

## Chapter NR 169

## DRY CLEANER ENVIRONMENTAL RESPONSE PROGRAM

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**NR 169.01 Purpose.** This chapter establishes rules promulgated under ss. 292.65 and 292.66, 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 dry cleaning facilities.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**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 dry cleaning solvents. Compliance with s. 292.11, Stats., this chapter and chs. NR 700 to 728 is a prerequisite to eligibility for reimbursement under s. 292.65 or 292.66, Stats.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

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

- (1) "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.
- (2) "Consultant" means a person or business under contract to perform a response action regulated or subject to regulation under chs. NR 702 to 736.
- (3) "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.
- (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 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 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.

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

Note: Section 292.65 (1) (e), Stats., states that "dry cleaning solvent" means a chlorine-based or hydrocarbon-based formulation or product that is used as a primary cleaning agent in dry cleaning facilities.

(8) "Dry store" means a retail outlet specifically for dropping off and picking up apparel or household fabrics which are then transported to a dry cleaning facility for dry cleaning activities. Dry cleaning activities do not occur at dry stores.

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

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

(11) "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.

(12) "Immediate action" has the meaning specified in s. NR 700.03 (28).

Note: Section NR 700.03 (28) states that "immediate action" means a response action that is taken within a short period of time after the discharge of a hazardous substance occurs, or after the discovery of a hazardous substance discharge or environmental pollution, to halt the discharge, contain or remove discharged hazardous substances, or remove contaminated environmental media, 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 that may exist. This term includes both emergency and non-emergency immediate actions.

(13) "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 other items which are not directly and exclusively attributable to a response action or the use of which is not limited to the response action.

(14) "Interim action" has the meaning specified in s. NR 700.03 (29).

Note: Section NR 700.03 (29) states that "interim action" means a response action taken to contain or stabilize a discharge of a hazardous substance, in order to mini-

minimize any threats to public health, safety or welfare or the environment, while other response actions are being taken or planned for the site or facility.

**(15)** "Interim remedial equipment" means equipment necessary to implement an interim action as defined in s. NR 700.03 (29).

**(16)** "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.

**(17)** "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:
  - 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.

**(18)** "Preliminary site screening" means collecting sufficient information to determine the appropriateness for an interim action, including all of the following:

- (a) Developing a conceptual site model, including the historical use and facility operations.
- (b) Identifying potential unsaturated zone sources and assessing their role in continued contaminant releases from the site.
- (c) Providing regional hydrogeologic information, some limited site specific hydrogeologic information, and site specific sampling which includes subsurface materials, groundwater, where feasible, and potential receptors such as nearby private and public wells, as appropriate.

Note: The information collected from a preliminary site screening will primarily be used to determine the appropriateness of a proposed interim remedial action, and is not intended to define the full extent of the contamination or site closure. For the purpose of this program, interim remedial actions are anticipated to address unsaturated zone sources, and in some limited cases, groundwater contamination. The appropriateness of an interim remedial action may not be directly related to a conclusion regarding the significance of the site from a site classification perspective, or from a risk perspective, for the purpose of determining award priorities. Information collected may also be used to develop a site investigation workplan, or to determine other appropriate response actions.

**(19)** "Program year" has the meaning specified in s. 292.65 (1) (j), Stats.

Note: Section 292.65 (1) (j), Stats., states that "program year" means the period beginning on July 1, and ending on the following June 30.

**(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), Stats., states that "remedial action" 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 and welfare and the environment.

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

**(23)** "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.

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

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

**(25)** "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.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.07 Eligible applicants. (1) GENERAL.** Eligible applicants are owners or operators who meet the requirements specified in s. 292.65 (4) (a), Stats.

Note: Section 292.65 (4) (a), Stats., states that the owner or operator of a dry cleaning facility may apply for reimbursement under this chapter. An owner or operator of a dry cleaning facility which is closed when the application is submitted to the department also must comply with the additional requirements, identified in s. NR 169.09 (2).

**(2) AGENTS.** 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 required under s. NR 169.09. The owner or operator and the agent shall jointly submit the application for an award 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 this subsection and complies with the rules promulgated under this section and any other rules promulgated by the department concerning dry cleaning facilities.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.09 Eligibility requirements. (1) GENERAL REQUIREMENTS.** Costs listed under s. NR 169.11 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 of the following:

1. Report the discharge to the department per 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. Apply for the program on a form developed by the department.

Note: Forms will be available at no charge on the DNR Web site ([www.dnr.state.wi.us/org/aw/rr](http://www.dnr.state.wi.us/org/aw/rr)) and from the Remediation and Redevelopment program in any department regional or central office.

3. Document to the department that the response meets the criteria for immediate action under s. NR 708.05.

4. Document to the satisfaction of the department that the response action was an appropriate response warranted by site conditions.

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

Note: This \$10,000 cost limit for immediate actions does not include the cost for preliminary site screening, it is only for the cost of the immediate action itself.

6. Within 120 days after completing an immediate action, submit an application to the department, as specified in s. NR 169.17, which documents all eligible actions and associated costs.

An immediate action is considered complete when the immediate nature of the release has been adequately addressed. An immediate action which includes operation and maintenance of equipment is considered completed at the time when the equipment is installed.

**Note:** If further action is necessary under ch. NR 708, the owner or operator shall continue through the NR 700 process.

(b) *Interim actions.* To receive reimbursement from the department for costs associated with preliminary site screening and the purchase and installation of interim remedial action equipment an eligible applicant shall do all of the following:

1. Report the discharge to the department per 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. Apply for the program on a form developed by the department.

**Note:** Forms will be available at no charge on the DNR Web site ([www.dnr.state.wi.us/org/awfir](http://www.dnr.state.wi.us/org/awfir)) and from the Remediation and Redevelopment program in any department regional or central office.

3. Document to the satisfaction of the department that the response meets the criteria of interim action in s. NR 708.11.

4. Document to the satisfaction of the department that immediate action is not necessary at the facility.

5. Complete a preliminary site screening at the facility.

6. Submit to the department an interim action options report, per ch. NR 708, for approval. The interim action options report shall include all of the following:

a. Results of the preliminary site screening.

b. Detailed information regarding the interim remedial action being proposed.

c. Appropriate cost estimates for the purchase and installation of the equipment being proposed.

d. Schedule for conducting a ch. NR 716 site investigation.

**Note:** The costs for the development of an interim action options report are not eligible costs per s. 292.66, Stats., which limits the reimbursement award for the costs of preliminary site screening and the purchase and installation of equipment only.

**Note:** Chapter NR 716 site investigation schedules may include phased approaches for the investigation, and will be negotiated with the department 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 options report for eligible dry cleaning facilities.

7. Obtain department approval of the interim action options report.

8. Implement the interim action in accordance with the interim action options report approved by the department.

9. Sign a statement agreeing to comply with all applicable statutes and rules, including agreeing 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.

10. Within 120 days of completing the interim action, submit an application as specified in s. NR 169.17, which documents all eligible actions and associated costs. An interim action is completed when field installations are completed.

**Note:** Eligible costs for interim actions are limited to preliminary site screening and the purchase and installation of equipment. Operation, maintenance and monitoring costs associated with the interim action are not eligible for reimbursement as an interim action.

11. Comply with the cost and contracting provisions contained in this chapter, specifically ss. NR 169.11 and 169.21 relating to costs and contracting provisions.

12. Comply with all other requirements in s. 292.66 (2), Stats.

**Note:** Section 292.66, Stats., states that the department may not make an award before September 1, 1998 or after June 30, 2002.

(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 per 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. Notify the department of the potential to submit a claim for reimbursement under this program, 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 will be available at no charge on the DNR Web site and from the Remediation and Redevelopment program in any department regional or central office.

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

**Note:** Forms will be available at no charge on the DNR Web site and from the Remediation and Redevelopment program in any department regional or central office.

4. Submit a site investigation workplan for approval by the department.

**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 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:** No ch. NR 749 fees associated with the review of a site inspection workplan will be charged for review of workplans required in this chapter. The department will review a workplan within 45 calendar days of its receipt. The department will approve the workplan, request revisions be made to the workplan prior to approval, or deny the workplan. If the department requires other documents to be submitted, the department may assess fees under ch. NR 749 for the review of those documents. Those fees will be considered eligible expenses for the purpose of reimbursement.

5. Before conducting a remedial action, complete a site investigation in compliance with ch. NR 716 to determine the extent of environmental contamination by the dry cleaning solvent discharge, except as provided in sub. (4).

6. Submit a remedial action options report, including the results of the site investigation and a schedule of remedial actions to the department for approval.

**Note:** No ch. NR 749 fees associated with the review of the remedial action options report will be charged for the first submittal. Within 45 calendar days of receipt of the remedial action options report, the department will approve the report, request revisions be made to the report prior to approval, or deny the report.

7. Based on the findings of the remedial action options report, the department shall classify the site under s. NR 169.13, to determine when reimbursement will be available. The owner or operator may not submit an application for the costs of the site investigation prior to the submittal of the remedial action options report for review by the department. Reimbursement will not be made until the report is approved by the department.

8. Conduct all actions identified in the remedial action options report in accordance with the schedule approved by the department and in compliance with chs. NR 700 to 728 and with s. 292.65 (4) (j), Stats.

9. Conduct all remedial action activities required under chs. NR 700 to 728 and under s. 292.65 (4) (j), Stats.

**Note:** Activities required under chs. NR 700 to 728 and under 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.

10. 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.

11. Within 120 days of completing the remedial action submit an application as specified in s. NR 169.17, which documents all eligible actions and associated costs.

12. Comply with the cost and contracting provisions contained in this chapter, specifically ss. NR 169.11 and 169.21.

(2) **ADDITIONAL REQUIREMENT - CLOSED FACILITIES.** The owner or operator of a closed facility shall comply with the additional requirements under s. 292.65 (6), Stats.

Note: Section 292.65 (6), Stats., has been repealed in 1999 Wisconsin Act 9.

Note: A facility that has been converted to a dry store at the time an application is submitted is considered a closed facility for the purpose of this section, since dry cleaning activities are no longer occurring at that particular facility.

Note: Each time a reimbursement application is submitted to the department, the facility will be assessed to determine whether it is a closed facility at that time. A facility that is determined to be closed when an application is submitted will be subject to the provisions of s. 292.65 (6), Stats. (see above note)

(3) **ADDITIONAL REQUIREMENTS - FACILITIES CONSTRUCTED AFTER OCTOBER 14, 1997.** The owner or operator of a dry cleaning facility on which construction begins after October 14, 1997 is eligible for an award under this chapter only as provided in s. 292.65 (5), Stats.

Note: Section 292.65 (5), Stats., provides that: (a) 1. An 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 not eligible 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 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 solvent 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 solvent or wastewater from dry cleaning machines into any sanitary sewer or septic tank or into the waters of this state. Any storm sewer discharging to the waters of the state would be included in this category.

3. That each machine or other piece of equipment in which dry cleaning solvent 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 contain any leak, spill or other release of dry cleaning solvent 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 solvent. Dry cleaning machines with impervious containment pans designed to hold the amount of solvents contained in the largest tank on the machine meet this requirement.

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

(4) **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.

(h) An owner or operator may install interim remedial equipment for which the owner or operator would be eligible for reimbursement under s. 292.66, Stats., before completing a site investigation or remedial action plan under ch. NR 708.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.11 Costs. (1) MAXIMUM AWARD AMOUNT.** Awards may not exceed the maximums imposed by ss. 292.65 (8) (f) and 292.66 (3), 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. Section 292.66 (3), Stats., provides that an award to reimburse costs for interim remedial actions at a single facility shall equal 50% of the eligible costs, except that an award may not exceed \$20,000.

(2) **ELIGIBLE COSTS. (a) General.** 1. Eligible costs are those allowed under s. 292.65 (7), Stats.

Note: Section 292.65 (7), Stats., provides that eligible costs include reasonable and necessary costs paid 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.

13. Those costs of the purchase and installation of interim remedial equipment that qualify for reimbursement under s. 292.66, Stats., for which reimbursement was not received under s. 292.66, Stats.

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 prior to February 1, 2000, will not be denied if they do not conform with the bidding provisions contained in this chapter, but will be reviewed and evaluated for reasonableness.

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

2. Reimbursement of eligible costs will be limited to the costs identified for the lowest cost acceptable alternative in the interim action options report or the remedial action options report.

Note: If an eligible applicant wishes to conduct a more costly remedy, they may do so, however their reimbursement total will be limited to the maximum identified in the lowest cost acceptable alternative in the interim action options report or the remedial action options report approved for the site. Chapter NR 726 site closure chapter determines whether a site may be closed.

(b) **Interim remedial equipment.** Eligible costs are those costs allowed under s. 292.66, Stats.

Note: Section 292.66, Stats., provides that eligible costs include reasonable and necessary costs paid for the following items only:

1. The purchase and installation of interim remedial equipment as specified in the workplan approved by the department.

2. Field screening costs, including on-site mobile laboratory analyses for soil and groundwater for the purpose of determining the location for installation of interim remedial equipment.

Note: Costs for workplan development, interim action options reports, monitoring and operation and maintenance of interim remedial equipment are not eligible for reimbursement under s. 292.66, Stats.

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

1. Costs incurred before January 1, 1991.
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 other, similar contracts.
4. An owner or operator's indirect costs, including indirect costs for equipment, supplies or services.

Note: This does not prohibit the department from reimbursing any of the following:

1. Actual costs for equipment, supplies or services that are used exclusively for the response action. If an owner or operator purchases equipment that is used exclusively for the response action, the department may reimburse the difference between the purchase cost and the salvage value of that equipment as determined by the department, provided that the difference does not exceed the reasonable cost of renting the equipment.

2. Normal employe wages, salaries, expenses or fringe benefit allocation for time which the owner or operator's employes worked on a response action.

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 employe wages, salaries, expenses or other fringe benefit allocations for time which employes other than officers spend implementing a response action.

6. Costs to construct, repair, replace, improve, relocate or demolish any building or fixture.

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 s. NR 169.11 (2) (a) 14. 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 insurance claim made to cover eligible costs, the status of the claim, and, if the owner or operator has received any insurance proceeds arising from the claim, the amount of the proceeds.

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 remedial action activities specified in the remedial action options report.

15. Costs for investigation or remedial action conducted outside of 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.

19. Costs for a contractor's services that exceed the contractor's bid price for those services, except as provided under s. NR 169.21.

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

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

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

23. Costs to analyze environmental samples for substances that are not dry cleaning solvents, 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.

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

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

Note: Costs for phase 1 and phase 2 environmental site assessments are not eligible for reimbursements if no release is found during those assessments. Some costs for phase 1 and phase 2 assessments may be reimbursed if they meet the eligible cost criteria for response actions in s. 292.65 or 292.66, Stats., and are incorporated into reports submitted as requirements for this program.

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

27. Costs to prepare an application under s. NR 169.17, to contest an application decision under s. NR 169.25 or to consult with the department on the application.

28. Air travel expenses.

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

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

31. Contractor charges that are not based on services provided by the contractor and documented under s. NR 169.17.

32. Costs for subcontractor service charges or markups.

33. Costs that are incurred prior to the effective date of this chapter that the department determines are unreasonable.

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

(b) *Interim remedial equipment.* Costs which are not eligible for reimbursement under s. 292.66, Stats., include costs associated with monitoring, operation or maintenance of an interim remedial action.

Note: If an interim remedial action is selected as a portion of a final remedy, appropriate monitoring, operation and maintenance costs allowed for final remedies may be eligible for reimbursement under s. 292.65, Stats.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.13 Site hazard categorization system.** After reviewing an interim action options report or a remedial action options report submitted to the department, the department project manager shall assign the site to one of the following categories:

(1) Category A shall consist of sites that the department determines pose an imminent risk to human health or the environment, or both.

Note: Examples include a site where contamination has caused public or private drinking water supplies to contain contaminants from the site in concentrations that exceed the health based standard for the contaminant, or sites where exposure of public or private water supplies to contaminants is imminent due to site geology, proximity of the site to a public or private water supply source or quantity or concentration of contaminants.

(2) Category B shall consist of sites that the department determines pose a significant risk to human health or the environment, or both.

Note: Examples include a site where there was contamination of a water supply below health based standards, or where there were impacts above an environmental standard to a receptor, including surface water or wetlands, or where site conditions will result in contamination affecting a public or private water supply but below health based standards.

(3) Category C shall consist of sites that pose a risk to human health or the environment, or both.

Note: Examples include sites with soil contamination that is not migrating to other media, i.e. groundwater or surface water or sites where the contamination levels are below health based standards and are not expected to increase over time.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.15 Allocation of reimbursement assistance.**

(1) **FUND ALLOCATION.** At a minimum, at the end of each fiscal year, the department shall allocate funding based on the revenues collected during that year as provided under this section. The department shall also determine the amount of any unused funds from that fiscal year which were previously allocated to immediate action and interim remedial actions and may reallocate those funds as provided in sub. (3).

(2) **PRIORITY OF AWARDS.** (a) The department shall prioritize the payment of awards as required by s. 292.65 (3) (am), Stats.

Note: Section 292.65 (3) (am) 3., Stats., states that after paying awards for immediate action activities, the department shall do the following with the remaining funds available for awards:

a. In the program year that begins on July 1, 1999, provide 75% to pay awards for eligible costs incurred before October 14, 1997, and provide 25% to pay awards for eligible costs incurred on or after October 14, 1997.

b. In the program year that begins on July 1, 2000, provide 50% to pay awards for eligible costs incurred before October 14, 1997, and provide 50% to pay awards for eligible costs incurred on or after October 14, 1997.

c. In the program year that begins on July 1, 2001, and every program year thereafter, provide at least 70% as awards to pay eligible costs incurred on or after October 14, 1997.

(b) All applications for reimbursement of eligible costs incurred after December 31, 1990 and before October 14, 1997 shall be submitted to the department within 60 days of February 1, 2000. The department shall allocate the funds available to reimburse past costs as follows:

1. The department shall review all applications and determine which costs are for immediate and remedial response actions, and which are for preliminary site screening and interim remedial equipment.

2. The department shall calculate the total amount of reasonable eligible past costs for each applicant for each of these categories.

3. The department shall reduce the amounts calculated under subd. 2 for each category by the appropriate deductible for that category.

Note: Deductibles are determined by ss. 292.65 (8) (e) and 292.66 (3), Stats.

4. The department shall add each amount calculated under subd. 3 for each applicant to determine the grand total of all reasonable eligible past costs submitted by all eligible applicants within 60 days of February 1, 2000.

5. Each eligible applicant's percentage of total reasonable eligible past costs which are reimbursable will be determined by dividing the amount in subd. 3 by the amount in subd. 4.

6. Each year an applicant's reimbursement for reasonable eligible past costs will be determined by multiplying the percentage in subd. 5 by the funding available to reimburse past costs, until each applicant's total reasonable eligible past costs have been reimbursed, or an applicant's reimbursement for a single facility has reached the maximum award allowed under s. NR 169.11 (1).

(3) **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 action.* 9.7% of the funds collected each fiscal year shall be reserved to reimburse costs associated with immediate actions. At the end of each fiscal year, the department may transfer unused funds set aside to reimburse costs of immediate actions to another class under this subsection.

(b) *Interim remedial actions.* 1. 46% of the funds collected each fiscal year shall be reserved to reimburse costs associated with preliminary site screening and the purchase and installation of interim remedial action equipment. Funds available in this class shall be allocated as follows:

a. 60% to sites classified as category A sites under s. NR 169.13.

b. 25% to sites classified as category B sites under s. NR 169.13.

c. 15% to sites classified as category C sites under s. NR 169.13.

2. At the end of each fiscal year, the department may transfer unused funds set aside in these categories to another category under this subsection.

3. At the end of each fiscal year, the department may transfer unused funds set aside for interim remedial actions to another class under this subsection.

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

a. 60% to sites classified as category A sites under s. NR 169.13.

b. 25% to sites classified as category B sites under s. NR 169.13.

c. 15% to sites classified as category C sites under s. NR 169.13.

2. At the end of each fiscal year, the department may transfer unused funds set aside in these categories for another category under this subsection.

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

(b) *Interim remedial actions.* 1. Interim remedial actions shall be placed within one of 3 site hazard categories determined by the department in s. NR 169.13 and ranked and reimbursed within

each hazard category based on the date on which the department receives the completed application.

2. Applications shall be received by the department at least 3 months prior to the final date by which the department may make awards for interim actions.

Note: Section 292.66 (1), Stats., states that the department may not make an award for costs of interim remedial equipment after June 30, 2002, so applications must be received by March 31, 2002.

(c) *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 169.13 and ranked and reimbursed within each site hazard category based on the date on which the department receives the completed application.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.17 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 before September 1, 1998. An owner or operator may not submit an application after August 30, 2003, if the application relates to a dry cleaning facility that ceased to operate before September 1, 1998. An owner or operator may not submit an application after August 20, 2008, if the application relates to any other dry cleaning facility.

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

(a) An application cover sheet containing all of the following:

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. The name and address of the person directing the response action on behalf of the owner or operator, if other than the owner or operator.

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. Other relevant information requested by the department.

(b) A multiple owner or operators form containing all of the following:

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

2. Other relevant information requested by the department.

(c) A total reimbursement costs form containing all of the following:

1. The total eligible response action costs for which the owner or operator seeks reimbursement from the department.

2. Other relevant information requested by the department.

(d) An insurance information form containing all of the following:

1. 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 or operator's insurance company stating that the insurance company has denied the owner or operator's claim for reimbursement of the response action costs.

2. Other relevant information requested by the department.

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

(f) 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.

(g) A summary statement 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:

1. Soil investigation.
2. Soil remediation.
3. Laboratory and other analysis.
4. Groundwater investigation.
5. Groundwater remediation.
6. 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).

(h) Invoices or other information documenting and cross referencing each of the costs listed under par. (g) 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.

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

(j) For each cost listed under par. (g), a summary, cross referenced to the statement provided under par. (g), of all the following:

1. Every proposal required under s. NR 169.21, including every accepted and rejected proposal. The summary for each proposal shall indicate the name of the consultant and the proposal amount.

2. Every cost estimate required under s. NR 169.21, including the name of the consultant and the amount of the cost estimate.

3. Every authorization required under s. NR 169.21, including the name of the consultant and the amount of the authorization.

(k) A spreadsheet that identifies and cross references each invoiced cost in par. (h) with the documentation under pars. (i) and (j) supporting that invoiced cost.

(L) A substitute W-9 tax form.

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

(m) 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.

(n) 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.

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

(p) A remedial action options report.

(q) 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 169.09.

(b) An owner or operator may submit an application for reimbursement of site investigation costs when the department approvable remedial action options report is submitted.

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

Note: An owner or operator may submit an application for immediate actions, interim actions or site investigation reimbursement all within the same fiscal year. The limit of application submittals for remedial actions is intended to prevent the submittal of costs such as operation and maintenance costs on a more frequent basis.

**(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 section.

(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, and is also ineligible for reimbursement for any other response action taken or ordered at any discharge 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 did not meet the requirements of s. 292.65, Stats.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.19 Reimbursement awards.** **(1) PROCESSING APPLICATIONS.** (a) *Preliminary opinion.* The department may issue a preliminary opinion on whether an applicant is eligible for reimbursement of response action costs which is not binding on the department.

(b) *Notice acknowledging application.* Within 30 days after the department receives an application under s. NR 169.17, 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 169.17, the department may require an applicant to submit any additional information which 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 169.17, 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 of 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 169.11. The decision shall specify that payment is subject to the terms and conditions specified under 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. The applicant has not paid all fees under ss. 77.9961, 77.9962 and 77.9963, Stats.

8. The dry cleaning solvent discharge was caused 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 169.23 (3) establish award reductions if ineligible costs are included in the application prepared either by the owner or operator or the consultant.

**(3) DEDUCTIBLES.** (a) The department may only reimburse eligible costs for each dry cleaning facility that exceed the deductibles or other costs as specified in ss. 292.65 (8) (e) and 292.66 (3), Stats.

Note: Section 292.65 (8) (e), Stats., provides that eligible costs at each dry cleaning facility that is operating at the time that the owner or operator applies for reimbursement 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.

Section 292.65 (8) (e), Stats., also provides that eligible costs incurred at each dry cleaning facility that has ceased operation before an application was submitted may be paid only if they exceed the sum of the following:

- 1.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.

2. An amount equal to 30 times the average annual license fee paid under s. 77.9961 (1), Stats., for the year in which an award is made.

3. An amount equal to 30 times the total amount collected under s. 77.9962, Stats., for the year in which the award is made divided by the number of dry cleaning facilities in operation during that year.

4. If the owner or operator did not pay the inventory fee under s. 77.9963, Stats., with respect to the dry cleaning facility, an amount equal to the total amount collected under s. 77.9963, Stats., divided by the number of dry cleaning facilities paying the inventory fee.

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

Note: Section 292.66 (3), Stats., provides that an award under this section shall equal 50% of the eligible costs, except that an award may not exceed \$20,000. Of the total award, the reimbursement for the preliminary site screening shall equal 50% of conducting the preliminary site screening, except that the reimbursement for the preliminary site screening may not exceed \$3000.

(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.** The maximum amount that may be paid for costs at a single dry cleaning facility is the sum of all of the following:

(a) *Immediate actions.* Costs associated with conducting immediate actions, both emergency and non-emergency, have no limit other than the \$500,000 total facility limit.

Note: Section 292.65 (8) (f), Stats., specifies that the department may not award more than \$500,000 for costs eligible under s. 292.65, Stats., at any single dry cleaning facility.

(b) *Interim actions.* Costs awarded under s. 292.66, Stats., relating to preliminary site screening and the purchase and installation of equipment for interim remedial actions may not exceed the amounts specified in s. 292.66 (3), Stats.

Note: Section 292.66 (3), Stats., provides that an award under this section shall equal 50% of the eligible costs, except that an award may not exceed \$20,000. Of the total award, the reimbursement for the preliminary site screening shall equal 50% of conducting the preliminary site screening, except that the reimbursement for the preliminary site screening may not exceed \$3000.

(c) *Site investigation and remedial actions.* Costs awarded under s. 292.65, Stats., for these activities may not exceed the amount specified in s. 292.65 (8) (f), Stats.

Note: Section 292.65 (8) (f), Stats., specifies that the department may not award more than \$500,000 for costs eligible under s. 292.65, Stats., at any single dry cleaning facility.

Note: The maximum award amount applies per facility not 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. Register, January, 2000, No. 529, eff. 2-1-00.

## NR 169.21 Consulting and contract services.

**(1) APPLICABILITY.** This section does not apply when hiring a consultant or contractor to design or implement immediate action activities.

**(2) PROPOSALS REQUIRED.** (a) An owner or operator shall select a consultant to provide services for the interim remedial action, remedial action and implementation phase of a response action using a qualification based selection system which includes at least 3 competitive proposals for at least each of the following stages of a response action:

1. Interim action activities including the preliminary site screening, the workplan, the interim action options report, and the implementation of the interim action.

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

2. Site investigation activities including the workplan through the development of the remedial options reports.

3. Selected remedial action activities including design and implementation of remedial actions.

Note: If a proposal for an alternate remedial action is made, that proposal may be submitted to the department for consideration along with the 3 proposals for the selected remedial action activity.

(b) Each proposal shall include a cost estimate for each service provided by the consultant. The department may require an owner or operator to obtain additional proposals if the department finds that existing proposals are unreasonable.

(c) The proposals shall include statements regarding the consultant's ability to do all of 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; provide qualified technical reviewers, who will keep the owner advised on technical and regulatory matters and work toward planned remediation goals.

4. Perform all services in an ethical, professional and timely manner.

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

(e) The department may reimburse an eligible applicant for consulting or contract services not included in the consultant's initial proposal under par. (a) or (b), or for additional hours or units of service beyond those included in the consultant 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 under par. (a) or (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. If the total cost of additional services exceeds \$3,000, the owner or operator provides the department with a copy of the cost estimate under subd. 3 before authorizing the consultant to proceed.

5. The owner or operator gives the consultant written authorization to proceed with the additional services, after receiving the consultant's estimate under subd. 3.

6. The cost for the additional services does not exceed the consultant's estimate under subd. 3.

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

(f) The proposal cost estimate provided by the selected consultant shall be the maximum paid by the department for the response action activities.

Note: These costs will be either the low cost proposal or the proposal approved by the department under par. (a).

(g) An owner or operator requesting reimbursement from the department shall keep copies of all bids 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.

(3) PROPOSAL AND ESTIMATE CONTENTS. Every proposal under sub. (2) (a) and (b) and every cost estimate under sub. (2) (e) 3. shall include all of the following:

(a) A clear description and itemization of the consultant and contract services included in the proposal or estimate. The description shall be based on an approved workplan or, if there is no workplan, on a good faith estimate of the scope of the project as stated in the proposal or estimate.

(b) A total cost estimate for all of the consultant and contract services included in the proposal or estimate, and a subtotal price for each of the component services itemized in the proposal or estimate.

(c) 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.

(d) Every certification required under sub. (6).

(4) 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.

(5) CHOICE OF CONSULTANT SERVICES. An owner or operator may select the consultant following a qualification based selection system. If the consultant selected has not submitted the lowest cost proposal, the owner or operator shall justify to the depart-

ment's satisfaction and obtain approval from the department for that selection before entering into a contract with that consultant. The department may require an eligible applicant to explain why the eligible applicant selected one consultant over others.

(6) CERTIFICATIONS. (a) *Consultants*. In every proposal or cost estimate under sub. (2), the consultant shall certify both of 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 the consultant will make available to the department upon request, for inspection and copying, all of the consultant's documents and records related to the contract services.

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

a. The consultant maintains coverage for errors and omissions.

b. The consultant maintains coverage for comprehensive general liability which includes pollution impairment liability coverage, for a minimum of \$1,000,000 per claim and a minimum of \$1,000,000 in annual aggregate claims.

c. The policy in subd. 1.b. is an occurrence based policy or is a claims made policy with a 3 year extended reporting period.

d. The maximum deductible amount of the policy which provides the coverage specified in subd. 1.b.

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.

(7) 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 \$3,000.

History: Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.23 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) ASSIGNMENTS 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 which 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 consultant prepares an application that is submitted by an owner or operator and that includes ineligible costs that are identified by rule, the consultant shall pay to the department an amount equal to 50% of the ineligible costs identified by rule that are included in the application. A consultant may not charge the owner or opera-

tor for any amount that the consultant is required to pay under this subdivision. Payments made under this subdivision shall be deposited in the dry cleaner environmental response fund.

**Note:** Section 292.65 (8) (j) 4., Stats., states that if, prior to receiving an award under this section, an owner or operator receives payment from an insurance company arising out of a claim for payment of 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) (j) 1. and 2. and (e) and (f) and the amount by which the insurance 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. 292.76 (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 (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 such statements shall be assessed as indicated in s. 292.99 (1m) and (2), Stats.

**History:** Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.25 Administration of reimbursement assistance.** **(1) RECORDS, RETENTION AND AUDITING.** The 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 arising under a reimbursement agreement. 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 section 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 receive 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 for noncompliance with the provisions of this chapter by an owner or operator who receives a reimbursement award under the provisions of this chapter:

(a) The reimbursement award may be terminated in accordance with sub. (3).

(b) Project costs directly related to the noncompliance may be declared ineligible for reimbursement funding.

(c) The department may seek recovery of payments made under this reimbursement award.

**History:** Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.27 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 such factors 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.** A request for a variance shall be submitted in writing to the department by an owner or operator submitting an award application as far in advance as the situation will permit. Each request shall contain all of the following:

(a) The name of the person or entity requesting the variance and the name and telephone number of a contact person who is 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 being sought.

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

**History:** Cr. Register, January, 2000, No. 529, eff. 2-1-00.

**NR 169.29 Evaluation and termination of the program.** **(1) ADVISORY COUNCIL.** (a) The dry cleaner environmental response council, as created under s. 15.347 (2), Stats., shall have the following responsibilities:

1. To advise the department on rules promulgated to implement ss. 292.65 and 292.66, 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 and at the call of the chairman, 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) DNR REVIEW.** The department shall complete a review of the program created under ss. 292.65 and 292.66, Stats., as required by s. 292.65 (3) (e), Stats.

**Note:** Section 292.65 (3) (e), Stats., provides that the department shall review the program and submit a report on the results of the review to the joint committee on finance and to the appropriate standing committees of the legislature. The review shall consider:

- (a) Whether the program should be expanded or ended.
- (b) Whether the program should be incorporated into a broader program of financial assistance for the remediation of environmental contamination.

(c) Whether private insurance coverage should be required for any dry cleaning facilities.

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

**History:** Cr. Register, January, 2000, No. 529, eff. 2-1-00.

