

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: RR-15-23

Relating to: Revisions to chs. NR 700, 720, and 722 related to definitions, land use classifications, procedures for identifying environmental standards for soil, and soil cleanup standards used to investigate and remediate environmental contamination

Rule Type: Permanent

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

The rules will be proposed as permanent rules.

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

Chapters NR 700 to 799, Wis. Adm. Code, establish standards and procedures for the identification, investigation, and cleanup of hazardous substance discharges and environmental pollution in Wisconsin under chs. 289 and 292, Wis. Stats.

The proposed rule revisions affect chs. NR 700, 720, and 722, Wis. Adm. Code, and other related administrative code, which provide definitions, standards, and procedures for soil cleanup as well as direction for selecting remedial actions during soil cleanup. Persons conducting the investigation and remediation of soil contamination must establish soil cleanup standards for soil remediations. Soil cleanup standards include Residual Contaminant Levels (RCLs), which are amounts of contamination that may be left in place after cleanup is complete. RCLs represent the concentration in soil above which there is a potential risk to human health or the environment. Currently, these RCLs are calculated using numeric criteria, methods, and procedures set forth by rule. If soil contaminants exceed the RCLs, then remedial action is typically required to protect human health or the environment. Another soil cleanup standard is performance standards, in which specific types of remedial action (*e.g.*, a concrete cap), or in some cases existing site conditions, prevent exposure to contaminants and/or decrease contaminant concentrations to protect human health and the environment. Performance standards may be used when there is residual contamination at concentrations greater than RCLs. Some sites may also be eligible for a risk assessment approach that allows for the development of cleanup standards that are specific to a particular site. Soil cleanup standards are generally determined based on the land use classification of the site (*e.g.*, “non-industrial”). Rule revisions will update land use classification requirements to provide additional flexibility while ensuring that the soil cleanups are protective of human health based on the intended use of the remediated site. Chapters NR 720 and 722, Wis. Adm. Code, were last updated in 2013.

The proposed rule changes would revise these chapters to provide updates to:

- Increase consistency in code between the descriptions of soil standards and the descriptions of cleanup standards for other media;

- Remove outdated soil cleanup requirements, while maintaining soil cleanup standards that are protective of human health, safety and the environment;
- Create consistency between state and federal approaches to calculating allowable RCLs for soil contamination;
- Increase consistency among administrative code related to soil cleanup standards and land use classification requirements;
- Update land use classifications to allow further flexibility for soil cleanups and to better reflect the risk of exposure at cleanup sites based on intended land use; and
- Clarify when certain methods of calculating RCLs may be applied to other media, such as floodplain soils and sediment.

Rule revisions related to soil standards may include:

- Addition of a “soil cleanup standard” definition and creation or revision of other terms relating to soil cleanup standards;
- Clarification of standards for soil cleanups, including performance standards and RCLs;
- Clarification of procedures for establishing soil performance standards and procedures for determining default and site-specific RCLs, including terminology changes, added citations to applicable authorities, and added cross-references to clarify other applicable portions of administrative code;
- Clarification of the process for identifying environmental standards for soil that are protective of groundwater and development of requirements and standards for site-specific evaluation;
- Clarification of the process for identifying environmental standards for protection of human health from direct contact with contaminated soils and development of requirements and standards for site-specific evaluation;
- Specification of criteria for determining RCLs, including specification of cumulative cancer risk target as the applicable RCL to use for polycyclic aromatic hydrocarbons;
- Revisions that allow direct contact RCLs to be derived utilizing the U.S. Environmental Protection Agency (U.S. EPA) Residual Screening Level calculator and the identified default exposure assumptions;
- Removal of provisions relating to the default exposure assumptions and soil parameter values that are used to calculate RCLs;
- Clarification of the applicability of soil cleanup standards, including the point of compliance (*i.e.*, the depth of application) over which soil standards apply; and
- Changes to administrative code affected by the proposed rule or that relate to soil cleanup standards.

Rule revisions related to land use classifications applied during soil remediation may include:

- New and revised definitions for terms relating to land use classification (*e.g.*, “industrial land use” and “nonresidential setting”) and insertion of references to these terms;
- Clarifications that describe how to determine RCLs based on land use classification, including which exposure scenario (*i.e.*, the extent to which a particular person may be exposed to contamination) to utilize when calculating RCLs in connection with land use classification;
- Other clarifications of the requirements and procedures for the selection of land use classification during the remedial action phase of cleanup; and
- Changes to administrative code affected by the proposed rule or that relate to land use classifications.

Other rule revisions may include:

- Revisions to clarify that direct contact RCLs for soil may be applied to floodplain soils and sediment when there is human health risk from direct contact with contaminated sediment or floodplain soils;
- Clarification of risk assessment approaches, changes to allow the site-specific development of standards based on site-specific exposure, and changes to allow use of the risk assessment approach for contaminated media other than soil; and
- Corresponding revisions to provisions relating to environmental requirements and standards for selection of a remedial action within ch. NR 722, Wis. Adm. Code, in order to create consistency between soil cleanup standards and standards for selecting a remedial action.

Additional rule changes or clarifications may be pursued which are reasonably related to those discussed here.

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

The proposed rule changes update rules to reflect current department soil cleanup policies and to improve rule consistency and clarity. Certain rule revisions would increase the ability of regulated parties to self-implement portions of code and reduce the number of regulatory reviews required. Many of the proposed rule revisions would create consistency among code chapters and between federal and state approaches for determining standards for soil remediation. Rule changes would also improve administrative code organization and consistency related to cleanup standards for different types of media.

The proposed rule changes would clarify and simplify the requirements for soil cleanups in Wisconsin, create additional efficiencies, increase code self-implementation, and reflect department experience and methodological changes over the last decade. The proposed rule changes would include updates to chs. NR 720 and 722, Wis. Adm. Code, which have not been updated since 2013, and other related administrative code updates.

The department evaluated the option of not pursuing rule revisions at this time. While this option allows for continued regulation of contaminated soil cleanup that has proved effective in protecting the environment and public health, a decision not to pursue rule revisions limits the department's flexibility in determining soil cleanup standards and ability to streamline regulatory requirements and soil cleanup processes for persons conducting soil cleanup. Without this rule, the department would continue to evaluate a greater number of requests for exceptions to soil cleanup RCLs and performance standards on a more time consuming, case-specific basis.

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

Section 292.31(2), Wis. Stats., requires the department to “promulgate rules relating to investigation and remedial action for sites or facilities and other properties at which the air, land, or waters of the state have been affected by the discharge of a hazardous substance or other environmental pollution.” Section 292.12(2)(c), Wis. Stats., authorizes the department to promulgate rules that impose limitations or other conditions related to property, to ensure that conditions at a site remain protective of public health, safety, welfare and the environment, and,

as applicable, to promote economic development. Section 227.11(2), Wis. Stats., confers rulemaking authority to the department to promulgate rules that are necessary to effectuate the purpose of ch. 292, Wis. Stats.

The proposed rule changes include revisions to chs. NR 700, 720, and 722, Wis. Adm. Code, which were originally promulgated under these and other statutory authorities. Other rule revisions may be necessary outside of chs. NR 700, 720, and 722 to ensure consistency in the administrative code regarding soil cleanups.

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

The department estimates that approximately 1,600 hours of staff time will be required to complete the proposed rule.

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

The proposed rule will primarily affect persons that clean up contaminated soil and other contaminated media in Wisconsin. These persons include “responsible parties” who are responsible for the cleanup of a hazardous substance discharge or environmental pollution under ch. 292, Wis. Stats., as well as voluntary or exempt persons conducting cleanup under state law. Proposed changes to soil cleanup standards, land use classification requirements, and risk assessment approaches and requirements may affect landowners who are not responsible for conducting soil cleanup but whose property is part of a soil remediation.

As of June 30, 2023, there were 2,620 sites with active cleanups in Wisconsin. Many of these sites involve some degree of investigation and remediation of contaminated soil.

Generally, property owners and businesses are indirectly affected by standards regulating the cleanup of hazardous substance discharges and environmental pollution because they rely on state cleanup laws to provide protection from risks to public health and the environment. Although this rule may not directly affect environmental consultants and businesses that assist with cleanup, changes to standards and requirements for soil cleanups reduce the amount of time needed to prepare certain reports and submissions.

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

Many of the proposed rule revisions are clarifications or updates that are specific to Wisconsin’s remediation process and are not readily comparable to federal approaches; however, available comparisons are provided below:

- Revisions to allow the state’s direct contact RCLs to be derived utilizing the U.S. EPA Residual Screening Level calculator will provide consistency between federal and state approaches.
- Revisions to allow a site-specific approach to developing standards based on the evaluation of site-specific exposure will provide more consistency between federal and state approaches.

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

The proposed rule is expected to result in both economic benefits and costs due to changes to requirements. Overall, the rule is expected to have a moderate cost impact (\$50,000 to \$5 million) on responsible parties, including changes to procedures, requirements, and reporting requirements for soil cleanups.

Portions of the rule may have a positive economic impact on responsible parties due to reduced stringency of requirements or other efficiencies, such as eliminating the need to seek site-specific review of soil cleanup standards in some cases, and increased consistency with federal requirements for soil remediation. The benefits will likely vary for each site based on size, complexity, media, and contaminants. Increased costs are not expected to be significant and may be entirely or partially offset by benefits realized from other changes within the proposed rule revisions. The benefits and impacts will be evaluated in more detail during the economic impact analysis based on the requirements in the draft rule. These impacts will be evaluated based on site data and environmental consulting industry input.

An unknown number of persons conducting cleanup may meet the definition of a small business. It is projected that the economic impact of this rule would be minimal or moderate for small businesses. Additional information will be collected during the economic impact solicitation period.

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

The department anticipates holding one public hearing in March 2025. The hearing will be held in Madison, WI.

The department will hold the hearing in-person with a virtual option to allow for as many people to attend as possible. Comments may be provided by mail, phone and email as well as in-person.

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