

DRAFT rule revisions for October 1, 2019, Rule Development Meeting

Comments on this draft may be sent to DNRRNR700input@wisconsin.gov

Subject matter (group/subgroup): VPLE Sediment

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Changes (include treatment, list in order of rules):

Chapter NR 758 is created to read:

Chapter NR 758: Insurance and Financial Responsibility at Contaminated Sediment Sites in the Voluntary Party Liability Exemption program

NR 758.01 Purpose. This chapter establishes rules and procedures promulgated under sections 292.15 (2) (af) 3m., (am) 2m and (e), Stats., that the department shall use to determine if voluntary parties have met the requirements under sections 292.15 (2) (af) and (am), Stats., related to environmental insurance, or other forms of financial responsibility, for voluntary parties seeking liability exemptions for sites with contaminated sediment.

NR 758.03 Applicability. This chapter applies to voluntary parties and successors and assigns of the voluntary party, as described in section 292.15 (3), seeking an exemption from liability for voluntary party remediation under section 292.15 (2) (af) or (am), Stats., where contaminated sediment exists from a release of a hazardous substance on or originating from a property. In this chapter, requirements that apply to the voluntary party shall also apply to successors or assigns of the voluntary party, if the successor or assignee agrees to pay for the insurance required under this chapter pursuant to a third-party agreement shared with the department.

NR 758.05 Definitions. In this chapter:

(1) "Pre-existing pollution condition" means contaminated soil, groundwater or sediment or other media from a release of a hazardous substance that occurred prior to the date the environmental investigation of the property was approved by the department.

(2) "Property" has the meaning specified in section 292.15(1)(c), Stats.

Note: Section 292.15 (1) (c), Stats., defines "property" to mean the area of real property that is included in an application to obtain an exemption under this section, made up of a legally identifiable parcel or legally identifiable contiguous parcels created in compliance with applicable laws.

(3) "Voluntary party" has the meaning specified in section 292.15 (1) (f), Stats.

Note: Section 292.15 (1) (f), Stats., defines "voluntary party" to mean a person who submits an application to obtain an exemption under section 292.15, Stats., and pays any fees required under section 292.15 (5), Stats.

NR 758.07 Insurance requirement. (1) STATE INSURANCE CONTRACT. If the department enters into a contract under s. 292.15 (2) (e), the voluntary party seeking a liability exemption under section 292.15 (2) (af), Stats., shall pay the department insurance fees, submit an application form and comply with the requirements and procedures described in this chapter for the property to obtain coverage under the state's master insurance contract. The voluntary party shall submit a complete form provided by the department and a fee that is established by the department. The department shall publish a fee schedule annually and it shall be calculated based on the cost of the insurance premium, a contribution towards the state's deductible, and other expenses necessary to administer the program.

(2) INDIVIDUAL POLICY. If the department does not enter into a contract with an insurance company as described in (1) or an applicant for a property is unable to use the contract in (1), the voluntary party seeking the liability exemption under section 292.15 (2) (af), Stats., shall obtain and maintain insurance that conforms to following the requirements in this section:

(a) The insurance shall provide liability insurance covering claims for response action expenses caused by pre-existing pollution conditions in the sediment on, at or emanating from the insured location. The insurance will cover response action expenses when the department issues a written determination that additional remedial action is necessary because the conditions described in section 292.15 (2) (b) 2. or 3, Stats., have occurred.

Note: Section 292.15 (2) (b) 2., Stats., states the voluntary party liability exemption continues to apply even when it is discovered that the cleanup fails to fully restore the environment and minimize the effects from a discharge of a hazardous substance. Section 292.15 (2) (b) 3., Stats., states the exemption continues to apply even when the contamination from a hazardous substance that is the subject of the cleanup under par. (a) 2., (ae) 2., (af) 2., or (ag) 1. is discovered to be more extensive than anticipated by the voluntary party and the department.

(b) The insurer providing the insurance coverage shall be rated at A X or better from A.M. Best Rating Services. If the insurer's rating falls below A X, the voluntary party shall notify the department within 30 days of this change and shall provide replacement coverage with a subsequent, qualified insurer within 90 days.

(c) The voluntary party shall submit the signed certificate of insurance from the insurer to the department which includes the exact endorsement language in the certificate of insurance forms supplied by the department.

(d) The voluntary party may obtain additional coverage beyond the required coverage described in this chapter. If coverage beyond the required endorsements is obtained, the voluntary party shall submit the insurance endorsements to the department, if requested by the department. If the department determines that the additional coverage and endorsements adversely interfere with coverage required under this chapter, the department may determine that the requirements of this section have not been met.

(e) The voluntary party may request approval of a set of endorsements that is not identical to what is required under sub (d). The department may approve an alternative set of

endorsements if they substantially meet the purpose and intent of this rule and the voluntary party provides an explanation of why the required endorsements were not provided.

(g) If the insurer terminates coverage for any reason, the insurer or group shall directly notify the department of such termination within 30 days.

(h) The policy shall not include any exclusion that would limit coverage for response action expenses caused by pre-existing pollution conditions in the sediment on, at or emanating from the insured site. Exclusions that shall not be on the policy include, but are not necessarily be limited to, capital improvements exclusions and voluntary investigation exclusions.

(j) If the voluntary party allows coverage to lapse or changes insurers, the voluntary party shall notify the department within 10 days.

(k) The insurance policy shall name the department as an insured party.

(L) The insurance policy shall provide that the insurance policy may not be canceled by the insurer unless a replacement insurance policy or other proof of financial responsibility under this section is provided to the department by the voluntary party. If the insurer proposes to cancel an insurance policy, the insurer shall provide notice to the department and to the voluntary party in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration of the 90-day notice period, the voluntary party shall deliver to the department a replacement insurance policy or other proof of financial responsibility in compliance with this section, and either shall remain in effect for the remainder of the coverage length required under section NR 758.11.

(m) If the insurer becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under section 618.41 (6) (d), Stats., the voluntary party or its successor or assigns shall, within 30 days after receiving written notice, deliver to the department a replacement insurance policy or other proof of financial responsibility under this section and either shall remain in effect for the remainder of the coverage length required under section NR 758.11.

(o) Each insurance policy shall contain a provision allowing assignment of the policy to a successor of the voluntary party. Assignment may be conditioned upon the consent of the insurer, provided consent is not unreasonably refused.

NR 758.09 Calculating the Amount of the Insurance Coverage. To calculate the amount of insurance coverage required, the voluntary party shall submit to the department a summary of the total costs spent on the investigation and remediation of the contaminated sediment. This shall include all money spent by the voluntary party as well as other parties including local, state or federal government. If the voluntary party is unable to provide a summary of the costs, the voluntary party shall provide coverage required under (3). The limits herein must be dedicated to the remediation of the insured location and not shared with other coverage parts (if any) and not be limited by the insurance policy's aggregate limit for other coverages (if any). The insurance shall provide coverage of no less than the following limits:

(1) If the cost of the site investigation and remediation of the contaminated sediment was less than \$1,500,000 then the insurance limit shall be at least \$1,000,000

(2) If the cost of the site investigation and remediation of the contaminated sediment was more than \$1,500,000 and less than \$4,000,000 then the insurance limit shall be at least \$3,000,000

(3) If the cost of the site investigation and remediation of the contaminated sediment was more than \$4,000,000 then the insurance limit shall be at least \$5,000,000

NR 758.10 Deductible.

(1) The insurance will be written with a per occurrence deductible and not a self-insured retention basis.

(2) insurance policy shall have a per-incident deductible that is a maximum of \$50,000 per incident unless a higher deductible is approved by the department in writing before the certificate of completion is issued.

(3) If a claim was made on the policy by the department, the department may pay the deductible if funds are available.

(4) the voluntary party shall pay a fee to the department that is equal to 5% of the deductible before a Certificate of Completion is issued. The department may use those funds toward payment of a future deductible.

NR 758.11 Length of Coverage.

(1) The voluntary party shall maintain the insurance coverage that meets the conditions in this chapter for 25 years after the closure letter has been issued by the department.

(2) The voluntary party shall demonstrate to the department that the coverage is in place continuously for the 25 years.

(3) The policy term of the insurance may be of any length longer than one year and may include more than one policy and the policies shall be renewed by the voluntary party to provide the 25 years of coverage.

(4) At least 90 days before the policy period of an existing policy will end, the voluntary party or its successors or assigns shall provide the certificate of insurance from the insurer and proof of insurance for a policy renewal or new policy that meet the requirements of this chapter.

NR 758.12 Proof of Insurance The voluntary party shall submit annually a copy of the certificate of insurance to the department to demonstrate the requirements for insurance described in this chapter are being met.

NR 758.13 Financial responsibility other than insurance.

(1) The department may accept a form of financial responsibility other than insurance if all the following conditions apply:

(a) The amount of financial responsibility shall be for the level of coverage required in section NR 758.09.

(b) The financial responsibility will be in place for 25 years.

(c) The financial responsibility is for response action expenses caused by pre-existing pollution conditions in the sediment on, at or emanating from the property. The financial responsibility will cover response action expenses when the department issues a written determination that additional remedial action is necessary because the conditions described in section 292.15 (2) (b) 2. or 3, Stats., have occurred.

(d) A method of providing proof of financial responsibility is documented that meets the applicable requirements in section NR 756.06(1),(2), (3), (4), (5) or (8).

(e) The hazardous substance contained in the contaminated sediment is not mercury, PCBs or dioxin.

(2) If a form of financial responsibility is provided other than insurance, the voluntary party shall:

(a) Follow the requirements in NR 756.09 if changes to the method of financial responsibility are requested.

(b) Provide access to the department and its designees to enter upon the site or facility and carry out appropriate site investigation and response actions.

(c) Take actions needed in order for the department may use part or all of the money deposited with it, or the money deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, or funds accumulated under other approved methods to carry out the approved actions or plan and compliance schedule requirements.

(d) Notify the department in the event of bankruptcy or receivership in accordance with NR 756.13.

NR 758.15 Waiver of insurance requirement.

The department may waive the insurance requirement in exceptional circumstances if all the following conditions apply:

(1) The voluntary party provides a written request to the department for a waiver with explanation of the exceptional circumstances.

(2) The hazardous substance contained in the contaminated sediment is not mercury, PCBs or dioxin.

(3) The department, after review of subsection (1) submitted by the voluntary party, determines the risk of additional cleanup being necessary in the future is low or the cost of additional cleanup that may be necessary would be low based on, but not limited to, the following factors:

(a) The volume of contaminated sediment;

(b) concentrations of hazardous substances in the sediment;

(c) threat to ecological resources; and

(d) known and potential effects of contaminated sediment on human health including consumption of fish, birds or other wildlife.

NR 758.19 Certificate of completion. The department shall issue the voluntary party a certificate of completion pursuant to section 292.15 (2) (af), Stats., if the department determines that all the following requirements have been met:

(1) The voluntary party has submitted to the department a request for case closure pursuant to chapter NR 726.

(2) The department has approved the request for case closure for the site.

(3) The voluntary party has submitted to the department one of the following pertaining to financial responsibility requirements:

(a) a certificate of insurance and copy of the policy with endorsements and the deductible fee required in section NR 758.10;

(b) documentation to demonstrate that another form of financial responsibility has been provided that meets the requirements in section NR 758.13; or

(c) the voluntary party received a waiver of the requirements from the department as described in section NR 758.15.

(5) The voluntary party has reimbursed the department for any department costs incurred under chapters NR 749 and 750.

(6) All of the conditions in sections 292.15 (2) (af) 1. to 6., Stats., have been met.

NR 758.21 Failure to satisfy requirements in this chapter.

The voluntary party and successors and assigns of the voluntary party, as described in section 292.15 (3), including the property owner, will no longer qualify for the liability protections under section 292.15 (2) (af), Stats., if the voluntary party or successors or its assigns fails to satisfy the requirements of this chapter and the department provides a written determination stating that the requirements are not being met after at least 90 days from the date of non-compliance.

NR 758.23 Partial Cleanup at contaminated sediment sites

If contaminated sediment, in addition to a hazardous substance in soil or soil and groundwater on a property, exists due to a release of a hazardous substance on or originating from a property and a voluntary party requests a liability exemption for a partial cleanup under section 292.15 (2) (am), Stats., for the property or discharge with respect to the soil or soil and groundwater, the department may approve a partial cleanup, only if all of the following apply:

(1) All requirements under section 292.15 (2) (am), Stats., have been met.

(2) An environmental investigation of the property, as defined in section NR 750.03 (2m) or the discharges is conducted and approved by the department.

(3) 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.

(4) All financial assurance requirements have been met, including:

(a) The voluntary party, or a person who has entered into a legally enforceable agreement with the department, shall prepare a remediation cost estimate. This estimate shall include a schedule with anticipated costs for each year. For the purpose of determining the amount of proof of financial responsibility that is required, the voluntary party, or a person who has entered into a legally enforceable agreement with the department, shall submit the estimated costs to complete the remedial action to the department for approval.

(b) The cost to complete the remedial action shall include all actions necessary under chapters NR 700 through NR 758 to obtain site closure under chapter 726 for each contaminated sediment site resulting from a hazardous substance discharge on or from the property that is subject to the request for approval of a partial cleanup under section 292.15 (2) (am), Stats. The estimated cost shall be prepared by an environmental consultant and shall include but is not limited to costs for remedial action planning, design, and permitting, and dredging including mobilization and disposal, and post-construction sampling and monitoring. The amount of financial assurance shall include a 10% contingency amount.

(c) If the voluntary party is unable to prepare a remediation cost estimate that meets the requirements in (a) due to exceptional conditions, the voluntary party shall submit a justification as to why they are unable to submit a cost estimate and the amount of financial assurance shall default to be at least \$5 million, unless the department determines that valuation is insufficiently low to meet the requirements of par. (b).

(d) the voluntary party shall provide financial assurance that meets the following requirements:

1. A method of providing proof of financial responsibility shall meet the applicable requirements in s. NR 756.06(1),(2), (3), (4), (5), (7) or (8).
2. The amount of financial responsibility that shall be provided is the annual cost in current year dollars for the costs estimated under (b).
3. The voluntary party may request an adjustment of the amount of financial responsibility provided due to a change in the remedial actions planned if approved by the department in writing.
4. The inflation rate shall be calculated as described in 756.07(6).
5. The amount of financial responsibility provided shall be calculated based on the chosen method of providing proof of financial responsibility and calculated using the method in s. NR 756.08(1)(a) or (b).

NR 758.24 Partial Cleanup at contaminated sediment sites – Use of Financial Assurance and other ongoing requirements and procedures

If the department approves a partial cleanup under section 292.15 (2) (am), Stats. and requirements under s. 758.23 have been met, the following apply:

- (1) Follow the requirements in NR 756.09 if changes to the method of financial responsibility are requested.
- (2) Notify the department in the event of bankruptcy or receivership in accordance with s. NR 756.13.
- (3) Whenever the department determines that the voluntary party, or a person who has entered into a legally enforceable agreement with the department, is not making reasonable progress towards completing the remedial action needed 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 upon the site or facility and carry out the appropriate remedial actions. The department may use part or all of the money deposited with it, or the money deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, insurance, or funds accumulated under other approved methods to carry out the actions.
- (4) the voluntary party, or a person who has entered into a legally enforceable agreement with the department, may request authorization to release funds annually by following the applicable requirements in s. NR 756.12(1)