

**Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item**

SUBJECT:

Request that the Board adopt Emergency Board Order RR-11-17(E), proposed rules affecting chapters NR 700 to 754 and creating chapters NR 756 and 758 related to financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments.

FOR: May 2020 Board meeting

PRESENTER'S NAME AND TITLE: Jodie Peotter, Brownfields, Outreach and Policy Section Chief

SUMMARY:

The Remediation and Redevelopment program is proposing revisions to chs. NR 700 to 754, Wis. Adm. Code, as well as the creation of chs. NR 756 and 758. The purpose of these revisions is to provide procedures for new requirements and statutory changes under 2015 Wisconsin Act 204 ("Act 204"). The department is not required to provide evidence that promulgating this emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for this rule, under Act 204, s. 36.

Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Act 204 created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, the department may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control or for the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 created the opportunity for persons to obtain the Voluntary Party Liability Exemption (VPLE) at sites with contaminated sediments, and imposed insurance and financial assurance requirements on contaminated sediment sites enrolled in the VPLE program. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

Proposed administrative rule revisions establish consistency with statutory changes and include the creation of ch. NR 756 to provide clarity, guidance, forms, and procedures for changes relating to financial responsibility for engineering controls and for addressing contamination if a structural impediment is removed; and the creation of ch. NR 758 to provide clarity, guidance, forms, and procedures for changes relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program, including those that receive partial certificates of closure.

The rule is not anticipated to have an economic impact on small businesses.

The Board last acted on this rule at the January 2019 meeting, approving the scope statement.

RECOMMENDATION: That the Board adopt Emergency Board Order RR-11-17(E).

LIST OF ATTACHED MATERIALS (check all that are applicable):

- | | |
|---|---|
| <input checked="" type="checkbox"/> Background memo | <input type="checkbox"/> Attachments to background memo |
| <input checked="" type="checkbox"/> Fiscal estimate and economic impact analysis (EIA) form | <input checked="" type="checkbox"/> Board order/rule |
| <input type="checkbox"/> Response summary | <input type="checkbox"/> (insert document name) |

Approved by	Signature	Date
Christine Haag, Remediation & Redevelopment Program Director	Christine Haag Remote Approval	4/16/20
Darsi J. Foss, Environmental Management Division Administrator	Bart Sponseller for Darsi J. Foss Remote Approval	4/16/20
Preston D. Cole, Secretary	 by Beth Bier	5/11/20

CORRESPONDENCE/MEMORANDUM

DATE: April 20, 2020

TO: All Members of the Natural Resources Board

FROM: Preston D. Cole, Secretary

SUBJECT: Background memo on Board Order RR-11-17(E), proposed rules affecting chapters NR 700 to 754 and creating chapters NR 756 and 758 related to financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments.

1. Subject of Proposed Rule:

Financial responsibility for engineering controls for contaminated sediment remediation and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments.

2. Background:

The Remediation and Redevelopment program is proposing revisions to chs. NR 700 to 754, Wis. Adm. Code, as well as the creation of chs. NR 756 and 758. The purpose of these revisions is to provide procedures for new requirements and statutory changes under 2015 Wisconsin Act 204 ("Act 204").

The department is not required to provide evidence that promulgating this emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for this rule, under Act 204, s. 36.

A corresponding permanent rule is under development through the permanent rulemaking process.

3. Why is the rule being proposed?

Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Act 204 created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, the department may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control or for the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 created the opportunity for persons to obtain the Voluntary Party Liability Exemption (VPLE) at sites with contaminated sediments, and imposed insurance and financial assurance requirements on contaminated sediment sites enrolled in the VPLE program. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

Proposed administrative rule revisions establish consistency with statutory changes and include the creation of ch. NR 756 to provide clarity, guidance, forms, and procedures for changes relating to financial responsibility for engineering controls and for addressing contamination if a structural impediment is removed; and the creation of ch. NR 758 to provide clarity, guidance, forms, and procedures for changes relating to environmental insurance and financial assurance requirements for

contaminated sediment sites in the VPLE program, including those that receive partial certificates of completion.

4. Summary of the rule:

The proposed ch. NR 756 creates consistency with statutory changes and provides clarity, direction, and procedures for changes relating to financial responsibility for engineering controls at contaminated sediment sites and for addressing contamination when a structural impediment is removed. The proposed rule includes added language in chapters NR 708, 722, and 726 to explain the applicability of NR 756 requirements, and the creation of ch. NR 756, which includes:

- The purpose, applicability, and definitions for the chapter in ss. NR 756.01 to 756.03.
- The primary requirements for the plan and compliance schedule in s. NR 756.04 (2) (a), including a plan and compliance schedule that contains scheduled actions, an engineering analysis, and 5-year inspection criteria.
- Financial assurance requirements under s. NR 756.04 (2) (b) for actions listed within the plan and compliance schedule and for events that may occur and affect the completion of the goals of the plan and compliance schedule.
- Length of time requirements, submittal requirements, authorized department responses, fees, and inspections under s. NR 756.04 (3) to (6).
- Continuing obligation responsibilities and department access authority at affected sediment sites under s. NR 756.05.
- Allowable methods of providing proof of financial responsibility under s. NR 756.06
- Procedures for estimating financial assurance costs and calculating the financial assurance amount under ss. NR 756.07 and 756.08.
- Policies and procedures for changing financial assurance methods and submitting annual adjustments under ss. NR 756.09 and 756.10.
- Policies and procedures for default on commitments under the plan and compliance schedule, for bankruptcy, compliance, and the release of funds under ss. NR 756.11 to 756.14.

The proposed ch. NR 758 creates consistency with statutory changes and provides clarity, direction, and procedures for changes relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program, including those receiving partial certificates of completion. The chapter includes:

- Purpose and applicability provisions and definitions for the chapter in ss. NR 758.01 to 758.05.
- Insurance requirements for either the use of a state insurance contract or an individual policy under s. NR 758.07.
- Procedures and policies for calculating the amount of the insurance coverage, the length of insurance, the amount of the deductible, and proof of insurance under ss. NR 758.09 to 758.12.
- Options for using financial assurance methods other than insurance under s. NR 758.13.
- Procedures and criteria for waiver of the insurance requirement under s. NR 758.15.
- Conditions for the issuance of a VPLE certificate of completion under s. NR 758.19 and the policy for failure to satisfy the conditions under s. NR 758.21.
- Policies and procedures for parties seeking a certificate of completion for partial cleanup of a sediment site under ss. NR 758.23 and 758.24.

5. **How does this proposal affect existing policy?**
This proposal will provide the procedures and methods that responsible parties and the department rely on to meet the existing statutory policies established under 2015 Wis. Act 204.


6. **Has Board dealt with these issues before?**
Yes. The Board approved the Statement of Scope for RR-11-17(E) at its January 2019 meeting.

7. **Who will be impacted by the proposed rule? How?**
Potentially affected parties include businesses, local governments, utilities, and developers and others that are responsible under Wis. Stat. s. 292.11 (3) for the investigation and cleanup of contamination, and parties that voluntarily elect to pursue investigation and cleanup of contamination, and environmental consultants that provide professional assistance to these entities.

8. **Soliciting public input on economic impact synopsis:**
Comments on the economic impact of the corresponding permanent rule will be solicited pursuant to s. 227.137, Stats., prior to finalizing the economic impact analysis for the promulgation of the permanent rule.

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

Drafters: Molly Schmidt and Michael Prager




Overview

- Proposed emergency rule adoption
- Two rule chapters
- 2015 Wis. Act 204 ("Act 204")


AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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Act 204

- Recommendations from Brownfields Study Group, in the 2015 Report
- Amendments to ch. 292, Wis. Stat.
- Emergency rule for two financial assurance requirements



AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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Chapter NR 756

- Contaminated sediment sites with engineering controls
- *Act 204* - plan and proof for:
 - Maintenance of engineering control
 - Investigation and remediation following an impediment removal
- *Ch. NR 756* - policies and procedures

AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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Chapter NR 758

- Voluntary Party Liability Exemption for sediment
- *Act 204* - insurance for full cleanup, financial assurance for partial cleanup
- *Ch. NR 758* - policies and procedures

AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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Drafting

- Permanent rules address Act 204 and other changes
- Drafted together
- Public rule development meetings held Feb. 2019 to Jan. 2020

AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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Input

- *Drafting* - stakeholders participated in four public rule development meetings and a subgroup meeting
- *Economic impacts* - input requested as part of permanent rule
- *Public hearings* - estimated for fall 2020

AGENDA ITEM 4.B. Jodie Peotter, Brownfields, Outreach and Policy Section Chief

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ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis <input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected	2. Date 4/6/2020
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3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable)
NR 700-754 – Investigation and Remediation of Environmental Contamination; RR-11-17(E)

4. Subject
Financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects.

5. Fund Sources Affected <input type="checkbox"/> GPR <input checked="" type="checkbox"/> FED <input checked="" type="checkbox"/> PRO <input type="checkbox"/> PRS <input checked="" type="checkbox"/> SEG <input type="checkbox"/> SEG-S	6. Chapter 20, Stats. Appropriations Affected Wis. Stat. s. 20.370 (4) (dh) and (du)
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7. Fiscal Effect of Implementing the Rule

<input type="checkbox"/> No Fiscal Effect	<input checked="" type="checkbox"/> Increase Existing Revenues	<input checked="" type="checkbox"/> Increase Costs	<input type="checkbox"/> Decrease Costs
<input type="checkbox"/> Indeterminate	<input type="checkbox"/> Decrease Existing Revenues	<input checked="" type="checkbox"/> Could Absorb Within Agency's Budget	

8. The rule will impact all of the following

<input type="checkbox"/> State's Economy	<input checked="" type="checkbox"/> Specific Businesses/Sectors
<input checked="" type="checkbox"/> Local Government Units	<input type="checkbox"/> Public Utility Rate Payers
	<input type="checkbox"/> Small Businesses (if checked, complete Attachment A)

9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1).
Approximately \$322,114 or less per year (Fiscal Impacts: \$54,809 and Economic Impacts: \$267,305)

10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)?

Yes No

11. Policy Problem Addressed by the Rule

The Remediation and Redevelopment program is proposing revisions to chs. NR 700 to NR 754, Wis. Adm. Code, as well as the creation of chs. NR 756 and 758. The purpose of these revisions is to provide procedures for new requirements and statutory changes under 2015 Wisconsin Act 204 ("Act 204").

Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Act 204 created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, the department may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control and the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 created the opportunity to 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 program. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

Proposed revisions create consistency with statutory changes and include the addition of ch. NR 756 to provide clarity, guidance, forms, and procedures for changes relating to financial responsibility for engineering controls and for addressing contamination if a structural impediment is removed; and the addition of ch. NR 758 to provide clarity, guidance, forms, and procedures for changes relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program, including those that receive partial certificates of closure.

12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments.

Potentially affected parties include businesses, local governments, utilities, and developers and others who are responsible under s. 292.11 (3), Stats., for the investigation and cleanup of contamination, and parties that voluntarily elect to pursue investigation and cleanup of contamination, and environmental consultants that provide professional assistance to these entities. All entities that may be affected will be contacted for comments during the solicitation period of the permanent rule.

13. Identify the Local Governmental Units that Participated in the Development of this EIA.

All local government units that may be affected will be given the opportunity to participate in the development of the EIA during the solicitation period of the permanent rule. The local government units that will be consulted as part of the solicitation include those that have expressed interest in the Brownfields Study Group and those that may be contacted through county and municipal associations such as the League of Wisconsin Municipalities.

14. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

The total Impact of this proposed rule (fiscal impacts of implementation and economic impacts) is estimated to range between \$101,809 to \$322,114, annually.

Fiscal Impacts on the WDNR Remediation and Redevelopment Program:

The fiscal impact of this proposed rule is estimated to be \$54,809 per year. The rule will have a minimal fiscal impact on the DNR Remediation and Redevelopment program. The financial responsibility requirements related to sediment (chs. NR 756 and NR 758) would affect few sites (1 or 2 every two years) and the workload for DNR technical staff would be covered by fee-based revenues. The department anticipate that most of the cost of additional DNR technical staff time required under this proposed rule can be absorbed within the agency's staff workload.

The cost of the additional workload for DNR technical staff is expected to be mostly or completely covered by fee-based program revenues. Staff costs in both cases are calculated as the median hourly rate for an advanced hydrogeologist, including fringe and indirect benefits, at a total hourly rate of \$67.94. For ch. NR 756, the DNR staff costs for reviewing the required plan and compliance schedule at 15 hours is nominally more than the current \$700 review fee. We anticipate that this additional cost could absorbed within the agency's budget.

For ch. NR 758, the approximate number of technical oversight hours for a complex VPLE site is around 100, which would generate \$10,500 in fee revenue. The hourly DNR staff costs for reviewing required reports are covered by the current hourly VPLE review fee rate of \$105. This is an existing revenue source for the agency, and we do not anticipate any changes to occur under this proposed rule.

While the cost of DNR technical staff time can be absorbed, the financial assurance requirements will necessitate a staff member with specialized background and expertise. The department estimates that the cost of hiring an additional staff to administer financial assurance requirements would incur an estimated cost of \$54,809 per year (0.5 FTE Natural Resource Program Coordinator, including salary, fringe benefits, and indirect costs of the position).

Economic Impacts on Private Sector Businesses, Local Governments and Public Entities

The economic impact of this rule on the private sector businesses, local governments units and public entities is estimated to be \$267,305. Details of this estimate are provided below.

Contaminated sediment sites with engineering controls: Act 204 requires parties that are responsible for addressing sediment contamination, and that use an engineering control to address this contamination, to maintain and monitor the engineering control and to demonstrate proof of financial responsibility to perform the maintenance and monitoring.

Act 204 also requires sites with a structural impediment that prevents full remediation of contaminated sediments to meet these requirements with regard to investigation and remediation following the removal of the impediment. The proposed rule, ch. NR 756, describes the procedures and options for meeting these requirements. Costs associated with the rule range from \$42,500 to \$257,225 and include the following:

- *Planning and inspection.* The costs of completing the plan and compliance schedule and 5-year inspections for maintenance of an engineering control and investigation and remediation following the removal of a structural impediment. Initial costs of completing the plan and compliance schedule are estimated to range between \$20,000 and \$30,000 per year; 5-year inspection costs are anticipated to range between \$42,500 and \$57,000 per year. The estimates for initial costs assume the completion of the plan and compliance schedule and the completion of an engineering analysis by a licensed professional engineer. The estimates for 5-year inspection costs assume the completion of an engineering analysis, along with annual engineering control monitoring, annual surface water and fish sampling and monitoring, and wetland monitoring under federal and state permit requirements.
- *Financial assurance.* The fees and costs for financial assurance requirements for planned actions listed within the plan and compliance schedule and for potential events that may occur to affect the completion of the goals of the plan and compliance schedule. Assuming that all requirements are applied to each site, the costs of financial assurance are anticipated to range between no cost and up to \$257,225 per year. This estimate assumes a 30-year proof period for all commitments, a one-acre area for the investigation and remediation following an impediment removal, and a 5-acre area for investigation, dredge, and disposal of sediments following the failure of an engineering control. The upper estimate assumes a method of financial assurance having an annual cost of 3%.

Items that may have an indeterminate cost include the opportunity cost for funds that are set aside for financial assurance purposes, which will vary according to the nature of the responsible party's business and the selected financial assurance method, and the annual resubmission of financial assurance to adjust for inflation.

The number of contaminated sediment sites is estimated to be fewer than 50 and these sites are at various stages of investigation and cleanup and take many years to address. For the purpose of this estimate, the department estimates that one engineering control approval is granted every two years. The rule provides a range of financial assurance options to allow maximum flexibility to parties (e.g., a bond, a letter of credit, an escrow account). Costs can vary based on the cost to maintain and monitor the engineering control, for example, a surety bond or letter of credit can cost between 0.5% to 3% of the bonded or letter of credit amount; use of the department trust fund or escrow would range from 0 to 3% of the amount that is set aside.

Contaminated sediment sites in VPLE: Act 204 requires persons obtaining a VPLE at a property with contaminated sediment to maintain insurance for the cost of any further remediation that may be necessary. The statutory change includes allowing the department to waive this requirement or accept forms of financial responsibility other than insurance. Act 204 also requires financial assurance for remaining contamination at contaminated sediment sites for which a party is seeking a VPLE *partial cleanup approval* and does not provide for waiver of this requirement. The proposed rule, ch. NR 758, sets forth the procedures, criteria, and options for these sets of requirements. The VPLE program is optional and not required by any party and any costs would be evaluated on a case by case basis by the party to consider against the VPLE benefits. Based on the number of potential sites and estimated premiums provided by the insurance broker for the State of Wisconsin, the costs associated with the rule range from \$4,500 to \$10,080 annually.

The department approves closure for approximately one contaminated sediment site per year; the department estimates that one business, local government, or individual may choose to enter the VPLE program every other year for properties with contaminated sediment. The rule requires insurance and the premiums for five years of insurance are estimated to be between \$45,000 and \$100,800. Therefore, the annual cost for insurance for each VPLE sediment site would be approximately \$9,000 to \$20,160. The costs of alternative 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, however, insurance is expected to be less costly than other types of financial assurance. A waiver would incur no costs.

The estimated cost of financial assurance for VPLE partial cleanup sites is indeterminate. Very few or none of the parties pursuing VPLE for sediment sites are expected to pursue this option. Of all the expected VPLE sediment sites (one every other year) a small fraction may consider this option. Less than 5% of all VPLE sites, including non-sediment sites, have requested a partial certificate of completion (about six sites in the history of the program). Also, since VPLE is optional, a party would only pursue this option if it was financially advantageous.

15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

The benefits of implementing the rule include:

- Implementation of 2015 Wis. Act 204 regulatory requirements and consistency between ch. 292, Stats., and the NR 700 rule series.
- Increased waterfront brownfields cleanup and redevelopment from regulatory certainty and option to obtain Voluntary Party Liability Exemption (VPLE) for sediment cleanups.
- Increased certainty on long-term liability for companies responsible for sediment cleanups by providing the VPLE option.

Alternatives to implementing the rule include not implementing the rule, which would result in the loss of these benefits.

16. Long Range Implications of Implementing the Rule

These rule revisions implement changes to statute made by 2015 Wis. Act 204, which has long-term implications for the risks and resultant costs of contaminated sediment cleanups. Act 204 allows the department to require responsible parties to secure financial assurance for engineering controls at contaminated sediment sites. This financial assurance provides for the long-term maintenance of the engineering control remedy, which in turn protects the responsible party from costs of failure of the engineering control, or alternatively if the responsible party is unable to pay, protects the state against cleanup costs. Act 204 also extended the VPLE program to contaminated sediment sites and provides that the department may require financial assurance at these sites. While the financial assurance provided for a VPLE contaminated sediment site protects against a portion of the risk of further cleanup after a VPLE exemption is awarded, there is a possibility that the financial assurance required may not be sufficient to cover all costs.

17. Compare With Approaches Being Used by Federal Government

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 C.F.R., Part 264, Subpart H, and Part 265, Subpart H.
- RCRA has rules that require financial assurance for Corrective Action sites that are found in 40 C.F.R., s. 264.101 (b) and (c).

18. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

There are no regulations at this time 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 the costs of monitoring, operation and maintenance, oversight, and other costs determined by the Michigan Department of Environment, Great Lakes, and Energy 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 or rules governing financial responsibility requirements for solid waste facility, hazardous waste facility, or corrective action sites or facilities as part of their respective delegations of authority to implement RCRA at the state level.

19. Contact Name	20. Contact Phone Number
Molly Schmidt	(608) 267-7500

This document can be made available in alternate formats to individuals with disabilities upon request.

4/6/2020

The statement of scope for this rule, SS# 107-18, was approved by the Governor on September 28, 2018, published in Register No. 754A4 on October 22, 2018, and approved by the Natural Resources Board on January 23, 2019. This rule was approved by the Governor on [insert date].

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board adopts an order to **amend** NR 150.20 (2) (a) 7e. and 7m., 440.75 (1) (b), 670.079 (2) (e), 700.01, 700.02 (1), (2), (Note 2), (Note 3), and (2m), 700.03 (intro.), (6) and (60), 700.05 (1) and (2), 700.13 (1) and (1m), 706.05 (2), 706.07 (2) (b) 1., 708.02 (2) (Note), 708.09 (3) and (Note), 712.02 (2) and (3), 712.05 (1), 712.07 (1), 712.09 (2), 712.11 (1) (f) and (2) (b), 714.01, 716.02 (2) (Note 2), 716.13 (11), 718.01, 718.02 (1) (a) (intro.) and (b) 1., 718.12 (1) (b), 718.15, 722.02 (2) and (3) (Note), 722.09 (4) (b) 3. (Note), 724.02 (2) (Note 2), 724.13 (1) (a), 726.05 (1) and (6) (e), 726.13 (1) (a) 2. and (2) (b), 726.15 (2) (f) and (m), 727.13 (3) (b), 728.01, 728.05, 750.05 (2) (c), 750.07 (1) (a); and to **create** NR 708.11 (4m), 708.17 (2) (am), 722.13 (2) (e) 11., 722.15 (2) (e) 1m., 724.09 (13), 724.18, 726.11 (2m), 726.15 (2) (dm), 750.09 (6), ch. 756 and ch. 758, relating to financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments.

RR-11-17 (E)

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted:

Wis. Stat. ch. 292

2. Statutory Authority:

Wis. Stat. ss. 292.12 (2) (d) (2) and 292.15 (2) (af) (3m); Section 36 of 2015 Wis. Act 204; and Wis. Stat. ss. 292.12 (2) (c), 292.31 (2), and 227.11 (2)

3. Explanation of Agency Authority:

Wis. Stat. ss. 292.12 (2) (d) (2) and 292.15 (2) (af) (3m) authorize the creation of rules regarding sediment financial responsibility. Nonstatutory language within Section 36 of 2015 Wis. Act 204 requires the department to promulgate these rules using the emergency rulemaking process. Wis. Stat. s. 292.12 (2) (c) requires the department to promulgate rules to identify limitations or other conditions related to property, to ensure that conditions at the site remain protective of public health, safety, and welfare and the environment, and, as applicable, to promote economic development. Wis. Stat. s. 292.31 (2) requires the department to promulgate rules relating to investigation and remedial action for sites or facilities and other properties at which the air, land, or waters of the state have been affected by the discharge of a hazardous substance or other environmental pollution. Wis. Stat. s. 227.11 (2) provides the department with authority to promulgate rules that are necessary to perpetuate the purpose of the statute.

4. Related Statutes or Rules:

Wis. Stat. ch. 292

5. Plain Language Analysis:

The Remediation and Redevelopment program is proposing revisions to chs. NR 700 to NR 754, Wis. Adm. Code, as well as the creation of chs. NR 756 and 758. The purpose of these revisions is to provide procedures for new requirements and statutory changes under 2015 Wisconsin Act 204 (“Act 204”).

Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Act 204 created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, the department may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control or for the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 created the opportunity for persons to obtain the Voluntary Party Liability Exemption (VPLE) at sites with contaminated sediments, and imposed insurance and financial assurance requirements on contaminated sediment sites enrolled in the VPLE program. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

The proposed ch. NR 756 creates consistency with statutory changes and provides clarity, guidance, forms, and procedures for changes relating to financial responsibility for engineering controls at contaminated sediment sites and for addressing contamination when a structural impediment is removed. The proposed rule includes added language in chapters NR 708, 722, 724, and 726 to explain the applicability of NR 756 requirements, and the creation of ch. NR 756, which includes:

- The purpose, applicability, and definitions for the chapter in ss. NR 756.01 to 756.03.
- The primary requirements for the plan and compliance schedule in s. NR 756.04 (2) (a), including a plan and compliance schedule that contains scheduled actions, an engineering analysis, and 5-year inspection criteria.
- Financial assurance requirements under s. NR 756.04 (2) (b) for actions listed within the plan and compliance schedule and for events that may occur and affect the completion of the goals of the plan and compliance schedule or the protectiveness of the engineering control remedy.
- Length of time requirements, submittal requirements, authorized department responses, fees, and inspections under s. NR 756.04 (3) to (6).
- Continuing obligation responsibilities and department access authority at affected sediment sites under s. NR 756.05.
- Allowable methods of providing proof of financial responsibility under s. NR 756.06
- Procedures for estimating financial assurance costs and calculating the financial assurance amount under ss. NR 756.07 and 756.08.
- Policies and procedures for changing financial assurance methods and submitting annual adjustments under ss. NR 756.09 and 756.10.
- Policies and procedures for default on commitments under the plan and compliance schedule, for bankruptcy, compliance, and the release of funds under ss. NR 756.11 to 756.14.

The proposed ch. NR 758 provides guidance, forms, and procedures for changes relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program, including those receiving partial certificates of completion. The chapter includes:

- Purpose and applicability provisions and definitions for the chapter in ss. NR 758.01 to 758.05.
- Insurance requirements for either the use of a state insurance contract or an individual policy under s. NR 758.07.
- Procedures and policies for calculating the amount of the insurance coverage, the length of insurance, the amount of the deductible, and proof of insurance under ss. NR 758.09 to 758.12.
- Options for using financial assurance methods other than insurance under s. NR 758.13.

- Procedures and criteria for waiver of the insurance requirement under s. NR 758.15.
- Conditions for the issuance of a VPLE certificate of completion under s. NR 758.19 and the policy for failure to satisfy the conditions under s. NR 758.21.
- Policies and procedures for parties seeking a certificate of completion for partial cleanup of a sediment site under ss. NR 758.23 and 758.24.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:

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 C.F.R., Part 264, Subpart H, and Part 265, Subpart H.
- RCRA has rules that require financial assurance for Corrective Action sites that are found in 40 C.F.R., s. 264.101 (b) and (c).

7. Comparison with Similar Rules in Adjacent States:

There are no regulations at this time 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 proposed post-closure agreements that are submitted as part of a “no further action report” following a remedial action. The financial assurance covers the costs of monitoring, operation and maintenance, oversight, and other costs determined by the Michigan Department of Environment, Great Lakes, and Energy 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 or rules governing financial responsibility requirements for solid waste facility, hazardous waste facility, or corrective action sites or facilities as part of their respective delegations of authority to implement RCRA at the state level.

8. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:

The policies, procedures, and methods for meeting financial assurance requirements under ch. NR 756, relating to financial assurance for sites with engineering controls, are based, in part, on the policies and procedures for financial assurance requirements for solid waste facilities under Wis. Stat. s. 289.41 and ch. NR 520, Wis. Admin. Code. These solid waste regulations are derived from federal requirements and have received positive evaluations from both internal staff and external customers that have experience in administering and meeting these requirements.

9. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:

The program requested estimates from various consulting firms regarding rule revisions impacting the costs of consulting services needed to meet the new requirements. This data was supplemented with Bureau of Remediation and Redevelopment Tracking System (BRRTS) data and department staff expertise.

10. Effect on Small Business (initial regulatory flexibility analysis):

Rule revisions are not anticipated to effect small business.

11. Agency Contact Persons:

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Molly Schmidt – RR/5
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Madison, WI 53703
(608) 267-7500
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12. Place where comments are to be submitted and deadline for submission:

Written comments may be submitted at the public hearings, by regular mail, or by email to:

Molly Schmidt – RR/5
Department of Natural Resources
101 S. Webster Street
Madison, WI 53703
(608) 267-7500
MollyE.Schmidt@wisconsin.gov

Written comments may also be submitted to the Department at

Hearing dates and the comment submission deadline are to be determined.

SECTION 1. NR 150.20 (2) (a) 7e. and 7m. are amended to read:

NR 150.20 (2) (a) 7e. Funding decisions made pursuant to ch. 292, Stats., and chs. NR 700 to ~~754~~ 799.

7m. Issuance of regulatory approvals, liability clarification letters, exemptions, and technical assistance under ch. 292, Stats., and chs. NR 700 to ~~754~~ 799.

SECTION 2. NR 440.75 (1) (b) is amended to read:

NR 440.75 (1) (b) Activities required by or conducted pursuant to a remedial action under the Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 to 9675); the Resource, Conservation and Recovery Act (42 USC 6901 to 6992k) or chs. NR 700 to ~~750~~ 799 are not considered construction, reconstruction or modification for purposes of this section.

SECTION 3. NR 670.079 (2) (e) is amended to read:

NR 670.079 (2) (e) May require that the person to whom a remediation variance is issued comply with any appropriate requirements of chs. NR 660 to 679, and chs. NR 700 to ~~750~~ 799, as a condition of issuance, in order to protect human health or the environment.

SECTION 4. NR 700.01 is amended to read:

NR 700.01 Purpose. (1) The purpose of this chapter is to provide definitions of terms used in chs. NR 700 to ~~754~~ 799, to incorporate by reference specified regulations or materials, and to grant confidential status for records, reports and other information furnished to or obtained by the department for use in the administration of chs. NR 700 to ~~754~~ 799.

(2) The purpose of chs. NR 700 to ~~754~~ 799 is to establish consistent, uniform standards and procedures that allow for site-specific flexibility, pertaining to the identification, investigation and remediation of sites and facilities ~~which~~ that are subject to regulation under chs. 289 and 292, Stats. The department intends that responsible parties and other interested persons should be able to efficiently move through the process set forth in chs. NR 700 to ~~754~~ 799 with minimal department oversight, except where the department has specified that more in-depth oversight is needed such as under s. 292.15 or s. 292.65, Stats., or through an enforceable order or agreement. These rules are adopted ~~pursuant to~~ under ch. 160, Stats., ss. 227.11 (2), 281.19 (1), 287.03 (1) (a), 289.05 (1), 289.06, 289.31 (7), 289.43 (8), 291.05 (6), Stats., and ch. 292, Stats.

SECTION 5. NR 700.02 (1), (2), (Note 2), (Note 3), and (2m) are amended to read:

NR 700.02 Applicability. (1) This chapter and chs. NR 702, 704, and 708 to ~~754~~ 799 apply to actions taken by the department under the authority of chs. 289 and 292, Stats.

(2) This chapter and chs. NR 706 to ~~754~~ 799 apply to actions taken by responsible parties at sites, facilities or portions of a site or facility that are subject to regulation under chs. 289 and 292, Stats., regardless of whether there is direct involvement or oversight by the department.

Note: Persons who are not responsible parties and who voluntarily take a response action at a site or facility that is subject to regulation under ch. 289, Stats., or s. 292.31 or 292.11, Stats., are not required to comply with the standards and procedures ~~in~~ under chs. NR 700 to ~~754~~ 799 unless the person is seeking the liability exemption under s. 292.15, Stats. However, the department may not consider case closure under ch. NR 726 for the site or facility until the applicable rules ~~in~~ under chs. NR 700 to ~~754~~ 799 have been complied with, and a person who did not originally fall within the definition of a responsible party may become a responsible party if the actions taken by that person cause or worsen the discharge of a hazardous substance or if the person takes possession or control of the site or facility.

Note: Persons who wish to conduct response actions that will be consistent with the requirements of CERCLA and the National Contingency Plan (NCP) may request that the

department enter into a contract with them pursuant to under s. 292.31, Stats., or a negotiated agreement under s. 292.11 (7) (d), Stats. However, a CERCLA-quality response action will likely require compliance with additional requirements beyond those contained in under chs. NR 700 to 754 799 in order to be consistent with CERCLA and the NCP.

(2m) This chapter and chs. NR 706 to 728, 750, and 754, and 758 apply to actions taken by persons who are seeking a liability exemption under s. 292.15, Stats.

SECTION 6. NR 700.03 (intro.), (6) and (60) are amended to read:

NR 700.03 Definitions. The following definitions apply to chs. NR 700 to 754 799:

(6) “Consultant” means a person or business under contract to perform a response action taken under, or subject to regulation under, chs. NR 702 to 754 799.

(60) “Submittal” means any document, report, plan, set of specifications, engineering design, or scientific evaluation of site data that is prepared to satisfy the requirements of chs. NR 700 to 754 799.

SECTION 7. NR 700.05 (1) and (2) are amended to read:

NR 700.05 (1) Except as provided under sub. (2), any record, report or other information furnished to, or obtained by, the department in the administration of chs. NR 700 to 754 799 is a public record subject to the provisions of ss. 19.21, 19.31 to 19.39, Stats., and s. NR 2.195.

(2) If confidential status is sought for any record, report or other information furnished to or obtained by the department under chs. NR 700 to 754 799, the standards and procedures in under s. NR 2.19 are applicable to all sites and facilities, and the standards and procedures in under s. 289.09 (2), Stats., are applicable to the owners and operators of solid waste facilities.

SECTION 8. NR 700.13 (1) and (1m) are amended to read:

NR 700.13 (1) GENERAL REQUIREMENTS. All sampling, preservation, extraction, and analytical methods used for compliance with chs. NR 700 to 754 799 shall be done according to the requirements in under s. NR 716.13.

(1m) USE OF GASOLINE RANGE ORGANICS/~~2~~3 DIESEL RANGE ORGANICS ANALYSIS. Soil or groundwater analyses for gasoline range organics or diesel range organics conducted for screening purposes shall be completed in accordance with the “Modified GRO, Method for Determining Gasoline Range Organics” and the “Modified DRO, Method for Determining Diesel Range Organics.” For purposes of this section, the term “screening purposes” means sampling conducted during site investigations, environmental assessments or other activities ~~in compliance with~~ under chs. NR 700 to NR ~~754~~ 799 for purposes of determining whether a discharge has occurred or to estimate the degree and extent of contamination.

SECTION 9. NR 706.05 (2) is amended to read:

NR 706.05 **(2)** CONTAINMENT, CLEANUP, DISPOSAL, AND RESTORATION. Responsible parties shall comply with the requirements of chs. NR 700 to ~~754~~ 799 for response actions to discharges of hazardous substances.

SECTION 10. NR 706.07 (2) (b) 1. is amended to read:

NR 706.07 **(2) (b) 1.** The discharged substance has not evaporated or has not been cleaned up in compliance with the requirements of chs. NR 700 to ~~754~~ 799.

SECTION 11. NR 708.02 (2) (Note) is amended to read:

NR 708.02 **(2)** Note: Persons who wish to conduct response actions that will be consistent with the requirements of CERCLA and the NCP may request that the department enter into a contract with them pursuant to s. 292.31, Stats., or a negotiated agreement under s. 292.11 (9) (e) 4., Stats. However, a CERCLA-quality response action will likely require compliance with additional requirements beyond those contained ~~in~~ under chs. NR 700 to ~~754~~ 799 in order to be consistent with CERCLA and the NCP.

SECTION 12. NR 708.09 (3) and (Note) are amended to read:

NR 708.09 **(3)** REOPENING A CASE. The department may require that additional response actions be conducted by responsible parties in compliance with the requirements of chs. NR 700

to ~~754~~ 799 if additional information indicates that residual contamination at a site or facility poses a threat to public health, safety, or welfare or the environment.

Note: Although the department may determine at this time that no further response action is necessary pursuant to chs. NR 700 to ~~754~~ 799, the site, facility or portion of the site or facility may be subject to the regulations and requirements of other department programs.

SECTION 13. NR 708.11 (4m) is created to read:

NR 708.11 (4m) PLAN AND COMPLIANCE SCHEDULE AND PROOF OF FINANCIAL RESPONSIBILITY. At a site where a person takes an interim or remedial action under ch. 292, Stats., and uses an engineering control to address contaminated sediment, the department may, as a condition of approving the interim action, require a plan and compliance schedule and proof of financial responsibility under ch. NR 756.

SECTION 14. NR 708.17 (2) (am) is created to read:

NR 708.17 (2) (am) Require a plan and compliance schedule and proof of financial responsibility under ch. NR 756.

SECTION 15. NR 712.02 (2) and (3) are amended to read:

NR 712.02 (2) Except as provided ~~in~~ under s. NR 712.11, this chapter applies to all sampling and field work conducted during any response action being taken to satisfy the requirements of chs. NR 700 to ~~754~~ 799, including the preparation of phase I or phase II environmental site assessments.

(3) Except as provided ~~in~~ under s. NR 712.11, this chapter applies to any person who provides engineering services or performs any scientific evaluation associated with a remedial action or any of the interim actions specified ~~in~~ under chs. NR 700 to ~~754~~ 799 for a site, facility or portion of a site or facility that is subject to regulation under ch. 292, Stats., regardless of whether there is direct involvement or oversight by the department. This chapter also applies to any person who provides engineering services or performs any scientific evaluation associated with a response action taken by a person seeking the liability exemption under s. 292.15, Stats.

SECTION 16. NR 712.05 (1) is amended to read:

NR 712.05 (1) GENERAL. All sampling, field work and development of plans for field activities for response actions being taken to satisfy the requirements of under ss. NR 708.09 to 708.15 or chs. NR 716 to ~~754~~ 799 shall be conducted by or under the supervision of a professional engineer, hydrogeologist or scientist, unless sub. (2) or an exemption in s. NR 712.11 is applicable.

SECTION 17. NR 712.07 (1) is amended to read:

NR 712.07 (1) Submittals that are prepared to satisfy the requirements of s. NR 708.11 (4) or 708.13 or chs. NR 716 to ~~754~~ 799, which require the performance of engineering services or scientific evaluations, including phase I and phase II environmental site assessments, shall be prepared by or under the supervision of a professional engineer, hydrogeologist, or scientist, except as provided in under s. NR 712.11. All phases of work necessary to obtain data, develop conclusions, recommendations and prepare submittals shall be conducted or supervised by the professional engineer, hydrogeologist, or scientist.

SECTION 18. NR 712.09 (2) is amended to read:

NR 712.09 (2) The act of signing the certification means that the professional engineer, hydrogeologist or scientist certifies that, to the best of her or his knowledge, all information contained in the submittal is correct and the submittal was prepared in accordance with all of the applicable requirements of chs. NR 708 to ~~754~~ 799. Conclusions and recommendations in the submittal shall represent the certifier's best professional opinions and judgments.

SECTION 19. NR 712.11 (1) (f) and (2) (b) are amended to read:

NR 712.11 (1) (f) Tank closure assessments performed in accordance with the requirements of ch. ATCP 93 by a site assessor certified by the department of agriculture, trade and consumer protection, and any other plans, specifications or reports required by the department of agriculture, trade and consumer protection not specifically required by under chs. NR 700 to ~~754~~ 799.

(2) (b) The department may reject any sampling results submitted under this subsection if the department determines that the samples were not taken in accordance with the requirements of this subsection and all other applicable sections of chs. NR 700 to ~~754~~ 799, or that the person taking the samples was not qualified to do so based on the statement submitted to the department under par. (a) 3. If the department rejects any sampling results, the department shall provide the responsible parties with specific reasons for the rejection in writing. The responsible parties shall hire a consultant who meets the qualifications of under s. NR 712.05 to conduct any required sampling if the department directs them to do so in writing.

SECTION 20. NR 714.01 is amended to read:

NR 714.01 Purpose. The purpose of this chapter is to identify the required public participation and notification activities for response actions undertaken pursuant to chs. NR 700 to ~~754~~ 799. Nothing in this chapter shall be construed to prevent the department or responsible parties from providing additional means for public participation and notification consistent with the provisions of this chapter. This chapter is adopted pursuant to ss. 227.11 (2) and 289.06 (1), Stats., and ch. 292, Stats.

SECTION 21. NR 716.02 (2) (Note 2) is amended to read:

NR 716.02 (2) Note: Persons who wish to conduct response actions that will be consistent with the requirements of CERCLA and the National Contingency Plan (NCP) may request that the department enter into a contract with them pursuant to s. 292.31 or a negotiated agreement under s. 292.11 (7) (d), Stats. However, a CERCLA-quality response action will likely require compliance with additional requirements beyond those contained in chs. NR 700 to ~~754~~ 799 in order to be consistent with CERCLA and the NCP.

SECTION 22. NR 716.13 (11) is amended to read:

NR 716.13 (11) Soil samples collected for analysis of volatile organic compounds for compliance with chs. NR 700 to ~~754~~ 799 shall be preserved immediately after collection to minimize volatilization of contaminants from the sample to the greatest extent possible. Preservation techniques used shall be according to the analytical method to be used. Sampling techniques shall be used that minimize volatilization from the sample. Extraction techniques

shall be according to the analytical method selected. Analytical methods used shall be suitable for the matrix, type of analyte, expected level of analyte, regulatory limit, and potential interferences in the samples to be tested.

SECTION 23. NR 718.01 is amended to read:

NR 718.01 Purpose. This chapter establishes minimum standards for the storage, transportation, treatment and disposal of contaminated soil and certain other solid wastes excavated during response actions conducted in accordance with the requirements of chs. NR 700 to ~~754~~ 799. Where responsible parties have chosen to comply with the requirements of this chapter, the responsible parties are exempt from the storage, transportation, treatment and disposal.

SECTION 24. NR 718.02 (1) (a) (intro.) and 1. and (b) 1. are amended to read:

NR 718.02 (1) (a) Contaminated soil ~~which~~ that has all of the following characteristics:

1. Is excavated as part of a response action conducted ~~pursuant to~~ under chs. NR 700 to ~~754~~ 799, at sites or facilities subject to regulation under s. 289.67, Stats., or ch. 292, Stats., or sites where remedial action is being taken by a person who is seeking the liability exemption under s. 292.15, Stats.; ~~and~~

(b) 1. Contains materials other than contaminated soil and is excavated during a response action conducted ~~pursuant to~~ under chs. NR 700 to ~~754~~ 799, at sites or facilities subject to regulation under s. 289.67, Stats., or ch. 292, Stats., or sites where remedial action is being taken by a person who is seeking the liability exemption under s. 292.15, Stats.;

SECTION 25. NR 718.12 (1) (b) is amended to read:

NR 718.12 (1) (b) The response action shall be conducted in accordance with all of the applicable requirements ~~in~~ under chs. NR 700 to ~~754~~ 799.

SECTION 26. NR 718.15 is amended to read:

NR 718.15 Management of other solid wastes. If solid waste ~~which~~ that contains waste other than contaminated soil is replaced at the site or facility from which it was excavated, as part of a response action conducted in compliance with all of the applicable requirements ~~in~~ under chs. NR 700 to ~~754~~ 799, and the department has granted prior written approval for the action, the replacement of that solid waste on the site or facility from which it was excavated is exempt from the requirements ~~of~~ under ch. 289, Stats., and chs. NR 500 to 538.

SECTION 27. NR 722.02 (2) and (3) (Note) are amended to read:

NR 722.02 (2) Unless otherwise specified elsewhere in chs. NR 700 to NR ~~754~~ 799, this chapter applies to all remedial actions taken by responsible parties at sites, facilities or portions of a site or facility that are subject to regulation under ch. 292, Stats., regardless of whether there is direct involvement or oversight by the department, except for those sites or facilities being addressed under the dry cleaner response program.

(3) Note: Persons who wish to conduct response actions that will be consistent with the requirements of CERCLA and the National Contingency Plan (NCP) may request that the department enter into a contract with them ~~pursuant to~~ under s. 292.31 or a negotiated agreement under s. 292.11 (7) (d), Stats. However, a CERCLA-quality response action will likely require compliance with additional requirements beyond those contained in chs. NR 700 to ~~754~~ 799 in order to be consistent with CERCLA and the NCP.

SECTION 28. NR 722.09 (4) (b) 3. (Note) is amended to read:

NR 722.09 (4) (b) 3. Note: Material contaminated with polychlorinated biphenyls (PCBs) must be managed in accordance with the requirements ~~of~~ under chs. NR 700 to ~~754~~ 799. EPA has independent authority to regulate material contaminated with PCBs under TSCA. The department and EPA have entered into a memorandum of understanding that specifies how responsibility for government oversight at sites with PCB contamination will be determined. The memorandum of agreement can be found at: <http://dnr.wi.gov/files/pdf/pubs/rr/rr786.pdf>.

SECTION 29. NR 722.13 (2) (e) 11. is created to read:

NR 722.13 (2) (e) 11. A description of any financial assurance required for the selected remedy under ch. NR 756.

SECTION 30. NR 722.15 (2) (e) 1m. is created to read:

NR 722.15 (2) (e) 1m. Require a plan and compliance schedule and proof of financial responsibility under ch. NR 756, if an interim or remedial action using an engineering control is selected to address contaminated sediment.

SECTION 31. NR 724.02 (2) (Note 2) is amended to read:

NR 724.02 (2) Note: Persons who wish to conduct response actions that will be consistent with the requirements of CERCLA and the National Contingency Plan (NCP) may request that the department enter into a contract with them pursuant to under s. 292.31 or a negotiated agreement under s. 292.11 (7) (d), Stats. However, a CERCLA-quality response action will likely require compliance with additional requirements beyond those ~~contained in~~ under chs. NR 700 to ~~754~~ 799 in order to be consistent with CERCLA and the NCP.

SECTION 32. NR 724.09 (13) is created to read:

NR 724.09 (13) Discussion of any types of financial assurance required under ch. NR 756.

SECTION 33. NR 724.13 (1) (a) is amended to read:

NR 724.13 (1) (a) Unless otherwise directed by the department, responsible parties shall conduct all necessary operation and maintenance activities in accordance with this section and in compliance with all applicable state or federal public health and environmental laws, whichever are more stringent, until all applicable public health and environmental laws are complied with as required ~~in~~ under chs. NR 700 to ~~754~~ 799.

SECTION 34. NR 724.18 is created to read:

NR 724.18 **Plan and compliance schedule and proof of financial responsibility for sites or facilities with contaminated sediment engineering controls.** Interim and remedial

actions taken under this chapter that include a contaminated sediment engineering control are subject to the requirements under ch. NR 756.

SECTION 35. NR 726.05 (1) and (6) (e) are amended to read:

NR 726.05 (1) COMPLIANCE. The responsible party or other person requesting closure shall ensure compliance with all applicable federal, state, and local public health and environmental laws, including chs. NR 140, 141, and 700 to 754 799 as applicable, prior to requesting case closure.

(e) Except for ch. NR 140, all applicable public health and environmental laws, including chs. NR 141 and 700 to 754 799, have been complied with.

SECTION 36. NR 726.11 (2m) is created to read:

NR 726.11 (2m) PLAN, COMPLIANCE SCHEDULE, AND PROOF OF FINANCIAL RESPONSIBILITY FOR SITES OR FACILITIES WITH CONTAMINATED SEDIMENT. (a) Responsible parties or other persons requesting closure at a site or facility where an engineering control was utilized to address contaminated sediment shall submit to the department all of the following documents:

1. A plan, a compliance schedule, and proof of financial responsibility for maintenance of an engineering control.

2. A plan, a compliance schedule, and proof of financial responsibility for an investigation of the extent of contamination and the performance of any necessary remedial action if a structural impediment is subsequently removed that had prevented the responsible party from completing the investigation or remedial action at the site or facility.

(b) The department shall include the information submitted under par. (a) on the database under s. 292.12 (3), Stats.

SECTION 37. NR 726.13 (1) (a) 2. and (2) (b) are amended to read:

NR 726.13 (1) (a) 2. It has been documented, in the case closure request that is submitted to the agency in compliance with the requirements of s. NR 726.09, that all applicable public

health and environmental laws, including chs. NR 700 to ~~754~~ 799, have been complied with, or where ch. NR 140 enforcement standards are the only standards that are attained or exceeded, that the criteria in s. NR 726.05 (6) are satisfied.

(2) (b) Following receipt of a request for case closure under this section, the department shall review the information provided under s. NR 726.09 to determine whether the applicable public health and environmental laws, including chs. NR 700 to ~~754~~ 799 where applicable, have been complied with and whether any further threat to public health, safety, or welfare or the environment exists at the site or facility. Based on this review, the department shall approve the case closure, or conclude that additional response actions, such as additional remedial action or long-term monitoring, are needed at the site or facility, or conclude that there is not sufficient information to allow the department to determine whether the applicable public health and environmental laws have been complied with.

SECTION 38. NR 726.15 (2) (dm) is created to read:

NR 726.15 (2) (dm) *Engineering control to address contaminated sediment.* For sites at which an engineering control is used to address contaminated sediment, the case closure letter shall reference any plan and compliance schedule or proof of financial responsibility that are required for the maintenance of the engineering control under ch. NR 756.

SECTION 39. NR 726.15 (2) (f) is amended to read:

NR 726.15 (2) (f) *Structural impediment.* For sites or facilities where a ~~building or other structural impediment at a site or facility~~ structure or other impediment, including buildings, has prevented the completion of an investigation to determine the degree and extent of residual contamination, ~~or the completion of a remedial action,~~ or both, the case closure letter shall include a description of the ~~general~~ location of the residual contamination, ~~and~~ The department, in the case closure letter, shall require the property owner or other responsible party to notify the ~~agency and then~~ and receive written approval from the department prior to taking any actions that may impact the structural impediment or engineering control. The department may require ~~the property owner or responsible party to conduct an investigation of the degree and extent of contamination~~ any necessary response actions at such time that the removal of structural

impediments makes the formerly inaccessible contamination accessible. If applicable, the case closure letter shall reference any plan and compliance schedule, proof of financial responsibility, or both, that are required under ch. NR 756.

SECTION 40. NR 727.13 (3) (b) is amended to read:

NR 727.13 (3) (b) May require the responsible parties to achieve compliance with the applicable public health and environmental laws, including chs. NR 700 to 754 799 where applicable, within a time period established by the department.

SECTION 41. NR 728.01 is amended to read:

NR 728.01 Purpose. The purpose of this chapter is to describe the tools that are available to the department to ensure compliance with chs. NR 700 to 754 799 and to implement response actions at sites or facilities with environmental pollution, and sites or facilities where there has been a discharge of a hazardous substance. This chapter is adopted pursuant to ss. 227.11 (2) and 289.06 (1), Stats., and ch. 292, Stats.

SECTION 42. NR 728.05 is amended to read:

NR 728.05 Referrals for rule violations. Any person who violates the requirements of under chs. NR 700 to 754 799 or ch. 292, Stats., may be referred to the office of the attorney general by the department. Any person who is referred to the office of the attorney general by the department shall be given written notice of the referral. Section 299.95, Stats., requires that the attorney general enforce chs. 289 to 292, Stats., and all rules promulgated to implement chs. 289 to 292, Stats.

SECTION 43. NR 750.05 (2) (c) is amended to read:

NR 750.05 (2) (c) *Notification to applicant.* The department shall mail written notice to the applicant stating whether or not the department believes that the applicant and the property are eligible for an exemption under s. 292.15, Stats. If the department finds that the applicant and property meet the criteria in par. (a) and the applicant chooses to proceed in the program, the applicant shall, at a minimum, submit to the department the appropriate fee ~~in~~ under s. NR

750.07, a ~~Phase~~ phase I environmental assessment, and a scope of work necessary to conduct an adequate ~~Phase~~ phase II environmental assessment. If the department finds that the applicant or the property does not meet the criteria in under par. (a), the applicant will not receive department oversight under s. 292.15, Stats. The applicant may submit additional information to the department to try to establish that the applicant or the property does meet the criteria in under par. (a), and may proceed to conduct a response action, while the department makes that determination, if the response action is conducted in compliance with the requirements of under chs. NR 700 to 754 799 and ss. 292.11 and 292.15, Stats.

SECTION 44. NR 750.07 (1) (a) is amended to read:

NR 750.07 (1) (a) Review of submittals required under this chapter, chs. NR 700 to 754 799 or under an agreement entered into under s. NR 728.07, or participation in meetings with the applicants or their representatives to discuss an application or proposed project.

SECTION 45. NR 750.09 (6) is created to read:

NR 750.09 (6) For properties where the voluntary party is seeking an exemption from liability for voluntary party remediation under s. 292.15 (2) (af), Stats., when contaminated sediment exists on a property from a release of any hazardous substance or environmental pollution on or originating from a property, the insurance requirements under ch. NR 758 have been satisfied.

SECTION 46. Chapter NR 756 is created to read:

Chapter NR 756

**FINANCIAL RESPONSIBILITY AT CONTAMINATED SEDIMENT SITES WITH
ENGINEERING CONTROLS**

NR 756.01 Purpose. The purpose of this chapter is to establish planning, compliance, and financial responsibility requirements for sites or facilities with contaminated sediment that rely on an engineering control to protect public health, safety, welfare, and the environment from the contaminated sediment. This chapter is adopted under s. 227.11 (2) and ch. 292, Stats.

NR 756.02 Applicability. Except as otherwise provided, this chapter applies to all sites or facilities where a person who is required to take action under ch. 292, Stats., with respect to contaminated sediment, takes an interim or remedial action that includes the use of an engineering control to address the contaminated sediment.

NR 756.03 Definitions. In this chapter:

(1) “Contaminated sediment engineering control” means an engineering control used to address contaminated sediment.

(2) “Event” means an occurrence that may affect the completion of the goals established in the plan and compliance schedule that are induced by either weather, or the combination of human activity and weather, including significant flood events, increased flow rates, anthropogenic induced scour, an increase in event frequency, or other events having a deleterious effect on the protectiveness of the contaminated sediment remedy.

(3) “Person required to submit proof” means a person that is required to submit proof of financial responsibility under s. NR 756.04 (1) d., including a person that has assumed responsibility under s. 292.15 (5m) (am), Stats.

(4) “Proof period” means the amount of time for which proof of responsibility requirements are applicable.

(5) “Proof method” means a mechanism for providing proof of financial responsibility under s. NR 756.06.

(6) “Third-party action” means activities that may affect the completion of the goals established in a plan and compliance schedule or that have a deleterious effect on the protectiveness of the contaminated sediment remedy that are taken by persons other than the person required to submit a plan and compliance schedule or proof of responsibility under this chapter.

NR 756.04 Plan and compliance schedule; financial responsibility; fees. (1)
GENERAL. As a condition of approving an interim action, a remedial action, or of granting case

closure, the department may require a person who is required to take action under ch. 292, Stats., with respect to contaminated sediment, and who takes action that includes the use of a contaminated sediment engineering control, to do any of the following:

(a) Maintain any contaminated sediment engineering controls on the site or facility.

(b) Investigate the extent of residual contamination and perform any necessary remedial action if a structural impediment is removed that had prevented a complete investigation or remedial action at the site.

(c) Submit a plan and compliance schedule for satisfying the requirements under pars. (a) and (b) to the department for approval.

(d) Submit proof of financial responsibility sufficient to pay the costs of complying with the plan and compliance schedule under par. (c) to the department for approval.

(2) PLAN AND COMPLIANCE SCHEDULE AND PROOF OF FINANCIAL RESPONSIBILITY. (a) *Requirements; plan and compliance schedule.* The responsible party shall provide to the department a design report meeting the requirements under s. NR 724.09, along with a plan and compliance schedule that identifies the scheduled actions that will lead to the completion of any applicable requirements under sub. (1) (a) and (b) for the purposes of meeting the requirements under ch. 292, Stats. Unless otherwise directed by the department, a person required to submit a plan and compliance schedule shall include all of the following in the plan and compliance schedule:

1. Scheduled actions that will be taken to attain the goals established under sub. (1) (a) and (b), and dates for completion of these actions. These actions may include items required under ss. NR 724.13, 724.15, and 724.17, as applicable, and any other actions directed by the department in writing. Verification of sufficient legal access to conduct all scheduled actions shall be included.

2. An engineering analysis certified by a licensed professional engineer, as defined under s. NR 712.03. The analysis shall include the duration and ongoing efficacy of any engineering controls or structural impediments and assessment of the vulnerability of any engineering

controls or structural impediments to any events or third-party actions that may occur and affect completion of the goals established in the plan and compliance schedule.

3. Inspection and reporting criteria that include an inspection schedule. The inspection schedule shall require an inspection and a report at least every 5 years. The inspection report shall provide an engineering analysis of the current conditions of the engineering control or structural impediment with respect to ongoing efficacy, vulnerabilities, events or actions identified under subd. 2. The inspection report shall be certified by a licensed professional engineer, as defined under s. NR 712.03. Report conclusions shall include identification of issues, recommendations and follow-up actions, and a determination of whether the remedy is protective of human health and the environment.

4. Any access agreements needed to secure legal access for the department to the enter property to determine compliance with this chapter and any plan and compliance schedule required under this chapter.

(b) *Requirements; financial responsibility.* Unless otherwise directed by the department, a person required to submit proof shall submit proof of financial responsibility, as required under this chapter, for all of the following:

1. The costs of planned engineering control monitoring, maintenance, inspections, and repair for each year of the proof period.

2. The costs of any additional engineering control monitoring, maintenance, inspections, and repair that may be needed following any events or third-party actions that may occur during the proof period, including investigation and remediation following a failed engineering control.

3. The costs of inspection, investigation of the extent of residual contamination, and the performance of any necessary response actions following the removal of a structural impediment that had prevented a complete investigation or remedial action at the site at the time of the approval of the plan.

4. The costs of any additional investigation and remediation necessary if the building or other structural impediment is removed pursuant to any events or third-party actions that may occur during the proof period.

(3) LENGTH OF REQUIREMENTS. (a) *Proof period.* Except as otherwise approved by the department, a person required to submit proof shall maintain proof of financial responsibility for the proof period for each applicable financial responsibility requirement under sub. (2) (b).

(b) *Establishing the initial proof period.* A person that is required to submit a plan and compliance schedule and proof of financial responsibility under this chapter shall submit to the department, as part of the plan and compliance schedule, a proposed initial proof period for each applicable financial responsibility requirement under sub. (2) (b). The proposed initial proof period is subject to approval by the department as part of the plan and compliance schedule and is subject to extension under par. (c).

(c) *Extension of plan and compliance schedule and proof period.* The department may, in writing, extend the plan and compliance schedule and the proof period for any applicable financial responsibility requirement until the department determines that the actions under s. NR 756.04 (1) (a) and (b) are no longer applicable and necessary to protect human health and the environment.

Note: The actions under s. NR 756.04 (1) (a) and (b) are no longer applicable and necessary if the engineering control is no longer needed and the structural impediment is removed, and any remaining contamination is investigated and remediated.

Note: Under s. NR 756.07 (2), a person that is required to maintain proof of financial responsibility is required to seek review of the length of the proof period from the department prior to submitting an adjustment to the cost estimate. Under s. NR 756.12 (3), a person that is required to maintain proof of financial responsibility is required to seek review of the length of the proof period from the department prior to submitting an application for a reduction in the amount of required financial responsibility.

(4) SUBMITTAL. The department may require a person subject to requirements under sub. (1) to submit the plan and compliance schedule and proof of financial responsibility

simultaneously with the plans, reports, and specifications required under ss. NR 708.15, 708.17, 722.13, and chs. NR 724 and 726.

(5) DEPARTMENT RESPONSE. When reviewing a plan for approval, the department may elect to do any of the following in regard to the entire plan or a part of the plan:

(a) Deny a request for approval.

(b) Request that additional information be supplied as part of the plan and compliance schedule.

(c) Require adjustments to actions, timeframes, and analyses presented in the plan and compliance schedule.

(d) Approve the plan and compliance schedule.

(6) FEES AND INSPECTIONS. (a) Plan and compliance schedule review fees shall be submitted in accordance with ch. NR 749.

(b) Reports, including inspection reports, required under sub. (2) (a) 3. shall be submitted with a fee in accordance with ch. NR 749.

(c) The department may enter a property for which access has been provided to determine compliance with this chapter and any plan and compliance schedule required under this chapter.

NR 756.05 Responsibility at contaminated sediment sites; access. (1) Requirements of this chapter shall be met in accordance with the applicable requirements under s. 292.12 (5m), Stats.

(2) Any person that acquires responsibility for the requirements of this chapter under s. 292.12 (5m) (am), Stats., shall provide any proof of financial responsibility required under s. NR 756.04 (1) (d) to the department in accordance with this section. Proof of financial responsibility shall be maintained by the transferor during transfer of responsibility until the person acquiring responsibility under s. 292.15 (5m) (am), Stats., obtains department approval of proof of financial responsibility under s. NR 756.04 (5).

(3) The length of any requirement imposed under s. NR 756.04 does not limit the responsibilities of a person under ch. 292, Stats., and any other rules promulgated under ch. 292, Stats.

(4) A person that is subject to the requirements under s. NR 756.04 (1) that does not own or occupy the property on which any engineering controls or structural impediments that are subject to the requirements under s. NR 756.04 (1) are located shall obtain access to the property in accordance with s. 292.12 (5m) (a) 2., Stats., and shall provide verification of access to the department.

NR 756.06 Methods of providing proof of financial responsibility. A person required to submit proof shall establish proof of financial responsibility made payable to or established for the benefit of the department. A person submitting financial assurances for a plan and compliance schedule shall specify, as part of the plan and compliance schedule, the methods of providing proof of financial responsibility that will be used. To provide proof of financial responsibility, the person required to submit proof may use up to two of the following methods for each of the types of costs listed under s. NR 756.04 (2) (b):

(1) **PERFORMANCE OR FORFEITURE BOND.** (a) A person required to submit proof may submit a performance or forfeiture bond. The performance or forfeiture bond shall be in the amount determined under s. NR 756.08 and conditioned upon faithful performance by the person required to submit proof and any successor in interest of all requirements of the approved plan and compliance schedule or subsequent remedial actions required by the department. Bonds shall be delivered to the department for approval. All bonds shall be established using forms supplied by the department.

(b) Bonds shall be issued by a surety company among those listed as acceptable sureties for federal bonds in Circular 570 of the U.S. department of the treasury. At the option of the owner, a performance bond or a forfeiture bond may be filed. The department shall be the obligee of the bond. Surety companies may have the opportunity to complete the respective requirements of the plan and compliance schedule in lieu of cash payment to the department if the person required to submit proof, or any successor in interest, fails to carry out the respective requirements of the approved plan and compliance schedule. The department shall mail

notification of the department's intent to use the funds for that purpose to the last known address of the person required to submit proof.

Note: Copies of Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" can be obtained from surety bond branch, financial management service, department of the treasury, Washington D.C. 20227, phone (202) 874-6850.

(c) Each bond shall provide that, as long as any respective obligation of the plan and compliance schedule remains, the bond may not be canceled by the surety, unless a replacement bond or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the surety proposes to cancel a bond, the surety shall provide notice to the department and to the owner 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 owner shall deliver to the department a replacement bond or other proof of financial responsibility under this section, and the bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule. The surety may discharge its obligation under the bond at any time by paying the unused portion of the bond to the department.

(d) If the surety company becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit proof shall, within 30 days after receiving written notice of the bankruptcy, insolvency, revocation, or suspension, deliver to the department a replacement bond or other proof of financial responsibility under this section, and the replacement bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule.

(2) DEPOSIT WITH THE DEPARTMENT. A person required to submit proof may make a deposit with the department in the form of cash, certificates of deposit, or U.S. government securities. The amount of the deposit shall be determined under s. NR 756.08 and deposits shall be submitted to the department for approval. Cash deposits placed with the department shall be

segregated and invested in an interest-bearing account. All interest payments shall be accumulated in the account. The department may use part or all of the funds to carry out the respective requirements in the plan and compliance schedule if the owner fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(3) ESCROW ACCOUNT. (a) A person required to submit proof may establish an escrow account. An established escrow account may include any of the following assets:

1. Cash.

2. Securities issued by the federal government.

3. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.

4. State bonds issued under subch. I of ch. 18, Stats.

5. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If a person required to submit proof establishes an escrow account, the amount shall be determined under s. NR 756.08 and the account shall be with a bank or financial institution located within the state of Wisconsin that is examined and regulated by the state or a federal agency. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the person required to submit proof in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the amount of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall

accumulate in the account. A duplicate original of the escrow agreement for closure or long-term care, with original signatures, shall be submitted to the department for approval. Escrow account forms shall be supplied by the department. The department shall be a party to the escrow agreement, which shall provide that there shall be no withdrawals from the escrow account except as authorized in writing by the department. The escrow agreement shall further provide that the department shall have the right to withdraw and use part, or all, of the funds in the escrow account to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(4) IRREVOCABLE TRUST. (a) A person required to submit proof may create an irrevocable trust. The corpus of the irrevocable trust may include any of the following:

1. Securities issued by the federal government.
2. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.
3. State bonds issued under subch. I of ch. 18, Stats.
4. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If a person required to submit proof creates an irrevocable trust, the trust shall be exclusively for the purpose of ensuring that the person required to submit proof or any successor in interest will comply with the requirements of the approved plan and compliance schedule. The trust agreement shall designate the department as sole beneficiary. The trustee shall be a bank or other financial institution located within the state of Wisconsin that has the authority to act as a trustee and whose trust operations are regulated and examined by the state or a federal agency.

The trust corpus shall consist of cash, certificates of deposit, or U.S. government securities in the amount determined under s. NR 756.08. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the owner in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall accumulate in the account. A duplicate original of the trust agreement with original signatures shall be submitted to the department for approval. Trust forms shall be supplied by the department. The trust agreement shall provide that there shall be no withdrawal from the trust fund except as authorized in writing by the department. The trust agreement shall further provide that sufficient funds shall be paid from the trust fund to the beneficiary in the event that the person required to submit proof or any successor in interest fails to complete the respective requirements of the approved plan and compliance schedule. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(5) IRREVOCABLE LETTER OF CREDIT. (a) A person required to submit proof may submit an irrevocable letter of credit. The letter of credit shall be in the amount determined under s. NR 756.08, and available exclusively for the purpose of assuring that all respective requirements of the approved plan and compliance schedule will be complied with. The original letter of credit shall be delivered to the department for approval. Letter of credit forms shall be supplied by the department.

(b) A letter of credit shall be issued by a bank or financial institution that has the authority to issue letters of credit and whose letter of credit operations are examined and regulated by a federal agency, or in the case of a bank or financial institution located within the state of Wisconsin, that is examined and regulated by the state or a federal agency. The department shall be the beneficiary of the letter of credit.

(c) The letter of credit shall provide either that the unused portion of the letter of credit shall be payable in full to the department upon the expiration of the letter of credit or that as long as any respective obligation of the person required to submit proof remains under the plan and

compliance schedule, the letter of credit may not be canceled by the bank or financial institution unless a replacement letter of credit or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the bank or financial institution proposes to cancel a letter of credit, the bank or financial institution shall provide notice to the department and the person required to submit proof 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 date of the 90-day notice period, the person required to submit proof shall deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, in the absence of which either the letter of credit shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or the unused portion of the letter of credit shall be payable in full to the department.

(d) If the bank or financial institution becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit proof shall, within 30 days after receiving written notice of bankruptcy, insolvency, revocation, or suspension, deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, and the replacement letter of credit shall either remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or be payable in full to the department.

(e) The letter of credit shall further provide that the department has the right to withdraw and use part, or all, of the funds to carry out the respective requirements of the plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit proof.

(6) INSURANCE. (a) A person required to submit proof may submit an insurance policy. The insurance policy shall be issued for the maximum risk limit determined under s. NR 756.08. A certificate of insurance shall be delivered to the department for approval. Certificate of insurance forms shall be submitted on a form supplied by the department.

(b) Except for captive insurance companies, the insurer shall be licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states. The department, after conferring with the Wisconsin insurance commissioner, shall determine the acceptability of a surplus lines or captive insurance company to provide coverage for proof of financial responsibility. The department shall ask the insurance commissioner to provide a financial analysis of the insurer including a recommendation as to the insurer's ability to provide the required coverage. The department shall be the beneficiary of the insurance policy. The department may require a periodic review of the acceptability of a surplus lines or captive insurance company.

(c) The insurance policy shall provide either that the unused proceeds of the policy shall be payable in full to the department upon expiration of the policy or that, as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule, 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 person required to submit proof. If the insurer proposes to cancel an insurance policy, the insurer shall provide notice to the department and to the person required to submit proof 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 person required to submit proof shall deliver to the department a replacement insurance policy or other proof of financial responsibility under this section, and either the policy shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or the proceeds of the policy shall be payable in full to the department.

(d) If the insurance company becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under s. 618.41 (6) (d), Stats., the person required to submit proof shall, within 30 days after receiving written notice of bankruptcy, insolvency, or an unfavorable evaluation, deliver to the department a replacement insurance policy or other proof of financial responsibility under this section and the replacement policy or other proof of financial responsibility shall either remain in effect as long as any respective obligation of the person

required to submit proof remains under the plan and compliance schedule or be payable in full to the department.

(e) The insurance policy shall further provide that funds, up to an amount equal to the maximum risk limit of the policy, will be available to the department to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit proof.

(f) Each insurance policy shall contain a provision allowing assignment of the policy to a successor person required to submit proof. Assignment may be conditioned upon the consent of the insurer, provided consent is not unreasonably refused.

(7) OTHER METHODS. The department may consider other methods of financial responsibility that the department finds satisfactory to ensure that the person required to submit proof will comply with the respective requirements specified in the plan and compliance schedule. The department may consider other financial commitments made payable to or established for the benefit of the department to ensure the person required to submit proof will comply with the requirements of the approved plan and compliance schedule. The department shall review the request of any person required to submit proof to establish proof of financial responsibility to determine whether the proposed method provides a degree of assurance that is at least equal to that provided by the methods listed in this section. The department may review such a request after the person required to submit proof submits a complete request, all supporting information, and any additional information required by the department as part of the plan and compliance schedule.

NR 756.07 Cost estimates. (1) GENERAL. (a) For the purpose of determining the amount of proof of financial responsibility that is required under s. NR 756.06, a person required to submit proof shall submit the estimated costs together with all necessary justification and documentation, as required by the department, to the department for approval as part of the initial request for approval of the plan and compliance schedule. The costs shall be based on a third party performing the work and reported on a per unit basis, as applicable. The source of estimates shall be indicated.

(b) For the planned costs under s. NR 756.04 (2) (b) 1. and 3., the person required to submit proof shall estimate the annual cost in current dollars for each year of the plan and compliance schedule proof period.

(c) For the additional costs under s. NR 756.04 (2) (b) 2. and 4., the person required to submit proof shall estimate costs in current dollars and shall multiply the sum of the costs by a percentage that is provided by the department and determined by the department based on all of the following criteria, as applicable:

1. The cost of response actions taken to address contaminated sediments at the site and the cost of response actions that are part of any approved plan to address contaminated sediments for the site.

2. The assessment of the vulnerability of any engineering controls and structural impediments to any occurrences, including third-party actions and events, that may affect the protectiveness of any engineering controls and the completion of the goals established in the plan and compliance schedule.

3. The following site-specific characteristics:

a. Types and amounts of bioaccumulative elements and substances present.

b. Volume of contaminated material.

c. Degree of contamination.

d. Cap complexity, including use of geosynthetics, armoring, and amendments.

e. Hydrologic and hydraulic characteristics.

f. Presence of outstanding resource waters or exceptional resource waters.

g. Design factor of safety.

h. Dissolved phase contaminants and chemical characteristics.

i. Fish advisories issued.

j. Navigation.

k. Drinking water sources.

(2) EXTENSIONS AND ADJUSTMENTS. (a) Prior to submitting a new cost estimate under par. (b), a person required to submit proof shall request in writing that the department review the length of the plan and compliance schedule and the length of the proof period for each applicable financial responsibility requirement. The department shall respond within 60 days of the request and shall provide any extensions in writing.

(b) The person required to submit proof shall prepare and submit to the department a new cost estimate during the proof period at all of the following times:

1. Once every 5 years, unless the costs are revised within the 5-year period as required under subd. 2. The new cost estimate shall use current dollars.

2. When any change in site design or operation is approved by the department in writing.

(3) COSTS FOR ENGINEERING CONTROL MAINTENANCE. Cost estimates for engineering control maintenance shall include all of the following, as applicable:

(a) Sampling, surveying, and monitoring, including bathymetry survey, core sampling, pore water measurements, poling, surface water sampling, event-based monitoring, regular monitoring, and comparison with previous monitoring occurrences. For the purposes of preparing cost estimates, all regular monitoring requirements specified in the plan and compliance schedule shall apply over the entire proof period.

(b) Modeling, including transport modeling and conceptual site modeling.

(c) Chemical and physical analysis.

(d) Repair and replacement of engineering controls. The expected operating life of all engineering controls shall be specified in the plan and compliance schedule. As each of these

features reach the end of their anticipated operating life, the cost of their replacement shall be added to the estimate for the appropriate year of the proof period.

(4) COSTS FOR SITE INVESTIGATION AND REMEDIATION FOLLOWING STRUCTURAL IMPEDIMENT REMOVAL. Costs estimates for inspection, the investigation of the extent of residual contamination, and performance of any necessary response actions that are needed following the removal of a structural impediment shall include all of the following, as applicable:

(a) Site investigation.

(b) Remedial action, including remedial action planning, design, and permitting. The length of time necessary to complete the remedial action to address the contamination shall be estimated and the cost of remedial actions for each year shall be presented.

(c) Full dredge including disposal.

(d) Annual monitoring and event monitoring.

(e) The expected life of any structural impediments, which shall be specified in the plan and compliance schedule, when practicable. As each structural impediment reaches the end of its anticipated life, the cost of the investigation and remediation following the removal of the structural impediment shall be added to the estimate for the appropriate year of the proof period. If the expected life of a structural impediment cannot be determined at the time of the plan and compliance schedule, the investigation and remediation following removal shall be planned to occur in the last year of the proof period and the costs shall be added to the estimate for the last year of the proof period.

Note: Under par. (e), the costs of inspection and response actions following a structural impediment removal may be based on the actual estimated date of inspection and response actions or based on a hypothetical date of inspection and response actions. The option for using a hypothetical date is intended to apply in situations when a person required to submit proof is unable to determine a removal date based on currently available data.

(5) ADDITIONAL COSTS OF EVENTS AND THIRD-PARTY ACTIONS. If an assessment of the vulnerability of any engineering controls and structural impediments to any events or third-party actions that may occur indicates that events or third-party actions may affect the protectiveness of the contaminated sediment engineering control and the attainment of the goals established in the plan and compliance schedule, cost estimates shall include damage, destruction, deterioration, and failure of any engineering controls and structural impediments following an event, including all of the following, as applicable:

(a) The costs of repair, replacement, or removal of any engineering controls used to address contaminated sediment.

(b) The costs of site investigation and remedial action plan and design, including permitting, following the removal of any structural impediment.

(c) Dredging and disposal of contaminated sediment in the area that may be affected by the unplanned event.

(d) The costs of post-event inspection, monitoring, maintenance, and repair.

(6) DUPLICATIVE COSTS. The department shall not impose financial responsibility costs under sub. (5) that are duplicative of those required under subs. (3) and (4).

Note: The department shall not impose financial responsibility costs under sub. (5) that are duplicative of those required under subs. (3) and (4). For example, if financial assurance is required for the cost of replacement of an engineering control under sub. (3), then the costs of replacement of an engineering control may only be required under sub. (5) to the extent that additional funding would be needed due to the nature or timing of the event or third-party action.

(7) INFLATION RATE. The rates of inflation applied to cost estimates approved by the department in previous years shall be derived from the most recent implicit price deflator for gross domestic product published by the U.S. department of commerce in its Survey of Current Business. The inflation rate is the result of dividing the latest published annual deflator by the deflator for the previous year. The projected rate of inflation to be applied in proof of financial

responsibility calculations for all future years shall be equal to the rate of inflation for the last full calendar year.

NR 756.08 Calculating the amount of the proof of financial responsibility. (1) A person required to submit proof shall, as part of the initial request for approval of the plan and compliance schedule, calculate the necessary amounts of proof of financial responsibility based on the methods of providing proof of financial responsibility under s. NR 756.06 that have been chosen by the person required to submit proof.

(2) For the planned costs under s. NR 756.04 (2) (b) 1. and 3., all of the following procedures for calculating the amount of proof of financial responsibility shall be used, as applicable:

(a) If proof of financial responsibility is submitted as escrow, trust or department accounts, the amount of proof of financial responsibility shall, at minimum, be equal to the sum of all estimated planned action expenditures for the entire proof period when the expenditure for each year has first been expressed in future dollars and then brought to present value using a discount rate based on future earnings. Future earnings shall be calculated based on a projected rate of return equal to the projected rate of inflation plus one percent, or the department may require that, when estimating future earnings on these accounts, the weighted average rate of return of the investments held in the account be used for a period of time not to exceed the weighted average maturity of the investments held in the account rounded to the nearest whole year. Earnings for years beyond the weighted average maturity of the investments in the account shall be calculated based on a projected rate of return equal to the projected rate of inflation plus one percent.

(b) If proof of financial responsibility is submitted as bonds, letters of credit, or insurance, the amount of proof of financial responsibility shall be equal to the sum of the costs in current dollars of performing the requirements for each year of the proof period.

(3) For the additional costs under s. NR 756.04 (2) (b) 2. and 4., the amount of proof of financial responsibility shall be equal to the sum of the costs in current dollars for completion of the requirements.

NR 756.09 Changing methods of proof of financial responsibility. A person required to submit proof may change from one method authorized under s. NR 756.06 to another with written approval from the department, but not more than once per year. A change may only be made on the anniversary of the first submittal of proof of financial responsibility under s. NR 756.06, unless otherwise approved by the department. The amount of funds secured by the new method of providing proof of financial responsibility 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.

NR 756.10 Adjustment of financial responsibility. (1) A person required to submit proof shall submit to the department verification of the adjustment of the amount of funds secured by a method of proof of financial responsibility on a form supplied by the department.

(2) The amounts of funds secured by methods of proof of financial responsibility shall be adjusted according to all of the following requirements:

(a) The amounts of funds for all proof methods shall be adjusted annually under s. NR 756.07 (7) to account for increases in cost estimates based on adjustments for inflation. The annual proof method adjustments shall be submitted to the department by December 31.

(b) Adjusted proof methods shall be submitted within 60 days after a new cost estimate submitted in accordance with s. NR 756.07 is approved by the department. The adjusted proof methods shall be in an amount adequate to cover the most recently approved cost estimate.

(3) For a person using trust accounts, escrow accounts or deposits with the department to meet the requirements of this chapter, revised proof of financial responsibility calculations shall be performed under s. NR 756.08 and submitted to the department by March 1 of the year succeeding the calendar year in which the weighted average annual rate of return of any trust or escrow account has fallen by one percent or more.

NR 756.11 Access and default. If the department determines that a person required to submit proof is in violation of any of the requirements specified in the plan and compliance schedule or this chapter, the department and its designees may enter upon the site or facility and carry out the approved actions or plan and compliance schedule requirements. The department may use part or all of the funds deposited with it, or the funds 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 approved actions or plan and compliance schedule requirements.

NR 756.12 Authorization to release funds. (1) PLANNED ACTIONS. Subject to sub. (3), for costs under s. NR 756.04 (2) (b) 1. and 3., one year after the issuance of the interim action, remedial action, or closure approval that is the subject of the financial responsibility requirement, and annually thereafter for the proof period, the person required to submit proof who has carried out all required actions and response actions under the approved plan and compliance schedule during the preceding year may apply to the department for reimbursement of funds from an escrow account, trust account, deposit with the department, or other approved methods, or for reduction of the bond, insurance or letter of credit equal to the estimated costs for that year. The application shall be accompanied by an itemized list of costs incurred. Upon determination that the expenditures incurred are in accordance with the requirements anticipated in the approved plan and compliance schedule, the department may authorize in writing the release of the funds or approve a reduction in the bond, insurance, or letter of credit. Prior to authorizing a release of the funds or a reduction of the amount of funds secured by the bond, insurance, or letter of credit, the department shall determine that adequate funds exist to complete the required actions under the plan and compliance schedule for the remaining proof period. The department shall make determinations within 90 days after the application is received. For persons using escrow accounts, trust accounts, or deposits with the department, the department may authorize the release and return of up to 75 percent of the expected cost of planned actions for the current year. Any funds remaining in an escrow account, trust account, or on deposit with the department at the termination of the proof period shall be released to the person required to submit proof.

(2) EVENTS. Subject to sub. (3), for costs under s. NR 756.04 (2) (b) 2. and 4., when a person required to submit proof has completed all of the requirements under the plan and compliance schedule, the person required to submit proof 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. Upon determination by the department that requirements under the plan and compliance schedule have been fulfilled and financial responsibility for costs under s. NR 756.04

(2) (b) 2. and 4. is no longer necessary to protect human health and the environment, 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. The department shall make a determination within 90 days after the application is received.

(3) EVALUATION OF PROOF PERIOD. Prior to submitting an application for the release of funds under sub. (1) or (2), the person required to submit financial assurances under s. NR 756.04 (1) shall request in writing that the department review the length of the plan and compliance schedule and the length of the proof period for each applicable financial responsibility requirement. The department shall respond within 60 days of the request and shall provide the length of any extension or reduction in writing.

NR 756.13 Bankruptcy or receivership notification. (1) A person required to submit proof shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding under the bankruptcy code, 11 USC 101 to 1532, naming the person required to submit proof as debtor, within 10 days after commencement of the proceeding.

(2) A person required to submit proof shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding within a state circuit court under ch. 128, Stats., naming the person required to submit proof as debtor, within 10 days after commencement of the proceeding.

NR 756.14 Compliance. (1) If a person required to submit proof fails to comply with any requirements in the approved plan and compliance schedule, the department may take any of the following actions:

(a) The department may require the forfeiture or conversion of any standard method of establishing proof of financial responsibility. All funds received from the forfeiture or conversion of any standard method of establishing proof 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.

(b) The department may request the department of justice to initiate court action against the person required to submit proof to recover funds sufficient to pay the cost of complying with

the plan and compliance schedule. Any funds recovered in an action under this paragraph or as a settlement in anticipation of an action under this paragraph shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund.

(2) If a person required to submit proof fails to comply with any requirements in the approved plan and compliance schedule, the department may take action or contract with a person to take action to comply with these requirements from funds obtained for that purpose under sub. (1) (a).

SECTION 47. 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 s. 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 s. 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 voluntary parties, as described under s. 292.15 (3), Stats., seeking an exemption from liability for voluntary party remediation under s. 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 a 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.

(1) “Preexisting pollution condition” means contaminated soil, groundwater or sediment or other media from a discharge of a hazardous substance that occurred prior to the date the environmental investigation of a property was approved by the department.

(2) “Property” has the meaning specified under s. 292.15 (1) (c), Stats.

Note: Section 292.15 (1) (c), 2017 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 under s. 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 s. 292.15, Stats., and pays any fees required under s. 292.15 (5), Stats.

NR 758.07 Insurance requirement. (1) STATE INSURANCE CONTRACT. (a) If the department enters into a contract under s. 292.15 (2) (e), Stats., the voluntary party seeking a liability exemption under s. 292.15 (2) (af), Stats., shall do all of the following:

1. Pay the department insurance fees calculated under par. (b).
2. Submit a completed application form to the department.
3. Comply with the requirements and procedures described in this chapter for the property to obtain coverage under the state’s master insurance contract.

(b) The department shall publish a state insurance contract fee schedule annually. The fee 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 under sub. (1) or the voluntary party is unable to use the contract under sub. (1), the voluntary party seeking the liability exemption under s. 292.15 (2)

(af), Stats., shall obtain and maintain insurance that conforms to all of the following requirements unless a waiver is obtained under s. NR 758.15:

(a) The insurance policy shall provide liability insurance covering claims for response action expenses caused by preexisting pollution conditions in the sediment on, at, or emanating from the insured location.

(b) The insurance policy shall cover response action expenses in the event that the department issues a written determination that additional remedial action is necessary due to the occurrence of the conditions described under s. 292.15 (2) (b) 2. or 3., Stats.

Note: Section 292.15 (2) (b) 2. and 3., Stats., refer to situations when the department discovers that a cleanup fails to fully restore the environment and minimize the effects from a discharge of a hazardous substance and when the department discovers the contamination from a hazardous substance that is the subject of a cleanup is more extensive than anticipated.

(c) The insurance policy shall name the department as an insured party for response action.

(d) The insurer providing the insurance policy 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 provide replacement coverage with a subsequent, qualified insurer within 90 days.

(e) Except under par. (f), the voluntary party shall submit a signed certificate of insurance from the insurer to the department that includes endorsement language developed by the department that certifies that coverage conforms with the requirements of this chapter.

(f) As an alternative to the endorsement language required under par. (e), the voluntary party may request that the department approve an alternative set of endorsements naming the voluntary party as the insured. The department may approve an alternative set of endorsements if all of the following requirements are met:

1. The alternative endorsements do not dilute the coverage naming the department as an insured party that are required by this chapter.

2. The alternative endorsements substantially meet the purpose and intent of this section.

3. The voluntary party provides an explanation of why the required endorsements described under par. (e) were not provided.

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

(h) The insurance policy may not include any of the following:

1. An exclusion that limits coverage for response action expenses caused by pre-existing pollution conditions in the sediment on, at, or emanating from the insured location.

2. Capital improvements exclusions.

3. Voluntary investigation exclusions.

(i) The insurance policy shall state that, except for non-payment of premium or misrepresentation by the insured, cancellation or termination of the insurance by the insurer will only be effective upon the following occurrences:

1. Notification to the department and the voluntary party in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date.

2. 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 that shall remain in effect for the length of coverage required under s. NR 758.11.

(j) If the insurer becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under s. 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. The replacement insurance

policy or proof of financial responsibility shall remain in effect for the length of coverage required under s. NR 758.11.

(k) The 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.

(3) If coverage beyond the required coverage described in this chapter 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 and deny the application for a liability exemption.

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 at the insured location, including all money spent by the voluntary party as well as other parties including local, state, or federal government entities. The limits of the insurance shall be dedicated to the response actions of the insured location and may not shared with other coverage parts and may not be limited by the insurance policy's aggregate limit for other coverages. The insurance shall provide coverage with limits of no less than the following:

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

(2) If the cost of the site investigation and remediation of the contaminated sediment was \$1,500,000 to \$3,999,999, then the insurance limit for response action coverage shall be at least \$3,000,000.

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

(4) If the voluntary party is unable to provide a summary of the costs, the voluntary party shall provide the coverage described under sub. (3).

NR 758.10 Deductible. (1) All insurance policies providing coverage required under this chapter shall be written with a per-occurrence deductible and not with a self-insured retention basis.

(2) The insurance policy shall have a deductible of no more than \$50,000 per occurrence unless a higher deductible is approved by the department in writing before the certificate of completion is issued.

(3) If a claim is 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 percent 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 insurance coverage that meets the conditions under this chapter for 25 years after a closure letter has been issued by the department under s. NR 758.19 (2).

(2) The policy term of the insurance may be of any length longer than one year. If the policy term ends before 25 years after the date that the closure letter is issued, the policy shall be renewed by the voluntary party to provide the 25 years of coverage.

(3) At least 90 days before the end of the existing policy period, the voluntary party or its successors or assigns shall provide a 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 that demonstrates that the requirements for insurance described in this chapter are being met.

NR 758.13 Financial responsibility other than insurance. (1) The department shall accept a form of financial responsibility from the voluntary party other than insurance to meet the requirements of this chapter if all of the following conditions apply:

(a) The financial responsibility is in the amount required under s. NR 758.09.

(b) The financial responsibility will provide coverage for 25 years.

(c) The financial responsibility covers response action expenses in the event that the department issues a written determination that additional remedial action is necessary due to the occurrence of any of the conditions described under s. 292.15 (2) (b) 2. or 3., Stats.

(d) The financial responsibility satisfies the requirements that a person required to submit proof financial responsibility under s. NR 756.04 (1) is required to follow, as specified under s. NR 756.06 (1), (2), (3), (4), (5), and (8).

(e) The hazardous substance contained in the contaminated sediment is not mercury, PCBs, as defined in s. 299.45 (1) (a), Stats., or dioxin.

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

(a) Follow the requirements under s. 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 to use part or all of the money deposited with the department, 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, insolvency, or receivership naming the voluntary party in accordance with s. NR 756.13.

NR 758.15 Waiver of insurance requirement. The voluntary party may submit a written request for a waiver of the insurance requirement under s. NR 758.07 to the department. The department may waive the insurance requirement after considering all the following factors, which shall be identified in the request for waiver:

(1) The voluntary party's explanation of the circumstances eliminating the need for insurance.

(2) The hazardous substance contained in the contaminated sediment. The department may not grant a waiver if mercury, PCBs, as defined in s. 299.45 (1) (a), Stats., or dioxin is one of the identified hazardous substances.

(3) Any of the applicable following site-specific factors:

(a) The volume of contaminated sediment.

(b) Concentrations of hazardous substances in the sediment.

(c) Threat to ecological resources.

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

(e) Risk that additional cleanup would be needed.

(f) Anticipated cost of additional future cleanup.

(g) Extent of removal of the known contaminants completed in accordance with applicable cleanup standards for the known contaminants.

NR 758.19 Certificate of completion. The department shall issue a certificate of completion under s. 292.15 (2) (af), Stats., to a voluntary party that is subject to the requirements of this chapter 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 under ch. NR 726.

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

(3) The voluntary party has submitted to the department any 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 under s. NR 758.10.

(b) Documentation that demonstrates that an alternative form of financial responsibility has been provided that meets the requirements under s. NR 758.13.

(c) Documentation that the voluntary party received a waiver of the requirements from the department as described under s. NR 758.15.

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

(6) All of the conditions under s. 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 under s. 292.15 (3), Stats., including the property owner, will no longer qualify for the liability protections under s. 292.15 (2) (af), Stats., if the voluntary party or its successors or 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. For a site at which contaminated sediment exists in addition to a hazardous substance in soil or in soil and groundwater on a property from a release of a hazardous substance on or originating from the property, the department may approve a partial cleanup if all of the following apply:

(1) A voluntary party requests a liability exemption for a partial cleanup under s. 292.15

(2) (am), Stats., for the soil or soil and groundwater on the property.

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

(3) An environmental investigation of the property is conducted and approved by the department.

Note: The environmental investigation must be performed for the entire property, including the upland portion and portions containing sediment.

(4) The voluntary party or another person shall enter into a written legally enforceable agreement with the department 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 agreement shall require that remedial action and case closure shall be completed by satisfying the requirements under ch. NR 726 and, if applicable, ch. NR 756.

(5) One of the following requirements have been met to determine the amount of financial assurance:

(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 financial assurance 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. The remediation cost estimate shall be prepared by an environmental consultant and include all of the following:

1. Cost estimates for all actions necessary under chs. NR 700 to NR 799 to obtain site closure under ch. NR 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 s. 292.15 (2) (am), Stats.

2. Cost estimates for remedial action planning, design, and permitting; dredging, including mobilization and disposal; and post-construction sampling and monitoring.

(b) If the voluntary party is unable to prepare a remediation cost estimate that meets the requirements under par. (a) due to exceptional conditions, the voluntary party shall submit a justification as to why it is unable to submit a cost estimate and the amount of financial

assurance shall default to a \$5,000,000 minimum, unless the department determines that valuation is insufficiently low to conduct all actions necessary under chs. NR 700 to NR 799 to obtain site closure under ch. NR 726. If the department determines that \$5,000,000 is insufficient, the department shall determine an amount of financial assurance based on data collected from similar cleanup projects.

(6) The voluntary party provides financial assurance that meets all of the following requirements:

1. The financial assurance satisfies the requirements that a person required to submit proof of financial responsibility under s. NR 756.04 (1) d. is required to follow, as specified under s. NR 756.06 (1),(2), (3), (4), (5), (7) or (8).

2. The amount of financial assurance is the annual cost in current year dollars for the costs estimated under sub. (5) in addition to a 10 percent contingency amount.

3. The inflation rate shall be calculated as described under s. NR 756.07 (6).

4. 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 under 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 s. 292.15 (2) (am), Stats., and requirements under s. NR 758.23 have been met, all of the following apply:

(1) The voluntary party, or a person who has entered into a legally enforceable agreement with the department under s. NR 758.23 (4), shall follow the requirements under s. NR 756.09 if changes to the method of providing financial assurance under s. NR 758.23 (5) are requested.

(2) The voluntary party, or a person who has entered into a legally enforceable agreement with the department under s. NR 758.23 (4), may request an adjustment of the amount of

financial assurance under s. NR 758.23 (5) provided due to a change in the remedial actions planned if approved by the department in writing.

(3) The voluntary party, or a person who has entered into a legally enforceable agreement with the department under s. NR 758.23 (4), shall notify the department in the event of bankruptcy, insolvency, or receivership in accordance with s. NR 756.13.

(4) The voluntary party, or a person who has entered into a legally enforceable agreement under s. NR 758.23 (4), with the department, shall comply with the agreement under s. NR 758.23 (4) and make reasonable progress, as determined by the department, to conduct the remedial action to obtain case closure by satisfying the requirements under ch. NR 726 and, if applicable, ch. NR 756. Whenever the department determines that the voluntary party, or a person who has entered into a legally enforceable agreement under s. NR 758.23 (4) with the department, is not making reasonable progress toward 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 may 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 for providing financial assurance to carry out the actions.

(5) The voluntary party, or a person who has entered into a legally enforceable agreement under s. NR 758.23 (4) with the department, may request authorization to release funds annually by following the applicable requirements under s. NR 756.12 (1).

SECTION 48. STATEMENT OF EMERGENCY. This rule making is statutorily exempt from requiring a finding of emergency under 2015 Wis. Act 204, s. 36.

SECTION 49. EFFECTIVE DATE. This rule shall take effect on the date of publication and shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats.

SECTION 50. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

BY _____

Preston D. Cole, Secretary

(SEAL)