



State of Wisconsin
2001 - 2002 LEGISLATURE

SOON

LRB-0360-111
RCT:hmh:km rml
stay

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

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

ONote

do not go

1 AN ACT ...; relating to: the budget.

Analysis
insert

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.

Insert
1-6

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:

and, if the site or facility is a landfill, the landfill is closed

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

6 292.35 (2) (b) The local governmental unit is a responsible party at the site or
7 facility and, commits itself, by resolution of its governing body, to paying more than
8 50% of the amount determined by subtracting any financial assistance received for
9 the site or facility from the total cost of investigation and remedial action for the site
10 or facility.

*all of the following apply: 1. The local governmental unit
2. If the site or facility is a landfill, the landfill is closed.*

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

12 292.35 (2g) (bg) 1. A transporter who is notified by certified mail by a local
13 governmental unit that the transporter is a responsible party at a site or facility shall
14 submit any records requested by the local governmental unit relating to the
15 transport and disposal of waste at the site or facility. The transporter shall submit
16 the records to the local governmental unit within 90 days of receiving the request.

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

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

22 b. A statement that the transporter will cooperate by providing depositions,
23 statements, and other materials reasonably sought by the ^{local governmental} responsible unit, or an
24 allocator appointed under sub. (3) (a), that will aid in the process of allocating
25 responsibility for the costs of investigation and remedial action at the site or facility.

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

2 3. A transporter shall provide depositions, statements, and other materials

3 reasonably sought by the ~~responsible~~ ^{local governmental} unit, or an allocator appointed under sub. (3)

4 (a), that will aid in the process of allocating responsibility for the costs of
5 investigation and remedial action at the site or facility.

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

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

11 292.35 (2g) (br) If a person fails to comply with par. (b) or (bg), the local
12 governmental unit may bring an action in circuit court to compel compliance. In an
13 action under this paragraph, the court may require a person who failed to comply
14 with par. (b) or (bg) to pay costs and, notwithstanding s. 814.04 (1), reasonable
15 attorney fees.

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

17 292.35 (2r) (a) The local governmental unit shall, in consultation with the
18 department, prepare a ~~draft report that identifies and evaluates options for remedial~~
19 ~~action plan at the site or facility and identifies the local governmental unit's~~
20 preferred remedial option. The local governmental unit shall submit the remedial
21 action option report and a list of responsible parties to the department.

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

23 292.35 (2r) (b) Upon ~~completion~~ receipt of the ~~draft remedial action plan option~~
24 report, the ~~local governmental unit shall send written notice to all responsible~~
25 parties identified by the local governmental unit, provide public notice and conduct

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

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

16 292.35 (2r) (c) Upon No later than 90 days after the conclusion of the period
17 for written comment, the local governmental unit department shall ~~prepare a~~
18 ~~preliminary remedial action plan~~ issue a decision specifying an approved remedial
19 option, taking into account the local governmental unit's preferred remedial option,
20 the written comments, and the comments received at the public hearing and ~~shall~~
21 ~~submit the preliminary remedial action plan to the department for approval.~~ The
22 ~~department may approve the preliminary remedial action plan as submitted or~~
23 ~~require modifications.~~ If the department fails to issue a decision within the time
24 required, the local governmental unit's preferred remedial option is approved and
25 constitutes the department's decision. The decision is subject to review under s.

and to judicial review under ss. 227.52 to 227.58

The decision ~~is~~ concerning the remedial option is not subject to review in any other administrative or judicial proceeding.
227.42. No later than 90 days after the conclusion of the period for written comment,

the department shall also issue a list of responsible parties, making any revision to the list provided under par. (a) that the department determines is appropriate, taking into account the written comments and the comments received at the public hearing. *plan*

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

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

SECTION 10. 292.35 (3) (a) of the statutes is renumbered ^{292.35 (3) (as)} and 292.35 (3) (as)

(intro.) and 2., as renumbered, ^{are} ~~is~~ amended to read:

292.35 (3) (as) (intro.) Upon receiving the department's approval of the preliminary remedial action plan Once a cost allocation decision has been made under par. (am), the local governmental unit shall ~~serve~~ ^{provide} an offer to settle regarding the contribution of funds for investigation and remedial action at the site or facility ^{in plain space} on based on the cost allocation decision to each of the responsible parties identified by the local governmental unit, using the procedure for service of a summons under s. 801.11 listed under sub. (2r) (c) by certified mail 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:

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

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

292.35 (3) (a) ^{can} The local governmental unit may appoint a person to make a cost allocation among the responsible parties at a site or facility. If the local governmental unit uses an allocator, the allocator shall submit a preliminary cost allocation to the local governmental unit no later than 90 days after the department issues a decision

1 under sub. (2r) (c). If the local governmental unit does not use an allocator, the local
2 governmental unit shall prepare a preliminary cost allocation no later than 90 days
3 after the department issues a decision under sub. (2r) (c).

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

5 292.35 (3) (ae) The local governmental unit shall hold a public hearing on the
6 preliminary cost allocation under par. (a). At least 14 days before the public hearing,
7 the local governmental unit shall mail a notice of the public hearing to all responsible
8 parties listed under sub. (2r) (c). The local governmental unit shall also publish a
9 class 2 notice, under ch. 985, of the hearing in a local newspaper with circulation in
10 the area where the site or facility is located. The local governmental unit shall accept
11 comments on the cost allocation for 30 days after the close of the public hearing.

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

13 292.35 (3) (am) If an allocator is used under par. (a), the allocator shall make
14 a final cost allocation decision, taking into account the written comments and
15 comments received at the public hearing and subject to sub. (6m), and provide the
16 cost allocation decision to the local governmental unit and the responsible parties no
17 later than 90 days after the close of the public comment period under par. (ae). If no
18 allocator is used, the local governmental unit shall make a final cost allocation
19 decision, taking into account the written comments and comments received at the
20 public hearing and subject to sub. (6m), and provide the cost allocation decision to
21 the responsible parties no later than 90 days after the close of the public comment
22 period under par. (ae).

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

24 292.35 (3) (aw) If a responsible party accepts the offer to settle under par. (as),
25 the responsible party shall notify the local governmental unit of the acceptance. If

1 a responsible party rejects the offer to settle, the responsible party shall notify the
2 local governmental unit, in writing, of the basis for the rejection no later than 30 days
3 after receiving the offer to settle. Upon receipt of notice of rejection, the local
4 governmental unit may request the department to select an umpire.

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

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

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

14 292.35 (3) (c) Within 10 days after receiving notice of the umpire selected by
15 the department under par. (b), the local governmental unit may notify the
16 department that the umpire selected is unacceptable. Within 10 days after receiving
17 notice of the umpire selected by the department under par. (b) [✓], a responsible party
18 may notify the department that the umpire selected is unacceptable or that the
19 responsible party does not intend to participate in the negotiation. Failure to notify
20 the department that the umpire is unacceptable shall be considered acceptance. ~~If~~
21 ~~all responsible parties identified by the local governmental unit indicate that they~~
22 ~~do not intend to participate in the negotiation, the department shall inform the local~~
23 ~~governmental unit and the local governmental unit shall cease further action under~~
24 this section.

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

Insert
7-24 →

1 292.35 (5) AGREEMENT IN NEGOTIATION. The local governmental unit and any of
 2 the responsible parties may enter into any agreement in negotiation regarding the
 3 ~~design and implementation of the remedial action plan and the contribution of funds~~
 4 by the local governmental unit and responsible parties for the investigation and
 5 remedial action. ~~The portion of the agreement containing the design and~~
 6 ~~implementation of the remedial action plan shall be submitted to the department for~~
 7 ~~approval. The department may approve that portion of the agreement as submitted~~
 8 ~~or require modifications.~~

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

10 292.35 (6) (a) If the local governmental unit and any responsible parties are
 11 unable to reach an agreement under sub. (5) by the end of the period of negotiation,
 12 the umpire shall make a recommendation, subject to sub. (6m), regarding the design
 13 ~~and implementation of the remedial action plan and the contribution of funds for~~
 14 investigation and remedial action by the local governmental unit and all responsible
 15 parties that were identified by the local governmental unit listed under sub. (2r)(c)
 16 and that did not reach an agreement under sub. (5), whether or not the responsible
 17 parties participated in negotiations under sub. (4). The umpire shall submit the
 18 recommendation to the department for its approval ^{of the local governmental unit and all} within ~~20~~ 60 days after the end ^{responsible}
 19 of the period of negotiation under sub. (4) (c). ~~The department may approve the~~ ^{parties}
 20 ~~recommendation as submitted or require modifications. The umpire shall distribute~~
 21 ~~a copy of the approved recommendation to the local governmental unit and all~~
 22 ~~responsible parties identified by the local governmental unit affected by the~~
 23 recommendation.

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

(strike period) X

3.0% notwithstanding sub. (9)(c), a finder of fact making an apportionment under sub. (9)(d)

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

6 (b) 1. Except as provided in subd. 2., if a transporter fails to comply with sub.
7 (2g) (bg) 1. to 3. or provides false information under those provisions, a local
8 governmental unit or other person making an allocation under sub. (3) (a) ³ ~~or~~ an
9 umpire making a recommendation under sub. (6) (a) shall allocate to the transporter
10 more than 15% of the costs allocated to responsible parties.

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

*Insert
9-16*

17 SECTION 20. 292.35 (9) (a) 1. of the statutes is renumbered 292.35 (9) (a) and
18 amended to read:

19 292.35 (9) (a) This subsection applies only to a site or facility that satisfies the
20 applicability provisions of sub. (2) and for which the remedial action specified in an
21 agreement under sub. (5) or a recommendation under sub. (6) is ~~completed~~ has
22 begun.

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

24 292.35 (9) (b) Except as provided in pars. (bm), (br), and (e), sub. (7) and s.
25 292.21, a responsible party is liable for a portion of the costs, as determined under

1 pars. (c) to (e), that have been or will be incurred by a local governmental unit for
2 remedial action in an agreement under sub. (5) or a recommendation under sub. (6)
3 and for any related investigation. A right of action shall accrue to a local
4 governmental unit against the responsible party for costs listed in this paragraph.

Insert
10-4
5 **SECTION 22.** 292.35 (9) (d) 7. of the statutes is created to read:

6 292.35 (9) (d) 7. The extent to which the party cooperated and assisted in the
7 process under subs. (2g) to (5).

8 (END)

ONote

ENVIRONMENT

HAZARDOUS SUBSTANCES AND ENVIRONMENTAL CLEANUP

Current law authorizes a local governmental unit that owns property that is contaminated with hazardous substances to initiate a process for negotiating about how the contamination will be remedied and how much the various parties that are responsible for the contamination will contribute toward the investigation and remedial action costs. The negotiations are conducted by an umpire. If an agreement is reached, it is binding on the parties. If an agreement is not reached, the umpire makes a recommendation that may be accepted or rejected by the parties. If the local governmental unit accepts the recommendation and another party rejects the recommendation, the local governmental unit may sue that party to attempt to recover a portion of the investigation and remedial action costs. If the local governmental unit recovers an amount equal to or exceeding the amount that the party would have paid under the umpire's recommendation, the local governmental unit may recover interest and litigation costs.

This bill expands the applicability of this ~~negotiation and cost recovery~~ ^{the} process so that it may be used by a local governmental unit that does not own a contaminated property if the local governmental unit is responsible for some of the contamination at the site or facility and commits itself to paying more than 50% of the investigation and remedial action costs, less any financial assistance received from this state, for the contaminated property. Under ~~this bill~~ ^{the bill}, DNR determines how contamination will be remedied, after considering a proposal from the local governmental unit, and the negotiations only relate to the amount that each responsible party will contribute toward the investigation and remedial action costs. This bill requires ~~person who transported hazardous substances to the contaminated~~ ^a person who transported hazardous substances to the contaminated ^{property} to provide records about the transport and disposal of waste at the property or, if the records are no longer available, to cooperate in providing information that will aid in the process of allocating costs. If a transporter cooperates, the amount of costs allocated to the transporter are limited. If a transporter fails to cooperate, the amount of costs allocated to the transporter may be increased. ~~The bill~~ ^{The bill} provides for public hearings during the negotiation and cost recovery process.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

292.35 (1) (d) "Remedial action" means means action that is taken in response to a discharge of a hazardous substance to ~~prevent additional discharge or to~~ restore the environment and minimize the harmful effects of the discharge on the air, lands, and waters of this state.

Analysis insert

Modifies the local governmental unit costs recovery process. The bill

Insert 1-6

property
the negotiation and cost recovery process

SECTION 2. 292.35 (4) (a) of the statutes is amended to read:

Insert

7-24

292.35 (4) (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.

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

SECTION 3. 292.35 (7) of the statutes is amended to read:

Insert
9-16

292.35 (7) RESPONSIBLE PARTIES SUBJECT TO AN OFFER TO SETTLE, AGREEMENT, OR RECOMMENDATION. A responsible party that accepts an offer to settle under sub. (3) (aw), 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 offer to settle, agreement, or recommendation. When the responsible party has complied with the offer to settle, 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 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 investigation or remedial action; and the responsible party is not subject to an order under s. 292.11

Insert 9-16, continued

(7) (c) for the discharge that is the subject of the offer to settle, agreement, or recommendation.

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

SECTION 4. 292.35 (8) (b) 2. of the statutes is amended to read:

292.35 (8) (b) 2. The responsible party accepts an offer to settle under sub. (3) (aw) or 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 offer to settle, agreement, or recommendation; and the local governmental unit recovers a judgment against that responsible party based on the offer to settle, agreement, or recommendation.

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

SECTION 5. 292.35 (9) (cs) of the statutes is created to read:

292.35 (9) (cs) If this state provides financial assistance for a site or facility, the finder of fact shall apply the financial assistance toward the amount that cannot be collected from a responsible party because the responsible party is unidentifiable, deceased, insolvent, or a dissolved corporation, before applying par. (c) to determine the liability of the responsible parties from which it is possible to collect.

*Insert
10-4*

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0360/1dn

RCT.....

hmb

Date

It is still unclear to me what DNR is concerned about with respect to the orphan share issue. Under current law, I do not see how state financial assistance would go for anything other than covering the costs of the orphan shares. However, I have added proposed s. 292.35 (9) (cs) in an attempt to respond to DNR's concern.

DNR's instructions use the phrase "expedited review process under s. 227.53." I do not see anything in ch. 227 about an expedited review process. If the intent is to modify the usual deadlines for judicial review under ch. 227 or to require a court to "expedite" these cases, the draft will have to be explicit about what is intended.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0360/1dn
RCT:hmh:pg

January 2, 2001

It is still unclear to me what DNR is concerned about with respect to the orphan share issue. Under current law, I do not see how state financial assistance would go for anything other than covering the costs of the orphan shares. However, I have added proposed s. 292.35 (9) (cs) in an attempt to respond to DNR's concern.

DNR's instructions use the phrase "expedited review process under s. 227.53." I do not see anything in ch. 227 about an expedited review process. If the intent is to modify the usual deadlines for judicial review under ch. 227 or to require a court to "expedite" these cases, the draft will have to be explicit about what is intended.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: bccky.tradewell@legis.state.wi.us

Tradewell, Becky

From: Wong, Manyee
Sent: Tuesday, January 16, 2001 3:14 PM
To: Tradewell, Becky
Subject: FW: LRB - 0360/1 - DNR Final Comments

Hi Becky,

Here are DNR's final comments on this draft. Please go ahead and make all recommended changes except for numeral 5.

Thanks.
Manyee

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

From: Stewart, Marie
Sent: Tuesday, January 16, 2001 11:29 AM
To: Potter, Lance
Cc: Felker-Donsing, Susan; Stewart, Marie; Ohm, Judith M; Wong, Manyee
Subject: LRB - 0360/1 - DNR Final Comments



Sec 292_.doc

Here are our responses to Rebecca Tradewell's January 2nd revision and notes.

01/12/01

Additional WDNR Comments on Sec. 292.35 Proposed Changes

Definitions:

1) "Remedial action"

Sec. 292.35(1)(d) "Remedial action" - We agree that a single definition makes sense. We would still like to expand the definition, somewhat, for clarification purposes and to assure that it is consistent with the definitions we use in our Administrative Code, ss. NR 770. 03 (28) and (29). Our suggested re-write is as follows:

292.35 (1)(d) "Remedial action" means action that is taken in response to a discharge of a hazardous substance to restore the environment and minimize the harmful effects of the discharge on the air, lands, and waters of this state, including immediate and interim actions

✓ 2) "Applicability"

Sec. 292.35(2) Applicability. We feel that there still needs to be clarification of what constitutes a "closed" landfill. Our suggested language is as follows:

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

- a) The site or facility is owned by a local governmental unit and, if the site or facility is a landfill, the landfill is closed pursuant to s. 289.05(3), Wis. Stats.

✓ 3) Sec. 292.35(2r)(c), regarding "expedited judicial review". In response to the drafters note we suggest the following additional language to clarify our intent.

Sec. 292.35(2r)(c) No later than 90 days after the conclusion of the period for written comment, the department shall issue a decision

specifying an approved remedial option, taking into account the local governmental unit's preferred remedial option, the written comments, and the comments received at the public hearing. If the department fails to issue a decision within the time required, the local governmental unit's preferred remedial option is approved and constitutes the department's decision. The decision is subject to review under s. 227.42 and to judicial review under ss 227.52 to 227.58. If a decision is subject to judicial review, the court shall expedite the review, to the extent possible.

- ✓ 4) Sec. 292.35(9) (c), regarding allocation of costs to transporters. On further review we feel some additional language is needed to clarify the liability of transporters in this section of the statute. We propose the following language be added:

S. 292/35 (9) (c) Except as provided in s. 292.35 (6m), 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. Section 895.045 does not apply to this paragraph.

- 5) Sec. 292.35(9)(cs), regarding application of financial assistance. We suggest the following additional language in response to the drafters note:

292.35(9)(cs) If this state provides financial assistance for a site or facility, the finder of fact shall apply the financial assistance toward the amount that cannot be collected from a responsible party because the responsible party is unidentifiable, deceased, insolvent, or a dissolved corporation, before applying par. (c) to determine the liability of the responsible parties from which it is possible to collect. A finder of fact may determine that a responsible party is insolvent based on the financial or legal status of the party, including factors such as bankruptcy protection or the impact of the allocation on the party and the party's ability to pay.



State of Wisconsin
2001 - 2002 LEGISLATURE

SOON

LRB-0360~~4~~ 2
RCT:hmb/pg rmr
G King

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

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

Note

1 AN ACT ^{DON'T} ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

ENVIRONMENT

HAZARDOUS SUBSTANCES AND ENVIRONMENTAL CLEANUP

Current law authorizes a local governmental unit that owns property that is contaminated with hazardous substances to initiate a process for negotiating about how the contamination will be remedied and how much the various parties that are responsible for the contamination will contribute toward the investigation and remedial action costs. The negotiations are conducted by an umpire. If an agreement is reached, it is binding on the parties. If an agreement is not reached, the umpire makes a recommendation that may be accepted or rejected by the parties. If the local governmental unit accepts the recommendation and another party rejects the recommendation, the local governmental unit may sue that party to attempt to recover a portion of the investigation and remedial action costs. If the local governmental unit recovers an amount equal to or exceeding the amount that the party would have paid under the umpire's recommendation, the local governmental unit may recover interest and litigation costs.

This bill modifies the local governmental unit cost-recovery process. The bill expands the applicability of the process so that it may be used by a local governmental unit that does not own a contaminated property if the local

governmental unit is responsible for some of the contamination at the site or facility and commits itself to paying more than 50% of the investigation and remedial action costs, less any financial assistance received from this state, for the contaminated property. Under this bill, DNR determines how contamination will be remedied, after considering a proposal from the local governmental unit, and the negotiations only relate to the amount that each responsible party will contribute toward the investigation and remedial action costs. This bill requires a person who transported hazardous substances to the contaminated property to provide records about the transport and disposal of waste at the property or, if the records are no longer available, to cooperate in providing information that will aid in the process of allocating costs. If a transporter cooperates, the amount of costs allocated to the transporter are limited. If a transporter fails to cooperate, the amount of costs allocated to the transporter may be increased. The bill provides for public hearings during the negotiation and cost-recovery process.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

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

2 292.35 (1) (am) "Financial assistance" means money, other than a loan,
3 provided by this state to pay a portion of the cost of investigation and remedial action
4 for a site or facility, except that "financial assistance" does not include money
5 provided by the state because the state is a responsible party at a site or facility.

6 **SECTION 2.** 292.35 (1) (d) of the statutes is created to read:

7 292.35 (1) (d) "Remedial action" means ~~means~~ [✓] action that is taken in response
8 to a discharge of a hazardous substance to restore the environment and minimize the
9 harmful effects of the discharge on the air, lands, and waters of this state. ^{including actions} taken immediately

10 **SECTION 3.** 292.35 (2) of the statutes is renumbered 292.35 (2) (intro.) and ^{after}
11 amended to read: ^{the}

12 292.35 (2) **APPLICABILITY.** (intro.) This section only applies to a site or facility
13 if the any of the following criteria is satisfied: ^{discharge occurs}

1 (a) The site or facility is owned by a local governmental unit and, if the site or
2 facility is a landfill, the landfill is closed. ^{stays} ~~This section does not apply to a landfill until~~
3 January 1, 1996. Under s. 289.05(3) ✓

4 SECTION 4. 292.35 (2) (b) of the statutes is created to read:

5 292.35 (2) (b) The local governmental unit is a responsible party at the site or
6 facility and all of the following apply:

7 1. The local governmental unit commits itself, by resolution of its governing
8 body, to paying more than 50% of the amount determined by subtracting any
9 financial assistance received for the site or facility from the total cost of investigation
10 and remedial action for the site or facility.

11 2. If the site or facility is a landfill, the landfill is closed.

12 SECTION 5. 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,
24 statements, and other materials reasonably sought by the local governmental unit,

1 or an 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 local governmental unit, or an allocator appointed under
6 sub. (3) (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 6.** 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 7.** 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 **SECTION 8.** 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
11 hearing, and a description of the procedures in this section. At the public hearing,
12 the ~~local governmental unit~~ department shall solicit testimony on whether the ~~draft~~
13 preferred remedial option in the remedial action plan options report is the least
14 costly most cost effective method of meeting the standards for remedial action
15 promulgated by the department by rule. The ~~local governmental unit~~ department
16 shall accept written comments for at least 30 days after the close of the public
17 hearing.

18 **SECTION 9.** 292.35 (2r) (c) of the statutes is amended to read:

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

A court shall conduct the review of a decision under this paragraph as expeditiously as possible.

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 and to judicial review under ss. 227.52 to 227.58. The decision concerning the
5 remedial option is not subject to review in any other administrative or judicial
6 proceeding. No later than 90 days after the conclusion of the period for written
7 comment, the department shall also issue a list of responsible parties, making any
8 revision to the list provided under par. (a) that the department determines is
9 appropriate, taking into account the written comments and the comments received
10 at the public hearing.

11 **SECTION 10.** 292.35 (3) (title) of the statutes is amended to read:

12 292.35 (3) (title) ~~OFFER~~ COST ALLOCATION, OFFER TO SETTLE; SELECTION OF UMPIRE.

13 **SECTION 11.** 292.35 (3) (a) of the statutes is renumbered 292.35 (3) (as), and
14 292.35 (3) (as) (intro.) and 2., as renumbered, are amended to read:

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

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

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

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

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

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

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

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

1 public hearing and subject to sub. (6m), and provide the cost allocation decision to
2 the responsible parties no later than 90 days after the close of the public comment
3 period under par. (ae).

4 **SECTION 15.** 292.35 (3) (aw) of the statutes is created to read:

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

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

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

19 **SECTION 17.** 292.35 (3) (c) of the statutes is amended to read:

20 292.35 (3) (c) Within 10 days after receiving notice of the umpire selected by
21 the department under par. (b), the local governmental unit may notify the
22 department that the umpire selected is unacceptable. Within 10 days after receiving
23 notice of the umpire selected by the department under par. (b), a responsible party
24 may notify the department that the umpire selected is unacceptable or that the
25 responsible party does not intend to participate in the negotiation. Failure to notify

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

6 **SECTION 18.** 292.35 (4) (a) of the statutes is amended to read:

7 292.35 (4) (a) The umpire, immediately upon being appointed, shall contact the
8 department, the local governmental unit, and the responsible parties that received
9 the offer to settle and shall schedule the negotiating sessions. The umpire shall
10 schedule the first negotiating session no later than 20 days after being appointed.
11 The umpire may meet with all parties to the negotiation, individual parties or groups
12 of parties. The umpire shall facilitate a discussion between the local governmental
13 unit and the responsible parties to attempt to reach an agreement on the design and
14 implementation of the remedial action plan and the contribution of funds by the local
15 governmental unit and responsible parties.

16 **SECTION 19.** 292.35 (5) of the statutes is amended to read:

17 292.35 (5) AGREEMENT IN NEGOTIATION. The local governmental unit and any of
18 the responsible parties may enter into any agreement in negotiation regarding the
19 design and implementation of the remedial action plan and the contribution of funds
20 by the local governmental unit and responsible parties for the investigation and
21 remedial action. The portion of the agreement containing the design and
22 implementation of the remedial action plan shall be submitted to the department for
23 approval. The department may approve that portion of the agreement as submitted
24 or require modifications.

25 **SECTION 20.** 292.35 (6) (a) of the statutes is amended to read:

1 292.35 (6) (a) If the local governmental unit and any responsible parties are
2 unable to reach an agreement under sub. (5) by the end of the period of negotiation,
3 the umpire shall make a recommendation, subject to sub. (6m), regarding the design
4 ~~and implementation of the remedial action plan and~~ the contribution of funds for
5 investigation and remedial action by the local governmental unit and all responsible
6 parties that were identified by the local governmental unit listed under sub. (2r) (c)
7 and that did not reach an agreement under sub. (5), whether or not the responsible
8 parties participated in negotiations under sub. (4). The umpire shall submit the
9 recommendation to the department ~~for its approval, the local governmental unit, and~~
10 all responsible parties affected by the recommendation within ~~20~~ 60 days after the
11 end of the period of negotiation under sub. (4) (c). ~~The department may approve the~~
12 ~~recommendation as submitted or require modifications. The umpire shall distribute~~
13 ~~a copy of the approved recommendation to the local governmental unit and all~~
14 ~~responsible parties identified by the local governmental unit.~~

15 **SECTION 21.** 292.35 (6m) of the statutes is created to read:

16 292.35 (6m) RESPONSIBILITY OF TRANSPORTER. (a) If a transporter complies with
17 sub. (2g) (bg) 1. to 3., a local governmental unit or other person making an allocation
18 under sub. (3) (a), an umpire making a recommendation under sub. (6) (a), or,
19 notwithstanding sub. (9) (c), a finder of fact making an apportionment under sub. (9)
20 (d) may not allocate to the transporter more than 15% of the costs allocated to
21 responsible parties.

22 (b) 1. Except as provided in subd. 2., if a transporter fails to comply with sub.
23 (2g) (bg) 1. to 3. or provides false information under those provisions, a local
24 governmental unit or other person making an allocation under sub. (3) (a), an umpire
25 making a recommendation under sub. (6) (a), or, notwithstanding sub. (9) (c), a finder

1 of fact making an apportionment under sub. (9) (d) shall allocate to the transporter
2 more than 15% of the costs allocated to responsible parties.

3 2. If a transporter provides information under sub. (2g) (bg) 1. to 3. after the
4 day on which the information is required to be provided and an explanation of why
5 the information was not provided sooner, a local governmental unit or other person
6 making an allocation under sub. (3) (a), an umpire making a recommendation under
7 sub. (6) (a), or, notwithstanding sub. (9) (c), a finder of fact making an apportionment
8 under sub. (9) (d) may allocate to the transporter less than 15% of the costs allocated
9 to responsible parties.

10 **SECTION 22.** 292.35 (7) of the statutes is amended to read:

11 292.35 (7) RESPONSIBLE PARTIES SUBJECT TO AN OFFER TO SETTLE, AGREEMENT, OR
12 RECOMMENDATION. A responsible party that accepts an offer to settle under sub. (3)
13 (aw), that enters into an agreement under sub. (5) with a local governmental unit,
14 or that accepts the umpire's recommendation under sub. (6), if the local
15 governmental unit does not reject the recommendation, is required to comply with
16 the offer to settle, agreement, or recommendation. When the responsible party has
17 complied with the offer to settle, agreement, or recommendation, the responsible
18 party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the
19 local governmental unit for any additional costs of the investigation or remedial
20 action; the responsible party is not liable to any other responsible party for
21 contribution to costs incurred by any other responsible party for the investigation or
22 remedial action; and the responsible party is not subject to an order under s. 292.11
23 (7) (c) for the discharge that is the subject of the offer to settle, agreement, or
24 recommendation.

25 **SECTION 23.** 292.35 (8) (b) 2. of the statutes is amended to read:

1 292.35 (8) (b) 2. The responsible party accepts an offer to settle under sub. (3)
2 (aw) or the local governmental unit and the responsible party enter into an
3 agreement under sub. (5) or accept the umpire's recommendation under sub. (6); ³ the ^{*}
4 responsible party does not comply with the requirements of the offer to settle,
5 agreement, or recommendation; and the local governmental unit recovers a
6 judgment against that responsible party based on the offer to settle, agreement, or
7 recommendation.

8 **SECTION 24.** 292.35 (9) (a) 1. of the statutes is renumbered 292.35 (9) (a) and
9 amended to read:

10 292.35 (9) (a) This subsection applies only to a site or facility that satisfies the
11 applicability provisions of sub. (2) and for which the remedial action specified in an
12 agreement under sub. (5) or a recommendation under sub. (6) ~~is completed~~ has
13 begun.

14 **SECTION 25.** 292.35 (9) (b) of the statutes is amended to read:

15 292.35 (9) (b) Except as provided in pars. (bm), (br), and (e), sub. (7) and s.
16 292.21, a responsible party is liable for a portion of the costs, as determined under
17 pars. (c) to (e), that have been or will be incurred by a local governmental unit for
18 remedial action in an agreement under sub. (5) or a recommendation under sub. (6)
19 and for any related investigation. A right of action shall accrue to a local
20 governmental unit against the responsible party for costs listed in this paragraph.

21 **SECTION 26.** 292.35 (9) (cs) of the statutes is created to read:

22 292.35 (9) (cs) If this state provides financial assistance for a site or facility, the
23 finder of fact shall apply the financial assistance toward the amount that cannot be
24 collected from a responsible party because the responsible party is unidentifiable,

Insert
12-20
→

Insert 12-20

Section #. 292.35 (9) (c) of the statutes is amended to read:

Except as provided in sub. (6m), the

292.35 (9) (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.

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

-03692dn
RET

DNte

:KMG:

Maryee Wong:

One of the changes that DNR requested was to add "including immediate and interim actions" at the end of the definition of "remedial action." The problem is that the statute ~~does not~~ does not refer either to immediate ^{actions} or ^{to} interim actions and those are not terms that anyone would be familiar

with, ~~and~~ except for persons familiar with DNR's rules. Thus, it really is not appropriate to use them here. I am confident that the definition is

~~broad enough to include what DNR calls immediate and interim actions.~~ I have made a slightly different change than DNR requested.

RET

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0360/2dn
RCT:kmg:kjf

January 17, 2001

Manyee Wong:

One of the changes that DNR requested was to add "including immediate and interim actions" at the end of the definition of "remedial action." The problem is that the statute does not refer either to immediate actions or to interim actions and those are not terms that anyone would be familiar with, except for persons familiar with DNR's rules. Thus, it really is not appropriate to use them here. I have made a slightly different change than DNR requested.

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State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-0360/2
RCT:hmh&kmg:kjf

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

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

ENVIRONMENT

HAZARDOUS SUBSTANCES AND ENVIRONMENTAL CLEANUP

Current law authorizes a local governmental unit that owns property that is contaminated with hazardous substances to initiate a process for negotiating about how the contamination will be remedied and how much the various parties that are responsible for the contamination will contribute toward the investigation and remedial action costs. The negotiations are conducted by an umpire. If an agreement is reached, it is binding on the parties. If an agreement is not reached, the umpire makes a recommendation that may be accepted or rejected by the parties. If the local governmental unit accepts the recommendation and another party rejects the recommendation, the local governmental unit may sue that party to attempt to recover a portion of the investigation and remedial action costs. If the local governmental unit recovers an amount equal to or exceeding the amount that the party would have paid under the umpire's recommendation, the local governmental unit may recover interest and litigation costs.

This bill modifies the local governmental unit cost-recovery process. The bill expands the applicability of the process so that it may be used by a local governmental unit that does not own a contaminated property if the local

governmental unit is responsible for some of the contamination at the site or facility and commits itself to paying more than 50% of the investigation and remedial action costs, less any financial assistance received from this state, for the contaminated property. Under this bill, DNR determines how contamination will be remedied, after considering a proposal from the local governmental unit, and the negotiations only relate to the amount that each responsible party will contribute toward the investigation and remedial action costs. This bill requires a person who transported hazardous substances to the contaminated property to provide records about the transport and disposal of waste at the property or, if the records are no longer available, to cooperate in providing information that will aid in the process of allocating costs. If a transporter cooperates, the amount of costs allocated to the transporter are limited. If a transporter fails to cooperate, the amount of costs allocated to the transporter may be increased. The bill provides for public hearings during the negotiation and cost-recovery process.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

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

2 292.35 (1) (am) “Financial assistance” means money, other than a loan,
3 provided by this state to pay a portion of the cost of investigation and remedial action
4 for a site or facility, except that “financial assistance” does not include money
5 provided by the state because the state is a responsible party at a site or facility.

6 **SECTION 2.** 292.35 (1) (d) of the statutes is created to read:

7 292.35 (1) (d) “Remedial action” means action that is taken in response to a
8 discharge of a hazardous substance to restore the environment and minimize the
9 harmful effects of the discharge on the air, lands, and waters of this state, including
10 actions taken immediately after the discharge occurs.

11 **SECTION 3.** 292.35 (2) of the statutes is renumbered 292.35 (2) (intro.) and
12 amended to read:

1 292.35 (2) APPLICABILITY. (intro.) 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 and, if the site or facility is a landfill, the
5 landfill is closed under s. 289.05 (3).

6 **SECTION 4.** 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 all of the following apply:

9 1. The local governmental unit commits itself, by resolution of its governing
10 body, to paying more than 50% of the amount determined by subtracting any
11 financial assistance received for the site or facility from the total cost of investigation
12 and remedial action for the site or facility.

13 2. If the site or facility is a landfill, the landfill is closed.

14 **SECTION 5.** 292.35 (2g) (bg) of the statutes is created to read:

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

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

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

1 b. A statement that the transporter will cooperate by providing depositions,
2 statements, and other materials reasonably sought by the local governmental unit,
3 or an allocator appointed under sub. (3) (a), that will aid in the process of allocating
4 responsibility for the costs of investigation and remedial action at the site or facility.

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

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

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

14 **SECTION 6.** 292.35 (2g) (br) of the statutes is created to read:

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

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

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

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

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

19 **SECTION 9.** 292.35 (2r) (c) of the statutes is amended to read:

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

SECTION 9

1 ~~department may approve the preliminary remedial action plan as submitted or~~
2 ~~require modifications. If the department fails to issue a decision within the time~~
3 ~~required, the local governmental unit's preferred remedial option is approved and~~
4 ~~constitutes the department's decision. The decision is subject to review under s.~~
5 ~~227.42 and to judicial review under ss. 227.52 to 227.58. A court shall conduct the~~
6 ~~review of a decision under this paragraph as expeditiously as possible. The decision~~
7 ~~concerning the remedial option is not subject to review in any other administrative~~
8 ~~or judicial proceeding. No later than 90 days after the conclusion of the period for~~
9 ~~written comment, the department shall also issue a list of responsible parties,~~
10 ~~making any revision to the list provided under par. (a) that the department~~
11 ~~determines is appropriate, taking into account the written comments and the~~
12 ~~comments received at the public hearing.~~

13 **SECTION 10.** 292.35 (3) (title) of the statutes is amended to read:

14 292.35 (3) (title) ~~OFFER~~ COST ALLOCATION, OFFER TO SETTLE; SELECTION OF UMPIRE.

15 **SECTION 11.** 292.35 (3) (a) of the statutes is renumbered 292.35 (3) (as), and
16 292.35 (3) (as) (intro.) and 2., as renumbered, are amended to read:

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

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

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

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

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

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

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

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

1 allocator is used, the local governmental unit shall make a final cost allocation
2 decision, taking into account the written comments and comments received at the
3 public hearing and subject to sub. (6m), and provide the cost allocation decision to
4 the responsible parties no later than 90 days after the close of the public comment
5 period under par. (ae).

6 **SECTION 15.** 292.35 (3) (aw) of the statutes is created to read:

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

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

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

21 **SECTION 17.** 292.35 (3) (c) of the statutes is amended to read:

22 292.35 (3) (c) Within 10 days after receiving notice of the umpire selected by
23 the department under par. (b), the local governmental unit may notify the
24 department that the umpire selected is unacceptable. Within 10 days after receiving
25 notice of the umpire selected by the department under par. (b), a responsible party

1 may notify the department that the umpire selected is unacceptable or that the
2 responsible party does not intend to participate in the negotiation. Failure to notify
3 the department that the umpire is unacceptable shall be considered acceptance. If
4 ~~all responsible parties identified by the local governmental unit indicate that they~~
5 ~~do not intend to participate in the negotiation, the department shall inform the local~~
6 ~~governmental unit and the local governmental unit shall cease further action under~~
7 ~~this section.~~

8 **SECTION 18.** 292.35 (4) (a) of the statutes is amended to read:

9 292.35 (4) (a) The umpire, immediately upon being appointed, shall contact the
10 department, the local governmental unit, and the responsible parties that received
11 the offer to settle and shall schedule the negotiating sessions. The umpire shall
12 schedule the first negotiating session no later than 20 days after being appointed.
13 The umpire may meet with all parties to the negotiation, individual parties or groups
14 of parties. The umpire shall facilitate a discussion between the local governmental
15 unit and the responsible parties to attempt to reach an agreement on the design and
16 implementation of the remedial action plan and the contribution of funds by the local
17 governmental unit and responsible parties.

18 **SECTION 19.** 292.35 (5) of the statutes is amended to read:

19 292.35 (5) AGREEMENT IN NEGOTIATION. The local governmental unit and any of
20 the responsible parties may enter into any agreement in negotiation regarding the
21 ~~design and implementation of the remedial action plan and the contribution of funds~~
22 by the local governmental unit and responsible parties for the investigation and
23 remedial action. ~~The portion of the agreement containing the design and~~
24 ~~implementation of the remedial action plan shall be submitted to the department for~~

1 approval. ~~The department may approve that portion of the agreement as submitted~~
2 ~~or require modifications.~~

3 **SECTION 20.** 292.35 (6) (a) of the statutes is amended to read:

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

18 **SECTION 21.** 292.35 (6m) of the statutes is created to read:

19 292.35 (6m) RESPONSIBILITY OF TRANSPORTER. (a) If a transporter complies with
20 sub. (2g) (bg) 1. to 3., a local governmental unit or other person making an allocation
21 under sub. (3) (a), an umpire making a recommendation under sub. (6) (a), or,
22 notwithstanding sub. (9) (c), a finder of fact making an apportionment under sub. (9)
23 (d) may not allocate to the transporter more than 15% of the costs allocated to
24 responsible parties.

1 (b) 1. Except as provided in subd. 2., if a transporter fails to comply with sub.
2 (2g) (bg) 1. to 3. or provides false information under those provisions, a local
3 governmental unit or other person making an allocation under sub. (3) (a), an umpire
4 making a recommendation under sub. (6) (a), or, notwithstanding sub. (9) (c), a finder
5 of fact making an apportionment under sub. (9) (d) shall allocate to the transporter
6 more than 15% of the costs allocated to responsible parties.

7 2. If a transporter provides information under sub. (2g) (bg) 1. to 3. after the
8 day on which the information is required to be provided and an explanation of why
9 the information was not provided sooner, a local governmental unit or other person
10 making an allocation under sub. (3) (a), an umpire making a recommendation under
11 sub. (6) (a), or, notwithstanding sub. (9) (c), a finder of fact making an apportionment
12 under sub. (9) (d) may allocate to the transporter less than 15% of the costs allocated
13 to responsible parties.

14 **SECTION 22.** 292.35 (7) of the statutes is amended to read:

15 292.35 (7) RESPONSIBLE PARTIES SUBJECT TO AN OFFER TO SETTLE, AGREEMENT, OR
16 RECOMMENDATION. A responsible party that accepts an offer to settle under sub. (3)
17 (aw), that enters into an agreement under sub. (5) with a local governmental unit,
18 or that accepts the umpire's recommendation under sub. (6), if the local
19 governmental unit does not reject the recommendation, is required to comply with
20 the offer to settle, agreement, or recommendation. When the responsible party has
21 complied with the offer to settle, agreement, or recommendation, the responsible
22 party is not liable to the state, including under s. 292.11 (7) (b) or 292.31 (8), or to the
23 local governmental unit for any additional costs of the investigation or remedial
24 action; the responsible party is not liable to any other responsible party for
25 contribution to costs incurred by any other responsible party for the investigation or

1 remedial action; and the responsible party is not subject to an order under s. 292.11
2 (7) (c) for the discharge that is the subject of the offer to settle, agreement, or
3 recommendation.

4 **SECTION 23.** 292.35 (8) (b) 2. of the statutes is amended to read:

5 292.35 (8) (b) 2. The responsible party accepts an offer to settle under sub. (3)
6 (aw) or the local governmental unit and the responsible party enter into an
7 agreement under sub. (5) or accept the umpire's recommendation under sub. (6); the
8 responsible party does not comply with the requirements of the offer to settle,
9 agreement, or recommendation; and the local governmental unit recovers a
10 judgment against that responsible party based on the offer to settle, agreement, or
11 recommendation.

12 **SECTION 24.** 292.35 (9) (a) 1. of the statutes is renumbered 292.35 (9) (a) and
13 amended to read:

14 292.35 (9) (a) This subsection applies only to a site or facility that satisfies the
15 applicability provisions of sub. (2) and for which the remedial action specified in an
16 agreement under sub. (5) or a recommendation under sub. (6) ~~is completed~~ has
17 begun.

18 **SECTION 25.** 292.35 (9) (b) of the statutes is amended to read:

19 292.35 (9) (b) Except as provided in pars. (bm), (br), and (e), sub. (7) and s.
20 292.21, a responsible party is liable for a portion of the costs, as determined under
21 pars. (c) to (e), that have been or will be incurred by a local governmental unit for
22 remedial action in an agreement under sub. (5) or a recommendation under sub. (6)
23 and for any related investigation. A right of action shall accrue to a local
24 governmental unit against the responsible party for costs listed in this paragraph.

25 **SECTION 26.** 292.35 (9) (c) of the statutes is amended to read:

