

2001 DRAFTING REQUEST

Bill

Received: **09/18/2000**

Received By: **traderc**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Wong**

This file may be shown to any legislator: **NO**

Drafter: **traderc**

May Contact:

Alt. Drafters:

Subject: **Environment - env. cleanup**

Extra Copies:

Pre Topic:

DOA:.....Wong -

Topic:

Local governmental unit negotiation and cost recovery for environmental cleanups

Instructions:

See Attached

Drafting History:

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2001-2003 Statutory Language Proposals

Division: AIR & WASTE

Bureau: REMEDIATION AND REDEVELOPMENT

Issue/Topic: LOCAL GOVERNMENTAL UNIT NEGOTIATION AND COST RECOVERY

Proposed Change: 1999 Wisconsin Act 9 nonstatutory s. 9136 (6g) directed the Department to submit to the legislature, by 1/1/01, proposed legislation to make the process for local governmental unit negotiation and cost recovery under s. 292.35 of the statutes more efficient and clear.

Explanatory Note: The attached proposed legislation [see document titled LGU Negot. & CR_Supplement which follows] provides a more efficient method of providing notice to all parties; clarifies the liability provisions; clarifies the provisions related to the identification of responsible parties; provides local governmental units with a clear method of dealing with information discovered late in the negotiation and cost recovery process; requires responsible parties to state the basis for their objection to a local governmental unit's offer to settle before seeking designation of an umpire; requires potential umpires to be environmental experts; and requires an umpire to submit a proposed recommendation under section 292.35 (6) (a) of the statutes and give the parties a period for making comments before the umpire finalizes the recommendation.

Desired Effective Date: Effective date of the budget act.

Contact Person: Lance Potter, MB/5 (7-7418); Eric Ebersberger MB/5 (6-0818); Marie Stewart, RR/3 (7-2465).

ISSUE/TOPIC:

Proposed Legislation for the Purpose of Improving the "Local Governmental Unit Negotiation and Cost Recovery Process" as Provided for Under Section 292.35, Wis. Stats.

Summary: As part of the 1999-2001 state budget bill, the Department of Natural Resources ("the department") was directed to submit to the Legislature, no later than January 1, 2001, proposed legislation to make the process for local governmental unit negotiation and cost recovery under section 292.35 of the statutes more efficient and clear (1999 Act 9, sec. 9136(6g)). The proposed legislation is to include provisions that do all of the following:

1. Provide a more efficient method of providing notice to all parties.
2. Clarify the liability provisions.
3. Clarify the provisions related to the identification of responsible parties.
4. Provide local governmental units with a clear method of dealing with information discovered late in the negotiation and cost recovery process.
5. Require responsible parties to state the basis for their objection to a local governmental unit's offer to settle before seeking designation of an umpire.
6. Require potential umpires to be environmental experts.
7. Require an umpire to submit a proposed recommendation under section 292.35(6)(a) of the statutes and give the parties a period for making comments before the umpire finalizes the recommendation.

Department staff, in cooperation with members of the Landfill sub-group of the Brownfields Study Group*, has developed the following recommended statutory changes for section 292.35 of the Statutes. Proposed language is underlined and highlighted. Deleted language is indicated by ~~strikeouts~~.

• Committee Members included:

Marie Stewart – Bureau for Remediation & Redevelopment, WDNR
Michael Prager – Bureau for Remediation & Redevelopment, WDNR
Robert Strous, Jr. – Bureau for Remediation & Redevelopment, WDNR
Judy Ohm – Bureau of Legal Services, WDNR

*Landfill sub-group of the Brownfields Study Group

James Lonsdorf – Attorney, Lonsdorf & Andraski, Wausau
John Robinson – REI, Civil & Environmental Engineering, Wausau
Mike Sachen – Attorney, City of West Allis
Pat Stevens – Wisconsin Manufacturers & Commerce
Charles "Buck" Sweeney – Attorney, Michael, Best & Friedrich
Chad Taylor – Attorney, Michael, Best & Friedrich
Mark Thimke – Attorney, Foley & Lardner

PROPOSED LANGUAGE CHANGES:

Taken from unofficial text from 97-98 Wis. Stats. database. See printed 97-98 Statutes and 99 Wis. Acts for official text under s. 35.18 (2), Stats. and modified.

292.35 Local governmental unit negotiation and cost recovery. (1) DEFINITIONS. In this section:

Create sec. 292.35(1)(a) "Financial Assistance" means money, other than a loan, provided by the State to pay all or a portion of the cost of emergency response, interim actions, investigation or remedial action for a site or facility and specifically excludes closure and post-closure costs. It does not include money the State pays as its cost allocation because of its duty as a responsible party at the site or facility. Financial assistance provided by the State is not cost-recoverable by the State.

(b) "Generator" means a person who, by contract, agreement or otherwise, either arranges or arranged for disposal or treatment, or arranges or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by

the person, if the disposal or treatment is done by another person at a site or facility owned and operated by another person and the site or facility contains the hazardous substance.

(bm) "Local governmental unit" means a municipality, a redevelopment authority created under s. 66.431 or a public body designated by a municipality under s. 66.435 (4) for transport to a site or facility.

Create sec. 292.35(1)(br) "Orphan share" is that portion of emergency response interim action, investigation or remedial action costs attributed to a dissolved corporation, an unidentifiable, deceased or insolvent responsible party which will not be collected through the allocation process. A local governmental unit may determine that a responsible party is insolvent based on the financial or legal status of the party. Factors to be considered include bankruptcy protection or the impact of the allocation on the party and the party's ability to pay.

(c) "Owner or operator" means any of the following:

1. If the property is taken for tax delinquency, a person who owns or operates a site or facility at the time that the site or facility is taken for tax delinquency.
2. A person who owns or operates a site or facility at the time that the disposal or discharge of a hazardous substance at the site or facility occurs.

(e) "Responsible party" means a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.

(f) "Site or facility" means an approved facility, an approved mining facility, a nonapproved facility, a waste site or any site where a hazardous substance is discharged on or after May 21, 1978.

(g) "Transporter" means a person who accepts or accepted a hazardous substance

(2) APPLICABILITY ~~(intro.)~~ This section only applies to a site or facility if ~~any~~ of the following criteria are satisfied:

~~(a) The site or facility is owned by a local governmental unit and is a closed facility. This section does not apply to a landfill until January 1, 1996.~~

~~(b) The local governmental unit is a responsible party at the site and commits itself, by resolution of its governing body, to paying more than 50% of the amount equal to the total cost of emergency response, interim action, investigation and remedial action for the site or facility. Any financial assistance received for the site or facility shall be deducted from the costs committed to by the local governmental unit.~~

(2g) IDENTIFICATION OF RESPONSIBLE PARTIES. (a) A local governmental unit that intends to use the cost recovery procedures in this section shall attempt to identify all responsible parties. All information obtained by the local governmental unit regarding responsible parties is a public record and may be inspected and copied under s. 19.35.

(b) Upon the request of an employee or authorized representative of the local governmental unit, or pursuant to a special inspection warrant under s. 66.122, any person who generated, transported, treated, stored or disposed of a hazardous substance that may have been disposed of or discharged at the site or facility or who is or was an owner or operator shall provide the employee or authorized representative access to any

records or documents in that person's custody, possession or control that relate to all of the following:

1. The type and quantity of hazardous substance that was disposed of or discharged at the site or facility and the dates of the disposal or discharge.
2. The identity of any person who may be a responsible party.
3. The identity of subsidiary or parent corporations, as defined in s. 292.31 (8) (a) 3., of any person who may be a responsible party.

Create sec. 292.35(2g)(bg). State licensed collectors and transporters who are notified by certified mail by the local governmental unit that they are a responsible party at the site or facility will be allocated a portion of the aggregate transporter liability share not to exceed 15% of the total responsible party cost allocation, or their actual share, whichever is lower, upon providing any and all records that document waste transportation and disposal at the site or facility. A transporter's allocated share shall be in addition to any shares attributable to the transporter as a facility owner or generator. Transporters who are notified by certified mail by the local governmental unit that they are a responsible party at the site or facility shall submit requested records relating to waste transportation and disposal to the local governmental unit within 90 days of receiving the notice. In the event the records are no longer available, the transporter may provide an affidavit stating that the records are no longer available if the records have been lost or destroyed prior to the transporter receiving notice from the local governmental unit and that the transporter will cooperate with the local governmental unit, or the allocator, to provide depositions, statements and other materials reasonably sought by the local governmental unit, or the allocator, which will aid in the allocation process. The affidavit shall include an

explanation of the process used by the transporter to search for the records to determine the records are available. The transporter shall cooperate with the local governmental unit, or the allocator, to provide depositions, statements and other materials reasonably sought by the local governmental unit, or the allocator, which will aid in the allocation process. The provision of false information under this section, the failure to cooperate with the local governmental unit, or the allocator, or the failure to provide the records within 90 days of the date of the notice will result in the non-compliant transporter being allocated greater than a 15% liability share in the cost recovery action. If a transporter discovers additional records more than 90 days after the date of the notice, the transporter shall immediately submit the records to the local governmental unit, along with an explanation of the reason why the records were not previously submitted. If records are submitted in this manner, the cost allocation for the transporter may be revised by the allocator or the umpire or both.

Create Sec. 292.35(2g) (c) The local governmental unit may seek an order from a circuit court requiring a responsible party to produce records and to pay the costs and attorneys fees incurred in securing the order.

(e) (d) The local governmental unit shall maintain a single repository that is readily accessible to the public for all documents related to responsible parties, the investigation, the remedial action and plans for redevelopment of the property.

(2r) PRELIMINARY REMEDIAL ACTION PLAN. (a) The local governmental unit shall, in consultation with the department, prepare a draft remedial action ~~options~~ report plan which specifies the preferred remedial option, and submit it to the department

~~for approval. Concurrently, the local governmental unit shall provide a list of responsible parties to the department.~~

(b) Upon ~~receipt~~ completion of the draft remedial action ~~options report~~ ~~plan~~, and ~~the list of responsible parties~~, the department shall hold a public hearing to receive ~~comments on the proposed remedial action options and the list of responsible parties.~~ The department shall provide a public notice of the hearing, using the procedure for a Class 2 public notice under ch. 985, Stats. Known responsible parties shall be provided ~~written notice of the hearing by certified mail.~~ ~~the local governmental unit shall send written notice to all responsible parties identified by the local governmental unit, provide public notice and conduct a public hearing on the draft remedial action plan.~~ The notice to responsible parties shall offer the person receiving the notice an opportunity to provide information regarding the status of that person or any other person as a responsible party, notice and a description of the public hearing and a description of the procedures in this section. At the public hearing, the ~~department~~ ~~local governmental unit~~ shall solicit testimony on whether ~~the preferred remedial option in~~ the draft remedial action ~~options report~~ ~~plan~~ is ~~the most cost effective~~ least-costly method of meeting the standards for remedial action promulgated by the department by rule. The ~~department~~ ~~local governmental unit~~ shall accept written comments for at least 30 days after the close of the public hearing.

(c) ~~Upon the conclusion of the period for written comment, the local governmental unit shall prepare a preliminary-final remedial action plan. No later than 90 days after the conclusion of the period for written comment, the department shall issue an approval, an approval with modifications or a denial of the remedial action options~~

report, taking into account the preferred remedial option and the written comments and comments received at the public hearing. If the department fails to issue a final decision within 90 days after the conclusion of the period for written comment, the preferred remedial action option shall be automatically approved and shall constitute a final decision by the department. Final decisions by the department are subject to administrative review pursuant to s. 227.42, and are subject to expedited judicial review under s. 227.53, Stats. This process shall be considered the exclusive remedy for review, and shall submit the preliminary remedial action plan to the department for approval. The department may approve the preliminary remedial action plan as submitted or require modifications. The department shall also issue a revised list of responsible parties, taking into account the written comments and comments received at the public hearing, no later than 90 days after the conclusion of the period for written comment.

(3) OFFER TO SETTLE, SELECTION OF ALLOCATOR AND UMPIRE. (a)

Upon receiving the department's approval of the preliminary remedial action plan, if an allocator is used for cost allocation by the local governmental unit, the allocator shall submit preliminary allocation totals to the local governmental unit within 90 days of the final approval of the remedial action options report by the department. If an allocator is not used by the local governmental unit, the local governmental unit shall prepare preliminary allocation totals within 90 days of the final approval of the remedial action options report by the department.

(b) The local governmental unit shall hold a public hearing on the preliminary cost allocation. At least 14 days before the public hearing, a notice of the public hearing shall be mailed by first class mail to all known responsible parties by the local

governmental unit. A class 2 notice shall also be published in the local newspaper with circulation in the area where the site or facility is located. Comments on the cost allocation shall be submitted to the local governmental unit within 30 days after the close of the public hearing.

(c) If an allocator is used, the allocator shall provide the final allocation decision to the local governmental unit and responsible parties within 90 days of the close of the public hearing comment period, taking into account the written comments and comments received at the public hearing. If no allocator is used, the local governmental unit shall provide the final allocation decision to the responsible parties within 90 days of the close of the public hearing comment period.

(d) Once an allocation has been made between the responsible parties identified by the local governmental unit, the responsible parties shall be notified of their cost allocation in writing by certified mail. The local governmental unit shall serve an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility on each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 and shall notify the department that the offer to settle has been served mailed. The local governmental unit shall include in the offer to settle all of the following information:

1. The amount of the offer and a rationale for the amount.
2. The names, addresses and contact persons, to the extent known, for all of the responsible parties identified by the local governmental unit.
3. The location and availability of documents that support the claim of the local governmental unit against the responsible party.

4. The location of the public repository where documents relating to the site or facility are maintained, the times during which the repository is open and the name and telephone number of the contact person at the repository.

5. A description of the procedures under this section.

~~Create sec. 292.35(3)(dm) If a responsible party accepts the offer to settle, the responsible party shall notify the local governmental unit of the acceptance and is required to comply with the offer to settle. When the responsible party has complied with the offer to settle, the responsible party is not liable, as provided in sub. (7). If a responsible party objects to the offer to settle, the responsible party state the basis for the objection, in writing, no later than 30 days after receiving the offer to settle. An umpire may then be selected, as provided under pars. (b) to (e).~~

~~(b) (e)~~ The department shall maintain a list of competent and disinterested umpires qualified to perform the duties under subs. (4) to (6). ~~All persons on the umpire list shall be environmental experts.~~ None of the umpires may be employees of the department. Upon receiving notice from a local governmental unit under par. ~~(a) (d)~~, the secretary or his or her designee shall select an umpire from the list and inform the local governmental unit and responsible parties of the person selected.

~~(e) (f)~~ Within 10 days after receiving notice of the umpire selected by the department under par. ~~(b) (e)~~, the local governmental unit may notify the department that the umpire selected is unacceptable. Within 10 days after receiving notice of the umpire selected by the department under par. ~~(b) (e)~~, a responsible party may notify the department that the umpire selected is unacceptable or that the responsible party does not intend to participate in the negotiation. Failure to notify the department that the umpire is

unacceptable shall be considered acceptance. ~~If all responsible parties identified by the local governmental unit indicate that they do not intend to participate in the negotiation, the department shall inform the local governmental unit and the local governmental unit shall cease further action under this section.~~

(d) ~~(g)~~ Upon receiving notice under par. (e) ~~(f)~~ that the selected umpire is unacceptable, the secretary or his or her designee shall select 5 additional umpires from the list and inform the local governmental unit and responsible parties of the persons selected.

(e) ~~(f)~~ Within 10 days after receiving notice of the umpires selected by the department under par. (d) ~~(g)~~, the local governmental unit or a responsible party may notify the department that one or more of the umpires selected are unacceptable. Failure to notify the department shall be considered acceptance. The secretary or his or her designee shall select an umpire from among those umpires not identified as unacceptable by the local governmental unit or a responsible party or, if all umpires are identified as unacceptable, the secretary or his or her designee shall designate a person to be umpire for the negotiation.

(4) NEGOTIATION PROCESS. (a) The umpire, immediately upon being appointed, shall contact the department, the local governmental unit and the responsible parties that received the offer to settle and shall schedule the negotiating sessions. The umpire shall schedule the first negotiating session no later than 20 days after being appointed. The umpire may meet with all parties to the negotiation, individual parties or groups of parties. The umpire shall facilitate a discussion between the local governmental unit and the responsible parties to attempt to reach an agreement on the design and

implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties.

(b) The umpire shall permit the addition to the negotiation, at any time, of any responsible party or any other person who wishes to be a party to the negotiated agreement.

(c) Negotiations may not continue for more than 60 days after the first negotiating session, unless an extension is approved by the department for cause, at the request of any party to the negotiation. The department shall approve an extension if necessary to settle insurance claims.

(d) The local governmental unit and the responsible parties that participate in negotiations shall pay for the costs of the umpire, whether or not an agreement among the parties is reached under sub. (5) or the parties accept the recommendation of the umpire under sub. (6). The umpire shall determine an equitable manner of paying for the costs of the umpire, which is binding.

(5) AGREEMENT IN NEGOTIATION. The local governmental unit and any of the responsible parties may enter into any agreement in negotiation regarding the design and implementation of the remedial action plan and the contribution of funds by the local governmental unit and responsible parties for the investigation and remedial action. The portion of the agreement containing the design and implementation of the remedial action plan shall be submitted to the department for approval. The department may approve that portion of the agreement as submitted or require modifications.

(6) FAILURE TO REACH AGREEMENT IN NEGOTIATION. (a) If the

local governmental unit and any responsible parties are unable to reach an agreement under sub. (5) by the end of the period of negotiation, the umpire shall make a recommendation regarding the ~~design and implementation of the remedial action plan~~ and the contribution of funds ~~for emergency response, interim actions,~~ investigation and remedial action by the local governmental unit and all responsible parties that were identified by the local governmental unit and that did not reach an agreement under sub. (5) ~~The umpire shall make the recommendation~~ whether or not the responsible parties participated in negotiations under sub. (4). The umpire shall submit the ~~a final~~ recommendation to the department for its approval within ~~20~~ ~~60~~ days after the end of the period of negotiation under sub. (4) (c). The department may approve the recommendation as submitted or require modifications. The umpire shall distribute a copy of the approved recommendation to the local governmental unit and all responsible parties identified by the local governmental unit ~~affected by the recommendation.~~

(b) The local governmental unit and the responsible parties that did not reach an agreement under sub. (5) shall accept or reject the umpire's recommendation within 60 days after receiving it. Failure to accept or reject the recommendation within 60 days shall be considered rejection of the recommendation. If the local governmental unit rejects the recommendation with respect to any responsible party, the recommendation does not apply to that responsible party. If a responsible party rejects the recommendation, it does not apply to that responsible party.

(7) RESPONSIBLE PARTIES SUBJECT TO AN AGREEMENT OR RECOMMENDATION. A responsible party that enters into an agreement under sub. (5) with a local governmental unit or that accepts the umpire's recommendation under sub.

(6), if the local governmental unit does not reject the recommendation, is required to comply with the agreement or recommendation. When the responsible party has complied with the agreement or recommendation, the responsible party is not liable to the state, including under s.292.11 (7) (b) or 292.31 (8), or to the local governmental unit for any additional costs of the emergency ~~response, interim actions~~ investigation or remedial action; the responsible party is not liable to any other responsible party for contribution to costs incurred by any other responsible party for the ~~emergency response, interim actions~~ investigation or remedial action; and the responsible party is not subject to an order under s. 292.11 (7) (c) for the discharge that is the subject of the agreement or recommendation.

(8) RESPONSIBLE PARTIES NOT SUBJECT TO OR NOT COMPLYING

WITH AN AGREEMENT OR RECOMMENDATION. (a) In this subsection:

1. "Interest" means interest at the annual rate of 12%, commencing on the date of the umpire's recommendation under sub. (6) or, if there is no umpire's recommendation, on the date of the agreement under sub. (5).

2. "Litigation expenses" means the sum of the costs, disbursements and expenses, including engineering fees and, notwithstanding s. 814.04 (1), reasonable attorney fees necessary to prepare for or participate in proceedings before any court.

(b) A local governmental unit is entitled to recover litigation expenses and interest on the judgment against a responsible party if any of the following occurs:

1. The local governmental unit accepts the recommendation of an umpire under sub. (6), the responsible party rejects it and the local governmental unit recovers a judgment under sub. (9) against that responsible party that equals or exceeds the amount of the umpire's recommendation.

2. The local governmental unit and the responsible party enter into an agreement under sub. (5) or accept the umpire's recommendation under sub. (6), the responsible party does not comply with the requirements of the agreement or recommendation and the local governmental unit recovers a judgment against that responsible party based on the agreement or recommendation.

(c) A responsible party is entitled to recover litigation expenses from a local governmental unit if the responsible party accepts the recommendation of an umpire under sub. (6), the local governmental unit rejects the recommendation of the umpire under sub. (6) with respect to the responsible party, the local governmental unit institutes an action under sub. (9) against the responsible party and the local governmental unit recovers a judgment under sub. (9) against the responsible party that is equal to or less than the amount of the umpire's recommendation.

(9) LIABILITY FOR REMEDIAL ACTION COSTS. (a) 1. This subsection applies only to a site or facility that satisfies the applicability provisions of sub. (2) or where a recommendation under sub. (6) ~~has commenced~~ and for which the remedial action specified in an agreement under sub. (5) or a recommendation under sub. (6) is completed.

(b) Except as provided in pars. (bm), (br) and (e), sub. (7) and s. 292.21, a responsible party is liable for a portion of the costs, as determined under pars. (c) to (e), incurred ~~or to be incurred~~ by a local governmental unit ~~for emergency response, interim actions, investigation and~~ remedial action in an agreement under sub. (5) or a recommendation under sub. (6) and for any related investigation. A right of action shall

accrue to a local governmental unit against the responsible party for costs listed in this paragraph.

(bm) Paragraph (b) does not apply with respect to a discharge if the discharge was in compliance with a permit license, approval, special order, waiver or variance issued under ch. 283 or 285 or under corresponding federal statutes or regulations.

(br) Paragraph (b) applies with respect to a transporter only if the transporter does any of the following:

1. Selects the site or facility where the hazardous substance is disposed of without direction from the generator.

2. Violates an applicable statute, rule, plan approval or special order in effect at the time the disposal occurred and the violation causes or contributes to the condition at the site or facility.

3. Causes or contributes to the condition at the site or facility by an action related to the disposal that would result in liability under common law in effect at the time the disposal occurred, based on standards of conduct for the transporter at the time the disposal occurred.

(c) The liability of each party to the action to recover costs under par. (b) is limited to a percentage of the cost of the remedial action that is determined by dividing the percentage of that party's contribution to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility by the percentage of contribution of all responsible parties to the environmental pollution resulting from the disposal or discharge of a hazardous substance at the site or facility. Section 895.045 does not apply to this paragraph. ~~State financial assistance targeted to cover the percentage of~~

the orphan shares contribution to the environmental pollution shall be applied to the costs of the remedial action for the orphan shares

(cm) Notwithstanding par. (c), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for the total contribution of all parties involved in the common scheme or plan.

(d) The finder of fact shall apportion the contribution of each responsible party to the environmental pollution resulting from the disposal or discharge of hazardous substances at the site or facility for the purposes of par. (c), using the following criteria, and any other appropriate criteria:

1. The ability of the responsible parties to demonstrate that their contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances can be distinguished from the contribution of other responsible parties.
2. The amount of hazardous substances involved.
3. The degree of toxicity of the hazardous substances involved.
4. The degree of involvement by the responsible parties in the generation, transportation, treatment, storage, disposal or discharge of the hazardous substances.
5. The degree of cooperation by the responsible parties with federal, state or local officials to prevent or minimize harm to the public health or the environment.
6. The degree of care exercised by the parties with respect to the hazardous substance, taking into account the characteristics of the hazardous substance.

Create Sec. 292.35(9)(d)(7) The party's cooperation and assistance in the allocation process

(e) A responsible party is not liable under par. (b) if the responsible party establishes by a preponderance of the evidence that the responsible party's contribution to the environmental pollution resulting from the disposal or discharge of hazardous substances was caused solely by any of the following:

1. An act of God.

2. An act of war.

3. An act or omission of a 3rd party, other than an officer, director, employee or agent of the responsible party, or other than a person whose act or omission occurs in connection with a direct or indirect contractual relationship with the responsible party if all of the following apply:

a. The responsible party establishes by a preponderance of the evidence that the responsible party exercised due care with respect to the hazardous substances that caused environmental pollution.

b. In exercising due care under sub.d. 3. a., the responsible party took into consideration the characteristics of the hazardous substances, in light of all relevant facts and circumstances.

c. The responsible party took precautions against foreseeable acts or omissions of the 3rd party and the consequences that could foreseeably result from those acts or omissions.

(f) Any responsible party may seek contribution from any other responsible party. Such a contribution claim may be brought as a separate action or may be brought in the action commenced against the responsible party under this section.

(10) TECHNICAL ASSISTANCE. The department shall provide technical assistance to an umpire at the request of the umpire. The department may limit the amount of staff time allocated to each negotiation.

(11) LIABILITY. Except as provided in sub. (7), no common law liability, and no statutory liability that is provided in other statutes, for damages resulting from a site or facility is affected in any manner by this section. The authority, power and remedies provided in this section are in addition to any authority, power or remedy provided in any other statutes or provided at common law.

(13) FEES. The department may, by rule, assess and collect fees to offset the cost of the department's activities under this section. The fees may include an advance deposit, from which the department shall return the amount in excess of the cost of the department's activities under this section.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27.

EXPLANATORY COMMENTS:

1) Secs. 292.35(1)(a) and (1)(br) –

These definitions were created to define terms in sec. 292.35(2)(b) and 292.35(3)(a), respectively. See those sections for an explanation of the need for the new terms.

2) Secs. 292.35(2)(a) and (2)(b) –

These provisions were added to allow local governmental units ('s) who do not own the site or facility to utilize the negotiation and cost recovery process, as long as the commits itself to pay more than 50% of the total cost of the emergency response, interim action,

investigation and remedial action for the site or facility. The Committee felt that the total cost should not include financial assistance from the state, since to do so would discourage 's from seeking such financial assistance. This provision is intended to make the negotiation and cost recovery process available to a greater number of 's, thus promoting the use of the process.

3) Sec. 292.35(2g)(bg) –

The purpose of this provision is to encourage transporters to submit records to the , in a timely manner, so that as many responsible parties as possible are identified early and can participate in the process. There is also a dis-incentive created for transporters who do not submit their records in a timely manner, but with discretion for the allocator or umpire to determine not to apply the dis-incentive if the records were submitted as soon as they were discovered.

4) Sec 292.35(2g)(c) –

This provision is added to help the acquire as many records as possible so that the responsible party list will be as complete as possible.

5) Sec's. 292.35(2r)(a), (2r)(b) and (2r)(c) –

The purpose of these provisions is to specify a procedure and establish deadlines for the submittal, public review and department approval of the remedial action options and list of responsible parties. The Committee felt that a clear procedure needed to be established so that remedial projects going through this process will be handled

consistently. The Committee also felt that portions of this process should be administered by the department since the approval of the remedial action is the department's responsibility. They also felt that deadlines needed to be established.

6) Sec. 292.35(3)(a), (3)(b) and (3)(c)–

The purpose of these provisions is to allow for the use of an independent allocator by the local governmental unit, if desired, and to establish a procedure and deadlines for a public notice and hearing on the preliminary cost allocation decision. It also establishes a deadline for the final allocation decision.

7) Sec. 292.35(3)(d) –

The purpose of these provisions are to change the method of notification of responsible parties from “service of a summons” under s. 801.11, Stats., to notification by certified mail. Based on the experience of the “pilot” communities, the Committee felt that the “service of summons” notification was extremely burdensome and costly to implement and would not necessarily result in better notification of responsible parties.

8) Sec. 292.35.(3)(dm) –

This provision was added to clarify the actions that the responsible parties must take to accept a settlement offer; the effect of acceptance on their liability and the requirements for objecting to a settlement offer.

9) Sec. 292.35(3)(e) –

As directed by the Legislature, the requirement for all persons on the department's umpire list to be environmental experts is added to this section.

10) Sec. 292.35(3)(f) –

The language deleted from this section was done so to prohibit responsible parties from stopping the negotiation process by choosing *not* to participate. The Committee felt that the existing statutory language leaves the local governmental unit with little choice but to initiate potentially expensive lawsuits against individual responsible parties.

11) Sec. 292.35(6)(a) –

The language deleted in this section was removed because the Committee agreed that it should not be the purview of the umpire to make decisions on the design and implementation of the remedial action. The Committee agreed that the Department of Natural Resources would make those decisions.

Language was also added to assure that the costs of emergency response and interim remedial actions are included in the cost allocation for site “remediation”. These costs can be substantial and would not have been included in the cost allocation under the current statutory language, thus, resulting in the burden of those costs being carried totally by the local governmental unit.

Language clarifying that the umpire will make a decision on the cost allocation, whether or not the responsible party participated in the negotiation, was also added. The Committee believes that this will provide incentive for all responsible parties to participate in the process.

Language for expanding the deadlines for decisions is also included. The experience of the Rice Lake umpire was that the existing statutory deadlines are extremely short and placed an unnecessary burden on the umpire and responsible parties to comply. The changes to the final sentence in this section are intended to clarify that the umpire must provide their recommendation only to the responsible parties who are affected by it as opposed to all the responsible that may have been identified.

12) Sec. 292.35(7) –

These provisions were added to assure that the costs of emergency response and interim remedial actions are included in the cost allocation for site “remediation”. These costs can be substantial and would not have been included in the cost allocation under the current statutory language, thus, resulting in the burden of those costs being carried totally by the local governmental unit.

13) Sec. 292.35(9)(a) –

These changes are proposed to allow the local governmental unit to determine a specific date for the purpose of establishing liability for remedial costs early in the process. The

Committee believes that determining when a remedial action is “completed”, as currently required by the statute, could take years and could easily be disputed by the various parties involved.

14) Sec. 292.35(9)(b) –

See number 12, above.

15) Sec. 292.35(9)(c) –

This provision was added to clarify what part of the cost allocation any state financial assistance would apply to.

16) Sec. 292.35(9)(d)(7) –

This provision was added as a criterion for determining a party’s cost allocation share to further promote cooperation from the responsible parties.



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-0360/P1

50010 (into editing 11/27)

RCT.....
hmk

DOA:.....Wong – Local governmental unit negotiation and cost recovery for environmental cleanups

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

DN

Do not give

1 AN ACT relating to: the budget.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 292.35 (1) (am) of the statutes is created to read:

3 292.35 (1) (am) "Financial assistance" means money, other than a loan,
4 provided by this state to pay a portion of the cost of investigation and remedial action
5 for a site or facility, except that "financial assistance" does not include money
6 provided by the state because the state is a responsible party at a site or facility.

7 SECTION 2. 292.35 (2) of the statutes is renumbered 292.35 (2) (intro.) and
8 amended to read:

1 292.35 (2) (intro.) APPLICABILITY. This section only applies to a site or facility
2 if ~~the~~ any of the following criteria is satisfied:

3 (a) The site or facility is owned by a local governmental unit. ~~This section does~~
4 ~~not apply to a landfill until January 1, 1996.~~

5 History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

6 **SECTION 3.** 292.35 (2) (b) of the statutes is created to read:

7 292.35 (2) (b) The local governmental unit is a responsible party at the site or
8 facility and commits itself, by resolution of its governing body, to paying more than
9 50% of the amount determined by subtracting any financial assistance received for
10 the site or facility from the total cost of investigation and remedial action for the site
11 or facility.

12 **SECTION 4.** 292.35 (2g) (bg) of the statutes is created to read:

13 292.35 (2g) (bg) 1. A transporter who is notified by certified mail by a local
14 governmental unit that the transporter is a responsible party at a site or facility shall
15 submit any records requested by the local governmental unit relating to the
16 transport and disposal of waste at the site or facility. The transporter shall submit
17 the records to the local governmental unit within 90 days of receiving the request.

18 2. If ^{any} records requested under subd. 1. were lost or destroyed before the
19 transporter received notice under subd. 1., the transporter may, within 90 days of
20 receiving the request under subd. 1., submit an affidavit that includes all of the
21 following:

22 a. A statement that the records are no longer available.

23 b. A statement that the transporter will cooperate by providing depositions,
statements, and other materials reasonably sought by the responsible unit, or an

1 allocator appointed under sub. (3) (a), that will aid in the process of allocating
2 responsibility for the costs of investigation and remedial action at the site or facility.

3 c. A description of the process used by the transporter to search for the records.

4 3. A transporter shall provide depositions, statements, and other materials
5 reasonably sought by the responsible unit, or an allocator appointed under sub. (3)
6 (a), that will aid in the process of allocating responsibility for the costs of
7 investigation and remedial action at the site or facility.

8 4. If a transporter discovers additional records more than 90 days after
9 receiving a request under subd. 1., the transporter shall immediately submit the
10 records to the local governmental unit, along with an explanation of why the records
11 were not submitted earlier.

12 SECTION 5. 292.35 (2g) (br) of the statutes is created to read:

13 292.35 (2g) (br) If a person fails to comply with par. (b) or (bg), the local
14 governmental unit may bring an action in circuit court to compel compliance. In an
15 action under this paragraph, the court may require a person who failed to comply
16 with par. (b) or (bg) to pay costs and, notwithstanding s. 814.04 (1), reasonable
17 attorney fees.

18 SECTION 6. 292.35 (2r) (a) of the statutes is amended to read:

19 292.35 (2r) (a) The local governmental unit shall, in consultation with the
20 department, prepare a draft report that identifies and evaluates options for remedial
21 action plan at the site or facility and identifies the local governmental unit's
22 preferred remedial option. The local governmental unit shall submit the remedial
23 action option report and a list of responsible parties to the department.

24 History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 72.

SECTION 7. 292.35 (2r) (b) of the statutes is amended to read:

1 292.35 (2r) (b) ~~Upon completion receipt of the draft remedial action plan option~~
2 ~~report, the local governmental unit shall send written notice to all responsible~~
3 ~~parties identified by the local governmental unit, provide public notice and conduct~~
4 ~~department shall schedule a public hearing to receive comments on the draft~~
5 ~~remedial action plan option report and the list of responsible parties. The~~
6 ~~department shall provide public notice of the hearing by publishing a class 2 notice,~~
7 ~~under ch. 985. The department shall provide notice to listed responsible parties by~~
8 ~~certified mail. The notice to responsible parties shall offer the person receiving the~~
9 ~~notice an opportunity to provide information regarding the status of that person or~~
10 ~~any other person as a responsible party, notice and a description of the public hearing,~~
11 ~~and a description of the procedures in this section. At the public hearing, the local~~
12 ~~governmental unit department shall solicit testimony on whether the draft preferred~~
13 ~~remedial option in the remedial action plan options report is the least costly most cost~~
14 ~~effective method of meeting the standards for remedial action promulgated by the~~
15 ~~department by rule. The local governmental unit department shall accept written~~
16 ~~comments for at least 30 days after the close of the public hearing.~~

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

17 **SECTION 8.** 292.35 (2r) (c) of the statutes is amended to read:

18 292.35 (2r) (c) ~~Upon~~ No later than 90 days after the conclusion of the period
19 for written comment, the ~~local governmental unit~~ department shall ~~prepare a~~
20 ~~preliminary remedial action plan~~ issue a decision specifying an approved remedial
21 option, taking into account the local governmental unit's preferred remedial option,
22 the written comments, and the comments received at the public hearing and shall
23 ~~submit the preliminary remedial action plan to the department for approval. The~~
24 ~~department may approve the preliminary remedial action plan as submitted or~~

1 ~~require modifications.~~ If the department fails to issue a decision within the time
 2 required, the local governmental unit's preferred remedial option is approved and
 3 constitutes the department's decision. The decision is subject to review under s.
 4 227.42. No later than 90 days after the conclusion of the period for written comment,
 5 the department shall also issue a list of responsible parties, making any revision to
 6 the list provided under par. (a) that the department determines is appropriate,
 7 taking into account the written comments and the comments received at the public
 8 hearing.

9 History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

9 **SECTION 9.** 292.35 (3) (title) of the statutes is amended to read:

10 292.35 (3) (title) ~~OFFER~~ COST ALLOCATION, OFFER TO SETTLE; SELECTION OF UMPIRE.

11 History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

11 **SECTION 10.** 292.35 (3) (a) of the statutes is renumbered and 292.35 (3) (as)

12 (intro.) and 2., as renumbered, is amended to read:

13 292.35 (3) (as) (intro.) ~~Upon receiving the department's approval of the~~
 14 ~~preliminary remedial action plan~~ Once an ^{cost} allocation decision has been made under
 15 par. (am), the local governmental unit shall ~~serve~~ ^{provide} an offer to settle regarding
 16 the contribution of funds for investigation and remedial action at the site or facility
 17 ~~on~~ ^{cost} based on the allocation decision to each of the responsible parties identified by the
 18 local governmental unit, using the procedure for service of a summons under s.
 19 801.11 listed under sub. (2r) (c) by certified mail and shall notify the department that
 20 the offer to settle has been ~~served~~ ^{mailed}. The local governmental unit shall include
 21 in the offer to settle all of the following information:

22 2. The names, addresses and contact persons, to the extent known, for all of the
 23 responsible parties identified by the ~~local governmental unit.~~

24 History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

24 **SECTION 11.** 292.35 (3) (a) of the statutes is created to read:

1 292.35 (3) (a) The local governmental unit may appoint a person to make a cost
2 allocation among the responsible parties at a site or facility. If the local governmental
3 unit uses an allocator, the allocator shall submit a preliminary cost allocation to the
4 local governmental unit no later than 90 days after the department issues a decision
5 under sub. (2r) (c). If the local governmental unit does not use an allocator, the local
6 governmental unit shall prepare a preliminary cost allocation no later than 90 days
7 after the department issues a decision under sub. (2r) (c).

8 **SECTION 12.** 292.35 (3) (ae) of the statutes is created to read:

9 292.35 (3) (ae) The local governmental unit shall hold a public hearing on the
10 preliminary cost allocation under par. (a). At least 14 days before the public hearing,
11 the local governmental unit shall mail a notice of the public hearing to all responsible
12 parties listed under sub. (2r) (c). The local governmental unit shall also publish a
13 class 2 notice, under ch. 985, of the hearing in a local newspaper with circulation in
14 the area where the site or facility is located. The local governmental unit shall accept
15 comments on the cost allocation for 30 days after the close of the public hearing.

16 **SECTION 13.** 292.35 (3) (am) of the statutes is created to read:

17 292.35 (3) (am) If an allocator is used under par. (a), the allocator shall make
18 a final ^{cost} allocation decision, taking into account the written comments and comments
19 received at the public hearing and subject to sub. (6m), and provide the ^{cost} allocation
20 decision to the local governmental unit and the responsible parties no later than 90
21 days after the close of the public comment period under par. (ae). If no allocator is
22 used, the local governmental unit shall make a final ^{cost} allocation decision, taking into
23 account the written comments and comments received at the public hearing and
24 subject to sub. (6m), and provide the ^{cost} allocation decision to the responsible parties no
25 later than 90 days after the close of the public comment period under par. (ae).

1 **SECTION 14.** 292.35 (3) (aw) of the statutes is created to read:

2 292.35 (3) (aw) If a responsible party accepts the offer to settle under par. (as),
3 the responsible party shall notify the local governmental unit of the acceptance. If
4 a responsible party rejects the offer to settle, the responsible party shall notify the
5 local governmental unit, in writing, of the basis for the rejection no later than 30 days
6 after receiving the offer to settle. Upon receipt of notice of rejection, the local
7 governmental unit may request the department to select an umpire.

8 **SECTION 15.** 292.35 (3) (b) of the statutes is amended to read:

9 292.35 (3) (b) The department shall maintain a list of competent and
10 disinterested umpires who are environmental experts and are qualified to perform
11 the duties under subs. (4) to (6). None of the umpires may be employees of the
12 department. Upon receiving ~~notice~~ a request from a local governmental unit under
13 par. (a) (aw), the secretary or his or her designee shall select an umpire from the list
14 and inform the local governmental unit and responsible parties of the person
15 selected.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 100 s. 672.

16 **SECTION 16.** 292.35 (3) (c) of the statutes is amended to read:

17 292.35 (3) (c) Within 10 days after receiving notice of the umpire selected by
18 the department under par. (b), the local governmental unit may notify the
19 department that the umpire selected is unacceptable. Within 10 days after receiving
20 notice of the umpire selected by the department under par. (b), a responsible party
21 may notify the department that the umpire selected is unacceptable or that the
22 responsible party does not intend to participate in the negotiation. Failure to notify
23 the department that the umpire is unacceptable shall be considered acceptance. If
24 ~~all responsible parties identified by the local governmental unit indicate that they~~

1 do not intend to participate in the negotiation, the department shall inform the local
2 governmental unit and the local governmental unit shall cease further action under
3 this section.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

4 **SECTION 17.** 292.35 (5) of the statutes is amended to read:

5 292.35 (5) AGREEMENT IN NEGOTIATION. The local governmental unit and any of
6 the responsible parties may enter into any agreement in negotiation regarding the
7 design and implementation of the remedial action plan and the contribution of funds
8 by the local governmental unit and responsible parties for the investigation and
9 remedial action. The portion of the agreement containing the design and
10 implementation of the remedial action plan shall be submitted to the department for
11 approval. The department may approve that portion of the agreement as submitted
12 or require modifications.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

13 **SECTION 18.** 292.35 (6) (a) of the statutes is amended to read:

14 292.35 (6) (a) If the local governmental unit and any responsible parties are
15 unable to reach an agreement under sub. (5) by the end of the period of negotiation,
16 the umpire shall make a recommendation, subject to sub. (6m), regarding the design
17 and implementation of the remedial action plan and the contribution of funds for
18 investigation and remedial action by the local governmental unit and all responsible
19 parties that were identified by the local governmental unit listed under sub. (2r) (c)
20 and that did not reach an agreement under sub. (5), whether or not the responsible
21 parties participated in negotiations under sub. (4). The umpire shall submit the
22 recommendation to the department for its approval within 20 60 days after the end
23 of the period of negotiation under sub. (4) (c). The department may approve the
24 recommendation as submitted or require modifications. The umpire shall distribute

1 a copy of the approved recommendation to the local governmental unit and all
2 responsible parties ~~identified by the local governmental unit~~ affected by the
3 recommendation.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150, s. 672.

4 **SECTION 19.** 292.35 (6m) of the statutes is created to read:

5 **292.35 (6m) RESPONSIBILITY OF TRANSPORTER.** (a) If a transporter complies with
6 sub. (2g) (bg) 1. to 3., a local governmental unit or other person making an allocation
7 under sub. (3) (a) or an umpire making a recommendation under sub. (6) (a) may not
8 allocate to the transporter more than 15% of the costs allocated to responsible
9 parties.

10 (b) 1. Except as provided in subd. 2., if a transporter fails to comply with sub.
11 (2g) (bg) 1. to 3. or provides false information under those provisions, a local
12 governmental unit or other person making an allocation under sub. (3) (a) or an
13 umpire making a recommendation under sub. (6) (a) shall allocate to the transporter
14 more than 15% of the costs allocated to responsible parties.

15 2. If a transporter provides information under sub. (2g) (bg) 1. to 3. after the
16 day on which the information is required to be provided and an explanation of why
17 the information was not provided sooner, a local governmental unit or other person
18 making an allocation under sub. (3) (a) or an umpire making a recommendation
19 under sub. (6) (a) may allocate to the transporter less than 15% of the costs allocated
20 to responsible parties.

21 **SECTION 20.** 292.35 (9) (a) 1. of the statutes is renumbered 292.35 (9) (a) and
22 amended to read:

23 **292.35 (9) (a)** This subsection applies only to a site or facility that satisfies the
24 applicability provisions of sub. (2) and for which the remedial action specified in an

1 agreement under sub. (5) or a recommendation under sub. (6) ~~is completed~~ has
2 begun.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

3 SECTION 21. 292.35 (9) (b) of the statutes is amended to read:

(4) 292.35 (9) (b) Except as provided in pars. (bm), (br), and (e), sub. (7) and s.
5 292.21, a responsible party is liable for a portion of the costs, as determined under
6 pars. (c) to (e), that have been or will be incurred by a local governmental unit for
7 remedial action in an agreement under sub. (5) or a recommendation under sub. (6)
8 and for any related investigation. A right of action shall accrue to a local
9 governmental unit against the responsible party for costs listed in this paragraph.

History: 1995 a. 227 s. 613 to 616; 1997 a. 27; 1999 a. 150 s. 672.

10 SECTION 22. 292.35 (9) (d) 7. of the statutes is created to read:

11 292.35 (9) (d) 7. The extent to which the party cooperated and assisted in the
12 process under subs. (2g) to (5).
13

(END)

ONote

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0360/P1dn

RCT:.....

hmb

(Date)

This is a preliminary version of the proposal to make changes in the local governmental unit negotiation and cost recovery statute (s. 292.35). Here are some specific questions and comments about the proposal:

1. The request from DNR adds "and is a closed facility" to the applicability provision, s. 292.35 (2) (a). It is not clear to me what is intended by this language. I thought that it might be intended to mean that if the site or facility is a landfill, it is no longer operating. Please note, though, that the definition of "site or facility" includes any site where a hazardous substance is discharged, so you would not necessarily want to limit the applicability to a site that is standing idle. For example, the site might be the location of a municipal garage that was contaminated by a discharge caused by a former owner of the site. Another possible meaning of the word "closed" is a site for which DNR had issued a case closure letter. Is that what was intended? If you want to limit the current applicability of the statute, please let me know what is intended.

unwise

2. The request for this draft indicates that the current statute omits coverage of the costs of emergency response and interim actions. In my opinion, this is a misreading of the current statute. Unlike DNR's rules, the statutes use the term "remedial action" broadly. There is no indication in the statutes that emergency response and interim actions are excluded from remedial action. Remedial action is used in the statutes to mean any action that is taken to remedy environmental contamination at a site or facility. I believe that it would be ~~wise~~ to add "emergency response" and "interim actions" to this statute because that might be used to imply that when "remedial action" is used in other statutes, it does not include emergency response and interim actions. An alternative would be to include a broad definition of "remedial action" in s. 292.35. Please let me know if you wish to define "remedial action" in this statute.

3. This draft omits some of the language proposed for 292.35 (3) (dm) (numbered s. 292.35 (3) (aw) in this draft) because the language repeated provisions currently in s. 292.35 (7).

* 4. It is my understanding that the intent of this proposal is that DNR determine the remedial action that will be undertaken and that the negotiation process is only to be concerned with the allocation of costs. Therefore, this draft modifies s. 292.35 (5). If the process only deals with the allocation of costs, should the department still have the role of reviewing and approving or modifying the umpire's recommendation under s. 292.35 (6) (a)?

5. I was not certain whether the provisions concerning allocation of costs to transporters (see proposed s. 292.35 (6m)) were intended to apply in a court case under s. 292.35 (9). Please let me know if they should. Please note that current s. 292.35 (9) (br) limits transporter liability. I do not know whether a transporter would often be liable for 15% or more of costs under current s. 292.35 (9), so it is difficult to tell how much of an effect proposed s. 292.35 (6m) would have.

6. Current s. 292.35 (9) (c) limits a responsible party's liability to the percentage of all costs that is the same as the party's percentage of contribution to the pollution at the site or facility. I do not think that this method allocates any portion of the "orphan shares" to any other party. Therefore, I do not understand the purpose of the language proposed to be added to s. 292.35 (9) (c).

Please contact me with any questions or comments concerning this draft.

Rebecca C. Tradewell
Managing Attorney
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0360/P1dn
RCT:hmh:km

November 30, 2000

This is a preliminary version of the proposal to make changes in the local governmental unit negotiation and cost recovery statute (s. 292.35). Here are some specific questions and comments about the proposal:

1. The request from DNR adds "and is a closed facility" to the applicability provision, s. 292.35 (2) (a). It is not clear to me what is intended by this language. I thought that it might be intended to mean that if the site or facility is a landfill, it is no longer operating. Please note, though, that the definition of "site or facility" includes any site where a hazardous substance is discharged, so you would not necessarily want to limit the applicability to a site that is standing idle. For example, the site might be the location of a municipal garage that was contaminated by a discharge caused by a former owner of the site. Another possible meaning of the word "closed" is a site for which DNR had issued a case closure letter. Is that what was intended? If you want to limit the current applicability of the statute, please let me know what is intended.
2. The request for this draft indicates that the current statute omits coverage of the costs of emergency response and interim actions. In my opinion, this is a misreading of the current statute. Unlike DNR's rules, the statutes use the term "remedial action" broadly. There is no indication in the statutes that emergency response and interim actions are excluded from remedial action. Remedial action is used in the statutes to mean any action that is taken to remedy environmental contamination at a site or facility. I believe that it would be unwise to add "emergency response" and "interim actions" to this statute because that might be used to imply that when "remedial action" is used in other statutes, it does not include emergency response and interim actions. An alternative would be to include a broad definition of "remedial action" in s. 292.35. Please let me know if you wish to define "remedial action" in this statute.
3. This draft omits some of the language proposed for 292.35 (3) (dm) (numbered s. 292.35 (3) (aw) in this draft) because the language repeated provisions currently in s. 292.35 (7).
4. It is my understanding that the intent of this proposal is that DNR determine the remedial action that will be undertaken and that the negotiation process is only concerned with the allocation of costs. Therefore, this draft modifies s. 292.35 (5). If the process only deals with the allocation of costs, should the department still have the role of reviewing and approving or modifying the umpire's recommendation under s. 292.35 (6) (a)?

5. I was not certain whether the provisions concerning allocation of costs to transporters (see proposed s. 292.35 (6m)) were intended to apply in a court case under s. 292.35 (9). Please let me know if they should. Please note that current s. 292.35 (9) (br) limits transporter liability. I do not know whether a transporter would often be liable for 15% or more of costs under current s. 292.35 (9), so it is difficult to tell how much of an effect proposed s. 292.35 (6m) would have.

6. Current s. 292.35 (9) (c) limits a responsible party's liability to the percentage of all costs that is the same as the party's percentage of contribution to the pollution at the site or facility. I do not think that this method allocates any portion of the "orphan shares" to any other party. Therefore, I do not understand the purpose of the language proposed to be added to s. 292.35 (9) (c).

Please contact me with any questions or comments concerning this draft.

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Tradewell, Becky

From: Wong, Manyee
Sent: Tuesday, December 19, 2000 3:08 PM
To: Tradewell, Becky
Subject: FW: LRB 0360/1

Hi Becky,

Here are DNR responses to your notes/questions on LRB draft 0360/1. They seem ok to me...make sense. If they look ok to you, please incorporate DNR's recommended changes. Thanks.

Manyee

-----Original Message-----

From: Potter, Lance
Sent: Tuesday, December 19, 2000 9:35 AM
To: Wong, Manyee
Subject: LRB 0360/1

Manyee,

Here are the notes that legal services staff (in this case, Judy Ohm) and program staff have suggested for the statutory language for the local government unit negotiation and cost recovery - LRB 0360/1. Let me know if you have questions about the remarks and suggestions.

Thanks,

Lance

Comments on LRB 0360/1:

- ✓ 1. The draft uses the phrase "investigation and remedial action" rather than "emergency response, interim actions, investigation or remedial action" (see definition of "financial assistance" in s. 292.35(1)(am) and the applicability provision under s. 292.35(2)(b), for example). Drafter's Note #2 explains that it would be unwise to add "emergency response" and "interim action" because the phrase "remedial action," as used in the statutes is broad enough to include emergency and interim actions already. Becky Tradewell suggested that we could include a broad definition of "remedial action" in s. 292.35, if we wanted to ensure that "remedial action" would be construed to include emergency and interim actions. I think we should accept this alternative.
- ✓ 2. The draft omits the definition of "orphan share," which we included in s. 292.35(1)(br). Drafter's Note #6 explains that current s. 292.35(9)(c) limits an RP's liability to the percentage of all costs equal to their percentage of contribution to the pollution and doesn't allocate any portion of the "orphan shares" to any party. Therefore, she didn't understand the purpose of the proposed change to s. 292.35(9)(c). Our purpose was to provide that if state financial assistance becomes available for a site or facility, then it should be targeted to cover the portion of remedial action costs that are not going to be paid for by identified responsible parties (thus, the orphan shares). We need to reiterate this to Becky Tradewell.
- ✓ 3. Drafter's Note #1 asks questions about the applicability provision in s. 292.35(2)(a), specifically the phrase "and is a closed facility." This phrase was intended to mean that if the site or facility is a landfill, then it must be a closed facility in order to utilize the process under s. 292.35. To clarify this, s. 292.35(2)(a) could be amended as follows:
 - The site or facility is owned by a local governmental unit. This section does not apply to a landfill until January 1, 1996, and only applies to landfills that are closed facilities.
- ✓ 4. In s. 292.35(2g)(bg), the language regarding allocating a 15% share to transporters was not included, but it was included in a newly created section, s. 292.35(6m).
- ✓ 5. In s. 292.35(2g)(bg)2.b and 3, the draft uses the phrase "responsible unit" instead of "local governmental unit." For clarification, please use "local governmental unit."

- ✓6. In s. 292.35(2r)(c), it is specified that DNR's decision specifying an approved remedial option is subject to review under s. 227.42 (administrative hearing), but there is no mention of the right to expedited judicial review under s. 227.53, and that this process is the exclusive remedy for review. I think we need to explain to Becky why we included these provisions. We wanted to provide for review before the remedy was implemented, but not allow parties to appeal the remedy once the process moved forward to the cost allocation process.
- ✓7. Drafter's Note #3 states that some of the language proposed for s. 292.35(3)(dm)(numbered s. 292.35(3)(aw) in the LRB draft) was omitted because it repeated provisions currently in s. 292.35(7). The language that was omitted is that the RP is required to comply with the offer to settle once the RP accepts the offer and when the RP has complied with the offer to settle, the RP is not liable. I agree that similar language exists in current s. 292.35(7). If the language is omitted from s. 292.35(3)(aw), however, then s. 292.35(7) must be amended to include a cross-reference to s. 292.35(3)(aw), which would say "a responsible party that accepts an offer to settle under sub. (3)(aw),".
- ✓8. Drafter's Note #4 asks whether s. 292.35(5) should be modified to delete the language regarding "the design and implementation of the remedial action plan." I agree that this language should be deleted. It should also be deleted from s. 292.35(4)(a). The Note also asks whether DNR should still review and approve or modify the umpire's recommendation, since the negotiation process only deals with the allocation of costs. I don't think DNR has any special expertise in the area of cost allocation, so we do not need to review the umpire's recommendation.
- ✓9. Drafter's Note #5 asks whether the provisions concerning allocation of costs to transporters should apply in a court case under s. 292.35(9). We all agree this should apply.