

## Chapter NR 169

## DRY CLEANER ENVIRONMENTAL RESPONSE PROGRAM

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**Note:** Chapter NR 169 as it existed on May 31, 2003 was repealed and a new chapter NR 169 was created Register May 2003 No. 569, effective June 1, 2003; Chapter NR 169 as it existed on July 31, 2005, was repealed and a new chapter NR 169 was created effective August 1, 2005.

**NR 169.01 Purpose.** This chapter establishes rules promulgated under s. 292.65, Stats., to implement and administer a program to reimburse eligible applicants for a portion of their costs associated with the investigation and cleanup of soil or groundwater, or both, contaminated by a discharge of a dry cleaning product from a dry cleaning facility.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.03 Applicability.** This chapter applies to all applicants for and recipients of reimbursements of costs paid to investigate and remediate soil and groundwater contaminated by a discharge of a dry cleaning product. Compliance with s. 292.11, Stats., this chapter and chs. NR 700 to 749 is a prerequisite to eligibility for reimbursement under s. 292.65, Stats.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.05 Definitions.** In this chapter:

(1) "Consultant" means a person or business under contract to perform a response action regulated or subject to regulation under chs. NR 702 to 736.

(2) "Contract services" means services provided by a contractor as part of a response action. Contract services includes all of the following services:

- (a) Excavating.
- (b) Trucking.
- (c) Landspreading.
- (d) Waste disposal services
- (e) Drilling, including at-depth soil sampling and well installation.
- (f) Backfilling and grading, including provision of backfill material.
- (g) Laboratory services.
- (h) General contractor services.
- (i) Other services provided by contractors.
- (j) Surveying.
- (k) Sampling.
- (L) Monitoring.

(3) "Contractor" means a person who contracts to perform all or part of a response action. Contractor includes a consultant, general contractor or subcontractor who contracts to perform all or part of a response action, but does not include an owner or operator or an employee of an owner or operator.

(4) "Department" means the department of natural resources.

(5) "Dry cleaner environmental response council" means the council created under s. 15.347 (2), Stats.

(6) "Dry cleaning" means to clean with a dry cleaning product.

(7) "Dry cleaning facility" has the meaning specified in s. 292.65 (1) (d), Stats.

**Note:** Section 292.65 (1) (d), Stats., states that a dry cleaning facility means a facility for dry cleaning apparel or household fabrics for the general public using a dry cleaning product other than a facility that is one of the following:

- 1. A coin-operated facility.
- 2. A facility that is located on a U.S. military installation.
- 3. An industrial laundry.
- 4. A commercial laundry.
- 5. A linen supply facility.
- 6. A facility that is located at a prison or other penal institution.
- 7. A facility that is located at a nonprofit hospital or at another nonprofit health care institution.
- 8. A facility that is located on property that is owned by the federal government or by this state or that is located on property that was owned by the federal government or by this state when the facility was operating.
- 9. A formal wear rental firm.

**Note:** Section 292.65 (1) (ek), Stats., defines "formal wear" to include tuxedos, suits and dresses, but does not include costumes, table linens and household fabrics.

**Note:** Section 292.65 (1) (em), Stats., defines a "formal wear rental firm" as a facility that rents formal wear to the general public and dry cleans only the formal wear that it rents to the general public.

**Note:** To qualify as a "dry cleaning facility" under s. 292.65 (1) (d), Stats., a facility must be capable of performing dry cleaning and thus must contain operational dry cleaning equipment. Under s. 292.65 (1) (i), Stats., a "dry cleaning facility" operating on or after October 14, 1997 must have been licensed under s. 77.9961, Stats., for its owners or operators to be eligible for reimbursement under s. 292.65, Stats.

(8) "Dry cleaning product" has the meaning specified in s. 292.65 (1) (e), Stats.

**Note:** Section 292.65 (1) (e), Stats., states that "dry cleaning product" means a hazardous substance used to clean apparel or household fabrics, except for a hazardous substance used to launder apparel or household fabrics.

(9) "Dry store" means a retail outlet specifically for dropping off and picking up apparel or household fabrics that are then transported to a dry cleaning facility for dry cleaning activities, but where dry cleaning does not occur.

(10) "Eligible costs" means costs for which the department is authorized to pay reimbursement under this chapter.

(11) "Fiscal year" means the period beginning on July 1 and ending on the following June 30.

**Note:** "Fiscal year" means the state fiscal year and means the same as "program year" as defined in s. 292.65 (1) (j), Stats.

(12) "General contractor" means a consultant or other contractor who, on behalf of an owner or operator, secures or directs the services of other contractors related to a response action. General contractor includes a person who solicits or receives contract bids, prepares contracts, directs response actions performed by others, or enters into contracts with subcontractors to perform response actions.

(12m) "High priority site" means the site of a discharge of dry cleaning product if at least one of the following applies:

(a) Dry cleaning product is present at or above preventive action limits in any well used to provide water for human consumption.

(b) Concentration of dry cleaning product in groundwater exceeds one-tenth solubility levels expected for that product.

(c) Enforcement standards in groundwater are exceeded within 1,200 feet of a well operated by a public utility or within

100 feet of any other well used to provide water for human consumption.

(d) Vapors from dry cleaning product at or above a vapor action level are confirmed within occupied buildings, except for operating dry cleaning facilities and dry stores.

**Note:** Vapor concentrations within occupied buildings are confirmed through time-integrated air sampling and the use of laboratory methods to achieve detection levels appropriate to human inhalation risk for the contaminants.

(13) "Immediate action" has the meaning specified in s. 292.65 (1) (gm), Stats.

**Note:** Section 292.65 (1) (gm), Stats., states that "immediate action" means a remedial action that is taken within a short time after the discharge of dry cleaning product occurs, or after the discovery of a discharge of dry cleaning product, to halt the discharge, contain or remove dry cleaning product, or remove contaminated soil or water, in order to restore the environment to the extent practicable and to minimize the harmful effects of the discharge to air, lands and waters of the state and to eliminate any imminent threat to public health, safety or welfare.

**Note:** This term includes both emergency and non-emergency immediate actions.

(14) "Indirect cost" means any general cost of business that cannot be directly and exclusively attributed to a response action. Indirect cost includes costs for equipment, supplies, services, real estate, structures and improvements, overhead, managerial and staff support, staff training, taxes, insurance, financing and items which are not directly and exclusively attributable to a response action or the use of which is not limited to the response action.

(15) "Interim action" has the meaning specified in s. 292.65 (1) (gs), Stats.

**Note:** Section 292.65 (1) (gs), Stats., states that "interim action" means a remedial action that is taken to contain or stabilize a discharge of a dry cleaning product, in order to minimize any threats to public health, safety or welfare or the environment, while other remedial actions are being planned.

(16) "Launder" has the meaning specified under s. 292.65 (1) (gv), Stats.

**Note:** Section 292.65 (1) (gv), Stats., states that "launder" means to use water and detergent as the main process for cleaning apparel or household fabrics.

(16g) "Low priority site" means a site that does not meet the definition of a high or medium priority site.

(16r) "Medium priority site" means the site of a discharge of dry cleaning product if at least one of the following applies and the site does not meet the definition of a high priority site:

(a) Contaminants from dry cleaning product in groundwater, soil, or soil vapor extend beyond the boundary of the source property.

(b) Vapor concentrations at or above a vapor risk screening level are confirmed beneath buildings but a vapor action level is not exceeded within occupied buildings regardless of the location or use of the buildings.

**Note:** Vapor concentrations beneath buildings are confirmed through time-integrated air sampling and the use of laboratory methods to achieve detection levels appropriate to human inhalation risk for the contaminants.

(17) "Operator" has the meaning specified under s. 292.65 (1) (h), Stats.

**Note:** Section 292.65 (1) (h), Stats., states that "operator" means any of the following:

1. A person who holds the license under s. 77.9961 (2), Stats., for a dry cleaning facility.
2. A subsidiary or parent corporation of the person specified under subd. 1.
3. A person who operated a dry cleaning facility that ceased operating before October 14, 1997.

4. A person who operated a dry cleaning facility that ceased operation after October 13, 1997, but that was licensed under s. 77.9961 (2) before it ceased operation.

(18) "Owner" has the meaning specified under s. 292.65 (1) (i), Stats.

**Note:** Section 292.65 (1) (i), Stats., states that "owner" means any of the following:

1. A person who owns, or has possession or control of, and who receives or received direct or indirect consideration from the operation of any of the following:
  - a. A dry cleaning facility that is licensed under s. 77.9961 (2), Stats.
  - b. A dry cleaning facility that has ceased operation but that, if it ceased operation on or after October 14, 1997, was licensed under s. 77.9961 (2), Stats., before it ceased operation.
2. A subsidiary or parent corporation of the person specified under subd. 1.

3. A person who owns the property on which one of the following is located:
  - a. A dry cleaning facility that is licensed under s. 77.9961 (2), Stats.
  - b. A dry cleaning facility that has ceased operation but that was licensed under s. 77.9961 (2), Stats., before it ceased operation and was licensed and operating while the person owned the property.

**Note:** A person who owns property on which a licensed dry cleaning facility was located during part of the period when the dry cleaning facility operated is eligible for this reimbursement program. Eligibility does not transfer to subsequent property owners.

**Note:** A facility has ceased operation when it is no longer capable of dry cleaning clothes and is no longer subject to the licensing requirements of s. 77.9961, Stats. Facilities that have ceased operation can include those that have been converted to dry stores or laundromats.

**Note:** Rent payments from a dry cleaner operation are not considered "indirect consideration" from the operation of the dry cleaner.

(20) "Qualification based selection" means a selection process that provides an owner or operator an objective and logical way to choose a professional consultant based on the consultant's qualifications and competence as they relate to the specific project.

(21) "Remedial action" has the meaning specified in s. NR 700.03 (48).

**Note:** Section NR 700.03 (48) reads: "Remedial action" or "remedy" means those response actions, other than immediate or interim actions, taken to control, minimize, restore, or eliminate the discharge of hazardous substances or environmental pollution so that the hazardous substances or environmental pollution do not present an actual or potential threat to public health, safety, or welfare or the environment. The term includes actions designed to prevent, minimize, stabilize, or eliminate the threat of discharged hazardous substances, and actions to restore the environment to the extent practicable and meet all applicable environmental standards. Examples include storage, disposal, containment, treatment, recycling, or reuse, and any monitoring required to assure that such actions protect public health, safety, or welfare or the environment.

(23) "Response action" means an immediate action, interim action, site investigation or remedial action as defined in s. NR 700.03.

(24) "Service provider" has the meaning specified in s. 292.65 (1) (L), Stats.

**Note:** Section 292.65 (1) (L), Stats., states that "service provider" means a consultant, testing laboratory, monitoring well installer, soil boring contractor, other contractor or any other person who provides a product or service for which an application for reimbursement has been or will be filed under this section, or a subcontractor of such a person.

(25) "Site investigation" has the meaning specified in s. NR 700.03 (57).

**Note:** Section NR 700.03 (57) states that "site investigation" means an investigation undertaken in conformance with ch. NR 716.

(26) "Site investigation report" includes those items specified in s. NR 716.15.

(27) "Site investigation scoping" means a report prepared to identify releases from a dry cleaning facility or to ensure that the scope and detail of a subsequent field investigation is appropriate to the complexity of the facility and which evaluates all the following items:

(a) History of the facility, including the location of dry cleaning equipment and chemical and filter storage.

(b) Knowledge of the type of contamination and the amount of the contamination.

(c) Environmental media affected or potentially affected by the contamination.

(d) Location of the site or facility and its proximity to other sources of contamination.

(e) Assessment of potential or known impacts to receptors.

**Note:** "Receptors" has the same meaning as in s. NR 700.03 (47), which defines "receptors" as "environmental resources, including but not limited to, plant and animal species and humans, sensitive environments and habitats, water supply wells, and buildings or locations that have the potential to be, or have actually been, exposed to contamination."

(f) Assessment of potential or known impacts to sensitive areas including wetlands, outstanding resource waters and exceptional resource waters, and sites or facilities of historical or archaeological significance.

(g) A map showing the site boundaries, location of source areas, including utility corridors, sewer lines, adjacent streets, receptor locations and sample locations and results of sampling.

**Note:** The purpose of the site investigation scoping is to document a release from a dry cleaning facility and provide sufficient data to develop an adequate workplan for a ch. NR 716 Site Investigation, if warranted. A limited number of samples per source area per media (soil/water) will be approved as site conditions warrant in order to meet the above objectives.

(28) “Subsidiary or parent corporation” has the meaning specified in s. 292.65 (1) (m), Stats.

**Note:** Section 292.65 (1) (m), Stats., states that “subsidiary or parent corporation” means a business entity, including a subsidiary, parent corporation or other business arrangement, that has elements of common ownership or control or that uses a long-term contractual arrangement with a person to avoid direct responsibility for conditions at a dry cleaning facility.

(29) “Third party” means a person who is not an owner or operator or the agent of an owner or operator for a particular site.

(29e) “Vapor action level” has the meaning specified in s. NR 700.03 (66p).

**Note:** Section NR 700.03 (66p) defines “vapor action level” as “the concentration of vapors from volatile compounds is at or above the 1-in-100,000 ( $1 \times 10^{-5}$ ) excess lifetime cancer risk or is at or above a hazard index of 1 for non-carcinogens”.

**Note:** Generic tables of risk based concentrations for air in residential and industrial land use scenarios can be found at: [http://www.epa.gov/reg3hwmd/risk/human/rb-concentration\\_table/Generic\\_Tables/index.htm](http://www.epa.gov/reg3hwmd/risk/human/rb-concentration_table/Generic_Tables/index.htm).

(29m) “Vapor risk screening level” has the meaning specified in s. NR 700.03 (66w).

**Note:** Section NR 700.03 (66w) defines “vapor risk screening level” as “the concentration of vapors in samples collected outside a building to estimate indoor vapor concentrations. The vapor risk screening level is equal to the vapor action level multiplied [divided] by an appropriate attenuation factor”.

**Note:** The correct word is shown in brackets. The scientific process for determining a vapor risk screening level is to divide, not multiply, the vapor action level by an appropriate attenuation factor. This error will be corrected in future rulemaking.

**Note:** Vapor risk screening levels are applied to sub-slab, soil gas and groundwater samples.

(29s) “Vapors” has the meaning specified in s. NR 700.03 (66y).

**Note:** Section NR 700.03 (66y) defines “vapors” as “chemicals that are sufficiently volatile and toxic to pose an inhalation risk to human health via vapor intrusion from a soil or groundwater source”.

(30) “Workplan” has the meaning specified in s. NR 700.03 (69).

**Note:** Section NR 700.03 (69) states “workplan” means a plan which outlines the intended scope of a response action, or any phase of a response action, including but not limited to intended methods, procedures and techniques to be used during the response action.

**History:** CR 04–128: cr. Register July 2005 No. 595, eff. 8–1–05; CR 12–023: cr. (12m), (16g), (16r), (29e), (29m), (29s) Register October 2013 No. 694, eff. 11–1–13.

**NR 169.07 Eligible applicants. (1) OWNERS OR OPERATORS.** Owners or operators who meet the requirements in s. 292.65 (4) (a), Stats., are eligible to apply for reimbursement under this chapter.

**Note:** Section 292.65 (4) (a), Stats., states that the owner or operator of a dry cleaning facility may apply for reimbursement under s. 292.65, Stats., and lists the provisions with which an owner or operator must comply to be eligible for an award.

**Note:** The personal representative of an owner or operator may complete the reimbursement process if the owner or operator had submitted a potential claim notification form to the DNR before the owner or operator’s death.

(2) AGENTS. (a) An agent is an eligible applicant as provided in s. 292.65 (4) (k), Stats.

**Note:** Section 292.65 (4) (k), Stats., states that an owner or operator may enter into a written agreement with another person under which that other person acts as an agent for the owner or operator in conducting the activities under pars. (e) to (j). If an agreement is entered into under this paragraph, all requirements applicable to an owner or operator under par. (m) and subs. (8) (a), (8m) and (12) apply to the agent. The owner or operator or the agent may submit the application for an award under this chapter.

(b) Agent agreements shall include the name of the eligible applicant and the person who will be acting as an agent for the owner or operator in conducting the activities required under s. NR 169.09 and shall be signed and dated by both parties.

(c) Costs incurred prior to a signed, written agency agreement are not eligible for reimbursement under this chapter.

(3) OWNERS OR OPERATORS OF DRY CLEANING FACILITIES ON TRIBAL TRUST LANDS. An owner or operator of dry cleaning facilities on tribal trust lands of an American Indian tribe is an eligible applicant as provided in s. 292.65 (4) (L), Stats.

**Note:** Section 292.65 (4) (L), Stats., states that the owner or operator of a dry cleaning facility located on trust lands of an American Indian tribe may be eligible for an award under this section if the owner or operator otherwise satisfies the requirements of s. 292.65 (4), Stats., and complies with the rules promulgated under this chapter and any other rules promulgated by the department concerning dry cleaning facilities.

**History:** CR 04–128: cr. Register July 2005 No. 595, eff. 8–1–05.

**NR 169.09 Eligible actions. (1) GENERAL.** Eligible actions are those actions that comply with chs. NR 700 to 728, including immediate and interim actions, site investigations and remedial actions.

(a) Immediate and interim actions include those actions identified in ch. NR 708.

(b) Site investigations include those actions identified in ch. NR 716.

(c) Remedial actions include those actions that comply with the standards identified in chs. NR 722 and 724.

(2) PRE-DISCOVERY ACTIVITIES. (a) An eligible applicant may conduct site investigation scoping or equivalent activities before discovering that a release had occurred in order to document that a dry cleaning product release had occurred from the dry cleaning facility associated with the eligible applicant.

(b) Reimbursement of site investigation scoping or other equivalent pre-discovery activities shall be limited to those identified in s. NR 169.05 (27) and are exempt from the contracting and consulting provisions in s. NR 169.23.

(c) Costs for site investigation scoping are eligible site investigation costs if they meet all of the following requirements:

1. They are limited to costs of investigating the discharge of a dry cleaning product from a former or current dry cleaning facility.

2. They result in the documentation of a discharge and subsequent notification of that discharge pursuant to s. 292.11, Stats.

3. The department deems the costs reasonable.

(d) Costs for site investigation scoping or other equivalent pre-discovery activities shall be considered site investigation costs and submitted with the site investigation reimbursement application. Only site investigation scoping or other equivalent pre-discovery actions that result in the documentation of a release of a dry cleaning product from a dry cleaning facility are eligible for reimbursement under this chapter.

(e) Eligible site investigation scoping costs up to \$15,000 that are incurred by a third party may be included in an eligible applicant’s site investigation reimbursement application if they meet all the following requirements:

1. The costs are approved by the department project manager.

2. The activities for which the costs were incurred resulted in the initial discovery of a dry cleaning solvent release from a dry cleaning facility.

3. The activities for which the costs were incurred meet the requirements of this section.

**Note:** Section 292.65 (7) (b) 2. Stats., states eligible costs for an award under this section include reasonable and necessary costs, up to \$15,000, incurred by a 3rd party in the discovery of a discharge of dry cleaning product from an eligible owner’s or operator’s dry cleaning facility before the eligible owner or operator discovered the discharge.

(f) All results of the site investigation scoping or other equivalent pre-discovery activities shall be made available to each consultant preparing a site investigation workplan under s. NR 169.23.

**Note:** If departmental review of site investigation scoping or other equivalent pre-discovery activities is requested, the review will be subject to fees under ch. NR 749. If a release is documented, those fees are eligible expenses for the purpose of reimbursement.

**History:** CR 04–128: cr. Register July 2005 No. 595, eff. 8–1–05.

**NR 169.11 Requirements for reimbursement.**

(1) GENERAL REQUIREMENTS. Costs listed under s. NR 169.13 submitted by an eligible applicant are eligible for reimbursement as follows:

(a) *Immediate actions.* To receive reimbursement for costs associated with immediate actions, an eligible applicant shall do all the following:

1. Report the discharge to the department as required by s. NR 706.05.

**Note:** Section NR 706.05 provides that unless exempted under s. NR 706.07, persons who cause the discharge to the environment of a hazardous substance or who possess or control a hazardous substance which is discharged to the environment shall immediately notify the department of the discharge. The toll free hot-line for spill reporting is 1-800-943-0003.

2. Conduct immediate action activities as required by ch. NR 706.

3. Obtain and document concurrence from the department project manager before incurring eligible immediate action costs that exceed \$10,000.

**Note:** A non-emergency immediate action is an action in which the department does not require a responsible party to take further action under s. NR 708.09 once the immediate action is completed. If the department requires further action after a non-emergency immediate response action is taken, that action meets the definition of "interim action" in s. NR 700.03 (29) and is accordingly subject to the interim action requirements of this chapter.

4. Apply for the program on a form developed by the department.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

5. Document to the department that the response meets the criteria for immediate action under s. NR 708.05 and that the response action was an appropriate response warranted by site conditions.

6. Within 120 days after completing an immediate action, submit an application to the department as specified in s. NR 169.19 which documents all eligible actions and associated costs. An immediate action is complete when the immediate nature of the release has been adequately addressed. An immediate action that includes operation and maintenance of equipment is complete once the equipment is installed.

**Note:** Section NR 708.05 (2) requires owners or operators who take emergency immediate actions to conduct any further response actions needed to restore the environment to the extent practicable unless the department determines that no further response is necessary in accordance with s. NR 708.09.

(b) *Interim actions.* To receive reimbursement from the department for costs associated with an interim action, an eligible applicant shall do all the following:

1. Report the discharge to the department as required by s. NR 706.05.

**Note:** Section NR 706.05 provides that unless exempted under s. NR 706.07, persons who cause the discharge to the environment of a hazardous substance or who possess or control a hazardous substance which is discharged to the environment shall immediately notify the department of the discharge. The toll-free hot-line for spill reporting is 1-800-943-0003.

2. Submit to the department a completed potential claim notification form as required by s. 292.65 (4) (c), Stats.

**Note:** Section 292.65 (4) (c), Stats., states that an owner or operator shall notify the department, before conducting a site investigation or any remedial action activity, of the potential for submitting an application for an award under this section. This does not apply to an owner or operator who began a site investigation or remedial action activity before October 14, 1997. Notification forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

3. Document to the satisfaction of the department that the response meets the criteria of interim action in s. NR 708.11 and that immediate action is not necessary at the facility.

4. Submit to the department for approval detailed information regarding the interim action being proposed including appropriate cost estimates for the proposed interim action and a schedule for conducting a ch. NR 716 site investigation.

**Note:** Chapter NR 716 site investigation schedules will be negotiated between the department and applicant. The department may allow phased investigations based on factors such as the risk posed by the site, the anticipated effectiveness of the interim remedial action, the amount and quality of the preliminary site screening data, and financial considerations including the ability to pay for the response action and the availability of funds for reimbursement of response actions.

**Note:** Chapter NR 749 fees will not be required by the department for review of the interim action proposal for eligible dry cleaning facilities.

**Note:** The department will use the information submitted under subds. 3. and 4. to classify the site's priority for reimbursement under ss. NR 169.15 and 169.17.

5. Obtain departmental approval to undertake the interim action that is detailed as required by subd. 4.

**Note:** The department may approve the action, deny the action or require that the eligible applicant obtain 3 bids for the cost of implementing the action. If the depart-

ment requires an applicant to obtain bids for an interim action, the bids must be submitted to the department for approval.

6. Implement the interim action in accordance with the proposal approved by the department.

7. Sign a statement agreeing to comply with all applicable statutes and rules, including an agreement to continue to operate, monitor and maintain all interim remedial action equipment and systems until the department determines they are no longer needed as part of the remedial action.

8. Within 120 days of completing the interim action, submit an application form developed by the department and specified in s. NR 169.19, which documents all eligible actions and associated costs. An interim action is completed when field installations are completed.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

(c) *Site investigations and remedial actions.* To receive reimbursement from the department for costs associated with a site investigation and remedial action, an eligible applicant shall do all of the following:

1. Report the discharge to the department as required by s. NR 706.05.

**Note:** Section NR 706.05 provides that unless exempted under s. NR 706.07, persons who cause the discharge to the environment of a hazardous substance or who possess or control a hazardous substance which is discharged to the environment shall immediately notify the department of the discharge.

2. Submit to the department a completed potential claim notification form, as required by s. 292.65 (4) (c), Stats.

**Note:** Section 292.65 (4) (c), Stats., states that notification of a potential claim is not required for site investigations or remedial action activity begun before October 14, 1997. Notification forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

3. Comply with the cost and contracting provisions in ss. NR 169.13 and 169.23.

4. Solicit a minimum of 3 and maximum of 6 site investigation workplan bid proposals. As part of that solicitation, identify a date upon which bids are to be received, and keep all bids sealed until after that date.

5. Submit to the department on a form provided by the department all site investigation workplan bids as required in s. NR 169.23 and obtain department approval for the selected workplan.

**Note:** Schedules included in a ch. NR 716 workplan may include phased approaches for the activities and will be negotiated based on factors such as risk posed by the site, anticipated effectiveness of the interim remedial action, the amount and quality of the site investigation scoping data, the ability to pay for the response action, and the availability of funds for reimbursement of response actions.

**Note:** No ch. NR 749 fees associated with the review of a site investigation workplan will be charged for review of workplans required in this chapter. The department will review workplans within 45 calendar days of their receipt. The department will approve the workplan, request revisions be made to the workplan prior to approval or deny the workplan.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

6. Except as provided in sub. (3), complete a site investigation in compliance with ch. NR 716, to determine the extent of environmental contamination by the dry cleaning product discharge before conducting a remedial action.

**Note:** A ch. NR 716 site investigation is not considered complete until an approvable site investigation report is submitted to the department.

7. Submit a site investigation report to the department for approval.

**Note:** No ch. NR 749 fees associated with the review of the site investigation report will be charged under this chapter.

8. Based on the findings in the site investigation report, the department shall classify the site under s. NR 169.15 to determine when reimbursement will be available.

9. After receiving departmental approval for the site investigation report, submit a complete reimbursement application on a form developed by the department and specified in s. NR 169.19 which documents all eligible actions and associated costs. The owner or operator may submit an application for the reimburse-

ment of site investigation costs prior to the submittal of the site investigation report. The minimum eligible reimbursement request shall be \$15,000 and no more than 3 reimbursement requests, each accompanied by a summary of work completed, may be submitted prior to submittal of the site investigation report. Only one interim reimbursement request may be submitted during any fiscal year.

**Note:** Forms are available at no charge on the DNR Web site (<http://dnr.wi.gov/topic/Brownfields/Pubs.html>) and from the remediation and redevelopment program in any department regional or central office.

10. Solicit a minimum of 3 and maximum of 6 remedial action bid proposals. As part of that solicitation, identify a date upon which bids are to be received, and keep all bids sealed until after that date.

11. Submit to the department for approval a minimum of 3 and a maximum of 6 bid proposals for remedial action consistent with ch. NR 722, including a technical and economic feasibility evaluation. The bid proposals shall be based on the site investigation report approved for the site and shall be submitted on a form provided by the department. All bids received shall be submitted to the department.

**Note:** Section NR 169.23 (6) (a) requires the remedial action proposals included in these bids to evaluate as detailed in ch. NR 722 the technical and economic feasibility of each appropriate alternative for a site. Chapter NR 722 requires that each alternative considered, not just the proposed alternative, be evaluated for technical and economic feasibility.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

12. Obtain department approval for the selected bidder and remedial alternative.

13. Conduct all remedial action activities required by chs. NR 700 to 728 and s. 292.65 (4) (j), Stats., and approved by the department in the bid document for the site.

**Note:** Activities required by chs. NR 700 to 728 and s. 292.65 (4) (j), Stats., include:

1. Recovering any recoverable dry cleaning solvent from the environment.
2. Managing any residual solid or hazardous waste in a manner consistent with local, state and federal law.
3. Restoring groundwater according to the standards promulgated by the department under ss. 160.07 and 160.09, Stats.

14. Sign a statement agreeing to comply with all applicable rules and regulations, including agreeing to continue to operate, monitor and maintain all remedial systems until the department determines they are no longer needed as part of the remedial action.

15. Within 120 days of completing the remedial action submit a final reimbursement application as specified in s. NR 169.13 which documents all eligible actions and associated costs.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

**(2) POLLUTION PREVENTION REQUIREMENTS.** Applicants shall implement the pollution prevention requirements in s. 292.65 (5), Stats., at their dry cleaning facilities before submitting a reimbursement application.

**Note:** Section 292.65 (5), Stats., provides that: (a) 1. The owner or operator of a dry cleaning facility on which construction begins after October 14, 1997, is not eligible for an award under this section unless the owner or operator has implemented the enhanced pollution prevention measures described in par. (b).

2. The owner or operator of a dry cleaning facility on which construction began on or before October 14, 1997, is ineligible for an award under this section with respect to a discharge that occurs on or after the 91st day after the day on which the department issues a case closure letter with respect to an earlier discharge of dry cleaning solvent from the dry cleaning facility, unless the owner or operator has implemented the enhanced pollution prevention measures described in par. (b).

(b) An owner or operator who is required to implement enhanced pollution prevention measures under par. (a) shall demonstrate all of the following:

1. That the owner or operator manages all wastes that are generated at the dry cleaning facility and that contain dry cleaning product as hazardous wastes in compliance with ch. 291, Stats., and 42 USC 6901 to 6991i.
2. That the dry cleaning facility does not discharge dry cleaning product or wastewater from dry cleaning machines into any sanitary sewer or septic tank or into the waters of this state.
3. That each machine or other piece of equipment in which dry cleaning product is used, or the entire area in which those machines or pieces of equipment are located, is surrounded by a containment dike or other containment structure that is able to con-

tain any leak, spill, or other release of dry cleaning product from the machines or other pieces of equipment.

4. That the floor within any area surrounded by a dike or other containment structure under subd. 3. is sealed or is otherwise impervious to dry cleaning product.

5. That any perchloroethylene delivered to the dry cleaning facility is delivered by means of a closed, direct-coupled delivery system.

(c) The owner or operator of a dry cleaning facility is not eligible for an award under this section unless the owner or operator has implemented the following enhanced pollution prevention measures:

1. That the owner or operator manages all wastes that are generated at the dry cleaning facility and that contain dry cleaning product as hazardous wastes in compliance with ch. 291, Stats., and 42 USC 6901 to 6991i.

2. That the dry cleaning facility does not discharge dry cleaning product or wastewater from dry cleaning machines into any sanitary sewer or septic tank or into the waters of this state.

3. That any perchloroethylene delivered to the dry cleaning facility is delivered by means of a closed, direct-coupled delivery system.

**(3) EXCEPTIONS.** Owners and operators are excepted from certain requirements as provided in s. 292.65 (4) (g) and (h), Stats.

**Note:** Section 292.65 (4) (g), Stats., provides that an owner or operator is not required to complete an investigation or prepare a remedial action plan before conducting an immediate action activity if the department determines that an immediate action is necessary per ch. NR 708. Section 292.65 (4) (h), Stats., provides that an owner or operator is not required to complete an investigation or prepare a remedial action plan before conducting an interim action activity if the department determines that an interim action is necessary per ch. NR 708.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05; CR 12-023: am. (1) (c) 9. Register October 2013 No. 694, eff. 11-1-13.

## NR 169.13 Awards. (1) MAXIMUM AWARD AMOUNT.

Awards may not exceed the maximums imposed by s. 292.65 (8) (f), Stats.

**Note:** Section 292.65 (8) (f), Stats., provides that an award to reimburse costs of immediate actions, site investigations and cleanup at a single facility may not exceed \$500,000.

**(2) ELIGIBLE COSTS.** (a) *General.* Eligible costs are those allowed under s. 292.65 (7), Stats.

**Note:** Section 292.65 (7) (a), Stats., provides that eligible costs include reasonable and necessary costs incurred for the following items only:

1. Removal of dry cleaning solvents from surface waters, groundwater or soil.
2. Investigation and assessment of contamination caused by a dry cleaning solvent discharge from a dry cleaning facility.
3. Preparation of remedial action plans.
4. Removal of contaminated soils.
5. Soil and groundwater treatment and disposal.
6. Environmental monitoring.
7. Laboratory services.
8. Maintenance of equipment for dry cleaning solvent recovery performed as part of remedial action activities.
9. Restoration or replacement of a private or public potable water supply.
10. Restoration of environmental quality.
11. Contractor costs for remedial action activities.
12. Inspection and supervision.
14. Other costs identified by the department as reasonable and necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 292.11, Stats.

**Note:** Costs incurred after October 14, 1997 and before February 1, 2000 will not be denied for failure to conform with the bidding provisions in this chapter, but will be reviewed and evaluated for reasonableness under this section.

**Note:** Equipment purchased to remediate environmental contamination belongs to applicant when the remediation is complete and is not property of the department.

(b) *Site investigation scoping.* Costs for site investigation scoping are eligible costs if they are limited to the scoping of discharges of dry cleaning products from former or current dry cleaning facilities, they result in the documentation of a discharge and subsequent notification of that discharge, per s. 292.11, Stats., and the department deems them reasonable. The results, including data, from that scoping shall be made available to all consultants from whom workplans are requested as part of the bidding process.

(c) *Site investigation workplan.* Costs for preparation of a site investigation workplan by the consultant who is awarded the contract are eligible costs, if the department determines that they are reasonable.

(d) *Bid proposal costs.* Costs paid to the consultant who is awarded the contract for preparation of a remedial action bid proposal, including costs to analyze the economic and technical feasibility of a selected remedy are eligible costs if the department determines that they are reasonable.

(e) *Costs limitation.* Reimbursement of eligible costs for remedial actions will be limited to the costs identified for the lowest cost alternative approved by the department.

**Note:** Eligible applicants may conduct a more costly remedy, but reimbursement will be limited to the maximum identified for the lowest cost acceptable alternative approved for the site. Criteria and requirements in ch. NR 726 determine whether a site may be closed.

(f) *Other reasonable and necessary costs.* Reasonable and necessary costs under s. 292.65 (7) (a) 14., Stats., include:

1. Actual costs for equipment, supplies or services that are used exclusively for the response action. The department may reimburse an owner or operator who buys equipment used exclusively for the response action the net cost (purchase cost less salvage value) of the equipment as determined by the department, but not to exceed the reasonable cost of renting the equipment.

2. Normal employee wages, salaries, expenses or fringe benefits allocated to hours that the employees of the owner or operator worked on a response action.

3. Costs that do not exceed \$15,000 that the department determines are integral to the response action for dry cleaning solvent discharged from a dry cleaning facility and are incurred for any of the following purposes:

a. To remove existing structures, fixtures, and building components in order to access and investigate, treat, or remove contaminated soil or water.

b. To reinstall existing structures, fixtures, and building components.

c. To replace existing building components destroyed or damaged beyond reuse by removal. Existing building components shall be salvaged and reused to the extent practicable, but existing building components destroyed or damaged beyond reuse by removal may be replaced by building components of comparable or lesser value than the value of the destroyed or damaged components before removal.

**Note:** Building components include windows, siding, and interior and exterior concrete, asphalt, walls, and doorways.

**Note:** All other costs to construct, repair, replace, improve, relocate, or demolish a structure, fixture, or building component are ineligible costs under sub. (3).

(3) **INELIGIBLE COSTS.** (a) *General costs.* Notwithstanding sub. (1), costs which the department has determined ineligible for reimbursement under s. 292.65 (7) (c), Stats., include, but are not limited to, the following:

1. Costs incurred before October 14, 1997.

2. Costs of retrofitting or replacing dry cleaning equipment.

3. Indirect costs charged by a contractor, unless those costs are allocated to the contract according to a reasonable cost allocation formula that the contractor uses for similar contracts.

4. An owner or operator's indirect costs, including indirect costs for equipment, supplies or services.

**Note:** This paragraph prohibits allocating indirect costs to the investigation and cleanup of a dry cleaning site. But direct costs for equipment, supplies, services, or employee services may be eligible for reimbursement pursuant to s. NR 169.13 (2) (f).

5. Costs for the time that the owner or operator, or any officer of the owner or operator, spends planning or implementing a response action.

**Note:** This does not prohibit the department from reimbursing normal employee wages, salaries, expenses or other fringe benefits allocated to hours that employees who are not owners, operators or officers spend implementing a response action.

6. Costs to construct, repair, replace, improve, relocate, or demolish any building or fixture except as allowed by sub. (2) (f) 3.

7. Loss or impairment of property values or other assets.

8. Loss or impairment of revenue or income.

9. Attorney fees or other legal costs.

10. Costs of relocating residents or business operations.

11. Costs of aesthetic or other improvements that are not essential to a response action, except for restorative grading and

filling costs authorized under sub. (2) (a), and under s. 292.65 (7) (a) 14., Stats.

12. Costs reimbursed from another source. If, after being reimbursed by the department for any cost, a owner or operator is reimbursed for the same cost from another source, the owner or operator shall promptly notify the department and repay any duplicate reimbursement, unless otherwise directed in s. 292.65, Stats.

**Note:** Section 292.65 (4) (m), Stats., requires that an owner or operator shall notify the department of any application, including any insurance claim, made to obtain funds to cover eligible costs or to obtain a tax credit based on eligible costs, the status of the application, and, if the owner or operator has received any funds or any tax credit arising from the application, the amount of the funds or tax credit received. Section. 292.65 (7) (c) 4., Stats., authorizes the department to exclude costs that the department determines are unreasonable or unnecessary.

13. Other costs that the department determined to be associated with, but not integral to, the investigation and remediation of a dry cleaning solvent discharge from a dry cleaning facility.

14. Costs that the department determines to be unreasonable or unnecessary to carry out the response activities specified in the bid proposal.

15. Costs for investigation or remedial action conducted at sites located outside this state.

16. Financing costs, including interest and loan origination fees.

17. Liability claims or judgments.

18. Costs incurred by any federal, state or local government entity for services they routinely provide.

19. Investigation or remedial action costs incurred by any federal, state or local government entity unless that entity is an eligible applicant or agent.

20. Costs incurred by a federal, state or local government entity for overseeing investigation or remedial action costs.

21. Costs for a contractor's services that exceed the contractor's bid price for those services, except as provided under s. NR 169.23.

22. Costs that the owner or operator has not yet paid, or for which the owner or operator may later receive a discount or rebate.

23. Costs not documented by an invoice and a canceled check, or other conclusive proof of payment by the eligible applicant applying for reimbursement.

24. Costs to investigate or repair environmental contamination involving substances that are not dry cleaning products. If a response action under this chapter is combined with the investigation or repair of environmental contamination involving substances that are not dry cleaning products, the department may reimburse a portion of the combined project costs based on a reasonable cost allocation formula approved by the department. If an owner or operator also submits a reimbursement claim to another governmental agency for any combination project, the cost allocation formula shall be approved by the department and that other agency.

25. Costs to analyze environmental samples for substances that are not dry cleaning products, except that the department may reimburse costs for the analysis of environmental parameters if that analysis is needed to design or implement a response action.

26. Costs to analyze environmental samples for dry cleaning products that could not reasonably have been discharged at the facility.

27. Costs for environmental audits, evaluation or appraisals, other than those needed for the effective planning and implementation of a response action.

**Note:** Costs for site investigation scoping or equivalent assessments are only eligible for reimbursements if a release of dry cleaning product is found during those assessments. Costs for site investigation scoping may be reimbursed if they meet the eligible cost criteria for response actions in s. 292.65, Stats., and this chapter and are incorporated into reports submitted as requirements for this program.

28. Costs incurred by an owner or operator because of a contractor's breach of contract.

29. Costs to prepare an application under s. NR 169.19, to contest an application decision under s. NR 169.27 or to consult with the department on the application.

30. Air travel expenses.

31. Expense charges for meals, lodging, travel or other personal expenses.

**Note:** No travel costs of any kind will be reimbursed except for approved mobilization costs.

32. Supplemental charges for expedited services, including expedited laboratory analysis, mail or parcel delivery service, unless the department approves those charges in advance.

33. Contractor charges that are not based on services provided by the contractor and documented under s. NR 169.19.

34. Costs for subcontractor service charges or markups.

35. Costs that are incurred prior to August 1, 2005, that the department determines are unreasonable.

36. Costs associated with the delivery of documents.

37. Fees required by third parties to obtain samples, including municipal permits or access fees.

38. Capitol equipment purchases that are not unique to the facility, such as general tools.

**Note:** Costs incurred after October 14, 1997 and before February 1, 2000 will not be denied for failure to conform with the bidding provisions in this chapter, but will be reviewed and evaluated for reasonableness.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05; CR 12-023: cr. (2) (f) 3., am. (3) (a) 6. Register October 2013 No. 694, eff. 11-1-13.

#### NR 169.15 Site hazard categorization system.

(1) The department project manager shall assign a preliminary high, medium, or low priority to the site.

(2) To determine reimbursement priorities pursuant to s. NR 169.17, the department project manager shall assign a final high, medium, or low priority to the site after approving a complete site investigation report submitted to the department.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05; CR 12-023: renum. 169.15 to (1) and am., cr. (2) Register October 2013 No. 694, eff. 11-1-13.

#### NR 169.17 Allocation of reimbursement assistance.

(1) **FUND ALLOCATION.** The department shall allocate funding based on statutory spending authority and as provided under this section. The department shall also determine the amount of any unused funds at the end of each fiscal year which were previously allocated to immediate actions and may reallocate those funds as provided in sub. (2).

(2) **CLASSES OF ACTIONS.** Funding available for eligible costs shall be allocated among the following classes of actions. Costs submitted for reimbursement shall be classified as one of the following:

(a) *Immediate actions.* 9.7% of the funds collected each fiscal year shall be reserved to reimburse costs associated with immediate actions. In the fourth quarter of each fiscal year, the department may transfer all or part of the unused funds which were set aside to reimburse costs of immediate actions to the fund which reimburses site investigations or remedial actions under this subsection.

(b) *Site investigations and remedial actions.* 1. Any funds not allocated under par. (a) shall be reserved to reimburse costs associated with site investigation and remedial actions. Funds available in this class shall be allocated as follows:

a. 25% to sites classified as high priority under s. NR 169.15.

b. 60% to sites classified as medium priority sites under s. NR 169.15.

c. 15% to sites prioritized as low priority sites under s. NR 169.15.

2. The department may transfer unused funds between high, medium and low priority sites as identified in this subsection to meet application needs.

(3) **REIMBURSEMENT PRIORITY WITHIN CLASSES.** (a) *Immediate actions.* Immediate actions shall be reimbursed based on the date on which the department receives the completed application.

(b) *Site investigations and remedial actions.* Site investigations and remedial actions shall be placed within one of 3 site hazard categories determined by the department in s. NR 169.15 and reimbursed within each site hazard category based on the date on which the department receives the completed application.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.19 Reimbursement applications.** (1) **TIMING OF APPLICATIONS.** An eligible applicant shall submit an application within the dates required by s. 292.65 (8) (a), Stats.

**Note:** Section 292.65 (8) (a), Stats., provides that an owner or operator may not submit an application if the owner or operator submits the notification of potential claim under sub. (4) (c) after August 30, 2008.

(2) **CONTENTS OF APPLICATIONS.** An owner or operator who seeks reimbursement of response action costs shall complete and submit to the department all the following:

(a) An application form containing all the following:

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

1. The owner or operator's name and address and a statement indicating how the applicant qualifies as an owner or operator under s. NR 169.07.

2. If an agent of the owner or operator is directing the response action, the name, address and phone number of the agent and a dated copy of the agency agreement.

3. A statement indicating whether the owner or operator has applied or will apply to another department program or another government agency for reimbursement of response action costs incurred for the same facility.

4. Information regarding multiple owner or operators including:

a. Names, addresses and phone numbers of all co-owners and all co-operators.

b. A certification that the owner or operator has made a reasonable effort to notify other owners or operators.

5. Dry cleaner facility information including information on whether the facility is still operating or operable, pollution prevention measures implemented and information on the construction of the facility.

6. Discharge information associated with the facility.

7. Consultant information, including the contact name and business name.

8. Insurance information, including a statement indicating whether any portion of the response action costs for which the owner or operator seeks reimbursement may be covered by insurance, or a statement from the owner's or operator's insurance company stating that the insurance company has denied the owner's or operator's claim for reimbursement of the response action costs

9. Other relevant information requested by the department.

(b) A reimbursement cost summary form containing all the following:

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

1. The total eligible response action costs for which the owner or operator seeks reimbursement from the department and a breakdown of those costs into the categories listed in par. (e).

2. Other relevant information requested by the department.

(c) A map showing the town, range, section and quarter-quarter section location of the facility.

(d) An accurate legal description of the land parcel where the facility is located which corresponds to the most recent accurate parcel description filed with the register of deeds in the county where the land parcel is located.

(e) A cost detail worksheet form which lists and identifies each eligible response action cost for which the applicant seeks reimbursement from the department, indicates whether the response action cost was for an immediate action, interim remedial action, site investigation or remedial action, and allocates cost to one of the following categories:

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

1. Soil investigation.
2. Soil remediation.
3. Groundwater investigation.
4. Groundwater remediation.
5. Air/vapor investigation.
6. Air/vapor remediation.
7. Laboratory and other analysis.
8. Miscellaneous.

**Note:** Section 292.65 (8) (j), Stats., provides that if any person applies for reimbursement of an ineligible cost, the department may deduct 50% of the amount of that cost from that person's eligible reimbursement claim. An owner or operator who is not certain whether a cost is eligible for reimbursement under this chapter may contact the department for a preliminary opinion under s. NR 169.19 (1).

(f) Invoices or other information documenting and cross referencing each of the costs listed under par. (e) and identifying the nature of the materials or services provided, the amount charged for the materials or services, the identity of the provider, and the dates on which the materials or services were provided

(g) Canceled checks or other information documenting that the applicant has paid all of the costs under par. (e), and cross referenced to the statement provided under par. (e).

(h) For each cost listed under par. (e), a copy of the accepted bid proposal as well as a cumulative listing of all change orders to the original bid proposal approved to date.

(i) A spreadsheet that identifies and cross references each cost in par. (e) with the documentation under pars. (f) and (g) supporting that cost.

(j) A substitute W-9 tax form completed by the owner or operator applying for reimbursement.

**Note:** Reimbursement paid to an owner or operator under this chapter may be reported as taxable income received by that person.

(k) Other relevant information required by the department.

**Note:** Contact the Department of Natural Resources, Bureau for Remediation and Redevelopment, P.O. Box 7921, Madison, WI 53707, for free application materials, including illustrative examples and the forms required under this section.

(L) A statement indicating whether the owner or operator has had past discharges at the facility for which a closure has been granted by the department.

(m) A record of investigation results and data interpretation.

(n) Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.

**(3) COSTS INCLUDED IN APPLICATIONS.** (a) Each reimbursement application shall include all eligible response action costs paid after the date an applicant's last application was submitted and before or on the date the current application is submitted.

(b) An owner or operator may not apply for reimbursement of eligible response action costs paid before the date of a prior reimbursement application to the department, unless those costs were not eligible for reimbursement under this chapter at the time of the prior application.

**(4) APPLICATION FREQUENCY.** (a) An owner or operator shall submit applications for immediate and interim actions as specified in s. NR 169.11.

(b) An owner or operator may submit an application for reimbursement of site investigation costs when a complete ch. NR 716 site investigation report is submitted to and approved by the department.

(c) An owner or operator who incurs costs for a ch. NR 716 site investigation may submit a request for reimbursement prior to completing the site investigation report. The minimum reim-

bursment request shall be \$15,000 and only one reimbursement request may be submitted within any fiscal year. No more than 3 reimbursement requests, each accompanied by a summary of work completed through the date of the last invoice may be submitted prior to submittal of the site investigation report. A final reimbursement request may be submitted upon department approval of the site investigation report.

(d) Not including the final application submitted after closure has been granted, an owner or operator may not submit more than 2 applications for remedial action reimbursement for each facility in a fiscal year.

**Note:** An owner or operator may submit applications for immediate actions, interim actions or site investigation reimbursement all within the same fiscal year. The number of applications submitted for remedial actions each year is limited to prevent too frequent submittals of costs such as operation and maintenance.

**(5) FRAUDULENT APPLICATIONS.** (a) No person may make, or conspire with another person to make, any false, deceptive or misleading representation in connection with any reimbursement application under this chapter.

(b) Any person who makes or conspires with another person to make any false, deceptive or misleading representation in connection with a reimbursement application under this chapter is ineligible for any reimbursement for that response action or any other response action taken or ordered at any dry cleaning facility within 5 years after the date of that application.

**Note:** Persons filing fraudulent claims may also be subject to criminal prosecution.

(c) Any person who has reason to believe that that person has received any reimbursement for which that person is ineligible under this section shall immediately notify the department and shall refund with the notification the full amount of any reimbursement for which that person is ineligible.

**Note:** Section 292.65 (9) (b), Stats., provides that the department shall ask the attorney general to take action to recover awards which were issued for applications which were fraudulent or to owners or operators who received awards but did not meet the requirements of s. 292.65, Stats.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05; CR 12-023: am. (4) (c) Register October 2013 No. 694, eff. 11-1-13; **reprinted to restore omitted copy in (4) (c), Register November 2013 No. 695.**

**NR 169.21 Reimbursement awards. (1) PROCESSING APPLICATIONS.** (a) *Preliminary opinion.* The department may issue a preliminary opinion which is not binding on the department on whether an applicant is eligible for reimbursement of response action costs.

(b) *Notice acknowledging application.* Within 30 days after the department receives an application under s. NR 169.19, the department shall issue a written notice to the applicant acknowledging receipt of the application.

(c) *Request for additional information.* Following receipt of an application under s. NR 169.19, the department may require an applicant to submit any additional information that may be relevant to the department's review of the application.

(d) *Decision.* Within 90 days after the department receives a complete application under s. NR 169.19, including any additional information required by the department under par. (c), the department shall issue a written decision approving or disapproving the application. The department may approve part of an application, or approve an application subject to conditions specified by the department. In its decision the department shall specify all the following:

1. The amount of eligible costs, if any, for which reimbursement may be paid.

2. The total amount, if any, approved for payment under s. NR 169.13. The decision shall specify that payment is subject to the terms and conditions specified in this chapter.

3. Any amounts and items not approved and the reasons for that disapproval. The department shall also explain any amounts deducted from the reimbursement application under sub. (3).

**(2) DENIAL OF APPLICATIONS.** Applications shall be denied as provided in s. 292.65 (8) (d), Stats.

**Note:** Section 292.65 (8) (d), Stats., provides that the department shall deny an application if any of the following applies:

1. The application is not within the scope of the statute.
2. The applicant submits a fraudulent application.
3. The applicant has been grossly negligent in the maintenance of the dry cleaning facility.
4. The applicant intentionally damaged the dry cleaning equipment.
5. The applicant falsified records.
6. The applicant willfully failed to comply with laws or rules of this state concerning the use or disposal of dry cleaning solvents.
7. All of the fees, interest and penalties due under ss. 77.9961, 77.9962 and 77.9964, Stats., have not been paid unless an agreement has been entered into with the department of revenue establishing a payment schedule for all of the fees, interest and penalties due.
8. The dry cleaning product discharge was caused on or after October 14, 1997, by a person who provided services or products to the owner or operator or to a prior owner or operator of the dry cleaning facility, including a person who provided perchloroethylene to the owner or operator or prior owner or operator of a dry cleaning facility using a system other than a closed, direct-coupled delivery system.

**Note:** Section 292.65 (8) (j), Stats., and s. NR 169.25 (3) establish award reductions if ineligible costs are included in the application prepared either by the owner, operator or consultant.

**(3) DEDUCTIBLES.** (a) The department may only make an award for eligible costs incurred at each dry cleaning facility that exceed the deductibles or other costs as specified in s. 292.65 (8) (e), Stats.

**Note:** Section 292.65 (8) (e), Stats., provides that eligible costs incurred at each dry cleaning facility may be paid if they exceed the following:

- a. If eligible costs are \$200,000 or less, \$10,000.
- b. If eligible costs exceed \$200,000 but do not exceed \$400,000, \$10,000 plus 8% of the amount by which eligible costs exceed \$200,000.
- c. If eligible costs exceed \$400,000, \$26,000 plus 10% of the amount by which eligible costs exceed \$400,000.

**Note:** Costs and deductibles are calculated on a cumulative per site basis.

(b) The department may waive deductibles as specified in s. 292.65 (8) (g), Stats.

**Note:** Section 292.65 (8) (g), Stats., provides that the department may waive the requirement that an owner or operator pay the deductible amount if the department determines that the owner or operator is unable to pay. If the department waives the deductible requirement, the department shall record a statement of lien with the register of deeds of the county in which the dry cleaning facility is located. If the department records the statement of lien, the department has a lien on the property on which the dry cleaning facility is located in the amount of the deductible that was waived. The property remains subject to the lien until that amount is paid in full at which point the department will record a satisfaction of lien.

**(4) MAXIMUM AWARDS.** Pursuant to s. 292.65 (8) (f), Stats., \$500,000 is the maximum amount that may be paid for costs at a single dry cleaning facility for immediate actions, both emergency and non-emergency, and site investigations and remedial actions.

**Note:** The maximum award amount applies to each facility rather than to each owner or operator. Costs and deductible maximums also apply per facility. If a facility is sold and the new owner or operator spends money to continue cleanup from an older release or to cleanup from a new release, the owner or operator may be eligible for reimbursement under this chapter to the extent that the maximum award amount payable under sub. (4) has not been exceeded. Awards to a subsequent owner or operator will be reduced by the amount of the deductibles under sub. (3) that have not been exceeded.

**(5) MULTIPLE CLAIMANTS.** If more than one owner or operator is eligible for reimbursement under this chapter for response action taken for one or more discharges at the facility, the combined amount paid to those owners or operators may not exceed the maximum amount specified for a facility under sub. (4).

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

## NR 169.23 Consulting and contract services.

**(1) APPLICABILITY.** This section does not apply to hiring a consultant or contractor to design or implement immediate action activities or to conduct site investigation scoping activities. This section does not apply to interim actions unless the department requires bidding for an interim action based on the scope of the action or costs projected by the consultant proposing to conduct the interim action activity.

**(2) PROPOSALS AND WORKPLANS REQUIRED.** (a) *Interim actions.* If required by the department, an owner or operator shall solicit a minimum of 3 and a maximum of 6 bid proposals from at least 3 consultants based on information contained in or equivalent to a site investigation scoping report or the initial phases of the site investigation.

**Note:** This requirement does not imply that all sites will need to implement interim action activities. This provision is only for those sites where interim actions, as defined in ch. NR 708, are appropriate.

(b) *Site investigations.* An owner or operator shall solicit and obtain a minimum of 3 and a maximum of 6 workplans from at least 3 consultants based on information contained in or equivalent to a site investigation scoping report. Site investigation workplans shall be consistent with s. NR 716.09 and include all activities required in ch. NR 716.

(c) *Remedial actions.* An owner or operator shall solicit and obtain a minimum of 3 and a maximum of 6 bid proposals for the implementation of a remedy based on the findings of the ch. NR 716 site investigation and in compliance with chs. NR 722 and 724.

(d) *Submittal of workplan and remedial action bids.* Each consultant shall submit a sealed bid to the owner or operator by the date specified by the owner or operator. The consultant shall also submit at the same time a copy of the sealed bid to the department project manager.

**(3) COST ESTIMATES AND SERVICES REQUIRED.** (a) Each site investigation workplan or interim or remedial action proposal shall include a cost estimate for each service provided by the consultant or contractor and shall be submitted with a completed form as provided by the department. The department may require an owner or operator to obtain additional workplans or proposals if the department finds that existing workplans or proposals are unreasonable or inadequate.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

(b) The site investigation workplan or remedial action proposal shall include statements regarding the consultant's ability to do all the following:

1. Be fully informed about the project's scope and required services, and have the experience and ability to analyze alternatives and design the most suitable response action consistent with technical and economic feasibility, environmental statutes and rules, restoration timeframes and the latest technical advances.
2. Provide necessary staff and facilities for all phases of planning, investigation, design, construction and operation.
3. Retain and confer with specialists on unusual matters and provide qualified technical reviewers to advise the owner on technical and regulatory matters and work toward planned remediation goals.
4. Perform all services in an ethical, professional and timely manner.

(c) Except as provided in par. (d), the department may not reimburse an eligible applicant for consulting service costs by the consultant selected to perform the service that exceed that consultant's proposal for those services under par. (a) or (b).

(d) The department may reimburse an eligible applicant for consulting or contract services not included in the consultant's workplan or proposal under par. (a) or (b), or for additional hours or units of service beyond those included in the consultant workplan or proposal under par. (a) or (b), if all of the following apply:

1. The consultant providing the additional services was selected by the qualification based selection process required under sub. (8) after evaluating the information required under pars. (a) and (b).
2. The consultant bills for the additional services at the same or lower per-unit price at which the consultant agreed to provide equivalent services, if any, in the consultant's initial proposal under par. (a) or (b).
3. The consultant provides the eligible applicant with a cost estimate for the additional services before performing those services. The department may require the owner or operator to obtain competitive proposals for the additional services if the department finds that the cost estimate is unreasonable.

4. The additional services do not involve the selection, design or installation of groundwater remediation.

5. If the total cost of additional services exceeds the greater of \$3,000 or 5% of the workplan or proposal cost, and before the additional work is performed, the owner or operator provides a change order and the cost estimate under subd. 3. to the department, and after obtaining department approval provides the consultant with written authorization to proceed with the additional services.

(e) An owner or operator requesting reimbursement from the department shall keep copies of all workplans and proposals required under this subsection, and shall make those copies available to the department for inspection and copying upon request. The owner or operator shall keep copies of the bids and cost estimates for at least 3 years beyond the completion of the project.

**(4) INTERIM ACTION PROPOSAL ESTIMATE CONTENTS.** Interim action activities included in the proposals shall include the need for and scope of the interim action, the implementation of the interim action, the design and documentation report at the conclusion of the action. Interim action proposals shall be consistent with s. NR 708.11.

**(5) SITE INVESTIGATION WORKPLAN ESTIMATE CONTENTS.** Every site investigation workplan under sub. (2) (b) shall include all the following:

(a) A clear description and itemization of the consultant and contract services included in the workplan based on the site investigation scoping report or, if there is no scoping report, on a good faith estimate of the scope of the project.

(b) A form provided by the department containing a description of the overall strategy for assessing the impacts from the site; a monitoring strategy to include parameters necessary to evaluate enhanced natural attenuation or monitored natural attenuation as a remedy, including a minimum of 4 rounds of groundwater sampling; and a discussion of the management of investigative derived waste.

**Note:** Forms are available at no charge from the remediation and redevelopment program in any department regional or central office or by contacting the department at (608) 266-2111.

(c) A total cost estimate for all the consultant and contract services included in the workplan and a subtotal price for each of the component services itemized in the workplan.

(d) All the following information related to every service priced on an hourly or per unit basis:

1. The price per hour or per unit of service.
2. A reasonable, good faith estimate of the number of hours or units of service to be provided.
3. The total estimated price for the service, based on the estimate under subd. 2.
4. The estimated date by which the consultant and contractor will perform their services.

(e) Every certification required under sub. (9).

**(6) REMEDIAL ACTION PROPOSAL ESTIMATE CONTENT.** Every remedial action proposal submitted under sub. (2) (c), and every cost estimate under sub. (3) (a) shall include all of the following information on a form provided by the department:

(a) A ch. NR 722 evaluation of technical and economic feasibility for appropriate alternatives at a site, including an evaluation of natural attenuation and enhanced natural attenuation.

(b) A description of the remedy proposed for the site. The description shall include an explanation of how that remedy will result in compliance with ch. NR 726 pertaining to case closure.

(c) A clear description and itemization of the consultant and contract services included in the proposal. The description and itemization shall be based on the proposed remedy selected for the site.

(d) A description and cost estimate for the implementation, analysis and interpretation of a pilot test for all active remediation

systems, unless the consultant can justify to the department's satisfaction that a pilot test is not necessary.

(e) A total cost estimate for all the consultant and contract services included in the proposal and a subtotal price for each component service itemized in the proposal.

(f) All the following information related to every service priced on an hourly or per unit basis:

1. The price per hour or per unit of service.
2. A reasonable, good faith estimate of the number of hours or units of service to be provided.
3. The total estimated price for the service, based on the estimate under subd. 2.
4. The estimated schedule by which the consultant and contractor will perform their services.

(g) Every certification required under sub. (9).

**(7) SERVICES PRICED ON AN HOURLY OR PER UNIT BASIS.** (a) Cost estimates for the following services shall be priced on an hourly or per unit basis:

1. Excavating.
2. Trucking.
3. Waste treatment or disposal services.
4. Drilling, including at-depth soil sampling and well installation.
5. Laboratory services.
6. Services normally billed on an hourly or per unit basis.

(b) Cost estimates for professional or personal services, including engineering, hydrogeologic, field technician and general contracting services, shall be priced on an hourly basis and include a maximum total price for each service. Each proposal shall include a statement of professional qualifications for every person whose professional services are included in that proposal.

**(8) CHOICE OF CONSULTANT SERVICES.** An owner or operator shall select the consultant following a qualification based selection system. Before entering into a contract with a consultant, the owner or operator shall submit to the department for approval all workplans or proposals received and the owner's or operator's justification for the selected workplan or proposal.

**(9) CERTIFICATIONS.** (a) *Consultants.* In every proposal or cost estimate under sub. (2), the consultant shall certify all the following:

1. That the consultant and contract services will comply with applicable requirements under this chapter and chs. NR 700 to 728.
2. That upon request the consultant will make available to the department for inspection and copying all of the consultant's documents and records related to the contract services.
3. That the consultant did not prepare the bid in collusion with any other consultant submitting a bid on the site.

(b) *Insurer.* 1. Every proposal under this section shall include a certification of insurance from an agent licensed to do business in Wisconsin that certifies all of the following facts:

- a. The consultant maintains coverage for errors and omissions professional liability coverage, including pollution impairment liability, of no less than \$1,000,000 per claim and a minimum of \$1,000,000 in annual aggregate claims.
- b. The policy in this subd. 1. a. is an occurrence based policy or is a claims made policy.
- c. If the policy is a claims made policy the consultant agrees to obtain that or a similar policy for a subsequent 3 years.
- d. The maximum deductible amount per claim of the policy that provides the coverage specified in subd. 1. a.
- e. The insurance company providing the coverage required by par. (b) has an A.M. Best rating of at least "A-."

2. If the maximum deductible specified in subd. 1. d. exceeds \$25,000 per claim, the consultant shall furnish proof of financial

responsibility acceptable to the department for the amount of the deductible.

**(10) EXEMPTIONS.** The department may reimburse reasonable costs incurred for necessary contract services, regardless of compliance with subs. (2) to (6), if any of the following apply:

(a) The contract service costs were incurred by the owner or operator pursuant to contracts made before February 1, 2000.

(b) The owner or operator demonstrates to the department's satisfaction that compliance with subs. (2) to (6) is not reasonably possible.

(c) The cumulative contract service costs for that contractor for costs at this dry cleaning facility do not exceed the greater of \$3,000 or 5% of the costs included in the approved workplan.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05; CR 12-023: am. (9) (b) 1. d. Register October 2013 No. 694, eff. 11-1-13.

**NR 169.25 Legal ramifications of awards. (1) CONTRIBUTORY NEGLIGENCE.** The department may not diminish or deny an award under this chapter as a result of negligence attributable to the applicant or any person who is entitled to submit an application, except as provided in s. 292.65 (8) (h), Stats.

**Note:** Section 292.65 (8) (h), Stats., cross references s. 292.65 (8) (d) 3., Stats., which states that applications from applicants who were grossly negligent in maintaining the dry cleaning facility in question shall be denied.

**(2) ASSIGNMENT OF AWARDS.** Awards may be assigned as provided in s. 292.65 (8) (i), Stats.

**Note:** Section 292.65 (8) (i), Stats., provides that the filing by an applicant with the department of an assignment of an award under this section to a person who loans money to the applicant for the purpose of conducting activities required under sub. (4) creates and perfects a lien in favor of the assignee in the proceeds of the award. The lien secures all principal, interest, fees, costs and expenses of the assignee related to the loan and has priority over any previously existing or subsequently created lien, assignment, security interest or other interest in the proceeds of the award.

**(3) REDUCTION OF AWARDS.** Awards based on applications that contain ineligible costs under s. NR 169.11 (3) shall be adjusted as provided in s. 292.65 (8) (j), Stats.

**Note:** Section 292.65 (8) (j), Stats., provides that: 1. If an owner or operator prepares and submits an application that includes ineligible costs that are identified by the department by rule, the department shall calculate the award by determining the amount that the award would otherwise be under pars. (e) and (f) based only on the eligible costs and then by reducing that amount by 50% of the ineligible costs identified by rule that are included in the application.

2. If a person other than an owner or operator prepares an application that is submitted by the owner or operator and that includes ineligible costs that are identified by rule, the person shall pay to the department an amount equal to 50% of the ineligible costs identified by rule that are included in the application. A person, other than an owner or operator, who prepares an application may not charge the owner or operator for any amount that the person is required to pay under this subdivision. Payments made under this subdivision shall be deposited in the dry cleaner environmental response fund.

3m. If a person other than an owner or operator prepares a statement that is submitted by the owner or operator to obtain payment for costs incurred by a 3rd party under sub. (7) (b) and the statement includes ineligible costs, the person shall pay to the department an amount equal to 50% of the amount of ineligible costs included in the statement.

4. If, prior to receiving an award under this section, an owner or operator receives payment from another person, including an insurance company, arising out of an application for payment of any eligible costs or receives a tax credit based on any eligible costs, the department may not reimburse the owner or operator any amount that exceeds the difference between the amount of the award calculated under s. 292.65 (8) (e), (f), and (j) 1. and 2., Stats., and the amount by which the payment exceeds the sum of the deductible and the amount by which the amount calculated under s. 292.65 (8) (e), Stats., exceeds the maximum award under s. 292.65 (8) (f), Stats.

**(4) RECOVERY OF AWARDS.** Awards shall be recovered as provided in s. 292.65 (9), Stats.

**Note:** Section 292.65 (9), Stats., provides that: (a) Right of action. A right of action under this section shall accrue to the state against an owner or operator only if the owner or operator submits a fraudulent application or does not meet the requirements under this section and if an award is issued under this section to the owner or operator for eligible costs under this section.

(b) Action to recover awards. The attorney general shall take appropriate actions to recover awards to which the state is entitled under par. (a). The department shall request that the attorney general take action if the department discovers a fraudulent application after an award is issued.

(c) Disposition of funds. The net proceeds of the recovery under par. (b) shall be paid into the dry cleaner environmental response fund.

**(5) LIABILITY.** This chapter does not create liability except as provided in s. 292.65 (10), Stats.

**Note:** Section 292.65 (10), Stats., provides that: (a) No common law liability, and no statutory liability that is provided in a statute other than s. 292.65, Stats., for damages resulting from a dry cleaning facility is affected by this section. Except as provided in par. (b), the authority power and remedies provided in this section are in addition to any authority, power or remedy provided in any statute other than this section or provided at common law.

(b) An award under this section is the exclusive method for the recovery of the amount of eligible costs equal to the amount of the award that may be issued under this section.

(c) If a person conducts a remedial action activity for a discharge at a dry cleaning facility site, whether or not the person files an application under this section, the remedial action activity conducted and any application filed under this section are not evidence of liability or an admission of liability for any potential or actual environmental pollution.

**(6) PENALTIES.** No person may knowingly make or cause to be made a false or misleading statement in any document submitted to the department under this chapter. Penalties for making the statements shall be assessed as indicated in s. 292.99 (1m) and (2), Stats.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.27 Administration of reimbursement awards. (1) RECORDS, RETENTION AND AUDITING.** An owner or operator who receives reimbursement shall retain all records pertaining to the project for a period of 3 years after the date of final payment and, upon request, shall make the records available to the department. Records requests by the department shall allow at least 48 hours for the records to be made available by the owner or operator who receives reimbursement.

**(2) DISPUTES.** (a) *Decision of the department.* Except as otherwise provided by law, the department shall decide any dispute regarding or arising under a reimbursement award, including disputes regarding decisions under s. NR 169.21 (1) (d) to (5). The department shall notify the reimbursement recipient of its decision in writing by personal service or by certified mail with return receipt requested.

(b) *Review of the decision.* A decision of the department made pursuant to this subsection shall be final unless within 30 days from the date of the decision, the recipient serves the secretary by personal service or certified mail with return receipt requested with a written petition requesting an administrative hearing and specifically stating the disputed facts or law which warrant a modification or reversal of the decision. Petitions are deemed filed upon receipt by the department. Any review of a department decision filed pursuant to this paragraph shall be treated as a contested case and adjudicated in accordance with ch. 227, Stats., and ch. NR 2.

**(3) REIMBURSEMENT TERMINATION.** (a) The department and an owner or operator who receives reimbursement may enter into an agreement to terminate the reimbursement award at any time under this subsection. The termination agreement shall establish the effective date of termination of the reimbursement, the basis for settlement of award termination costs, and the amount and date of payment of any sums due any party.

(b) The department may terminate a reimbursement award in whole or in part, and require the owner or operator who received reimbursement to repay all or part of the reimbursement amount, if the department determines any of the following apply:

1. There has been no substantial performance on the project by the owner or operator who received reimbursement.

2. There is substantial evidence that reimbursement was obtained on the basis of inaccurate or erroneous information or by fraud.

3. The owner or operator who received reimbursement has failed to comply with the provisions of this chapter.

**(4) ENFORCEMENT.** The department may impose any of the following sanctions upon an owner or operator who receives an award but fails to comply with the provisions of this chapter:

(a) The department may terminate the reimbursement award in accordance with sub. (3).

(b) The department may declare project costs directly related to the noncompliance ineligible for reimbursement funding.

(c) The department may seek recovery of awards it paid under this chapter.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.29 Variances. (1) GENERAL.** The department may approve a variance from any nonstatutory requirement of this chapter. In considering a variance request, the department shall take into account factors such as good cause, circumstances beyond the control of the owner or operator seeking reimbursement, whether the variance is essential to effect necessary actions or departmental objectives, and whether special circumstances make the variance in the best interest of the state.

**(2) REQUEST FOR VARIANCE.** An owner or operator submitting an award application and requesting a variance shall submit a written request for a variance to the department as far in advance as the situation will permit. Each request shall contain all of the following:

(a) The name of the person requesting the variance and the name and telephone number of a contact person familiar with the variance request.

(b) An explanation of why the variance is needed, including the factual basis for the variance request and the specific provision of this chapter from which a variance is sought.

(c) Within 30 days of receiving a request, the department shall mail the applicant for a variance a written decision stating the reasons or basis for the decision.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.

**NR 169.31 Evaluation and termination of the program. (1) ADVISORY COUNCIL.** (a) The dry cleaner environmental response council created under s. 15.347 (2), Stats., shall have the following responsibilities:

1. To advise the department on rules promulgated to implement s. 292.65, Stats.

2. To evaluate the dry cleaners environmental cleanup program at least every 5 years using criteria established by the council.

(b) The council shall meet at least annually at the call of the chairperson, a majority of its members, or at the request of the department.

(c) Each member shall be reimbursed for actual and necessary travel and meal expenses incurred in the performance of their duties in accordance with current state travel expense guidelines.

(d) A majority of members of the council shall constitute a quorum to conduct business and take actions.

**(2) SUNSET.** This program ends on June 30, 2032.

**History:** CR 04-128: cr. Register July 2005 No. 595, eff. 8-1-05.