

## Remediation and Redevelopment Program – Rule Development Meeting (Subgroup Meeting)

April 18, 2019 | 1:00 p.m. to 3:00 p.m.

Wisconsin Dept. of Natural Resources GEF 2 | Room 513  
101 S. Webster St. | Madison, WI 53701

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

**Attendees:** Kenn Anderson, Angie Carey, Douglas Coenen, Judy Fassbender, Jennifer Hagen, Dustin Helmenstine, Adrian Herrera, Scott Inman, Lynn Morgan, Bill Nelson, Laurie Parsons, Michael Prager, Molly Schmidt, Dustin Sholly, Ray Seegers, Jenna Soyer, Dee Surillo, Sharlene TeBeest, Mark Thimke, Carrie Webb, Xiaochun Zhang

### Meeting notes:

#### 1. Welcome and Introductions

Staff and guests introduced themselves.

#### 2. Overview of rule development relating to financial assurance costs, mechanisms, and procedures for the implementation of 2015 Wis. Act 204 statutory requirements relating to:

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

[See presentation]. Molly Schmidt provided a brief overview of new statutory requirements relating to financial responsibility (“FR”) for certain contaminated sediment sites, stating that these new requirements were the subject of rules to be developed and that the existing Wis. Admin. Code ch. 520 requirements for solid waste facility owners and operators may serve as an example or starting point for proposed rules.

Dustin Sholly provided additional information FR requirements for solid waste facility owners and operators under Wis. Admin. Code ch. NR 520 and briefly explained FR requirements for hazardous waste facilities and corrective action.

Mark Thimke stated that it would be important to review the statutory definition of sediment for the distinction between soil and sediment.

Ray Seegers (Waste Management) added further explanation and overview of the FR requirements for solid waste facilities under ch. NR 520, adding that bonds were the most common FR mechanism used by his company and that the ch. NR 520 process worked well. He suggested a phasing approach based on acreage as an alternative to the current practice of estimating closure costs at a point in time when closure would be at its highest cost.

Mark Thimke stated that solid waste FR may be different in context, in that it was not typically done from a redevelopment perspective, whereas contaminated sediment cleanups were often done at

waterfront redevelopment sites; therefore, a further degree of flexibility may be needed in the proposed rules. Dustin Sholly added that Wis. Stat. § 289.41 and Wis. Admin. Code ch. NR 520 offered an “other method” alternative that had not been discussed; this method provided some flexibility in FR mechanism selection.

Lynn Morgan stated that the purpose of FR was to protect taxpayers from bearing certain costs and, given this purpose, there may be a distinction between public and private entities. She said government should also provide FR because government could default if they didn’t budget and have funds available for closure/ cleanup.

### **3. Discussion of the costs and lengths of requirements and related procedures that may be included in proposed rules for the implementation of statutory financial assurance and financial responsibility requirements.**

Michael Prager stated that determining costs was a key part of the rule drafting effort. He stated that NR 520 lists specific minimum long-term care costs and asked for input from DNR staff on a minimum list items to be included for a plan and compliance schedule for the maintenance of an engineering control for contaminated sediment. Scott Inman listed items, including but not limited to: taking cores, collective bathymetry, poling, physical and chemical monitoring.

Xiaochun Zhang and Scott Inman discussed the breadth of the definition of a engineering control. Bill Nelson stated that costs at a given site would be determined by the respective plan.

Michael Prager asked whether costs such as caps, dredging, and catastrophic event monitoring belonged on the list. Judy Fassbender stated that long-term repair and replacement costs at contaminated sediment sites were large in comparison to NR 520 landfill sites, where risk reduced over time. Scott Inman added that marine construction costs were higher. Xiaochun Zhang stated the risks of addressing *in situ* contaminated sediment.

Mark Thimke stated that varying risk levels and site-specific concerns could be addressed in the respective plan for each site – this plan aspect reduces the need for a one-size fits all solutions in the rule.

Sharlene TeBeest asked how catastrophic events were to be addressed – especially when they were becoming more common – and how to draw a line.

Michael Prager discussed potential approaches and added that the ability to open a new case/site with regard to new discharges (and other avenues) were available such that the entire spectrum of risk did not need to be addressed through FR. Sharlene TeBeest commented on the high-risk nature of engineering controls used to address contaminated sediment.

Lynn Morgan stated that in past discussions regarding FR for solid waste sites, the conclusion had been that using FR to address catastrophic events was an inappropriate use of funds. She added that state funds may be more appropriate. Jenna Soyer stated the likelihood of a catastrophic event affecting a landfill is less likely than a flood or other event that could affect a sediment cap since that is a more common occurrence in a waterbody.

Judy Fassbender stated that the requirement for FR at these sites would result in more sediment removal versus sediment capping. Mark Thimke agreed and added that the requirement might address where dredging was not feasible due to unique site conditions.

Dustin Sholly stated that hazardous waste treatment and storage facilities were subject to a liability insurance requirement – with a minimum amount per occurrence and per aggregate. DNR also has authority to require a set aside ahead of corrective action cleanups.

Laurie Parsons stated that the minimum costs could be divided into two categories: likely occurrence/expected activities and unique hydraulic situations, etc., necessitating cap replacement or similar. Perhaps combining different forms of FR would make sense for the different categories. She stated that she supported including the “other mechanism” option from NR 520 and that the group was looking at creative solutions to a specific environmental issue. Tapered monitoring may be appropriate along pre and post closure distinctions. The physical setting greatly affects which costs are applicable; for example, a site that is not within a depositional zone may not need chemical monitoring. Event-based monitoring may be a necessity at all sites. She said she would submit some written ideas.

Bill Nelson added that staff could consider using multiple minimum cost categories within the rule.

Michael Prager asked about costs for FR relating to a structural impediment removal would include investigation and sediment cleanup (dredging, disposal, etc.) if impediment is removed.

Jenna Soyer stated that costs may be imposed in situations where a party does not have control over changing conditions that create need for a structural impediment replacement. Scott Inman stated that he knew of specific sites where this had occurred. Bill Nelson stated that there may be a requirement to update the plan and also rely somewhat on assumptions and respective estimates.

The group discussed the length of the requirement. Judy Fassbender stated that it was not practicable to state that the risk at these sites ends in 40 years – with a 40-year period there would be a sudden drop off of costs unrelated to the actual risk borne. Mark Thimke stated that this statutory requirement encouraged people to plan for long-term at sediment sites. Xiaochun Zhang asked how this concept could be linked to FR. Judy Fassbender asked whether acceptable FR would be viable for addressing the various liability and risk based on assumptions. Dustin Sholly stated that perpetual FR may be feasible if an interest-bearing mechanism is used. Sharlene TeBeest suggested a pool of funds for multiple parties that could be used to address any or all sites, like a state self-insurance pool of funds. Others discussed that there is not clear statutory authority for this approach and the likelihood of the use of the funds for unanticipated purposes. Dustin Sholly added that the Waste Program had once used a similar method, but no longer used it following complications with expending the funds.

Michael Prager thanked the group for their input on FR for the first new statutory requirement and asked the group to consider the latter two statutory requirements for FR for VPLE sites with contaminated sediment – specifically, what types of insurance would be available.

Kenn Anderson stated that 3-year, 5-year, or maybe 10-year term catastrophic event insurance might be available, with renewal options. Michael Prager asked about estimating costs. Dustin Sholly added that Waste Program insurance costs were consistent with RCRA minimums. Molly Schmidt asked what parallels might exist between the plan and compliance schedule for engineering control maintenance and this VPLE FR requirement. Scott Inman stated that there would not be a similar need for monitoring

since the cleanup would be completed. It was pointed out that Superfund sites with sediment require 5-year reviews including monitoring and sampling.

Michael Prager asked whether the third requirement – for FR for VPLE partial cleanups – would be similar costs. Unlike the other VPLE requirement for unexpected possible full cleanup at a contaminated sediment site, the remedial action at partial cleanup sites includes known expected actions needed to address the contaminated sediment.

Scott Inman stated that the costs would not be sufficiently available on the site investigation end of the process and Judy Fassbender added that using the site investigation to determine costs would result in disproportionately large costs.

#### **4. Discussion of the assurance methods and mechanisms and related procedures that may be included in proposed rules for the implementation of statutory financial assurance and financial responsibility requirements.**

Per a request from attendees, Dustin Sholly summarized the FR mechanisms available under ch. NR 520. He distinguished between interest-bearing and non-interest-bearing methods and discussed fees for certain mechanisms. He explained that certain set-aside mechanisms enabled the owner to be reimbursed over time. He added that the net worth method had high standards and that it had become an undesirable option.

Michael Prager added that the US EPA had recently published a report recommending against the use of the net worth test for various reasons. Kenn Anderson stated that one of the reasons was the lack of a collective analysis for the overall environmental liabilities of a company. Dustin Sholly provided the standards for the net worth test in NR 520. Michael Prager stated that one premise for the net worth test was the unlikelihood of failure for large corporations; however, the program had recently dealt with multiple bankruptcies and/or closures, including that of GM and Chrysler. Jenna Soyer suggested looking at Michigan's FR materials. Bill Nelson stated that that the Dept. of Justice attorneys that he had worked with on federal cleanup orders and agreements no longer used the net worth method for FR – not even for large utilities. Michael Prager stated that institutions issuing bonds and credit considered the viability of an organization as a factor. Judy Fassbender stated that certain items counted against the bottom line of a business and others did not – this would factor into their preferences.

#### **5. Discussion of other related policies and procedures that may be included in proposed rules for the implementation of statutory financial assurance and financial responsibility requirements.**

#### **6. Conclude and Adjourn**

Michael Prager thanked attendees for their time and for contributing their expertise to the development of the draft rules.