposed rule would provide guidance, requirements and procedures for the following:

- Agreement to complete cleanup
- Financial assurance

The RR program does not currently have rules that provide a detailed set of FR/FA requirements and procedures and the statutory language that imposes FA/FR requirements is broad and general; therefore, the program will look to existing statutory and rule requirements that DNR’s Waste Program uses for financial responsibility as part of licensing requirements for solid waste disposal facility owners to ensure that they have adequate financial resources to close the facility and ensure the site’s long-term care and reuse. These regulations, along with other state and federal laws, will serve as a basis for the general policies and procedures for new statutory FA/FR requirements proposed below. The proposed rules for each set of requirements listed above are discussed in further detail below

PROPOSED CHANGES

Part III of this paper first discusses the three sets of FA/FR requirements in six different categories of requirements. **Part IV** then discusses the VPLE “agreement” requirements.

III. Proposed rules: Financial assurance, financial responsibility, and insurance

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Act 204 created general requirements specifying what costs are to be assured through FA or FR. The statutory language addresses the basic requirements: who must submit FR/FA, when and where, and what costs should be covered (see table 1, below).

Table 1: Requirements in statute (refer to statute for exact language)

| Statute | A) Plan for engineering control maintenance or impediment removal Wis. Stat. § 292.12(2)(d) | B) Full cleanup VPLE COC Wis. Stat. § 292.15(2)(af)(3m) | C) Partial cleanup VPLE COC Wis. Stat. § 292.15(2)(am)(2m) |
|-------------|--|---|---|
| Who & Where | a person seeking approval of an interim or remedial action or closure at a site with residual contamination, if that site is one where a person is required to take action under Wis. Stat. § 292.11 (3), (4), or (7) (b) with respect to contaminated sediment and is taking action that includes the use of an engineering control | a person seeking a full VPLE certificate of completion at a property with contaminated sediment | a person seeking a VPLE partial cleanup certificate of completion (or other person that has contractually agreed to address sediments at the site) with respect to the soil or soil and groundwater at a property where contaminated sediment exists in addition to a hazardous substance in soil or soil and groundwater |
| What | Proof of financial responsibility to pay the cost of complying with an approved plan and compliance schedule for: (a) maintenance of an engineering control on the site (b) investigation of the extent of residual contamination and the performance of any necessary remedial action if a building or other structural impediment is removed | Insurance (DNR may waive requirement or accept another form of financial responsibility) to cover the cost of complying with Wis. Stat. § 292.11(3) with respect to the contaminated sediment in the event that additional remedial action is necessary | Financial assurance in the event that the voluntary party ... "fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment" |
| When | The department may require at closure, or upon the approval of an interim or remedial action | Prior to COC issuance (unless waived) | Prior to partial COC issuance |

The proposed rules will provide further detail for broad statutory requirements and will address the main question of “how” FA/FR requirements are to be met, to ensure that staff and affected persons are able to apply and interpret these requirements evenly and consistently. The discussion on FA/FR will follow this structure:

1. Basic requirements – clarifying costs
2. Length of requirement, termination, successors
3. Compliance and use of funds, inspection, fees
4. Methods of FA/FR
5. Duration of methods and changes to methods
6. Cost calculations, estimates, adjustments

1. Basic requirements – clarifying costs

The costs that must be assured are different for each new statutory requirement (see table 1.1).

Table 1.1 Costs

| Statute | A) Engineering control maintenance or impediment removal Wis. Stat. § 292.12(2)(d) | B) Full cleanup VPLE COC Wis. Stat. § 292.15(2)(af)(3m) | C) Partial cleanup VPLE COC Wis. Stat. § 292.15(2)(am)(2m) |
|-------------|--|---|---|
| what (cost) | the cost of complying with an approved plan (and compliance schedule) for satisfying requirements to: (a) Require maintenance of an engineering control on the site. (b) Require an investigation of the extent of residual contamination and the performance of any necessary remedial action if a building or other structural impediment is removed that had prevented a complete investigation or remedial action at the site. | the cost of complying with Wis. Stat. § 292.11(3) with respect to the contaminated sediment in the event that additional remedial action is necessary | "... in the event that the voluntary party ... fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment" |

In each case, further description of these costs in rules can provide additional clarity.

1.A. Costs: FR/FA plan and compliance schedule for engineering controls and impediment removal. The FR that may be required under Wis. Stat. § 292.12(2)(d)(2) is the cost of complying with an approved plan and compliance schedule for either or both of the following:

- (a) Maintenance of an engineering control on the site
- (b) An investigation of the extent of residual contamination and the performance of any necessary remedial action if a building or other structural impediment is removed that had prevented a complete investigation or remedial action at the site.

The plan and compliance schedule required by Wis. Stat. § 292.12(2)(d) is a new requirement imposed by Act 204; therefore, rules for this subject matter are within the scope of this rulemaking. While the plan and compliance schedule are new requirements, the requirement to maintain an engineering control (Wis. Stat. § 292.12(2)(a)) and remediate following a structural impediment removal (Wis. Stat. § 292.12(2)(b)) are not new.

Generally, a “compliance schedule” means a timetable of actions that includes an enforceable sequence of events for the completion of actions leading to compliance with a standard or requirement. The phrase “plan and compliance schedule” is not used elsewhere in Wisconsin Statutes; however, one example that may be referenced is Wis. Admin. Code ch. NR 217, which refers to a “compliance schedule” as a potential condition that may be imposed by DNR as a condition for a WPDES permit for certain effluent limits. The proposed rules for a plan and compliance schedule will likely clarify when it is required, set forth the procedures for submitting it, establish the required minimum contents of the plan and schedule.

There are currently several viewpoints on how the calculation of costs may occur for set-aside mechanisms for FR/FA for the plan and compliance schedule:

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- The proposed rule may require that FR/FA must be set aside at 100% of the estimated cost, based on the estimated costs of the activities to be completed over a fixed/established number of years. In this case, the rule may reference specific lists of cost items that must be included as part of FR/FA cost estimates, similar to Wis. Admin. Code § NR 520.07(3) for solid waste facility long-term care cost estimates (see Figure A1 below).
- Alternatively, the proposed rule may require that FR/FA must be set aside at a lesser percentage of the estimated cost, based on the planned activities and a risk-based formulaic calculation. In this case, the rule may include factors for a formula-based calculation of FA/FR (see Figure A2 below).

Figure A1. Minimum requirements for estimated costs for calculation of FR/FA

| A) Engineering control (EC) maintenance or impediment removal - Wis. Stat. § 292.12(2)(d) | |
|--|--|
| <p>EC maintenance</p> <ul style="list-style-type: none"> • Bathymetry survey • Core sampling • Pore water measurements • Poling • Comparison with previous monitoring events • Chemical & physical analysis • Surface water sampling • Event based monitoring • Transport modeling • Repair to EC • Replacement of EC • Regular monitoring and post catastrophic event monitoring • Contingency | <p>Structural impediment removal</p> <ul style="list-style-type: none"> • Replacement of EC • Site investigation of sediment • Remedial action plan/ design/ permitting • Full dredge including disposal • Regular annual monitoring and post-catastrophic event monitoring |

Figure A2. Factors that may be included in a formulaic calculation of FR/FA amount or % of amount

| A) Engineering control maintenance or impediment removal - Wis. Stat. § 292.12(2)(d) |
|---|
| <p>Example scheme for calculation of FA/FR:</p> <ul style="list-style-type: none"> • Annual monitoring + catastrophic event monitoring <ul style="list-style-type: none"> - 1 year at \$10k, 10 years at \$100k, or 30 years at \$300k • Structural impediment removal <ul style="list-style-type: none"> - replacement or construction of engineering control, and/or - full dredge • Maintenance of engineering control (initial construction \$6 million cost) <ul style="list-style-type: none"> - fund FR set-aside mechanism at 100% (\$6m), 50% (\$3m), or 10% (\$600k) • Complete removal by dredging or excavation (\$15m cost) <ul style="list-style-type: none"> - fund FR set-aside mechanism at 100% (\$15m), 50% (\$7.5m), or 10% (\$1.5m) |
| <p>Factors for calculating percentage (for either impediment removal or EC maintenance)</p> <ul style="list-style-type: none"> • Type of contaminant <ul style="list-style-type: none"> - degrades - bioaccumulates • Areal extent • Quality water body • Potential exposure – receptors • Mass of contaminants • Complexity of control – design/construction |

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- Financial viability – utilities/state & local govt/other
- Hydrodynamics
- Susceptibility to failure
- Contingency
- Other special considerations of sediment
 - resides in dynamic waterbodies
 - navigation condition
 - higher probability of instability subject to normal flooding and catastrophic conditions
 - contaminants are present in both solid and dissolved phases
 - carried by water, can spread and transport in long distance
 - diffusive contaminant source
 - directly affect surface water quality and hence ecosystem and human health.
 - drinking water source
 - reliance on a dam
 - risk (navigation hazard, toxicity, ecological and human health, surface water quality, mobility, cost to remove residual sediment and EC materials, contaminant volume and proximity to receptors)

The establishment of minimum costs and the method of calculation of costs are primary issues that must be resolved during rule development if the rules are to provide affected parties and staff clear guidance.

1.B. Costs: VPLE full COC. Costs for the VPLE full COC FA/FR requirement are not explicitly tied to a plan, rather, the FA is intended to cover the cost of complying with Wis. Stat. § 292.11(3) with respect to the contaminated sediment in the event that additional remedial action is necessary:

Wis. Stat. § 292.15(2)(af)(3m) The voluntary party obtains and maintains insurance to cover the cost of complying with s. 292.11 (3) with respect to the contaminated sediment in the event that additional remedial action is necessary, unless additional action is not required under par. (b). The insurance shall conform with rules promulgated by the department and shall name the state as the insured. The department may waive the requirement to obtain and maintain insurance or accept a form of financial responsibility other than insurance if the hazardous substance contained in the contaminated sediment is not mercury, PCBs, as defined in s. 299.45 (1) (a), or dioxin and the department determines that insurance is not necessary.

In other words, the cost is the price of taking additional action (following the COC) to respond to contaminated sediment under Wis. Stat. § 292.11(3). When the department issues a VPLE COC, it is based on the determination that actions necessary to “restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state” under Wis. Stat. § 292.11 have been completed.

The insurance (or FA/FR) in this case is for the event that further cleanup is needed because of an unexpected situation. Further cleanup may be needed if the remedial action failed, if the investigation missed an area of contaminated sediment meriting remedial action, or if the cleanup levels are later determined not to be protective, or if other scenarios described under Wis. Stat. § 292.15(2)(b) were to occur. The current mechanism for FA/FR for more than 60 VPLE sites using natural attenuation for groundwater has been insurance and, to date, there has not been a case when the policies have been needed.

An insurance policy would be the most appropriate tool for addressing risk (which may be why the statute mentions insurance as the primary option); however, the statute allows for other forms of FA/FR, and if DNR allows forms of FA such as escrow or bonds, DNR would need further guidance in rule for determine the amount of funding needed for those mechanisms. Some potential rule options include:

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- Require a set amount of insurance (or other FA/FR) for every site, \$1 million, \$5 million, etc. that would be sufficient in most cases to cover the cost if cleanup was needed.
- Create a rule that requires the voluntary party to submit a report on the recommended amount based on an analysis of risk that is performed by a certified professional;
- Create a rule that provides a table or formula for calculating the FA amount based on risk or other factors like size of the site, cost of the cleanup, etc.; or
- Create a rule that states that the department will contract a professional to make risk-based assessments of how much funding is needed on site-by-site basis.

For any of these options, the proposed rule may include a requirement that the voluntary party submit a contingency plan or other type of plan or report for responding in the event that additional remedial action is necessary with respect to contaminated sediment. This plan could be submitted to the department for review and serve as the basis for FR/FA.

1.C. Costs: VPLE partial COC. Similar to the full VPLE COC for a contaminated sediment cleanup, a partial cleanup at a site with contaminated sediment requires FA for costs based on the occurrence of an event rather than being explicitly linked to a plan. A voluntary party that seeks a COC for partial cleanup, through cleaning up contamination in soil or soil and groundwater at a site with contaminated sediment, must provide FA for a COC. The FA covers the cost of failure to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property. The DNR may only approve a partial cleanup if:

Wis. Stat. § 292.15(2)(am)(2m)(c) The voluntary party or the person who has entered into a legally enforceable agreement under subd. 2m. b. provides financial assurance to the department, in the manner required by the department, in the event that the voluntary party or the person who has entered into a legally enforceable agreement under subd. 2m. b. fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment.

The costs of this type of FA differ from those of the FA required for a COC for full cleanup at a VPLE site with contaminated sediment. The FA is needed to show that the party doing the cleanup of the sediment has enough funding to respond in the event that the voluntary party or other contracting party fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment. The partial COC law requires a complete site investigation before the partial COC can be issued so the DNR and the party doing the sediment cleanup should have a good understanding of the extent of the sediment contamination at the time of the site investigation. They may or may not have an approved plan to conduct the remediation and there may or may not be a solid estimate of the cleanup cost.

2. Length of requirement, termination, successors

Rules may specify the length of the FA/FR requirement, how and when the requirement is triggered and terminates, and what happens in the event of property transactions, bankruptcies, or other successions.

2.A. When due/"triggered". In all three instances, the statute provides for when, in each respective process, the FA/FR is due. For FA/FR for engineering control maintenance and structural impediment removals, Wis. Stat. § 292.12 states that FR requirements may be imposed by the department at closure, or upon the approval of an interim or remedial action. For the two sets of VPLE FR/FA requirements, the statute states that the requirements are conditions of an approved COC. Rules may clarify the procedures for these submissions further.

Table 2.A. Due date of FR/FA and resubmission

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| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|--------------------------|---|--------------------------|-------------------------------|
| when due (statute) | At closure, or upon the approval of an interim or remedial action | Prior to COC issuance | Prior to partial COC issuance |
| Re-submission (proposed) | Resubmitted annually | Resubmitted annually | Resubmitted annually |

The statute does not speak to the rate of resubmission of requirements. The program will likely propose to follow the resubmission requirement from Wis. Admin. Code § NR 520.05(1) which states owners of landfills must provide proof of financial responsibility as part of the initial operating license and annually thereafter for the period of active facility life, or longer where required, to ensure compliance with closure, long-term care or remedial actions.

2.B. Duration, termination, successors, bankruptcy. Where feasible, the program will adopt policies regarding duration, termination, successors, and bankruptcy that are consistent with Wis. Admin. Code ch. NR 520; however, in some instances there are remaining questions when applying these policies across varying FA/FR requirements – these are highlighted in red text in table 2.B. below.

Table 2.B. Duration, termination, successors, bankruptcy

| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|--|--|---|---|
| duration of requirement, termination | <p>The proposed rule may require that the duration of the requirement be specified in the approved plan since the size, complexity, duration, etc. of the contamination at a site, or an EC (or impediment removal) will vary.</p> <p>The rule may also state a minimum and/or maximum number of years for FA/FR, subject to variances to protect health, welfare, safety, similar to policies found at Wis. Stat. § 289.41(1m).</p> | <p>Can duration be specified in a document, contingency plan, etc., since there's potential for wide variability?</p> <p>The rule may also state a minimum and/or maximum number of years for FA/FR, subject to variances to protect health, welfare, safety, similar to policies found at Wis. Stat. § 289.41(1m).</p> | <p>Can duration be specified in a contingency plan, etc., since there's potential for wide variability?</p> <p>The rule may also state a minimum and/or maximum number of years for FA/FR, subject to variances to protect health, welfare, safety, similar to policies found at Wis. Stat. § 289.41(1m).</p> |
| sale of property or facility; successors | <p>Wis. Stat. § 292.12(5m) address the responsibility of persons at sites with continuing obligations. An RP that uses an EC to address contaminated sediment will be responsible for the FR regardless of whether they own the property -- unless</p> | <p>Wis. Stat. § 292.15(3) clarifies that a new owner will only maintain an exemption if they continue to meet requirements as if they are the voluntary party.</p> <p>The rule may add a requirement similar to the language in Wis. Admin.</p> | <p>Wis. Stat. § 292.15(3) clarifies that a new owner will only maintain an exemption if they continue to meet requirements as if they are the voluntary party.</p> <p>The rule may add a requirement similar to the language in Wis.</p> |

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| | <p>transferred by agreement.</p> <p>The rule may add a requirement similar to the language in Wis. Admin. Code § NR 520.05(2), which states that a previous owner shall maintain proof of financial responsibility until the person acquiring ownership, possession or operation of the facility obtains department approval of proof of financial responsibility.</p> | <p>Code § NR 520.05(2), which states that a previous owner shall maintain proof of financial responsibility until the person acquiring ownership, possession or operation of the facility obtains department approval of proof of financial responsibility.</p> | <p>Admin. Code § NR 520.05(2), which states that a previous owner shall maintain proof of financial responsibility until the person acquiring ownership, possession or operation of the facility obtains department approval of proof of financial responsibility.</p> |
| bankruptcy | <p>The rule may adopt a policy similar to Wis. Admin. Code § NR 520.13, which states that a facility owner shall notify the department by certified mail of the commencement of a voluntary or involuntary bankruptcy proceeding within 10 days after commencement of the proceeding</p> | <p>The rule may adopt a policy similar to Wis. Admin. Code § NR 520.13, which states that a facility owner shall notify the department by certified mail of the commencement of a voluntary or involuntary bankruptcy proceeding within 10 days after commencement of the proceeding</p> | <p>The rule may adopt a policy similar to Wis. Admin. Code § NR 520.13, which states that a facility owner shall notify the department by certified mail of the commencement of a voluntary or involuntary bankruptcy proceeding within 10 days after commencement of the proceeding</p> |

3. Compliance and use of funds, inspection, fees

Rules may establish the effect of noncompliance or default and establish when and how FA/FR funds may be used for their committed purposes and/or released. Where feasible, the program will adopt policies that are consistent with Wis. Admin. Code ch. NR 520.

Table 3. Compliance, default, release of funds

| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|---|--|--|---|
| failure to comply / forfeiture / conversion | <p>The rule may set forth policies similar to those at Wis. Stat. § 289.41(11) for closure and long-term care requirements:</p> <p>If the person fails to comply with the approved plan and schedule</p> <ul style="list-style-type: none"> - the department may require the forfeiture or convert financial responsibility - moneys received from | <p>The rule may set forth policies similar to those at Wis. Stat. § 289.41(11) for closure and long-term care requirements, where applicable:</p> <p>In the event that additional remedial action is necessary</p> <ul style="list-style-type: none"> - the department may require the forfeiture or convert financial responsibility - moneys received from the forfeiture or conversion of financial responsibility shall be | <p>The rule may set forth policies similar to those at Wis. Stat. § 289.41(11) for closure and long-term care requirements, where applicable:</p> <p>In the event that the voluntary party fails to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated</p> |

| | | | |
|---------------------------------------|---|---|--|
| | <p>the forfeiture or conversion of financial responsibility shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund</p> <ul style="list-style-type: none"> - the department may request that DOJ initiate court action against the person to recover moneys sufficient to pay the cost of complying with the approved plan - any moneys recovered shall be credited to the department and managed specifically for the site in the same manner as a settlement | <p>shall be credited to the department and managed specifically for the site in the same manner as a settlement</p> <ul style="list-style-type: none"> - the department may request that DOJ initiate court action against the person to recover moneys sufficient to pay the cost of complying - any moneys recovered shall be credited to the department and managed specifically for the site in the same manner as a settlement | <p>sediment</p> <ul style="list-style-type: none"> - the department may require the forfeiture or convert financial responsibility - moneys received from the forfeiture or conversion of financial responsibility shall be credited to the department and managed specifically for the site in the same manner as a settlement - the department may request that DOJ initiate court action against the person to recover moneys sufficient to pay the costs - any moneys recovered shall be credited to the department and managed specifically for the site in the same manner as a settlement |
| <p>access to funds and default</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.11:</p> <p>Whenever on the basis of any reliable information, and after opportunity for a hearing, the department determines that person is in violation of any of the requirements of the approved plan, the department and its designees shall have the right to enter the property and carry out the plan requirements.</p> <p>The department may use part or all of the money deposited to carry out the approved plan.</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.11:</p> <p>Whenever on the basis of any reliable information, and after opportunity for a hearing, the department determines that additional remedial action is necessary, the department and its designees shall have the right to enter the property and carry out the plan requirements.</p> <p>The department may use part or all of the money deposited to carry out the approved plan.</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.11:</p> <p>Whenever on the basis of any reliable information, and after opportunity for a hearing, the department determines that the voluntary part (or successor) has failed to restore the environment to the extent practicable and minimize the harmful effects from the contaminated sediment on the property or the discharges resulting in contaminated sediment, the department and its designees shall have the right to enter the property and carry out the plan requirements.</p> <p>The department may use part or all of the money deposited to carry out the approved plan.</p> |
| <p>authorization to release funds</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.12(2) for funds committed for long-term care of a facility:</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.12(1) for closure of a facility:</p> | <p>The rule may follow a policy similar to that in Wis. Admin. Code § NR 520.12(1) for closure of a facility:</p> |

| | | | |
|--|---|--|--|
| | <p>One year after closure, and annually thereafter for the period of responsibility as defined in the approved plan, a person may apply to the department for reimbursement (from certain types of FR/FA) for the estimated costs for maintenance activities for that year.</p> <p>The application shall include an itemized list of costs incurred. The department may authorize the release of the funds or approve a reduction and shall determine that adequate funds exist to complete required work for the remaining period of owner responsibility prior to releasing.</p> <p>Determinations shall be made within 90 days. For certain FA/FR (e.g., trust accounts) the department may authorize the release of up to 75% of the expected cost for the current year. Any funds remaining at the termination of the period of responsibility shall be released to the owner.</p> | <p>When a person has completed the time period for obtaining and maintaining insurance/FR, the person may apply to the department for release of the bond, insurance or the letter of credit or return of the money held on deposit, in escrow, or in trust for closure of the facility.</p> <p>The application shall be accompanied by a report, signed by a qualified professional, that documents and verifies that the relevant activities under the approved plan (for which FA/FR has been supplied) have been fulfilled, and summarizes the actual costs incurred.</p> <p>Upon determination by the department that the assured activities have been accomplished, the department shall authorize in writing the release and return of all funds accumulated in such accounts or give written permission for cancellation of the bond, insurance or letter of credit.</p> <p>Determinations shall be made within 90 days of receipt of the completed application.</p> | <p>When a person has completed the time period for obtaining and maintaining FA, the person may apply to the department for release of the bond, insurance or the letter of credit or return of the money held on deposit, in escrow, or in trust for closure of the facility.</p> <p>The application shall be accompanied by a report, signed by a qualified professional, that documents and verifies that the relevant activities under the approved plan (for which FA/FR has been supplied) have been fulfilled, and summarizes the actual costs incurred.</p> <p>Upon determination by the department that the assured activities have been accomplished, the department shall authorize in writing the release and return of all funds accumulated in such accounts or give written permission for cancellation of the bond, insurance or letter of credit.</p> <p>Determinations shall be made within 90 days of receipt of the completed application.</p> |
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Remaining questions and topics that may also be addressed in the draft rule include:

- What occurs if insurance/financial assurance is not paid? For both VPLE requirements, nonpayment of FA may result in loss of the exemption.
- Whether the applicable enforcement/compliance/penalties are clear for each requirement.
- Consideration of fees and inspection costs similar to either or both of the following examples:
 - compliance inspection fees under Wis. Admin. Code § NR 520.04(7) and Table 2, and
 - construction inspection under Wis. Admin. Code § NR 520.04(5).

4. Methods of FA/FR

The proposed rules will establish the acceptable methods that may be used to meet FR/FA requirements. Where feasible, the program will adopt policies that are consistent with Wis. Admin. Code ch. NR 520. Wis. Admin. Code § NR

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520.06 regarding FA/FR mechanisms for solid waste facility long-term care provides full details for each instrument/mechanism, where applicable:

- conditions of agreement
- when specific paperwork is due and what forms are required
- what types of entities may issue the instrument, requirements for the institution
- who is obligee (in whose favor is the promise made)
- DNR notice to company prior to use
- non-cancellation/replacement
- surety bankruptcy/insolvency
- any limitations on the amount that may be funded

The proposed rule will likely adopt similar language to that within Wis. Admin. Code § NR 520.06 for the set-aside mechanisms (bond, deposit with department, escrow, irrevocable trust, and letter of credit); however, the proposed rule will likely differ from Wis. Admin. Code ch. NR 520 in regard to insurance, net worth, and other mechanisms due to the differences in the underlying statutory requirements for these rules. See the table below.

Table 4. FA/FR Mechanisms

| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|--------------------------------|--|---|---|
| net worth | The rule may not include this option. In 2017, EPA Office of Inspector General released a report detailing the regulatory constraints and data and technical gaps in implementing self-insurance and net worth tests for financial assurance. ¹ | The rule may not include this option. In 2017, EPA Office of Inspector General released a report detailing the regulatory constraints and data and technical gaps in implementing self-insurance and net worth tests for financial assurance. | The rule may not include this option. In 2017, EPA Office of Inspector General released a report detailing the regulatory constraints and data and technical gaps in implementing self-insurance and net worth tests for financial assurance. |
| performance or forfeiture bond | Adopt language at Wis. Admin. Code § NR 520.06(1). | Adopt language at Wis. Admin. Code § NR 520.06(1). | Adopt language at Wis. Admin. Code § NR 520.06(1). |
| deposit with department | Adopt language at Wis. Admin. Code § NR 520.06(2). | Adopt language at Wis. Admin. Code § NR 520.06(2). | Adopt language at Wis. Admin. Code § NR 520.06(2). |
| escrow | Adopt language at Wis. Admin. Code § NR 520.06(3). | Adopt language at Wis. Admin. Code § NR 520.06(3). | Adopt language at Wis. Admin. Code § NR 520.06(3). |
| irrevocable trust | Adopt language at Wis. Admin. Code § NR 520.06(4). | Adopt language at Wis. Admin. Code § NR 520.06(4). | Adopt language at Wis. Admin. Code § NR 520.06(4). |

¹ Self-Insurance for Companies With Multiple Cleanup Liabilities Presents Financial and Environmental Risks for EPA and the Public, Report No. 18-P-0059 December 22, 2017, U.S. EPA, Office of Inspector General (https://www.epa.gov/sites/production/files/2017-12/documents/epa_oig_20171222-18-p-0059.pdf).

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| | | | |
|--------------------------------------|---|--|--|
| letter of credit | Adopt language at Wis. Admin. Code § NR 520.06(5). | Adopt language at Wis. Admin. Code § NR 520.06(5). | Adopt language at Wis. Admin. Code § NR 520.06(5). |
| insurance | Adopt language at Wis. Admin. Code § NR 520.06(7). | DNR may propose option for obtaining specific insurance. | DNR may propose option for obtaining specific insurance. |
| financial commitment / other methods | DNR is requesting input on alternative financial commitment instruments which are foreseeable, viable and applicable to these events. Specific detail on the applicable standards, thresholds, requirements may be needed in rule to ensure that these alternative forms of assurance adequately protect taxpayers from these costs. | The rule may not provide this option if level of complexity and costs of administration are determined to outweigh the benefit to voluntary parties of providing additional methods. If other methods are allowed, specific detail on the applicable standards, thresholds, requirements may be needed in rule to ensure that these alternative forms of assurance adequately protect taxpayers from these costs. | The rule may not provide this option if level of complexity and costs of administration are determined to outweigh the benefit to voluntary parties of providing additional methods. If other methods are allowed, specific detail on the applicable standards, thresholds, requirements may be needed in rule to ensure that these alternative forms of assurance adequately protect taxpayers from these costs. |

Remaining questions or topics that may be addressed by the rule include:

- Distinctions between requirements for public and private entities.
- An explanation of how to obtain insurance for the two VPLE requirements, including consideration of whether the ability to provide insurance will be open to any insurer or limited (for example, limited to one vendor, three approved vendors, etc.), and consideration of the similarity these policies to natural attenuation policies.
- Consideration of whether all potential circumstances are adequately addressed by policies with Wis. Admin. Code ch. NR 520, for example: notice of expiration requirements, notice of insolvency, receivership, etc.

5. Duration of methods and changes to methods

Rules will clarify the duration of the various methods of FA/FR and how changes to those methods may be made. Where feasible, the program will adopt policies that are consistent with Wis. Admin. Code ch. NR 520.

Table 5. Duration and change of methods

| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|---------------------|---|---|---|
| duration of methods | The proposed rule may follow the policy stated at Wis. Stat. § 289.41(3)(b): The department may approve a standard method of establishing proof of financial | The proposed rule may follow the policy stated at Wis. Stat. § 289.41(3)(b) (see left). | The proposed rule may follow the policy stated at Wis. Stat. § 289.41(3)(b) (see left). |

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| | responsibility that expires before the termination of the owner's obligation to provide proof of financial responsibility if the person shows to a reasonable degree of certainty that the proof of financial responsibility can be renewed or replaced upon expiration and that the person has an adequate plan to maintain proof of financial responsibility for the remaining activities under the approved plan until termination of the obligation. | | |
| changing methods | <p>The proposed rule may follow the policy stated at Wis. Admin. Code § NR 520.09:</p> <p>The person may change from one method of providing proof of FR to another, but not more than once per year. A change may only be made on the anniversary of the submittal of the original method of providing proof of FR. The amount of the new method of providing proof of FR shall be in the amount that is equal to the amount that would have accumulated had the new method been used as the original method.</p> | <p>The proposed rule may follow the policy stated at Wis. Admin. Code § NR 520.09 (see left); however, it may limit this policy or clarify whether it applies solely to "other FA" or "DNR insurance and other FA".</p> | <p>The proposed rule may follow the policy stated at Wis. Admin. Code § NR 520.09 (see left).</p> |

6. Cost calculations, estimates, adjustments

Costs are discussed generally at #1. This section puts forth detail on the process of estimating, calculating, and adjusting costs. Where feasible, the program will adopt policies that are consistent with Wis. Admin. Code ch. NR 520; however, in some instances there are remaining questions when applying these policies across varying FA/FR requirements – these are highlighted in **red text** in the table below.

Table 6. Cost estimates, calculation, adjustments, inflation

| | A) Engineering control maint. or impediment removal | B) Full cleanup VPLE COC | C) Partial cleanup VPLE COC |
|----------------|---|--|------------------------------------|
| cost estimates | The rule may use the policies stated at Wis. Admin. Code § NR 520.07(1) and, similar to Wis. Admin. Code § NR 520.07(3), may include a detailed list of minimal requirements for a plan and compliance schedule for | Details on producing cost estimates and calculating the amount may depend on the selected approach to determining these costs | See left. |

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| | | | |
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| | maintenance of an engineering control and remediation following removal of a structural impediment. <i>See #1 regarding cost requirements.</i> | – see #1 regarding cost requirements. | |
| calculating the amount | The rule may use the policies stated at Wis. Admin. Code § NR 520.08 and Wis. Admin. Code § NR 520.08(2). | <i>Details on producing cost estimates and calculating the amount may depend on the selected approach to determining these costs – see #1 regarding cost requirements.</i> | See left. |
| adjustments | The rule may use the policies at Wis. Admin. Code § NR 520.07(1m) and Wis. Admin. Code § NR 520.10, where applicable. | The rule may use the policies at Wis. Admin. Code § NR 520.07(1m) and Wis. Admin. Code § NR 520.10, where applicable. | The rule may use the policies at Wis. Admin. Code § NR 520.07(1m) and Wis. Admin. Code § NR 520.10, where applicable. |
| inflation | The rule may use the policy at Wis. Admin. Code § NR 520.07(5). | The rule may use the policy at Wis. Admin. Code § NR 520.07(5). | The rule may use the policy at Wis. Admin. Code § NR 520.07(5). |

Part IV. VPLE Agreements

Act 204 added a provision regarding requirements for VPLE partial COCs at contaminated sediment sites. Language added by the act references another party that may enter into a legally enforceable agreement with the department; this party may also be subject to financial assurance requirements.

At sites where a person seeks a partial VPLE COC for soil or soil and groundwater cleanup on a property with contaminated sediment, the department may only approve a partial cleanup of the property or discharge with respect to the soil or soil and groundwater if the voluntary party, or “a person who has entered into a legally enforceable agreement with the department,” agrees to restore the environment and provides financial assurance (Wis. Stat. § 292.15(2)(am)(2m)(c)).

The department has authority to enter into various agreements for cleanup. Under Wis. Stat. § 292.31(3)(b)(1), the department can enter into a contract for any person to take action to address environmental pollution. Under Wis. Stat. § 292.11(7)(d), the department can enter into a negotiated agreement with a person that possesses or controls a hazardous substance to take non-emergency action to address the hazardous substance discharge. The department may also enter into various enforcement-related agreements related to cleanup.

Rules may clarify that any or all of these types of agreements may be used as described at VPLE sites.

AFFECTED RULE CHAPTERS

Wis. Admin. Code chs. NR 754, NR 756 (new), and NR 758 (new)

OTHER RELATED RULE REVISIONS

Act 204 - rights and responsibilities for owners or occupants at sites with residual contamination
Contaminated sediments - adequate procedures and guidance for contaminated sediment sites

COMPARABLE STATE OR FEDERAL POLICIES

Federal: 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 has rules that require financial assurance for Corrective Action sites that are found in 40 CFR 264.101(b) and (c).

State: There are no regulations within Michigan, Minnesota, Illinois, or Iowa that address the specific activities to be regulated by the proposed rules; however, there are related requirements in certain states:

- The state of Michigan, under Part 201 of Natural Resources and Environmental Protection Act (Act 451) of 1994, requires financial assurance as part of a proposed post-closure agreements that are submitted as part of a “no further action report” following a remedial action. The financial assurance covers costs of monitoring, operation and maintenance, oversight, and other costs determined by the Michigan Department of Natural Resources to be necessary to assure the effectiveness and integrity of the remedial action (Mich. Stat. s. 324.20114d).
- The state of Iowa, under Iowa Code Chapter 455H, the Iowa Land Recycling and Environmental Remediation Standards Act, may require financial assurance from those participating in its voluntary Iowa Land Recycling Program. The director of the Iowa Department of Natural Resources may require reasonable proof of financial assurance for a technological control to ensure that it remains effective. The requirement is in statute (Iowa Stats. s. 455H.206 and Iowa Administrative Code s. 137.7(1)).

Minnesota, Illinois, Iowa, and Michigan all have adopted statutes and/or rules governing financial responsibility requirements for solid waste facility, hazardous waste facility, and/or corrective action sites or facilities as part of their respective delegations of authority to implement RCRA at the state level.

DISCUSSION OF POTENTIAL ECONOMIC IMPACTS

Economic impacts may occur under the following portions of the proposed rules relating to the available methods and options for obtaining financial assurance and financial responsibility:

Engineering controls: 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. The rule will provide a range of financial assurance mechanisms (e.g., a bond, a letter of credit, an escrow account) to allow maximum flexibility to parties while ensuring that the primary purpose of financial responsibility is met. The costs of most of these options will vary based on the cost to maintain and monitor the engineering control, for example, a surety bond can 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.

VPLE full approval: The rule may have an effect in regard to the cost differences between the insurance, financial assurance, and insurance waiver options. The department estimates that one to three businesses, local governments, or individuals may choose to enter the VPLE program annually for properties with contaminated sediment. Based on

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information obtained from the environmental insurance industry, insurance would have a onetime 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.

VPLE partial approval: Costs incurred by the rule would relate solely to the comparative costs of the financial assurance options provided. For the purpose of the proposed rules, the department estimates that less than one contaminated sediment site per year may seek VPLE for a partial cleanup. The rule would provide a range of financial assurance options to allow maximum flexibility to parties (e.g., a bond, a letter of credit, an escrow account). The costs of these options may vary based on the estimated cost to complete the sediment remediation; however, a surety bond is estimated to cost from 1% to 3% of the bonded amount; a letter of credit can cost between 1% to 10% of the letter of credit cost.

COMMENTS
