

Remediation and Redevelopment Program – Rule Development Meeting

December 3, 2019 | 10:00 a.m. to 2:00 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: Molly Schmidt (DNR), Michael Prager (DNR), Gena Larson (DNR), Jenna Soyer (DNR), Renee Exum (Michael Best), Carrie Webb (DNR), Bill Nelson (DNR), Jennifer Hagen (OBG Ramboll), Andrea Gelatt (Midwest Environmental Advocates), Mark Thimke (Foley & Lardner), Mark A. Rutkowski (Shannon & Wilson), Emma MacAlister (Geosyntec), Jacquelyn Pomerville, (Georgia-Pacific Consumer Operations LLC), Jay Karls (Ramboll), Paige Scobee (Hamilton Consulting), John Delwiche (WEC Energy Group), Matt Schroeder (Fehr Graham), Maria Powell (Midwest Environmental Justice Organization), Jeff B. (Xcel Energy)

Meeting Notes:

1. Welcome and Introductions.

Staff provided background on rule development meetings, stating that the purpose of holding the 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 the rule development meetings. The timing of the public hearings and the other steps of the rulemaking process is available on the NR 700 Rule Changes web page.

Staff and guests introduced themselves. DNR staff member Molly Schmidt stated that, to accommodate for the schedules of the presenters, the group would begin with item 7 on the agenda, and then go back to item 2 and proceed down the list in order.

7. Second draft of rules relating to notification and closure.

DNR staff member Jenna Soyer presented an overview of the second draft. An attendee stated that in the part of the rule relating to notifications, the rule referenced a form “provided by the department” and that the language of the rule may be interpreted to mean that the form itself is incorporated into the rule by reference and therefore can only be changed through future rule revisions. Staff discussed various uses of incorporation by reference in code, stating that the incorporated material would be interpreted to be the version of the referenced material available on the date that the rules become effective, unless a different version is explicitly referenced. An attendee stated that the length of the rules process caused a lag time between updates to external standards and the version that is referenced in rules – meaning that consultants could be held to multiple standards.

An attendee commented that changes at NR 726.09 (1) may not be necessary, since electronic copies are usually legible. Staff replied that scanned images had been difficult to read in some cases.

An attendee asked whether language regarding sediment-related requirements in NR 726.09 (2) for closure could be clarified. He asked if an RP would not be able to get closure until the fish consumption advisories were

no longer in place? Staff explained that the intent had been to allow closure when a downward trend is established, and that advice on how to improve the language would be welcome. An attendee asked whether the timeframe would be length if it depended on fish life cycles and respective sampling. Staff replied that it would depend on the species and that they would defer to DNR fish biologists on a specific answer but had thought that it was relatively quick, but staff would also welcome language suggestions.

An attendee stated that changes at NR 726.09 (3) regarding notification may benefit from reviewing whether “received” should be replaced with “delivered” such that those sending notification can document that they’ve met the requirement in situations like when a property owner doesn’t live at the property.

At attendee stated that the data summary table in s. NR 726.11 (6) excluded sediment. Staff replied that this omission may either be an accidental omission, or the change may have been included with other sediment-related rules that were discussed at an earlier meeting.

2. First draft of proposed rule revisions relating to 2015 Wis. Act 204 changes and the definition of “continuing obligations”.

DNR staff member Molly Schmidt presented an overview of the first draft.

3. First draft of rule revisions relating to 2015 Wis. Act 204 changes and continuing obligations for interim actions.

DNR staff member Michael Prager presented an overview of the first draft.

4. First draft of rule revisions 2015 Wis. Act 204 and the rights and responsibilities of owners and occupants at sites with residual contamination.

DNR staff member Michael Prager presented an overview of the first draft. An attendee stated that the draft rules could clarify the process for a property owner to submit an agreement regarding continuing obligations at a site, since the responsible party would otherwise be submitting the closure paperwork; however, the property owner, not the responsible party, would benefit from proper receipt of the agreement for recording on the database.

5. Second draft of proposed rule changes relating to emerging contaminants.

DNR staff member Molly Schmidt presented an overview of the second draft. An attendee asked staff what the basis had been for including references to ASTM standards for Phase I and Phase II environmental assessments. Staff and attendees discussed the benefits and disadvantages of having the ASTM standard become part of the rules. An attendee added that that, while ASTM Phase I standards are followed in practice, ASTM Phase II standards were less frequently adhered to. An attendee stated that the consulting industry is usually able to adapt to new standards in three months, whereas standards that are updated by administrative rule would take much longer. Staff stated that the state program is required by a cooperative agreement to use the most recent federal standards. Staff added that the proposed rule states that ASTM standards need to be followed at a minimum and that more work may be needed, including evaluating potential for any substance that would be a hazardous substance under WI law. Also, staff stated that the standards are recommended in a note in the existing code and the proposal is to include them in the rule because of a concern regarding the enforcement of the standards if they were not stated in the rule.

An attendee suggested redefining a “Phase I environmental assessment” as “an assessment that is approved by the department”. Another attendee suggested listing the major elements of the Phase I in the rule.

An attendee stated that the draft rules included many repeating references to site specific standards. As a drafting approach, staff could consider adding a new part that would apply to all media, rather than repeating the phrase where each media is listed. Also, staff should consider clarifying the language, especially for groundwater, such that the site-specific standards are only used when there are not standards in NR 140; the proposed language may allow someone to successfully argue for the application of site-specific standards when there is an existing standard available.

6. Second draft of proposed rule revisions relating to remedy selection (Wis. Admin. Code ch. NR 722).

DNR staff member Molly Schmidt presented an overview of the second draft.

8. Conclude and Adjourn.

DNR staff announced that the next Rule Development Meeting would be held on January 9, 2020, in Madison. Staff would be presenting the following items for comment:

- A second draft of proposed rule revisions relating to timelines in the NR 700 series;
- A second draft of proposed rule revisions relating to fees under ch. NR 749;
- A second draft of proposed rule revisions relating to remedial action confirmation samples;
- A second draft of proposed rule revisions relating to 2015 Wis. Act 204 changes and the definition of “continuing obligation”;
- A second draft of proposed rule revisions relating to 2015 Wis. Act 204 changes and continuing obligations for interim actions; and
- A second draft of proposed rule revisions relating to 2015 Wis. Act 204 changes and the rights and responsibilities of owners and occupants at sites with residual contamination.