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Chapter NR 756

FINANCIAL RESPONSIBILITY AT CONTAMINATED SEDIMENT SITES WITH ENGINEERING CONTROLS

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NR 756.01 Purpose. The purpose of this chapter is to establish planning, compliance, and financial responsibility requirements for sites or facilities with contaminated sediment that rely on an engineering control to protect public health, safety, welfare, and the environment from the contaminated sediment. This chapter is adopted under s. 227.11 (2), Stats., and ch. 292, Stats.

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

NR 756.02 Applicability. Except as otherwise provided, this chapter applies to all sites or facilities where a person who is required to take action under ch. 292, Stats., with respect to contaminated sediment, takes an interim or remedial action that includes the use of an engineering control to address the contaminated sediment.

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

NR 756.03 Definitions. In this chapter:

(1) "Contaminated sediment engineering control" means an engineering control used to address contaminated sediment.

(2) "Event" means an occurrence that may affect the completion of the goals established in the plan and compliance schedule that are induced by either weather, or the combination of human activity and weather, including significant flood events, increased flow rates, anthropogenic induced scour, an increase in event frequency, or other events having a deleterious effect on the protectiveness of the contaminated sediment remedy.

(3) "Person required to submit proof" means a person that is required to submit proof of financial responsibility under s. NR 756.04 (1) (d), including a person that has assumed responsibility under s. 292.12 (5m) (am), Stats.

(4) "Proof period" means the amount of time for which proof of responsibility requirements are applicable.

(5) "Proof method" means a mechanism for providing proof of financial responsibility under s. NR 756.06.

(6) "Third-party action" means activities that may affect the completion of the goals established in a plan and compliance schedule or that have a deleterious effect on the protectiveness of the contaminated sediment remedy that are taken by persons other than the person required to submit a plan and compliance schedule or proof of responsibility under this chapter.

History: EmR2032: emerg. cr., eff. 9-8-20; CR 20-038: cr. Register September 2021 No. 789, eff. 10-1-21; correction in (3) made under s. 13.92 (4) (b) 7., Stats., Register September 2021 No. 789.

NR 756.04 Plan and compliance schedule; financial responsibility; fees. (1) GENERAL. As a condition of approving an interim action, a remedial action, or of granting case closure, the department may require a person who is required to take action under ch. 292, Stats., with respect to contaminated sediment, and who takes action that includes the use of a contaminated sediment engineering control, to do any of the following:

(a) Maintain any contaminated sediment engineering controls on the site or facility.

(b) Investigate the extent of residual contamination and perform any necessary remedial action if a structural impediment is removed that had prevented a complete investigation or remedial action at the site.

(c) Submit a plan and compliance schedule for satisfying the requirements under pars. (a) and (b) to the department for approval.

(d) Submit proof of financial responsibility sufficient to pay the costs of complying with the plan and compliance schedule under par. (c) to the department for approval.

(2) PLAN AND COMPLIANCE SCHEDULE AND PROOF OF FINANCIAL RESPONSIBILITY. (a) *Requirements; plan and compliance schedule.* The responsible party shall provide to the department a design report meeting the requirements under s. NR 724.09, along with a plan and compliance schedule that identifies the scheduled actions that will lead to the completion of any applicable requirements under sub. (1) (a) and (b) for the purposes of meeting the requirements under ch. 292, Stats. Unless otherwise directed by the department, a person required to submit a plan and compliance schedule shall include all of the following in the plan and compliance schedule:

1. Scheduled actions that will be taken to attain the goals established under sub. (1) (a) and (b), and dates for completion of these actions. These actions may include items required under ss. NR 724.13, 724.15, and 724.17, as applicable, and any other actions directed by the department in writing. Verification of sufficient legal access to conduct all scheduled actions shall be included.

2. An engineering analysis certified by a licensed professional engineer, as defined under s. NR 712.03. The analysis shall include the duration and ongoing efficacy of any engineering controls or structural impediments and assessment of the vulnerability of any engineering controls or structural impediments to any events or third-party actions that may occur and affect completion of the goals established in the plan and compliance schedule.

3. Inspection and reporting criteria that include an inspection schedule. The inspection schedule shall require an inspection and a report at least every 5 years. The inspection report shall provide an engineering analysis of the current conditions of the engineer-

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ing control or structural impediment with respect to ongoing efficacy, vulnerabilities, events or actions identified under subd. 2. The inspection report shall be certified by a licensed professional engineer, as defined under s. NR 712.03. Report conclusions shall include identification of issues, recommendations and follow-up actions, and a determination of whether the remedy is protective of human health and the environment.

4. Any access agreements needed to secure legal access for the department to the enter property to determine compliance with this chapter and any plan and compliance schedule required under this chapter.

(b) *Requirements; financial responsibility.* Unless otherwise directed by the department, a person required to submit proof, as required under this chapter, shall submit proof for all of the following:

1. The costs of planned engineering control monitoring, maintenance, inspections, and repair for each year of the proof period.

2. The costs of any additional engineering control monitoring, maintenance, inspections, and repair that may be needed following any events or third-party actions that may occur during the proof period, including investigation and remediation following a failed engineering control.

3. The costs of inspection, investigation of the extent of residual contamination, and the performance of any necessary response actions following the removal of a structural impediment that had prevented a complete investigation or remedial action at the site at the time of the approval of the plan.

4. The costs of any additional investigation and remediation necessary if the building or other structural impediment is removed pursuant to any events or third-party actions that may occur during the proof period.

(3) LENGTH OF REQUIREMENTS. (a) *Proof period.* Except as otherwise approved by the department, a person required to submit proof shall maintain proof of financial responsibility for the proof period for each applicable financial responsibility requirement under sub. (2) (b).

(b) *Establishing the initial proof period.* A person that is required to submit a plan and compliance schedule and proof of financial responsibility under this chapter shall submit to the department, as part of the plan and compliance schedule, a proposed initial proof period for each applicable financial responsibility requirement under sub. (2) (b). The proposed initial proof period is subject to approval by the department as part of the plan and compliance schedule and is subject to extension under par. (c).

(c) *Extension of plan and compliance schedule and proof period.* The department may, in writing, extend the plan and compliance schedule and the proof period for any applicable financial responsibility requirement until the department determines that the actions under sub. (1) (a) and (b) are no longer applicable and necessary to protect human health and the environment.

Note: The actions under s. NR 756.04 (1) (a) and (b) are no longer applicable and necessary if the engineering control is no longer needed and the structural impediment is removed, and any remaining contamination is investigated and remediated.

Note: Under s. NR 756.07 (2), a person that is required to maintain proof of financial responsibility is required to seek review of the length of the proof period from the department prior to submitting an adjustment to the cost estimate. Under s. NR 756.12 (3), a person that is required to maintain proof of financial responsibility is required to seek review of the length of the proof period from the department prior to submitting an application for a reduction in the amount of required financial responsibility.

(4) SUBMITTAL. The department may require a person subject to requirements under sub. (1) to submit the plan and compliance schedule and proof of financial responsibility simultaneously with the plans, reports, and specifications required under ss. NR 708.15, 708.17, and 722.13, and chs. NR 724 and 726.

(5) DEPARTMENT RESPONSE. When reviewing a plan for approval, the department may elect to do any of the following in regard to the entire plan or a part of the plan:

(a) Deny a request for approval.

(b) Request that additional information be supplied as part of the plan and compliance schedule.

(c) Require adjustments to actions, timeframes, and analyses presented in the plan and compliance schedule.

(d) Approve the plan and compliance schedule.

(6) FEES AND INSPECTIONS. (a) Plan and compliance schedule review fees shall be submitted in accordance with ch. NR 749.

(b) Reports, including inspection reports, required under sub. (2) (a) 3. shall be submitted with a fee in accordance with ch. NR 749.

(c) The department may enter a property for which access has been provided to determine compliance with this chapter and any plan and compliance schedule required under this chapter.

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NR 756.05 Responsibility at contaminated sediment sites; access. (1) Requirements of this chapter shall be met in accordance with the applicable requirements under s. 292.12 (5m), Stats.

(2) Any person that acquires responsibility for the requirements of this chapter under s. 292.12 (5m) (am), Stats., shall provide any proof of financial responsibility required under s. NR 756.04 (1) (d) to the department in accordance with this section. Proof of financial responsibility shall be maintained by the transferor during transfer of responsibility until the person acquiring responsibility under s. 292.12 (5m) (am), Stats., obtains department approval of proof of financial responsibility under s. NR 756.04 (5).

(3) The length of any requirement imposed under s. NR 756.04 does not limit the responsibilities of a person under ch. 292, Stats., and any other rules promulgated under ch. 292, Stats.

(4) A person that is subject to the requirements under s. NR 756.04 (1) that does not own or occupy the property on which any engineering controls or structural impediments that are subject to the requirements under s. NR 756.04 (1) are located shall obtain access to the property in accordance with s. 292.12 (5m) (a) 2., Stats., and shall provide verification of access to the department.

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NR 756.06 Methods of providing proof of financial responsibility. A person required to submit proof shall establish proof of financial responsibility made payable to or established for the benefit of the department. A person submitting financial assurances for a plan and compliance schedule shall specify, as part of the plan and compliance schedule, the methods of providing proof of financial responsibility that will be used. To provide proof of financial responsibility, the person required to submit proof may use the method under s. NR 756.15, if applicable, and up to 2 of the following methods for each of the types of costs listed under s. NR 756.04 (2) (b):

Note: The reference to s. NR 756.15 is an error and will be corrected in future rulemaking by the department.

(1) PERFORMANCE OR FORFEITURE BOND. (a) A person required to submit proof may submit a performance or forfeiture bond. The performance or forfeiture bond shall be in the amount determined under s. NR 756.08 and conditioned upon faithful

performance by the person required to submit proof and any successor in interest of all requirements of the approved plan and compliance schedule or subsequent remedial actions required by the department. A bond shall be delivered to the department for approval. A bond shall be established using a form supplied by the department.

(b) A bond shall be issued by a surety company among those listed as acceptable sureties for federal bonds in Circular 570 of the U.S. department of the treasury. At the option of the owner, a performance bond or a forfeiture bond may be filed. The department shall be the obligee of the bond. Surety companies may have the opportunity to complete the respective requirements of the plan and compliance schedule in lieu of cash payment to the department if the person required to submit proof, or any successor in interest, fails to carry out the respective requirements of the approved plan and compliance schedule. The department shall mail notification of the department's intent to use the funds for that purpose to the last known address of the person required to submit proof.

Note: Copies of Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" can be obtained from surety bond branch, financial management service, department of the treasury, Washington D.C. 20227, phone (202) 874-6850.

(c) Each bond shall provide that, as long as any respective obligation of the plan and compliance schedule remains, the bond may not be canceled by the surety, unless a replacement bond or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the surety proposes to cancel a bond, the surety shall provide notice to the department and to the owner in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration of the 90-day notice period, the owner shall deliver to the department a replacement bond or other proof of financial responsibility under this section, and the bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule. The surety may discharge its obligation under the bond at any time by paying the unused portion of the bond to the department.

(d) If the surety company becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit proof shall, within 30 days after receiving written notice of the bankruptcy, insolvency, revocation, or suspension, deliver to the department a replacement bond or other proof of financial responsibility under this section, and the replacement bond or other proof of financial responsibility shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule.

(2) DEPOSIT WITH THE DEPARTMENT. A person required to submit proof may make a deposit with the department in the form of cash, certificates of deposit, or U.S. government securities. The amount of the deposit shall be determined under s. NR 756.08 and deposits shall be submitted to the department for approval. Cash deposits placed with the department shall be segregated and invested in an interest-bearing account. All interest payments shall be accumulated in the account. The department may use part or all of the funds to carry out the respective requirements in the plan and compliance schedule if the owner fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(3) ESCROW ACCOUNT. (a) A person required to submit proof may establish an escrow account. An established escrow account may include any of the following assets:

1. Cash.

2. Securities issued by the federal government.

3. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.

4. State bonds issued under subch. I of ch. 18, Stats.

5. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If a person required to submit proof establishes an escrow account, the amount shall be determined under s. NR 756.08 and the account shall be with a bank or financial institution located within the state of Wisconsin that is examined and regulated by the state or a federal agency. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the person required to submit proof in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the amount of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall accumulate in the account. A duplicate original of the escrow agreement for closure or long-term care, with original signatures, shall be submitted to the department for approval. Escrow account forms shall be supplied by the department. The department shall be a party to the escrow agreement, which shall provide that there shall be no withdrawals from the escrow account except as authorized in writing by the department. The escrow agreement shall further provide that the department shall have the right to withdraw and use part, or all, of the funds in the escrow account to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(4) IRREVOCABLE TRUST. (a) A person required to submit proof may create an irrevocable trust. The corpus of the irrevocable trust may include any of the following:

1. Securities issued by the federal government.

2. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.

3. State bonds issued under subch. I of ch. 18, Stats.

4. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If a person required to submit proof creates an irrevocable trust, the trust shall be exclusively for the purpose of ensuring that the person required to submit proof or any successor in interest will comply with the requirements of the approved plan and compliance schedule. The trust agreement shall designate the department as sole beneficiary. The trustee shall be a bank or other financial institution located within the state of Wisconsin that has

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the authority to act as a trustee and whose trust operations are regulated and examined by the state or a federal agency. The trust corpus shall consist of cash, certificates of deposit, or U.S. government securities in the amount determined under s. NR 756.08. A total of no more than the amount of the Federal Deposit Insurance Corporation insurance limit in cash and certificates of deposit may be placed into escrow accounts or trust accounts established by the owner in the same bank or financial institution for the purposes of providing financial assurance to the department. U.S. government securities shall be used in these escrow or trust accounts for amounts in excess of the Federal Deposit Insurance Corporation insurance limit. All interest or coupon payments shall accumulate in the account. A duplicate original of the trust agreement with original signatures shall be submitted to the department for approval. Trust forms shall be supplied by the department. The trust agreement shall provide that there shall be no withdrawal from the trust fund except as authorized in writing by the department. The trust agreement shall further provide that sufficient funds shall be paid from the trust fund to the beneficiary in the event that the person required to submit proof or any successor in interest fails to complete the respective requirements of the approved plan and compliance schedule. The department shall mail notification of its intent to use funds for that purpose to the last known address of the person required to submit proof.

(5) IRREVOCABLE LETTER OF CREDIT. (a) A person required to submit proof may submit an irrevocable letter of credit. The letter of credit shall be in the amount determined under s. NR 756.08, and available exclusively for the purpose of assuring that all respective requirements of the approved plan and compliance schedule will be complied with. The original letter of credit shall be delivered to the department for approval. Letter of credit forms shall be supplied by the department.

(b) A letter of credit shall be issued by a bank or financial institution that has the authority to issue letters of credit and whose letter of credit operations are examined and regulated by a federal agency, or in the case of a bank or financial institution located within the state of Wisconsin, that is examined and regulated by the state or a federal agency. The department shall be the beneficiary of the letter of credit.

(c) The letter of credit shall provide either that the unused portion of the letter of credit shall be payable in full to the department upon the expiration of the letter of credit or that as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule, the letter of credit may not be canceled by the bank or financial institution unless a replacement letter of credit or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the bank or financial institution proposes to cancel a letter of credit, the bank or financial institution shall provide notice to the department and the person required to submit proof in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration date of the 90-day notice period, the person required to submit proof shall deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, in the absence of which either the letter of credit shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or the unused portion of the letter of credit shall be payable in full to the department.

(d) If the bank or financial institution becomes bankrupt or insolvent or if its authorization to do business is revoked or suspended, the person required to submit proof shall, within 30 days after receiving written notice of bankruptcy, insolvency, revocation, or suspension, deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, and the replacement letter of credit shall either remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or be payable in full to the department.

(e) The letter of credit shall further provide that the department has the right to withdraw and use part, or all, of the funds to carry out the respective requirements of the plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit proof.

(6) INSURANCE. (a) A person required to submit proof may submit an insurance policy. The insurance policy shall be issued for the maximum risk limit determined under s. NR 756.08. A certificate of insurance shall be delivered to the department for approval. Certificate of insurance forms shall be submitted on a form supplied by the department.

(b) Except for captive insurance companies, the insurer shall be licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states. The department, after conferring with the Wisconsin insurance commissioner, shall determine the acceptability of a surplus lines or captive insurance company to provide coverage for proof of financial responsibility. The department shall ask the insurance commissioner to provide a financial analysis of the insurer including a recommendation as to the insurer's ability to provide the required coverage. The department shall be the beneficiary of the insurance policy. The department may require a periodic review of the acceptability of a surplus lines or captive insurance company.

(c) The insurance policy shall provide either that the unused proceeds of the policy shall be payable in full to the department upon expiration of the policy or that, as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule, the insurance policy may not be canceled by the insurer unless a replacement insurance policy or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the insurer proposes to cancel an insurance policy, the insurer shall provide notice to the department and to the person required to submit proof in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration of the 90-day notice period, the person required to submit proof shall deliver to the department a replacement insurance policy or other proof of financial responsibility under this section, and either the policy shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or the proceeds of the policy shall be payable in full to the department.

(d) If the insurance company becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under s. 618.41 (6) (d), Stats., the person required to submit proof shall, within 30 days after receiving written notice of bankruptcy, insolvency, or an unfavorable evaluation, deliver to the department a replacement insurance policy or other proof of financial responsibility under this section and the replacement policy or other proof of financial responsibility shall either remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or be payable in full to the department.

(e) The insurance policy shall further provide that funds, up to an amount equal to the maximum risk limit of the policy, will

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be available to the department to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit proof.

(f) Each insurance policy shall contain a provision allowing assignment of the policy to a successor person required to submit proof. Assignment may be conditioned upon the consent of the insurer, provided consent is not unreasonably refused.

(7) OTHER METHODS. The department may consider other methods of financial responsibility that the department finds satisfactory to ensure that the person required to submit proof will comply with the respective requirements specified in the plan and compliance schedule. The department may consider other financial commitments made payable to or established for the benefit of the department to ensure the person required to submit proof will comply with the requirements of the approved plan and compliance schedule. The department shall review the request of any person required to submit proof to establish proof of financial responsibility to determine whether the proposed method provides a degree of assurance that is at least equal to that provided by the methods listed in this section. The department may review such a request after the person required to submit proof submits a complete request, all supporting information, and any additional information required by the department as part of the plan and compliance schedule.

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NR 756.07 Cost estimates. (1) GENERAL. (a) For the purpose of determining the amount of proof of financial responsibility that is required under s. NR 756.06, a person required to submit proof shall submit the estimated costs together with all necessary justification and documentation, as required by the department, to the department for approval as part of the initial request for approval of the plan and compliance schedule. The costs shall be based on a third party performing the work and reported on a per unit basis, as applicable. The source of estimates shall be indicated.

(b) For the planned costs under s. NR 756.04 (2) (b) 1. and 3., the person required to submit proof shall estimate the annual cost in current dollars for each year of the plan and compliance schedule proof period.

(c) For the additional costs under s. NR 756.04 (2) (b) 2. and 4., the person required to submit proof shall estimate costs in current dollars and shall multiply the sum of the costs by a percentage that is provided by the department and determined by the department based on all of the following criteria, as applicable:

1. The cost of response actions taken to address contaminated sediments at the site and the cost of response actions that are part of any approved plan to address contaminated sediments for the site.

2. The assessment of the vulnerability of any engineering controls and structural impediments to any occurrences, including third-party actions and events, that may affect the protectiveness of any engineering controls and the completion of the goals established in the plan and compliance schedule.

3. The following site-specific characteristics:

a. Types and amounts of bioaccumulative elements and substances present.

b. Volume of contaminated material.

c. Degree of contamination.

d. Cap complexity, including use of geosynthetics, armoring, and amendments.

e. Hydrologic and hydraulic characteristics.

f. Presence of outstanding resource waters or exceptional resource waters.

g. Design factor of safety.

h. Dissolved phase contaminants and chemical characteristics.

i. Fish advisories issued.

j. Navigation.

k. Drinking water sources.

(2) EXTENSIONS AND ADJUSTMENTS. (a) Prior to submitting a new cost estimate under par. (b), the person required to submit proof shall request in writing that the department review the length of the plan and compliance schedule and the length of the proof period for each applicable financial responsibility requirement. The department shall respond within 60 days of the request and shall provide any extensions in writing.

(b) The person required to submit proof shall prepare and submit to the department a new cost estimate during the proof period at all of the following times:

1. Once every 5 years, unless the costs are revised within the 5-year period as required under subd. 2. The new cost estimate shall use current dollars.

2. When any change in site design or operation is approved by the department in writing.

(3) COSTS FOR ENGINEERING CONTROL MAINTENANCE. Cost estimates for engineering control maintenance shall include all of the following, as applicable:

(a) Sampling, surveying, and monitoring, including bathymetry survey, core sampling, pore water measurements, poling, surface water sampling, event-based monitoring, regular monitoring, and comparison with previous monitoring occurrences. For the purposes of preparing cost estimates, all regular monitoring requirements specified in the plan and compliance schedule shall apply over the entire proof period.

(b) Modeling, including transport modeling and conceptual site modeling.

(c) Chemical and physical analysis.

(d) Repair and replacement of engineering controls. The expected operating life of all engineering controls shall be specified in the plan and compliance schedule. As each of these features reach the end of their anticipated operating life, the cost of their replacement shall be added to the estimate for the appropriate year of the proof period.

(4) COSTS FOR SITE INVESTIGATION AND REMEDIATION FOLLOWING STRUCTURAL IMPEDIMENT REMOVAL. Costs estimates for inspection, the investigation of the extent of residual contamination, and performance of any necessary response actions that are needed following the removal of a structural impediment shall include all of the following, as applicable:

(a) Site investigation.

(b) Remedial action, including remedial action planning, design, and permitting. The length of time necessary to complete the remedial action to address the contamination shall be estimated and the cost of remedial actions for each year shall be presented.

(c) Full dredge including disposal.

(d) Annual monitoring and event monitoring.

(e) The expected life of any structural impediments, which shall be specified in the plan and compliance schedule, when practicable. As each structural impediment reaches the end of its anticipated life, the cost of the investigation and remediation following the removal of the structural impediment shall be added to

the estimate for the appropriate year of the proof period. If the expected life of a structural impediment cannot be determined at the time of the plan and compliance schedule, the investigation and remediation following removal shall be planned to occur in the last year of the proof period and the costs shall be added to the estimate for the last year of the proof period.

Note: Under par. (e), the costs of inspection and response actions following a structural impediment removal may be based on the actual estimated date of inspection and response actions or based on a hypothetical date of inspection and response actions. The option for using a hypothetical date is intended to apply in situations when a person required to submit proof is unable to determine a removal date based on currently available data.

(5) ADDITIONAL COSTS OF EVENTS AND THIRD-PARTY ACTIONS. If an assessment of the vulnerability of any engineering controls and structural impediments to any events or third-party actions that may occur indicates that events or third-party actions may affect the protectiveness of the contaminated sediment engineering control and the attainment of the goals established in the plan and compliance schedule, cost estimates shall include damage, destruction, deterioration, and failure of any engineering controls and structural impediments following an event, including all of the following, as applicable:

(a) The costs of repair, replacement, or removal of any engineering controls used to address contaminated sediment.

(b) The costs of site investigation and remedial action plan and design, including permitting, following the removal of any structural impediment.

(c) Dredging and disposal of contaminated sediment in the area that may be affected by the unplanned event.

(d) The costs of post-event inspection, monitoring, maintenance, and repair.

(6) DUPLICATIVE COSTS. The department shall not impose financial responsibility costs under sub. (5) that are duplicative of those required under subs. (3) and (4).

Note: For example, if financial assurance is required for the cost of replacement of an engineering control under sub. (3), then the costs of replacement of an engineering control may only be required under sub. (5) to the extent that additional funding would be needed due to the nature or timing of the event or third-party action.

(7) INFLATION RATE. The rates of inflation applied to cost estimates approved by the department in previous years shall be derived from the most recent implicit price deflator for gross domestic product published by the U.S. department of commerce in its Survey of Current Business. The inflation rate is the result of dividing the latest published annual deflator by the deflator for the previous year. The projected rate of inflation to be applied in proof of financial responsibility calculations for all future years shall be equal to the rate of inflation for the last full calendar year.

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

NR 756.08 Calculating the amount of the proof of financial responsibility. (1) A person required to submit proof shall, as part of the initial request for approval of the plan and compliance schedule, calculate the necessary amounts of proof of financial responsibility based on the methods of providing proof of financial responsibility under s. NR 756.06 that have been chosen by the person required to submit proof.

(2) For the planned costs under s. NR 756.04 (2) (b) 1. and 3., all of the following procedures for calculating the amount of proof of financial responsibility shall be used, as applicable:

(a) If proof of financial responsibility is submitted as escrow, trust or department accounts, the amount of proof of financial responsibility shall, at minimum, be equal to the sum of all estimated planned action expenditures for the entire proof period when the expenditure for each year has first been expressed in future dollars and then brought to present value using a discount rate based on future earnings. Future earnings shall be calculated based on a projected rate of return equal to the projected rate of inflation plus one percent, or the department may require that, when estimating future earnings on these accounts, the weighted average rate of return of the investments held in the account be used for a period of time not to exceed the weighted average maturity of the investments held in the account rounded to the nearest whole year. Earnings for years beyond the weighted average maturity of the investments in the account shall be calculated based on a projected rate of return equal to the projected rate of inflation plus one percent.

(b) If proof of financial responsibility is submitted as bonds, letters of credit, or insurance, the amount of proof of financial responsibility shall be equal to the sum of the costs in current dollars of performing the requirements for each year of the proof period.

(3) For the additional costs under s. NR 756.04 (2) (b) 2. and 4., the amount of proof of financial responsibility shall be equal to the sum of the costs in current dollars for completion of the requirements.

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

NR 756.09 Changing methods of proof of financial responsibility. A person required to submit proof may change from one method authorized under s. NR 756.06 to another with written approval from the department, but not more than once per year. A change may only be made on the anniversary of the first submittal of proof of financial responsibility under s. NR 756.06, unless otherwise approved by the department. The amount of funds secured by the new method of providing proof of financial responsibility shall be in the amount that is equal to the amount that would have accumulated had the new method been used as the original method.

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

NR 756.10 Adjustment of financial responsibility. (1) A person required to submit proof shall submit to the department verification of the adjustment of the amount of funds secured by a method of proof of financial responsibility on a form supplied by the department.

(2) The amounts of funds secured by methods of proof of financial responsibility shall be adjusted according to all of the following requirements:

(a) The amounts of funds for all proof methods shall be adjusted annually under s. NR 756.07 (7) to account for increases in cost estimates based on adjustments for inflation. The annual proof method adjustments shall be submitted to the department by December 31.

(b) Adjusted proof methods shall be submitted within 60 days after a new cost estimate submitted in accordance with s. NR 756.07 is approved by the department. The adjusted proof methods shall be in an amount adequate to cover the most recently approved cost estimate.

(3) For a person using trust accounts, escrow accounts, or deposits with the department to meet the requirements of this chapter, revised proof of financial responsibility calculations shall be performed under s. NR 756.08 and submitted to the department by March 1 of the year succeeding the calendar year in which the weighted average annual rate of return of any trust or escrow account has fallen by one percent or more.

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

NR 756.11 Access and default. If the department de-

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termines that a person required to submit proof is in violation of any of the requirements specified in the plan and compliance schedule or this chapter, the department and its designees may enter upon the site or facility and carry out the approved actions or plan and compliance schedule requirements. The department may use part or all of the funds deposited with it, or the funds deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, insurance, or funds accumulated under other approved methods to carry out the approved actions or plan and compliance schedule requirements.

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

NR 756.12 Authorization to release funds. (1) PLANNED ACTIONS. Subject to sub. (3), for costs under s. NR 756.04 (2) (b) 1. and 3., one year after the issuance of the interim action, remedial action, or closure approval that is the subject of the financial responsibility requirement, and annually thereafter for the proof period, the person required to submit proof who has carried out all required actions and response actions under the approved plan and compliance schedule during the preceding year may apply to the department for reimbursement of funds from an escrow account, trust account, deposit with the department, or other approved methods, or for reduction of the bond, insurance, or letter of credit equal to the estimated costs for that year. The application shall be accompanied by an itemized list of costs incurred. Upon determination that the expenditures incurred are in accordance with the requirements anticipated in the approved plan and compliance schedule, the department may authorize in writing the release of the funds or approve a reduction in the bond, insurance, or letter of credit. Prior to authorizing a release of the funds or a reduction of the amount of funds secured by the bond, insurance, or letter of credit, the department shall determine that adequate funds exist to complete the required actions under the plan and compliance schedule for the remaining proof period. The department shall make determinations within 90 days after the application is received. For persons using escrow accounts, trust accounts, or deposits with the department, the department may authorize the release and return of up to 75 percent of the expected cost of planned actions for the current year. Any funds remaining in an escrow account, trust account, or on deposit with the department at the termination of the proof period shall be released to the person required to submit proof.

(2) EVENTS AND THIRD-PARTY ACTIONS. Subject to sub. (3), for costs under s. NR 756.04 (2) (b) 2. and 4., when a person required to submit proof has completed all of the requirements under the plan and compliance schedule, the person required to submit proof may apply to the department for release of the bond, insurance, or the letter of credit or return of the money held on deposit, in escrow, or in trust. Upon determination by the department that requirements under the plan and compliance schedule have been fulfilled and financial responsibility for costs under s. NR 756.04 (2) (b) 2. and 4. is no longer necessary to protect human health and the environment, the department shall authorize in writing the release and return of all funds accumulated in such accounts or give written permission for cancellation of the bond, insurance, or letter of credit. The department shall make a determination within 90 days after the application is received.

(3) EVALUATION OF PROOF PERIOD. Prior to submitting an application for the release of funds under sub. (1) or (2), the person required to submit financial assurances under s. NR 756.04 (1) shall request in writing that the department review the length of the plan and compliance schedule and the length of the proof period for each applicable financial responsibility requirement. The department shall respond within 60 days of the request and shall provide the length of any extension or reduction in writing.

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

NR 756.13 Bankruptcy or receivership notification. (1) A person required to submit proof shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding under the bankruptcy code, 11 USC 101 to 1532, naming the person required to submit proof as debtor, within 10 days after commencement of the proceeding.

(2) A person required to submit proof shall notify the department by certified mail of the commencement of a voluntary or involuntary proceeding within a state circuit court under ch. 128, Stats., naming the person required to submit proof as debtor, within 10 days after commencement of the proceeding.

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

NR 756.14 Compliance. (1) If a person required to submit proof fails to comply with any requirements in the approved plan and compliance schedule, the department may take any of the following actions:

(a) The department may require the forfeiture or conversion of any standard method of establishing proof of financial responsibility. All funds received from the forfeiture or conversion of any standard method of establishing proof of financial responsibility shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund.

(b) The department may request the department of justice to initiate court action against the person required to submit proof to recover funds sufficient to pay the cost of complying with the plan and compliance schedule. Any funds recovered in an action under this paragraph or as a settlement in anticipation of an action under this paragraph shall be credited to the department and managed specifically for the site in the same manner as a settlement to the environmental fund.

(2) If a person required to submit proof fails to comply with any requirements in the approved plan and compliance schedule, the department may take action or contract with a person to take action to comply with these requirements from funds obtained for that purpose under sub. (1) (a).

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