

Chapter NR 758

INSURANCE AND FINANCIAL RESPONSIBILITY AT CONTAMINATED SEDIMENT SITES IN THE VOLUNTARY PARTY LIABILITY EXEMPTION PROGRAM

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**NR 758.01 Purpose.** This chapter establishes rules and procedures promulgated under s. 292.15 (2) (af) 3m. and (e), Stats., that the department shall use to determine if voluntary parties have met the requirements under s. 292.15 (2) (af), Stats., related to environmental insurance, or other forms of financial responsibility, for voluntary parties seeking liability exemptions for sites with contaminated sediment.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21; correction made under s. 13.92 (4) (b) 7., Stats., Register September 2021 No. 789.

**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), 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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21; correction made under s. 13.92 (4) (b) 7., Stats., Register September 2021 No. 789.

**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), 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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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 be 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).

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21; correction in (intro.) made under s. 35.17, Stats., Register September 2021 No. 789.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21; correction in (3) (d) made under s. 35.17, Stats., Register September 2021 No. 789.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.

**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.

**History:** EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21.