

# STATEMENT OF SCOPE

## Department of Natural Resources

**Rule No.:** RR-10-17

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**Relating to:** Implementation of 2015 Wisconsin Act 204 and 2017 Wisconsin Act 70, contaminated sediment usability, and other changes needed to update, clarify, and promote consistency within chs. NR 700 through NR 754, Wis. Adm. Code, including, but not limited to, application of the code to contaminated sediment sites.

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**Rule Type:** Permanent

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### 1. Finding/nature of emergency (Emergency Rule only):

The rules will be proposed as permanent rules.

### 2. Detailed description of the objective of the proposed rule:

The proposed rule changes will address three topics within the Wisconsin Administrative Code NR 700 rule series: changes needed as a result of 2015 Wisconsin Act 204 (“Act 204”), changes needed as a result of 2017 Wisconsin Act 70 (“Act 70”), and code clarifications and updates.

Act 204 and contaminated sediments: The goal of the proposed revisions to code will be to achieve consistency with 2015 Wisconsin Act 204 (“Act 204”) and to provide sufficient clarifications, guidance, and procedures for those seeking to comply with the new requirements. Additionally, in consideration of Act 204 and the application of ch. 292, Wis. Stats., to contaminated sediment sites, the proposed rule revisions will aim to clarify the application of several code processes and requirements to contaminated sediment, as well as revisions to specific code provisions that refer directly to various other media (*e.g.*, soil, groundwater).

Act 204 amended ch. 292, Wis. Stats., by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. The act created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, DNR may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control and/or the investigation and remediation of residual contamination following the removal of a structural impediment. The act established access requirements and the responsibilities of owners of properties with contaminated sediment and conditions under which they are not liable for off-site contamination. The act created the opportunity for 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. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

Act 204 also made several other modifications to the law that relate to all types of contaminated media. The act established that the department can require continuing obligations for interim remedial actions for any type of contaminated site, not just contaminated sediment sites, and it modified requirements regarding information to be included in the public database established in s. 292.12(3), Wis. Stats.

Act 204 and contaminated sediments rule revisions: Rule revisions to reflect statutory changes made by Act 204 will include modifications and additions to code chapters within Wisconsin Administrative Code, including, but not limited to:

- NR 700 to reflect definitions added by statute or needed to clarify statutory changes;
- NR 708 to provide clarifications and procedures for new requirements regarding continuing obligations for interim actions, database listings, fees, and noninterference and other responsibilities of owners of sites with contaminated sediments;
- NR 714 to ensure that code clearly communicates new requirements relating to continuing obligations, database requirements, and submittal of third party agreements;
- NR 716 to clarify terms needed to interpret code with respect to new requirements and definitions;
- NR 718 to clarify interpretation of new requirements for interim actions and continuing obligations regarding management of contaminated soil or excavated solid wastes;
- NR 722 to provide guidance, procedures, requirements and forms related to new requirements for database entries, maintenance and monitoring plans for engineering controls and structural impediment removals at sites where an engineering control is being used to address contaminated sediments, and respective financial responsibility requirements, and to provide guidance and procedures relating to Act 204 requirements regarding non-interference and other responsibilities of property owners with regard to engineering controls;
- NR 725 to provide consistency, clarifications, procedures, requirements, and forms related to new requirements for database entry and notification at sites with contaminated sediment;
- NR 725, NR 726, NR 727 to provide clarifications, procedures, requirements and forms related to new requirements relating to maintenance, non-interference, and responsibilities of property owners and tenants; submittal of third party agreements; and the liability of various parties for contaminated sediment sites;
- NR 725, NR 727 to provide clarifications, guidance, procedures, requirements and forms related to new requirements regarding continuing obligations for interim actions;
- NR 750 to provide clarity, guidance, forms, and procedures relating to contaminated sediment sites, VPLE partial certificates of closure, conditions for VPLE partial cleanup approval; and
- NR 754 to clarify that the chapter applies to natural attenuation VPLE projects only.

Rule revisions will also include the creation of new chapter 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 new chapter 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 receiving partial certificates of closure.

Rule revisions will also clarify interpretation of the following code chapters with respect to Act 204 changes and the application of ch. 292, Wis. Stats., to contaminated sediment: chs. NR 700, NR 708, NR 716, NR 722, NR 724, NR 725, NR 726, and NR 727, Wis. Adm. Code. Changes will include, but are not limited to: revised or added definitions, and the clarification of exposure assumptions for sediments. Rule revisions may include any other revisions necessary to effectuate Act 204 and clarify the application of chs. NR 700 through NR 754, Wis. Adm. Code, to sites with contaminated sediments.

Act 70: The goals of the proposed revisions to code will be to provide consistency and direction regarding 2017 Wisconsin Act 70 (“Act 70”). Act 70 revised provisions within ch. 292, Wis. Stats., that affect the VPLE program. The act clarified which properties are eligible for a VPLE and created a new process for property boundary changes that may occur following application.

Act 70 rule revisions: Rule revisions will include amendments to chs. NR 700, 750 and NR 754, Wis. Adm. Code, as necessary to provide clarity and consistency with Act 70, including a new definition of "property" as used in the VPLE program, and new requirements and procedures for property boundary changes in the VPLE program. Rule revisions may include any other revisions necessary to effectuate Act 70.

Code clarifications and updates: The goal of the third category of changes is to provide minor updates, clarifications and modifications to various sections of the rule series as described below. Over time, recurring issues with unclear portions of code have become evident. Revisions are needed to code provisions where better clarity, simplification, further direction, or revised requirements will result in better guidance for users and more efficient administration of the site investigation and cleanup process. The last modifications to the NR 700 rule series includes adjustments to revisions that took effect in 2013. Objectives include clarifying timeframes for when required items must be completed, providing fees for specific technical assistance items that are not listed, and providing cross-references when appropriate. Objectives also include clarifying procedures for submitting documents, storing data, and submitting payments beyond what is allowed by code.

Code clarifications and updates rule revisions: Rule revisions will include changes or additions to code chapters, including, but not limited to:

- NR 700 to clarify and update definitions and procedures for submitting documents;
- NR 712 to clarify the requirements for submittal preparation in NR 712.07;
- NR 714 to clarify and update portions of the chapter regarding methods of notifying the public;
- NR 716 to clarify and update methods of submitting various reports and other information required under code, including changes regarding sample results notification requirements, and to clarify and achieve consistency with 2018 revisions to chapter NR 149, *Laboratory Certification and Registration*, including revisions to definitions;
- NR 718 to remove code provisions relating to soil management practices no longer in use;
- NR 718, NR 708, NR 722, and NR 724 to include cross-references between portions of code regarding documentation of soil management;
- NR 720 and NR 722 to include cumulative approach and background considerations for PAH contaminants; include a reference EPA exposure values; and to cross-reference other portions of code where standard exposure assumptions are found;
- NR 724 to clarify when confirmation samples are required following remedial action;
- NR 725 and NR 726 to revise notification requirements for off-site properties with groundwater contamination and relation to NR 812;
- NR 726 to reflect updates to terminology; clarify and update the methods and requirements for submitting closure requests and forms, and case closure response action goals; and
- NR 749 to provide clarity and flexibility regarding payment of fees, including, but not limited to fees for enforcement-related submittals, contracts under ch. 292.31, Wis. Stats., and database entries; and to clarify the disposition of fees for incomplete closure requests and their application to other submittals required by code.

Rule revisions will include limited and focused clarifications to chs. NR 700 through 754, Wis. Adm. Code, where necessary to update references to “CLEAN” and “GIS registry” to reflect current terminology; update requirements regarding geolocation specifications; to clarify that e-submittals are required for various required submittals; and to update references and requirements relating to s. 101.144, Wis. Stats., pursuant to 2013 Wis. Act 20. In addition, DNR will consider rule modifications or additions to clarify requirements and procedures in place so that responsible parties make reasonable progress towards completing their cleanup. This includes deadlines and regulatory timelines for regulatory steps found in, but not limited to, the following sections of Wis. Adm. Code: NR 700.11, NR 716.09, NR 716.11, NR 716.15, NR 722.13, NR 722.15, NR 724.09, NR 724.02, NR 724.07, NR 724.13, NR 725.15, NR 725.07, NR 726.05, NR 726.13, and other sections as needed. Rule revisions may include modifications or additions to clarify the applicability of chs. NR 700, NR 706, NR 708, NR 716, NR 722, NR 725, NR 726, NR 750, NR 754, Wis. Adm. Code, and new chs. NR 756 and NR 758 to emerging contaminants (*e.g.*, substances for which there are no environmental standards for some or all environmental media). Rule revisions may include any other revisions necessary to effectuate the goals stated above.

### **3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

Act 204 and contaminated sediments: Existing policies that have relevant similarities to the proposed rules relating to proof of financial responsibility and financial assurance include s. 289.41, Wis. Stats., and ch. NR 520, Wis. Adm. Code, relating to financial responsibility requirements for owners and operators of solid waste facilities. The department's Waste and Materials Management Program administers these laws, which contain substantial detail and direction regarding financial responsibility requirements. These policies will be considered for inclusion in the proposed revisions and additions to chs. NR 700 through NR 754, Wis. Adm. Code. Language within s. 292.63, Wis. Stats., relating to proof of financial responsibility required from owners and operators receiving funds under the Petroleum Environmental Cleanup Fund Award program will also be considered.

Existing policies that have relevant similarities to the proposed rules relating to continuing obligations for interim actions and database requirements are those within ch. NR 727, Wis. Adm. Code, which describes requirements for continuing obligations and updates to the public database.

Existing policies that have relevant similarities to the proposed rules relating to insurance required for VPLE sites with contaminated sediment include ch. NR 754, Wis. Adm. Code, which describes the environmental insurance requirements for VPLE sites at which the voluntary party elects to rely on natural attenuation as a final remedy. Policies within ch. NR 754, Wis. Adm. Code, will be considered for inclusion in the first proposed rule.

Existing policies that have relevant similarities to the investigation and cleanup of contaminated sediment are those policies within chs. NR 700 through NR 754, Wis. Adm. Code, relating to other media such as soil and groundwater, as well as ch. NR 347, Wis. Adm. Code, relating to sediment sampling, chs. NR 500 through NR 599, Wis. Adm. Code, relating to solid waste management, and ch. NR 105, Wis. Adm. Code, relating to surface water. These policies will be considered for inclusion.

An alternative to the proposed approach is to not revise the rules to reflect Act 204 changes. This approach may prevent some sediment cleanup projects from achieving case closure; it may cause difficulties for those seeking to comply simultaneously with statutory and administrative rule requirements; and it may result in a greater workload for staff members that do not have a clear process to follow.

Act 70: There are no existing policies relevant to the proposed rule, which aims to achieve consistency and direction regarding additions to statute made by Act 70. An alternative to the proposed approach is to not revise the rules to reflect Act 70 changes. This approach may cause complications and difficulties for those seeking to comply simultaneously with statutory and administrative rule requirements, and may result in unnecessary delays for projects within the VPLE program due to misunderstood requirements.

Code clarifications and updates: There are no existing policies relevant to the proposed rule, which is intended to address recurring issues with unclear portions of code and provide better guidance for users and more efficient administration of the site investigation and cleanup process. An alternative to the proposed approach is to not revise the rules to implement the described changes, which would result in continuation of these issues and the continued use of time by staff members and external customers in clarifying unclear portions of code on a case-by-case basis.

### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

The rule revisions described herein will be promulgated under the following general authorities:

- Section 292.31(2), Wis. Stats., 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;  
and

- Section 227.11(2), Wis. Stats., provides the department with authority to promulgate rules that are necessary to perpetuate the purpose of the statute.

Additionally, nonstatutory language within Section 36 of Act 204 requires DNR to promulgate emergency rules for s. 292.12(2)(d)(2) and 292.15(2)(af)(3m), Wis Stats. The emergency rule will proceed concurrently with promulgation of this permanent rule.

#### **5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :**

The amount of time necessary to develop the rule is estimated to be about 2,800 to 3,300 cumulative DNR employee hours over three years, including review as needed from assigned Bureau of Legal Services staff.

#### **6. List with description of all entities that may be affected by the proposed rule :**

Act 204 and contaminated sediments: Affected parties include businesses, local governments, utilities, and others who are responsible for remedial actions for sediment contamination, as well as those who may be responsible for continuing obligations at any cleanup site with residual contamination. Also affected are businesses, local governments, utilities, and developers that may be responsible for sediment contamination, and any others that elect to pursue a liability exemption through the VPLE Program for a property where contaminated sediment from a hazardous substance discharge exists. VPLE is an optional incentive program; the only parties that will be affected by the rule are those that choose to enter the program.

Act 70: Affected parties include businesses, local governments, utilities, and developers that elect to pursue a liability exemption through the VPLE Program. VPLE is an optional incentive program; the only parties that will be affected by the rule are those that choose to enter the program.

Code clarifications and updates: Affected parties include businesses, local governments, utilities, and developers and others who are responsible under s. 292.11(3), Wis. Stats., for the investigation and cleanup of contamination, or parties that voluntarily elect to pursue investigation and cleanup of contamination, and environmental consultants that provide professional assistance to these entities.

#### **7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :**

Act 204 and contaminated sediments: 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 CFR, parts 264 and 265, subparts H.

- RCRA also has rules that require financial assurance for Corrective Action sites that are found in 40 CFR 264.101(b) and (c).

These federal requirements will be considered as the rule is being developed.

Act 70: There are no federal regulations that address the specific activities to be regulated by the proposed rules.

Code clarifications and updates: There are no federal regulations that address the specific activities to be regulated by the proposed rules; however, there are federal regulations that accomplish similar goals at the federal level, such as the Cross-Media Electronic Reporting Rule, 40 CFR Part 3, which provides the framework for electronic reporting under all of EPA's environmental regulations. This policy and other federal-level policies with similarities will be considered during the drafting of the proposed rule.

### **8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

The total economic impacts of the proposed rules are not anticipated to be significant and are estimated to be less than \$4,000,000 per year. No economic impacts on small businesses are anticipated.

Act 204 and contaminated sediments: Economic impacts may occur under the following portions of the proposed rules relating to Act 204 and contaminated sediments, as explained below:

- *Engineering controls:* Act 204 requires parties that are responsible for sediment contamination, and that choose to 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. The proposed rule would describe the procedures and options for meeting these requirements. Costs incurred by the rule would relate solely to the comparative costs of the financial assurance options provided. The number of contaminated sediment sites is unknown; however, for the purpose of this estimate, the department estimates that less than 200 sediment remediation sites exist in Wisconsin. The rule will provide a range of financial assurance options to allow maximum flexibility to parties (e.g., a bond, a letter of credit, an escrow account). The costs of most of these options will vary based on the cost to maintain and monitor the engineering control, for example, a surety bond can cost between 1% to 3% of the bonded amount; a letter of credit can cost between 1% to 10% of the letter of credit cost.

- *VPLE:* Act 204 requires persons electing to obtain a VPLE at a property with contaminated sediment to maintain insurance for the cost of any further remediation that may be necessary. The act also allows the department to waive this requirement or accept forms of financial responsibility other than insurance. This proposed rule would describe the procedures, criteria, and options for these requirements; therefore, the rule may have an effect in regard to the cost differences between the insurance, financial assurance, and insurance waiver options. The department estimates that one to three businesses, local governments, or individuals may choose to enter the VPLE program annually for properties with contaminated sediment. Based on information obtained from the environmental insurance industry, insurance would have a onetime estimated cost between \$50,000 to \$250,000 per site. The costs of other 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. A waiver would incur no costs.

- *VPLE partial approval:* Act 204 requires financial assurance for remaining contamination at contaminated sediment sites for which a party is voluntarily seeking a VPLE partial cleanup approval. The proposed rule will describe the procedures and options for the statutory requirement. Costs incurred by the rule would relate solely to the comparative costs of the financial assurance options provided. For the purpose of the proposed rules, the department estimates that less than one contaminated sediment site per year may seek VPLE for a partial cleanup. The rule would provide a range of financial assurance options to allow maximum flexibility to parties (e.g., a bond, a letter of credit, an escrow account). The costs of these options may vary based on the estimated cost to

complete the sediment remediation; however, a surety bond is estimated to cost from 1% to 3% of the bonded amount; a letter of credit can cost between 1% to 10% of the letter of credit cost.

No economic impacts on small businesses are anticipated for rules relating to Act 204 and contaminated sediments. Small businesses are rarely involved as responsible parties in sediment contamination sites. For all parties that are found to be responsible for contaminated sediment sites, including small businesses, the flexibility that the rules will provide to those seeking to meet the statutory requirements would counterbalance any economic impacts that may arise under various parts of the rule. The rule relating to financial responsibility for engineering controls will only apply to parties that choose to use an engineering control to address contaminated sediment. With regard to the changes affecting rules relating to contaminated sediment sites within the VPLE program, the voluntary nature of the program fully mitigates any economic impacts on small businesses; parties can choose to participate depending upon whether they find the program to be advantageous.

Act 70: No economic impacts are likely to occur under rule revisions relating to Act 70, which are intended to implement and provide consistency with statutory changes to the VPLE program.

No impacts to small businesses are anticipated; however, the voluntary nature of the program would fully mitigate any economic impacts on small businesses. Parties can choose to participate depending upon whether they find the program to be advantageous.

Code clarifications and updates: Small economic impacts may result due to some of the proposed rules relating to code clarifications and updates to address recurring issues. Some provisions may result in cost savings and expedition of cleanup approvals. The rule revisions relating to fees may result in some additional fees being charged in situations where grossly incomplete requests are submitted, or where uncommon technical assistance items are requested, and other situations. Estimates regarding these rule revisions will not be available until rule content is developed; however, economic impact will be mitigated by the optional nature of most of these fees.

No impacts to small businesses are anticipated; however, the optional nature of most fee-based assistance requests would mitigate any economic impact of these fees on any affected persons.

## **9. Anticipated number, month and locations of public hearings:**

The DNR anticipates holding two public hearings in June 2020 in Milwaukee and either Wausau or Eau Claire. The DNR will hold hearings in these centrally located cities to encourage input from members of the public located across the state.

### **Contact Persons:**

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