

The statement of scope for this rule, SS# 107-18, was approved by the Governor on September 28, 2018, published in Register No. 754A4 on October 22, 2018, and approved by the Natural Resources Board on January 23, 2019. This rule was approved by the Governor on August 21, 2020.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board adopts an order to **create** chs. NR 756 and 758, relating to financial responsibility for engineering controls for contaminated sediment remediation, and insurance and financial responsibility for Voluntary Party Liability Exemption projects with contaminated sediments.

RR-11-17 (E)

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted:

Wis. Stat. s. 292.12 (2) (d) 2. creates requirements for proof of financial responsibility, as determined by the department, sufficient to pay the costs of a plan and compliance schedule for an engineering control that is used to contain or minimize the spread of contamination in sediment. Wis. Stat. s. 292.15 (2) (af) 3m. creates financial assurance and insurance requirements for a voluntary party liability exemption for a contaminated sediment site.

2. Statutory Authority:

Section 36 of 2015 Wis. Act 204 directs the department to use the procedure under Wis. Stat. s. 227.24 for emergency rules to promulgate rules required under sections 292.12 (2) (d) 2. and 292.15 (2) (af) 3m. of the statutes for the period before the effective date of the permanent rules promulgated under these sections. Other statutory authority includes Wis. Stat. ss. 292.12 (2) (c), 292.31 (2), and 227.11 (2).

3. Explanation of Agency Authority:

Wis. Stat. ss. 292.12 (2) (d) 2. and 292.15 (2) (af) 3m. were adopted as part of 2015 Wis. Act 204. Section 292.12 (2) (d) 2. creates new financial responsibility requirements when engineering controls are used at contaminated sediment sites. Section 292.15 (2) (af) 3m. creates new financial assurance and insurance requirements for a voluntary party liability exemption for a contaminated sediment site. Nonstatutory language within Section 36 of 2015 Wis. Act 204 requires the department to promulgate rules to implement Wis. Stat. ss. 292.12 (2) (d) 2. and 292.15 (2) (af) 3m. using the emergency rulemaking process. Section 36 states that the department “is not required to provide evidence that promulgating a rule...as an emergency rule is necessary for the preservation of the public peace, health, safety or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.” Wis. Stat. s. 292.12 (2) (c) requires the department to promulgate rules to identify limitations or other conditions related to property, to ensure that conditions at the site remain protective of public health, safety, and welfare and the environment, and, as applicable, to promote economic development. Wis. Stat. s. 292.31 (2) requires the department to promulgate rules relating to investigation and remedial action for sites or facilities and other properties at which the air, land, or waters of the state have been affected by the discharge of a hazardous substance or other environmental pollution. Wis. Stat.

s. 227.11 (2) (a) provides the department with authority to promulgate rules that are necessary to effectuate the purpose of a statute.

4. Related Statutes or Rules:

Wis. Stat. ch. 292 and Wis. Adm. Code chs. NR 700-754.

5. Plain Language Analysis:

The purpose of these revisions is to provide procedures for new requirements and statutory changes under 2015 Wisconsin Act 204 (“Act 204”). Act 204 mandates that DNR promulgate emergency rules for two provisions of Act 204 relating to new financial assurance for certain types of contaminated sediment sites.

Board order revisions. DNR revised this board order in response to comments received for the item in advance of its consideration at the May 2020 meeting of the Natural Resources Board. Revisions to the previous version of this order include: (1) deletion of supporting revisions to chs. NR 700 to 754, Wis. Adm. Code; and (2) deletion of two proposed rule sections within ch. NR 758, ss. NR 758.23 and 758.24, relating to the partial cleanup voluntary party liability exemption (VPLE) option for contaminated sediment sites. These provisions will be considered as part of the permanent rule process, which is ongoing.

Board order content: The Remediation and Redevelopment program is proposing the creation of chs. NR 756 and 758 as emergency rules. These two chapters are proposed as emergency rules and will also be considered as part of the permanent rulemaking process. The department is proposing the emergency rules to comply with section 36 of 2015 Act 204, which directed the department to adopt emergency rules for two provisions of Act 204. Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed, and remediated. Act 204 created requirements relating to sites where a person is using an engineering control to address contaminated sediment. At these sites, the department may require submission of a plan and compliance schedule and proof of financial responsibility for the maintenance of an engineering control or for the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 also created the opportunity for persons to obtain VPLE at sites with contaminated sediments, and imposed insurance and financial assurance requirements on contaminated sediment sites enrolled in the VPLE program.

Proposed ch. NR 756 to implement Wis. Stat. s. 292.12 (2) (d) 2.

The proposed ch. NR 756 contains provisions relating to financial responsibility for engineering controls at contaminated sediment sites and for addressing contamination when a structural impediment is removed. Section 292.12 of the remedial action statute contains provisions concerning sites with residual contamination. Often the residual contamination lies in sediments at the sites. If all of the contamination cannot be removed, engineering controls such as constructed caps, sheet piles, and other physical barriers designed to permanently limit exposure to and movement of contaminated sediment in a waterbody, are used to contain and minimize the spread of the contamination. Act 204 added provisions to section 292.12 concerning proof of financial responsibility to pay for a plan and compliance schedule relating to the use of engineering controls. The proposed rule creates ch. NR 756, which implements Wis. Stat. s. 292.12 (2) (d) 2. and includes:

- The purpose, applicability, and definitions for the chapter in ss. NR 756.01 to 756.03.
- The primary requirements for the plan and compliance schedule in s. NR 756.04 (2) (a), including a plan and compliance schedule that contains scheduled actions, an engineering analysis, and 5-year inspection criteria.

- Financial assurance requirements under s. NR 756.04 (2) (b) for actions listed within the plan and compliance schedule and for events that may occur and affect the completion of the goals of the plan and compliance schedule or the protectiveness of the engineering control remedy.
- Length of time requirements, submittal requirements, authorized department responses, fees, and inspections under s. NR 756.04 (3) to (6).
- Continuing obligation responsibilities and department access authority at affected sediment sites under s. NR 756.05.
- Allowable methods of providing proof of financial responsibility under s. NR 756.06.
- Procedures for estimating financial assurance costs and calculating the financial assurance amount under ss. NR 756.07 and 756.08.
- Policies and procedures for changing financial assurance methods and submitting annual adjustments under ss. NR 756.09 and 756.10.
- Policies and procedures for default on commitments under the plan and compliance schedule, for bankruptcy, compliance, and the release of funds under ss. NR 756.11 to 756.14.

The proposed ch. NR 756 includes requirements and procedures for a plan and compliance schedule. Wis. Stat. s. 292.12 (2) (d) 2. establishes DNR’s authority to require financial responsibility “sufficient to pay the costs of complying with a plan approved under subd. 1.” The referenced subdivision establishes the plan and compliance schedule. The proposed rule includes provisions concerning the plan and compliance schedule and penalties for failure to comply with the plan and compliance schedule (ss. NR 756.04, NR 756.11, and NR 756.14) because the plan and compliance schedule is the basis for establishing the amount of financial assurance required under Wis. Stat. s. 292.12 (2) (d) 2.

The proposed ch. NR 756 includes provisions that financial responsibility costs are suited to the conditions of each contaminated sediment site. Cost estimates are based on the total cost of the individual cost items listed in the rule; however, two of financial responsibility requirements have a provision that allows DNR to reduce the cost estimate presented by the responsible party, based on site-specific criteria and reports presented by the responsible party. Section NR 756.07 (1) (c) allows DNR to reduce the financial responsibility cost estimate provided by the responsible party. DNR may reduce costs by a percentage based on site-specific criteria, including the results of the engineering analysis submitted by the responsible party. This approach allows DNR to reduce costs according to the physical circumstances of each different, highly variable contaminated sediment site. This provision and another provision prohibiting DNR from the inclusion of redundant costs are included to safeguard against any disproportionate costs to responsible parties.

Proposed ch. NR 758 to implement Wis. Stat. s. 292.15 (2) (af)3m.

The proposed ch. NR 758 contains provisions that implement section 292.15 (2) (af) 3m. relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program. The VPLE program provides a liability exemption to developers or businesses so they can have comfort and assurance that they will not have to pay for or conduct additional remediation in the future, regardless of what may be found in the future. Wis. Stat. s. 292.15 (2) (b) lists several situations when the liability exemption would protect the voluntary party. 2015 Wis. Act 204 added requirements to section 292.15 concerning financial responsibility and insurance for contaminated sediment sites. The proposed chapter NR 758 includes:

- Purpose and applicability provisions and definitions for the chapter in ss. NR 758.01 to 758.05.
- Insurance requirements for either the use of a state insurance contract or an individual policy under s. NR 758.07.
- Procedures and policies for calculating the amount of the insurance coverage, the length of insurance, the amount of the deductible, and proof of insurance under ss. NR 758.09 to 758.12.
- Options for using financial assurance methods other than insurance under s. NR 758.13.

- Procedures and criteria for waiver of the insurance requirement under s. NR 758.15.
- Conditions for the issuance of a VPLE certificate of completion under s. NR 758.19 and the policy for failure to satisfy the conditions under s. NR 758.21.

This insurance program is similar to the existing insurance requirement in Wis. Stat. s. 292.15 (2) (ae) 3m., which allows a voluntary party to obtain a liability exemption if the party pays for insurance for remaining groundwater contamination that will be addressed with natural attenuation. This similar requirement has been in place since 2001. The insurance is a required condition of obtaining a certificate of completion and as long as the insurance is obtained, the developer or business and future owners have the liability protection and would not be required to conduct any additional remediation in the future. Wis. Stat. s. 292.15 (2) (af) 3m. states that the voluntary party must obtain insurance to cover the cost in case additional remediation is necessary. This insurance covers the risk to the State of Wisconsin that a VPLE site would later be discovered to have additional contamination that warrants remediation. The most likely situations when additional remediation would be needed are if DNR discovers that the contamination is more extensive than initially identified when the investigation was conducted or somehow it is later discovered that the cleanup was not successful. In that scenario, DNR would file a claim on the insurance to conduct the additional remediation, and the party covered by the liability exemption would not have to conduct or fund any remedial actions.

The statutory section that authorizes the VPLE program requires that parties provide insurance as a condition of the liability exemption. Under statute, if a party obtains this liability exemption, and then fails to maintain the insurance coverage, the party would lose its liability exemption. The rule reiterates this policy to ensure that parties are aware that they must maintain coverage to retain the liability exemption. Providing this incentive to maintain insurance or other financial assurance helps protect the state taxpayers from bearing the costs of additional cleanup, if needed.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:

There are no federal regulations that address the specific activities to be regulated by the proposed rules; however, there are related federal regulations that require financial assurance in some cases for sites that are being processed under federal laws:

- Sites being cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Superfund process or sites using the Superfund alternatives process may be required to provide financial assurance in a settlement agreement or order. There are no federal regulations that apply to this specific subject; however, EPA has issued guidelines.
- The Resource Conservation and Recovery Act (RCRA) requires all hazardous waste treatment, storage and disposal facilities to demonstrate that they will have the financial resources to properly close the facility or unit when its operational life is over or provide the appropriate emergency response in the case of an accidental release. These financial assurance requirements are found at 40 C.F.R., Part 264, Subpart H, and Part 265, Subpart H.
- RCRA has rules that require financial assurance for Corrective Action sites that are found in 40 C.F.R., s. 264.101 (b) and (c).

7. Comparison with Similar Rules in Adjacent States:

There are no regulations at this time within Michigan, Minnesota, Illinois, or Iowa that address the specific activities to be regulated by the proposed rules; however, there are related requirements in certain states:

- The state of Michigan, under Part 201 of Natural Resources and Environmental Protection Act (Act 451) of 1994, requires financial assurance as part of proposed post-closure agreements that

are submitted as part of a “no further action report” following a remedial action. The financial assurance covers the costs of monitoring, operation and maintenance, oversight, and other costs determined by the Michigan Department of Environment, Great Lakes, and Energy to be necessary to assure the effectiveness and integrity of the remedial action (Mich. Stat. s. 324.20114d).

- The state of Iowa, under Iowa Code Chapter 455H, the Iowa Land Recycling and Environmental Remediation Standards Act, may require financial assurance from those participating in its voluntary Iowa Land Recycling Program. The director of the Iowa Department of Natural Resources may require reasonable proof of financial assurance for a technological control to ensure that it remains effective. The requirement is in statute (Iowa Stats. s. 455H.206 and Iowa Administrative Code s. 137.7(1)).

Minnesota, Illinois, Iowa, and Michigan all have adopted statutes or rules governing financial responsibility requirements for solid waste facility, hazardous waste facility, or corrective action sites or facilities as part of their respective delegations of authority to implement RCRA at the state level.

8. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:

The policies, procedures, and methods for meeting financial assurance requirements under ch. NR 756, relating to financial assurance for sites with engineering controls, are based, in part, on the policies and procedures for financial assurance requirements for solid waste facilities under Wis. Stat. s. 289.41 and ch. NR 520, Wis. Adm. Code. These solid waste regulations are derived from federal requirements and have received positive evaluations from both internal staff and external customers that have experience in administering and meeting these requirements.

The statutory emergency rulemaking process requires a public hearing following the effective date of the emergency rule. To encourage public input, DNR staff presented these rules throughout various stages of their development at five public meetings during the 14-month rule development phase of the rulemaking process. Following the receipt of comments on the emergency rule at the May 2020 meeting of the Natural Resources Board, DNR staff withdrew the emergency rule and held two additional public meetings in June and July of 2020. DNR subsequently revised the proposed emergency rule to remove provisions not explicitly authorized by the emergency rulemaking mandate in s. 36, 2015 Wis. Act 204.

The department will continue to solicit input on these provisions during the permanent rule process. The permanent rule process includes solicitation of comments on the economic impact of the proposed permanent rules as well as comments on the approach chosen by the department in the proposed emergency rule. The solicitation of comments on the economic impact of the proposed permanent rule occurred between April 21, 2020, and May 21, 2020. The department is currently reviewing comments received and revising the draft economic impact analysis statement. Public hearing dates and the comment submission deadline are to be determined but are tentatively planned for fall of 2020.

9. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:

The program requested estimates from various consulting firms regarding rule revisions impacting the costs of consulting services needed to meet the new requirements. This data was supplemented with Bureau of Remediation and Redevelopment Tracking System (BRRTS) data and department staff expertise.

10. Effect on Small Business (initial regulatory flexibility analysis):

Rule revisions are not anticipated to affect small business.

11. Agency Contact Persons:

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12. Place where comments are to be submitted and deadline for submission:

The statutory emergency rulemaking process requires a public hearing following the effective date of the emergency rule. To encourage public input, DNR staff presented these rules throughout various stages of their development at five public meetings during the 14-month rule development phase of the rulemaking process. Following the receipt of comments on the emergency rule at the May 2020 meeting of the Natural Resources Board, DNR staff withdrew the emergency rule and held two additional public meetings in June and July of 2020. DNR subsequently revised the proposed emergency rule to remove provisions not explicitly authorized by the emergency rulemaking mandate in s. 36, 2015 Wis. Act 204.

Written comments may be submitted at the public hearings, by regular mail, or by email to:

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Written comments may also be submitted to the Department at
DNRAdministrativeRulesComments@wisconsin.gov.

Hearing dates and the comment submission deadline are to be determined but are preliminarily planned for fall of 2020.

SECTION 1. Chapter NR 756 is created to read:

Chapter NR 756

**FINANCIAL RESPONSIBILITY AT CONTAMINATED SEDIMENT SITES WITH
ENGINEERING CONTROLS**

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

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

NR 756.03 Definitions. In this chapter:

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

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

(3) “Person required to submit proof” means a person that is required to submit proof of financial responsibility under s. NR 756.04 (1) d., including a person that has assumed responsibility under s. 292.15 (5m) (am), Stats.

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

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

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

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

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

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

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

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

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

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

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

3. Inspection and reporting criteria that include an inspection schedule. The inspection schedule shall require an inspection and a report at least every 5 years. The inspection report shall provide an engineering analysis of the current conditions of the engineering control or structural impediment with respect to ongoing efficacy, vulnerabilities, events or actions identified under subd. 2. The inspection report shall be certified by a licensed professional engineer, as defined under s. NR 712.03. Report conclusions shall include identification of issues, recommendations and follow-up actions, and a determination of whether the remedy is protective of human health and the environment.

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

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

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

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

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

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

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

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

(c) *Extension of plan and compliance schedule and proof period.* The department may, in writing, extend the plan and compliance schedule and the proof period for any applicable financial responsibility requirement until the department determines that the actions under s. NR 756.04 (1) (a) and (b) are no longer applicable and necessary to protect human health and the environment.

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

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

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

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

(a) Deny a request for approval.

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

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

(d) Approve the plan and compliance schedule.

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

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

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

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

(2) Any person that acquires responsibility for the requirements of this chapter under s. 292.12 (5m) (am), Stats., shall provide any proof of financial responsibility required under s. NR 756.04 (1) (d) to the department in accordance with this section. Proof of financial responsibility shall be maintained by the transferor during transfer of responsibility until the person acquiring responsibility under s. 292.15 (5m) (am), Stats., obtains department approval of proof of financial responsibility under s. NR 756.04 (5).

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

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

NR 756.06 Methods of providing proof of financial responsibility. A person required to submit proof shall establish proof of financial responsibility made payable to or established for the benefit of the department. A person submitting financial assurances for a plan and compliance schedule shall specify, as part of the plan and compliance schedule, the methods of providing proof of financial responsibility that will be used. To provide proof of financial responsibility, the person required to submit

proof may use up to two of the following methods for each of the types of costs listed under s. NR 756.04 (2) (b):

(1) PERFORMANCE OR FORFEITURE BOND. (a) A person required to submit proof may submit a performance or forfeiture bond. The performance or forfeiture bond shall be in the amount determined under s. NR 756.08 and conditioned upon faithful performance by the person required to submit proof and any successor in interest of all requirements of the approved plan and compliance schedule or subsequent remedial actions required by the department. Bonds shall be delivered to the department for approval. All bonds shall be established using forms supplied by the department.

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

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

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

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

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

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

1. Cash.
2. Securities issued by the federal government.
3. Debt securities issued by a commission, board, agency, or other instrumentality of the federal government that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency.
4. State bonds issued under subch. I of ch. 18, Stats.
5. Corporate bonds that have a rating that is the highest rating category assigned by Standard & Poor's Corporation, Moody's Investors Service, or other similar nationally recognized rating agency. Corporate bonds may not be used to provide more than 50 percent of the required amount of proof of financial responsibility.

(b) If a person required to submit proof establishes an escrow account, the amount shall be determined under s. NR 756.08 and the account shall be with a bank or financial institution located within the state of Wisconsin that is examined and regulated by the state or a federal agency. A total of no more

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

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

1. Securities issued by the federal government.

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

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

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

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

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

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

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

(c) The letter of credit shall provide either that the unused portion of the letter of credit shall be payable in full to the department upon the expiration of the letter of credit or that as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule, the letter of credit may not be canceled by the bank or financial institution unless a replacement letter of credit or other proof of financial responsibility under this section is provided to the department by the person required to submit proof. If the bank or financial institution proposes to cancel a letter of credit, the bank or financial institution shall provide notice to the department and the person required to submit

proof in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date. Not less than 30 days prior to the expiration date of the 90-day notice period, the person required to submit proof shall deliver to the department a replacement letter of credit or other proof of financial responsibility under this section, in the absence of which either the letter of credit shall remain in effect as long as any respective obligation of the person required to submit proof remains under the plan and compliance schedule or the unused portion of the letter of credit shall be payable in full to the department.

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

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

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

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

(c) The insurance policy shall provide either that the unused proceeds of the policy shall be payable in full to the department upon expiration of the policy or that, as long as any respective obligation

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

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

(e) The insurance policy shall further provide that funds, up to an amount equal to the maximum risk limit of the policy, will be available to the department to carry out the respective requirements of the approved plan and compliance schedule if the person required to submit proof fails to do so. The department shall mail notification of its intent to use the funds for that purpose to the last known address of the person required to submit proof.

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

(7) OTHER METHODS. The department may consider other methods of financial responsibility that the department finds satisfactory to ensure that the person required to submit proof will comply with the respective requirements specified in the plan and compliance schedule. The department may consider other financial commitments made payable to or established for the benefit of the department to ensure the person required to submit proof will comply with the requirements of the approved plan and compliance schedule. The department shall review the request of any person required to submit proof to

establish proof of financial responsibility to determine whether the proposed method provides a degree of assurance that is at least equal to that provided by the methods listed in this section. The department may review such a request after the person required to submit proof submits a complete request, all supporting information, and any additional information required by the department as part of the plan and compliance schedule.

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

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

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

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

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

3. The following site-specific characteristics:

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

b. Volume of contaminated material.

c. Degree of contamination.

- d. Cap complexity, including use of geosynthetics, armoring, and amendments.
- e. Hydrologic and hydraulic characteristics.
- f. Presence of outstanding resource waters or exceptional resource waters.
- g. Design factor of safety.
- h. Dissolved phase contaminants and chemical characteristics.
- i. Fish advisories issued.
- j. Navigation.
- k. Drinking water sources.

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

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

1. Once every 5 years, unless the costs are revised within the 5-year period as required under subd. 2. The new cost estimate shall use current dollars.
2. When any change in site design or operation is approved by the department in writing.

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

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

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

(c) Chemical and physical analysis.

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

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

(a) Site investigation.

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

(c) Full dredge including disposal.

(d) Annual monitoring and event monitoring.

(e) The expected life of any structural impediments, which shall be specified in the plan and compliance schedule, when practicable. As each structural impediment reaches the end of its anticipated life, the cost of the investigation and remediation following the removal of the structural impediment shall be added to the estimate for the appropriate year of the proof period. If the expected life of a structural impediment cannot be determined at the time of the plan and compliance schedule, the investigation and remediation following removal shall be planned to occur in the last year of the proof period and the costs shall be added to the estimate for the last year of the proof period.

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

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

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

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

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

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

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

Note: The department shall not impose financial responsibility costs under sub. (5) that are duplicative of those required under subs. (3) and (4). For example, if financial assurance is required for the cost of replacement of an engineering control under sub. (3), then the costs of replacement of an engineering control may only be required under sub. (5) to the extent that additional funding would be needed due to the nature or timing of the event or third-party action.

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

NR 756.08 Calculating the amount of the proof of financial responsibility. (1) A person required to submit proof shall, as part of the initial request for approval of the plan and compliance

schedule, calculate the necessary amounts of proof of financial responsibility based on the methods of providing proof of financial responsibility under s. NR 756.06 that have been chosen by the person required to submit proof.

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

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

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

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

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

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

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

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

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

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

NR 756.11 Access and default. If the department determines that a person required to submit proof is in violation of any of the requirements specified in the plan and compliance schedule or this chapter, the department and its designees may enter upon the site or facility and carry out the approved actions or plan and compliance schedule requirements. The department may use part or all of the funds deposited with it, or the funds deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, insurance, or funds accumulated under other approved methods to carry out the approved actions or plan and compliance schedule requirements.

NR 756.12 Authorization to release funds. (1) PLANNED ACTIONS. Subject to sub. (3), for costs under s. NR 756.04 (2) (b) 1. and 3., one year after the issuance of the interim action, remedial action, or closure approval that is the subject of the financial responsibility requirement, and annually thereafter for the proof period, the person required to submit proof who has carried out all required actions and response actions under the approved plan and compliance schedule during the preceding year may apply to the department for reimbursement of funds from an escrow account, trust account, deposit with the department, or other approved methods, or for reduction of the bond, insurance or letter of credit

equal to the estimated costs for that year. The application shall be accompanied by an itemized list of costs incurred. Upon determination that the expenditures incurred are in accordance with the requirements anticipated in the approved plan and compliance schedule, the department may authorize in writing the release of the funds or approve a reduction in the bond, insurance, or letter of credit. Prior to authorizing a release of the funds or a reduction of the amount of funds secured by the bond, insurance, or letter of credit, the department shall determine that adequate funds exist to complete the required actions under the plan and compliance schedule for the remaining proof period. The department shall make determinations within 90 days after the application is received. For persons using escrow accounts, trust accounts, or deposits with the department, the department may authorize the release and return of up to 75 percent of the expected cost of planned actions for the current year. Any funds remaining in an escrow account, trust account, or on deposit with the department at the termination of the proof period shall be released to the person required to submit proof.

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

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

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

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

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

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

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

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

SECTION 2. Chapter NR 758 is created to read:

Chapter NR 758

INSURANCE AND FINANCIAL RESPONSIBILITY AT CONTAMINATED SEDIMENT SITES IN THE VOLUNTARY PARTY LIABILITY EXEMPTION PROGRAM

NR 758.01 Purpose. This chapter establishes rules and procedures promulgated under s. 292.15 (2) (af) 3m., (am) 2m., and (e), Stats., that the department shall use to determine if voluntary parties have met the requirements under s. 292.15 (2) (af) and (am), Stats., related to environmental insurance, or other forms of financial responsibility, for voluntary parties seeking liability exemptions for sites with contaminated sediment.

NR 758.03 Applicability. This chapter applies to voluntary parties, and successors and assigns of voluntary parties, as described under s. 292.15 (3), Stats., seeking an exemption from liability for voluntary party remediation under s. 292.15 (2) (af) or (am), Stats., where contaminated sediment exists from a release of a hazardous substance on or originating from a property. In this chapter, requirements that apply to a voluntary party shall also apply to successors or assigns of the voluntary party, if the successor or assignee agrees to pay for the insurance required under this chapter pursuant to a third-party agreement shared with the department.

NR 758.05 Definitions.

(1) “Preexisting pollution condition” means contaminated soil, groundwater or sediment or other media from a discharge of a hazardous substance that occurred prior to the date the environmental investigation of a property was approved by the department.

(2) “Property” has the meaning specified under s. 292.15 (1) (c), Stats.

Note: Section 292.15 (1) (c), 2017 Stats., defines “property” to mean “the area of real property that is included in an application to obtain an exemption under this section, made up of a legally identifiable parcel or legally identifiable contiguous parcels created in compliance with applicable laws.”

(3) “Voluntary party” has the meaning specified under s. 292.15 (1) (f), Stats.

Note: Section 292.15 (1) (f), Stats., defines “voluntary party” to mean a person who submits an application to obtain an exemption under s. 292.15, Stats., and pays any fees required under s. 292.15 (5), Stats.

NR 758.07 Insurance requirement. (1) STATE INSURANCE CONTRACT. (a) If the department enters into a contract under s. 292.15 (2) (e), Stats., the voluntary party seeking a liability exemption under s. 292.15 (2) (af), Stats., shall do all of the following:

1. Pay the department insurance fees calculated under par. (b).
2. Submit a completed application form to the department.
3. Comply with the requirements and procedures described in this chapter for the property to obtain coverage under the state’s master insurance contract.

(b) The department shall publish a state insurance contract fee schedule annually. The fee shall be calculated based on the cost of the insurance premium, a contribution towards the state's deductible, and other expenses necessary to administer the program.

(2) INDIVIDUAL POLICY. If the department does not enter into a contract with an insurance company as described under sub. (1) or the voluntary party is unable to use the contract under sub. (1), the voluntary party seeking the liability exemption under s. 292.15 (2) (af), Stats., shall obtain and maintain insurance that conforms to all of the following requirements unless a waiver is obtained under s. NR 758.15:

(a) The insurance policy shall provide liability insurance covering claims for response action expenses caused by preexisting pollution conditions in the sediment on, at, or emanating from the insured location.

(b) The insurance policy shall cover response action expenses in the event that the department issues a written determination that additional remedial action is necessary due to the occurrence of the conditions described under s. 292.15 (2) (b) 2. or 3., Stats.

Note: Section 292.15 (2) (b) 2. and 3., Stats., refer to situations when the department discovers that a cleanup fails to fully restore the environment and minimize the effects from a discharge of a hazardous substance and when the department discovers the contamination from a hazardous substance that is the subject of a cleanup is more extensive than anticipated.

(c) The insurance policy shall name the department as an insured party for response action.

(d) The insurer providing the insurance policy shall be rated at A X or better from A.M. Best Rating Services. If the insurer's rating falls below A X, the voluntary party shall notify the department within 30 days of this change and provide replacement coverage with a subsequent, qualified insurer within 90 days.

(e) Except under par. (f), the voluntary party shall submit a signed certificate of insurance from the insurer to the department that includes endorsement language developed by the department that certifies that coverage conforms with the requirements of this chapter.

(f) As an alternative to the endorsement language required under par. (e), the voluntary party may request that the department approve an alternative set of endorsements naming the voluntary party as the

insured. The department may approve an alternative set of endorsements if all of the following requirements are met:

1. The alternative endorsements do not dilute the coverage naming the department as an insured party that are required by this chapter.
2. The alternative endorsements substantially meet the purpose and intent of this section.
3. The voluntary party provides an explanation of why the required endorsements described under par. (e) were not provided.

(g) If the insurer terminates or lapses coverage for any reason, the insurer shall directly notify the department of the termination within 30 days.

(h) The insurance policy may not include any of the following:

1. An exclusion that limits coverage for response action expenses caused by pre-existing pollution conditions in the sediment on, at, or emanating from the insured location.
2. Capital improvements exclusions.
3. Voluntary investigation exclusions.

(i) The insurance policy shall state that, except for non-payment of premium or misrepresentation by the insured, cancellation or termination of the insurance by the insurer will only be effective upon the following occurrences:

1. Notification to the department and the voluntary party in writing by registered or certified mail not less than 90 days prior to the proposed cancellation date.
2. Not less than 30 days prior to the expiration of the 90-day notice period, the voluntary party shall deliver to the department a replacement insurance policy or other proof of financial responsibility in compliance with this section that shall remain in effect for the length of coverage required under s. NR 758.11.

(j) If the insurer becomes bankrupt or insolvent or if the company receives an unfavorable evaluation under s. 618.41 (6) (d), Stats., the voluntary party or its successor or assigns shall, within 30 days after receiving written notice, deliver to the department a replacement insurance policy or other

proof of financial responsibility under this section. The replacement insurance policy or proof of financial responsibility shall remain in effect for the length of coverage required under s. NR 758.11.

(k) The insurance policy shall contain a provision allowing assignment of the policy to a successor of the voluntary party. Assignment may be conditioned upon the consent of the insurer, provided consent is not unreasonably refused.

(3) If coverage beyond the required coverage described in this chapter is obtained, the voluntary party shall submit the insurance endorsements to the department, if requested by the department. If the department determines that the additional coverage and endorsements adversely interfere with coverage required under this chapter, the department may determine that the requirements of this section have not been met and deny the application for a liability exemption.

NR 758.09 Calculating the amount of the insurance coverage. To calculate the amount of insurance coverage required, the voluntary party shall submit to the department a summary of the total costs spent on the investigation and remediation of the contaminated sediment at the insured location, including all money spent by the voluntary party as well as other parties including local, state, or federal government entities. The limits of the insurance shall be dedicated to the response actions of the insured location and may not be shared with other coverage parts and may not be limited by the insurance policy's aggregate limit for other coverages. The insurance shall provide coverage with limits of no less than the following:

(1) If the cost of the site investigation and remediation of the contaminated sediment was less than \$1,500,000, then the insurance limit for response action coverage shall be at least \$1,000,000.

(2) If the cost of the site investigation and remediation of the contaminated sediment was \$1,500,000 to \$3,999,999, then the insurance limit for response action coverage shall be at least \$3,000,000.

(3) If the cost of the site investigation and remediation of the contaminated sediment was \$4,000,000 or more, then the insurance limit for response action coverage shall be at least \$5,000,000.

(4) If the voluntary party is unable to provide a summary of the costs, the voluntary party shall provide the coverage described under sub. (3).

NR 758.10 Deductible. (1) All insurance policies providing coverage required under this chapter shall be written with a per-occurrence deductible and not with a self-insured retention basis.

(2) The insurance policy shall have a deductible of no more than \$50,000 per occurrence unless a higher deductible is approved by the department in writing before the certificate of completion is issued.

(3) If a claim is made on the policy by the department, the department may pay the deductible if funds are available.

(4) The voluntary party shall pay a fee to the department that is equal to 5 percent of the deductible before a certificate of completion is issued. The department may use those funds toward payment of a future deductible.

NR 758.11 Length of coverage. (1) The voluntary party shall maintain insurance coverage that meets the conditions under this chapter for 25 years after a closure letter has been issued by the department under s. NR 758.19 (2).

(2) The policy term of the insurance may be of any length longer than one year. If the policy term ends before 25 years after the date that the closure letter is issued, the policy shall be renewed by the voluntary party to provide the 25 years of coverage.

(3) At least 90 days before the end of the existing policy period, the voluntary party or its successors or assigns shall provide a certificate of insurance from the insurer and proof of insurance for a policy renewal or new policy that meet the requirements of this chapter.

NR 758.12 Proof of insurance. The voluntary party shall submit annually a copy of the certificate of insurance to the department that demonstrates that the requirements for insurance described in this chapter are being met.

NR 758.13 Financial responsibility other than insurance. (1) The department shall accept a form of financial responsibility from the voluntary party other than insurance to meet the requirements of this chapter if all of the following conditions apply:

(a) The financial responsibility is in the amount required under s. NR 758.09.

(b) The financial responsibility will provide coverage for 25 years.

(c) The financial responsibility covers response action expenses in the event that the department issues a written determination that additional remedial action is necessary due to the occurrence of any of the conditions described under s. 292.15 (2) (b) 2. or 3., Stats.

(d) The financial responsibility satisfies the requirements that a person required to submit proof financial responsibility under s. NR 756.04 (1) is required to follow, as specified under s. NR 756.06 (1), (2), (3), (4), (5), and (8).

(e) The hazardous substance contained in the contaminated sediment is not mercury, PCBs, as defined in s. 299.45 (1) (a), Stats., or dioxin.

(2) If a form of financial responsibility is provided other than insurance, the voluntary party shall do all of the following:

(a) Follow the requirements under s. NR 756.09 if changes to the method of financial responsibility are requested.

(b) Provide access to the department and its designees to enter upon the site or facility and carry out appropriate site investigation and response actions.

(c) Take actions needed in order for the department to use part or all of the money deposited with the department, or the money deposited in escrow or trust accounts, or performance or forfeiture bonds, or letters of credit, or funds accumulated under other approved methods, to carry out the approved actions or plan and compliance schedule requirements.

(d) Notify the department in the event of bankruptcy, insolvency, or receivership naming the voluntary party in accordance with s. NR 756.13.

NR 758.15 Waiver of insurance requirement. The voluntary party may submit a written request for a waiver of the insurance requirement under s. NR 758.07 to the department. The department may waive the insurance requirement after considering all the following factors, which shall be identified in the request for waiver:

(1) The voluntary party's explanation of the circumstances eliminating the need for insurance.

(2) The hazardous substance contained in the contaminated sediment. The department may not grant a waiver if mercury, PCBs, as defined in s. 299.45 (1) (a), Stats., or dioxin is one of the identified hazardous substances.

(3) Any of the applicable following site-specific factors:

(a) The volume of contaminated sediment.

- (b) Concentrations of hazardous substances in the sediment.
- (c) Threat to ecological resources.
- (d) Known and potential effects of contaminated sediment on human health including consumption of fish, birds or other wildlife.
- (e) Risk that additional cleanup would be needed.
- (f) Anticipated cost of additional future cleanup.
- (g) Extent of removal of the known contaminants completed in accordance with applicable cleanup standards for the known contaminants.

NR 758.19 Certificate of completion. The department shall issue a certificate of completion under s. 292.15 (2) (af), Stats., to a voluntary party that is subject to the requirements of this chapter if the department determines that all the following requirements have been met:

- (1) The voluntary party has submitted to the department a request for case closure under ch. NR 726.
- (2) The department has approved the request for case closure for the site.
- (3) The voluntary party has submitted to the department any of the following pertaining to financial responsibility requirements:
 - (a) A certificate of insurance and copy of the policy with endorsements and the deductible fee required under s. NR 758.10.
 - (b) Documentation that demonstrates that an alternative form of financial responsibility has been provided that meets the requirements under s. NR 758.13.
 - (c) Documentation that the voluntary party received a waiver of the requirements from the department as described under s. NR 758.15.
- (5) The voluntary party has reimbursed the department for any department costs incurred under chs. NR 749 and 750.
- (6) All of the conditions under s. 292.15 (2) (af) 1. to 6., Stats., have been met.

NR 758.21 Failure to satisfy requirements in this chapter. The voluntary party, and successors and assigns of the voluntary party, as described under s. 292.15 (3), Stats., including the property owner, will no longer qualify for the liability protections under s. 292.15 (2) (af), Stats., if the voluntary party or its successors or assigns fails to satisfy the requirements of this chapter and the department provides a written determination stating that the requirements are not being met after at least 90 days from the date of non-compliance.

SECTION 3. STATEMENT OF EMERGENCY. This rule making is statutorily exempt from requiring a finding of emergency under 2015 Wis. Act 204, s. 36.

SECTION 4. EFFECTIVE DATE. This rule shall take effect on the date of publication and shall remain in effect for 150 days, as provided in s. 227.24 (1) (c), Stats.

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 12, 2020.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

BY _____

For Preston D. Cole, Secretary