

Remediation and Redevelopment Program

Rule Development Meeting (Emergency Rule Input Session)

July 6, 2020, 2 p.m. to 3:30 p.m.

Meeting held via Skype

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

Attendees: Breuer, Delanie (Reinhart); Gallo, Don (Axley Brynerson); Fassbender, Judy (DNR); Foss, Darsi (DNR); Geiger, Joe (Essity); Haag, Christine (DNR); Hagen, Jennifer (Ramboll); Heilman, Cheryl; (DNR); Iverson, Bruce (TRC); Larson, Gena (DNR); Nelson, Bill (DNR); Olah, Laura (Citizens for Safe Water Around Badger); Peotter, Ben (Ayers Associates); Peotter, Jodie (DNR); Prager, Michael (DNR); Skwarok, Mick (DNR); Schlichholz, Sarah (Alter Trading Corporation); Scobee, Paige (Hamilton Consulting/WMC); Schmidt, Molly (DNR); Soyer, Jenna (DNR); Stibal, John (West Allis); TeBeest, Sharlene (WISDOT); Timke, Mark (Foley); Tierney, Ray (SCS); Turner, Matthew (Superior Refinery)

Meeting notes:

1. Welcome, introductions, and background on emergency rule RR-11-17E.

Mick Skwarok, Outreach Team Leader in the DNR Remediation and Redevelopment Program, welcomed attendees and introduced himself. He provided instructions for the meeting's use of Skype and then asked attendees to introduce themselves.

Jodie Peotter, Brownfields, Outreach, and Policy Section Chief in the DNR Remediation and Redevelopment Program, provided an overview of the proposed rule (RR-11-17E), the rule development process, and the purpose of the meeting.

The proposed rule (board order RR-11-17E) consists of two new rule chapters, NR 756 and 758, along with revisions throughout code that relate to those chapters. The new chapters provide direction and procedures for financial assurance, which is required under statute for certain types of contaminated sediment sites. 2015 Wisconsin Act 204 ("Act 204") created these new financial assurance requirements in March 2016. Act 204 is based on recommendations in the Brownfields Study Group's 2015 report, Investing in Wisconsin. The act introduced a range of amendments to Wisconsin Statute chapter 292. Chapter 292 regulates the investigation and cleanup of contaminated sites. Specifically, Act 204 changed how contaminated sediments are investigated and cleaned up, and included new financial assurance requirements relating to certain contaminated sediment sites. Section 36 of Act 204 directed the department to promulgate emergency rules, without the finding of an emergency.

DNR previously held 12 public input sessions held from February 2019 through January 2020 and one additional subgroup session focused on the emergency rules. During the public input sessions stakeholder comments were received and incorporated into draft rules prepared for the May meeting of the Natural Resources Board (NRB); however, comments received prior to the May NRB meeting differed from those previously received during public input sessions. The department made the decision to pull the emergency rule board order from the NRB agenda to hear additional input from the public and stakeholders prior to taking the emergency rules to NRB for adoption. DNR then scheduled two public input sessions to hear additional comments and receive additional input on the emergency rules prior to going back to the NRB for adoption. Today is the second session. The first session was held on June 23, 2020.

Following the first meeting in June, DNR considered comments regarding draft emergency rules based on input received in the June session as well as the comments that were received prior to the May NRB meeting. The purpose of today's meeting is for DNR to respond regarding comments received thus far, and to provide an additional opportunity for the public to provide further comments on the emergency rule.

After today's meeting, after review of any further input, comments, or questions submitted, DNR will resubmit the emergency rule board order for review and adoption at a future NRB meeting. If the emergency rules are adopted by NRB, a public hearing will be held after the emergency rules become effective.

The proposed rule, as submitted to the NRB in May 2020, consists of two new rule chapters (chs. NR 756 and NR 758), along with revisions in throughout code that relate to the new chapters. The two new chapters provide the procedures and requirements for meeting Act 204 financial assurance requirements at two types of contaminated sediment sites.

The proposed Chapter NR 756 addresses the first set of new financial assurance requirements created under Act 204. These requirements apply at sites where an engineering control is used to address contaminated sediment. An example of an engineering control is a cap over the remaining contamination. At sites where an engineering control is used, the department may require a plan and compliance schedule and proof of financial responsibility for the maintenance of the engineering control. In addition, when a structural impediment (such as a bridge footing) prevented the complete investigation or cleanup of the sediment, the department may require a plan and compliance schedule and proof of financial responsibility for Investigation and cleanup should removal of that structure occur.

The proposed chapter NR 758 addresses financial assurance requirements created in Act 204. Interested persons may apply to the Voluntary Party Liability Exemption Program, known as the VPLE program, for sites with contaminated sediments. In addition, VPLE applications may obtain partial cleanup approval of the upland portion of a VPLE site with contaminated sediment, which allows development of the upland portion to move forward. The conditions for obtaining these liability exemptions include providing financial assurance to cover certain contaminated sediment cleanup costs.

The two proposed rule chapters establish the procedures, forms, and requirements necessary to implement the statutory requirements. These rules are also being promulgated as permanent rules. The larger permanent rule package includes other rule changes needed following Act 204, as well as other code clarifications and updates. DNR staff anticipate presenting the permanent rule package to the NRB in late 2020 or early 2021. The program drafted the emergency and permanent rules concurrently following the NRB's approval of two scope statements in January of 2019.

Additional opportunities for public comment on the proposed permanent rule changes will be available during the public hearing and public comment period that is anticipated this fall and prior to the NRB meeting at which the proposed permanent rules will be presented for adoption, anticipated this winter.

2. Remediation and Redevelopment program response to comments received on emergency rule RR-11-17E.

Michael Prager explained that DNR would make changes to the May version of board order RR-11-17E to address comments made by stakeholders as part of the May NRB meeting and previous emergency rule meeting, stating that staff may also propose further changes based on any comments received today. Pursuant to several points raised by testimony submitted for the May NRB meeting and comments submitted for the June 26, 2020, public meeting, the RR program is drafting two main revisions to the emergency rule board order that was submitted in May: deletion of provisions outside of chs. NR 756 and 758, and deletion of provisions relating to the partial sediment cleanup VPLE option.

The first change, deletion of provisions outside of the two new rule chapters, would respond to concerns that the emergency rule's scope has been interpreted too broadly. The main effect of this change will be to remove references to the new chapters and their requirements from other chapters of code. The downside of withdrawing these provisions may be less clarity regarding applicable requirements and when and how certain items are to be submitted; however, the program agrees that the increased opportunity for public input during the permanent rulemaking process outweighs the need to have these provisions in effect during the interim time that emergency rules are in effect. Removal of this language also addresses some of the comments and questions raised about sections of the emergency rule that are not in NR 756 and 758.

The second change, deletion of provisions relating to financial assurance for the VPLE partial cleanup option (ss. NR 758.23 and 758.24) would also respond to concerns that the emergency rule's scope has been interpreted too broadly. The program initially included these financial assurance provisions because – as a practical matter – some sites may wish to complete a partial cleanup at a VPLE sediment site prior to pursuing a full VPLE cleanup at a sediment site, as part of a phased cleanup and development strategy; however, these provisions were not a necessary part of the emergency rulemaking mandate under section 36 of Act 204, because the act did not explicitly refer to these financial assurance provisions.

Chapters NR 756 and 758 will be included in the emergency rule because they are integral to the directive in Act 204 for the emergency rulemaking process. These chapters lay out the process and actions needed to follow the requirements for financial responsibility and insurance.

3. Comments and input session on emergency rule RR-11-17E.

Michael Prager, Land Recycling Team Leader in the DNR Remediation and Redevelopment Program, requested any comments that attendees may have regarding the proposed rule. He asked that attendees limit comments to four minutes or less to ensure adequate time for everyone to comment. He asked that attendees notify him of their intent to provide comments via either the conversation bar (instant messaging feature) in Skype or by his email address, which he provided, so that comments could be provided in order.

At attendee asked how costs would be determined under ch. NR 756. DNR staff replied that provisions relating to the costs had not been changed from the May version of the board order, and cost estimates were determined under s. NR 756.07. Staff would need to refer to rules for more specific citations. The attendee stated that he understood the cost estimate provisions; however, there would be further details determined relating to the costs of items. The attendee asked whether there would be guidance for costs.

DNR staff explained that costs were reviewed case by case and would depend on the submittals provided by responsible parties and that DNR guidance would be provided for the permanent rule. An attendee stated that there would be actual costs behind the rule's estimates and that there would likely be some back and forth regarding these determinations.

An attendee asked whether engineering controls in upland areas would be treated differently. DNR staff replied that it would depend on whether the types of risks that apply to sediment engineering controls applied at these upland areas.

4. Overview of next steps.

Molly Schmidt, Policy Analyst in the DNR Remediation and Redevelopment Program, stated that following this meeting, DNR would evaluate any further comments, input, and questions received regarding the proposed emergency rule draft. Anyone that would like to submit written comments following this meeting to email at DNRRRNR700input@wisconsin.gov. Staff would be able to consider comments received until the end of the day on July 6, 2020. Staff would assume any comments received were intended for the purposes described in these meetings—submitters should clarify if they would like comments also submitted as comments for the official comment period or other input opportunities. Future public input opportunities would include the NRB meeting for emergency rule adoption (estimated to be late summer early fall), the public hearing and public comment period for the emergency and permanent rule, which will be held together and will occur after the effective date of the emergency rule, but before the effective date of the permanent rule, and the NRB meeting for permanent rule adoption.

5. Conclude and adjourn

Jodie Peotter thanked attendees for their time and comments.