

Report From Agency

REPORT TO LEGISLATURE
NR 756 and 758, Wis. Adm. Code

Board Order No. RR-10-17
Clearinghouse Rule No. CR 20-038

Basis and Purpose of the Proposed Rule

The department is proposing to create chs. NR 756 and 758, relating to implementation of 2015 Wisconsin Act 204.

Act 204 amended Wis. Stat. ch. 292 by establishing new requirements regarding the way contaminated sediments are assessed, managed and remediated. The act 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 and for the investigation and remediation of residual contamination following the removal of a structural impediment. Act 204 created the opportunity for persons to obtain the Voluntary Party Liability Exemption (VPLE) at sites with contaminated sediments and imposed insurance or an alternative form of financial assurance requirements on contaminated sediment sites enrolled in the VPLE program. It also outlined special conditions for partial cleanup approvals at VPLE properties with contaminated sediment.

Proposed revisions include the following:

Chapter NR 756. The proposed ch. NR 756 creates consistency with statutory changes and provides clarity, guidance, forms and procedures for changes relating to financial responsibility for engineering controls at contaminated sediment sites and for addressing contamination when a structural impediment is removed. The proposed rule includes the creation of ch. NR 756, which 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.

Chapter NR 758. The proposed ch. NR 758 provides guidance, forms and procedures for changes relating to environmental insurance and financial assurance requirements for contaminated sediment sites in the VPLE program, including those receiving partial certificates of completion. The chapter 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.

Summary of Public Comments

Public comments were initially requested for a broader version of the draft rule that proposed revisions to chs. NR 700-799 and the creation of chs. NR 756 and NR 758. The narrower adopted rule proposes only the creation of chs. NR 756 and NR 758. For a complete summary of public comments submitted for the broader draft rule during the public comment period, please see the full “NR 700-799 Revision Public Comments and DNR Responses” document, attached.

To facilitate input from any impacted stakeholders, the department held regular public meetings during rule development phase of the rulemaking process, in addition to the statutorily-required economic impact input period, and the statutorily-required public hearing and comment period.

Rule development meetings. The department sought input from stakeholders early in the rulemaking process during rule drafting through a series of monthly town-hall style rule development meetings, from February 2019 (following scope statement approval) to January 2020. In advance of each meeting, the department provided monthly drafting updates organized by subject matter to any interested members of the public via a dedicated web page and email listserv. At the meetings, staff described proposed changes and outlined the department’s positions on key issues. Staff then answered questions and collected comments from attendees. In addition to verbal comments, the department collected written comments via a dedicated email account. Meetings were publicized in advance on the RR Report, the DNR Remediation and Redevelopment (RR) program’s online news feed with an estimated audience of 4,000. In addition, the department sent email announcements to numerous external advisory groups and maintained a listserv for any additional interested persons.

Solicitation for input on economic impacts. The department provided a 30-day timeframe and requested input from a wide range of entities on the economic impacts of the proposed rule, including: municipal clerks, county treasurers, the Brownfields Study Group, subscribers to the RR Report newsfeed (est. 4,000 subscribers), persons that subscribed to the NR 700 rule changes listserv, small businesses on the department’s small business listserv, consultants listed in the Bureau of Remediation and Redevelopment Tracking System (BRRTS), the Wisconsin Bar Association, Wisconsin Manufacturers & Commerce, Wisconsin Realtors Association, Wisconsin Builders Association, Wisconsin Paper Council, Wisconsin Commercial Ports Association, Transportation Builders Association, League of Wisconsin Municipalities, Wisconsin Counties Association, Wisconsin County Treasurers Association, Wisconsin Towns Association, Wisconsin Economic Development Corporation, Wisconsin Electric Cooperative Association and the Army Corps of Engineers. The department received five letters of comment during the solicitation period. The department updated the economic impact analysis to adopt or respond to various comments made during the solicitation period.

Public hearing and comment period. On October 16, 2020, the department held a public hearing to receive input on the proposed permanent rule and the previously-adopted emergency rule. The public comment period, announced on September 16, 2020, remained open until October 23, 2020. At the hearing, the department provided a presentation on the proposed rule. At least 20 members of the public attended; no one offered verbal comments. During the comment period, the department received over 90 written comments from 9 different entities and individuals. Many commenters had questions or comments on specific sections of the draft proposed rule. Comments expressed opposition, suggested changes, expressed support or asked

questions about the proposed changes. In response to the comments, the department either revised the proposed rule or provided the rationale for not revising the proposed rule.

Following adoption of the scope statement by the Natural Resources Board (NRB) on January 23, 2019, the department pursued numerous opportunities for public input throughout the rulemaking process. Milestones and public input steps for this permanent rule and the related emergency rule include:

- January 23, 2019 –NRB approved scope statements and conditionally approved public hearing notice for permanent rule RR-10-17 and emergency rule RR-11-17(E).
- February 2019 to March 2020 – The department developed the initial rule in phases, with public input at monthly open meetings. The department provided advance meeting notice, materials, and preliminary rule drafts to interested members of the public via a dedicated website and email listserv. Each meeting had significant participation representing industry, consultants, attorneys and public interest groups. Written input from the public was solicited and accepted after each meeting via a dedicated email account. Rule drafts were revised based on input received as a result of open monthly meetings and publicly available drafts posted on the department’s dedicated web page.
 - Feb. 5, 2019 – Public Rule Development Meeting
 - March 5, 2019 – Public Rule Development Meeting
 - April 9, 2019 – Public Rule Development Meeting
 - April 18, 2019 – Public Rule Development Meeting, Financial Assurance Subgroup
 - May 7, 2019 – Public Rule Development Meeting
 - June 4, 2019 – Public Rule Development Meeting
 - July 9, 2019 – Public Rule Development Meeting
 - Aug. 6, 2019 – Public Rule Development Meeting
 - Sept. 5, 2019 – Public Rule Development Meeting
 - Oct. 1, 2019 – Public Rule Development Meeting
 - Nov. 6, 2019 – Public Rule Development Meeting
 - Dec. 3, 2019 – Public Rule Development Meeting
 - Jan. 9, 2020 – Public Rule Development Meeting
- April 2020 to May 2020 – The department posted a draft economic impact analysis for permanent rule to the department’s permanent rule web page and solicited input on economic impacts.
- May 2020 – The department submitted emergency rule on financial assurance (NR 756) to NRB for adoption.
- May 2020 to July 2020 – The department withdrew the emergency rule on financial assurance from NRB consideration and scheduled additional public meetings to address testimony.
 - June 23, 2020 – Public Meeting on Emergency Rule
 - July 6, 2020 – Public Meeting on Emergency Rule
- June 2020 to July 2020 – The department revised the economic impact analysis for the permanent rule based on public input received.
- July 2020 – The department revised the emergency rule on financial assurance in response to comments received.
- August 12, 2020 – The NRB adopted the emergency rule on financial assurance, with department changes made based on public input.
- September 8, 2020 – The emergency rule was published in the Wisconsin State Journal and went into effect.
- September 2020 to October 2020 – The department hosted a public comment period and public hearing on the emergency rule and permanent rule.
 - September 17, 2020 – The department hosted *Issues and Trends* public webinar and provided an overview of NR 700 rule change topics and encouraged public input during the hearing and comment period.
- October 21, 2020 – The department staff presented the permanent rule to the Small Business Regulatory Review Board (SBRRB).
- October 22, 2020 – The department staff presented the permanent rule to the Federation of Environmental Technologists (FET), a well-established nonprofit organization that assists members

from industry, municipalities, organizations and individuals with interpreting and complying with environmental regulations.

- October 2020 to January 2021 – The department revised the permanent rule based on public comments.
- November 2020 to February 2021 – The department began work with the Contaminated Sediments External Advisory Group (CSEAG) to gain consensus on guidance for the rule on financial assurance.
 - November 17, 2020 – CSEAG meeting
 - December 2, 2020 – CSEAG Financial Assurance Work Group
 - December 9, 2020 – CSEAG Financial Assurance Work Group
 - December 16, 2020 – CSEAG Financial Assurance Work Group
 - January 8, 2021 – CSEAG Financial Assurance Work Group
 - January 27, 2021 – CSEAG Financial Assurance Work Group
 - February 5, 2021 – CSEAG Financial Assurance Work Group
 - February 17, 2021 – CSEAG Financial Assurance Work Group
- January 21, 2021 – The legislative Joint Committee on Review of Administrative Rules (JCRAR) held a hearing regarding extension of the emergency rule and approved the 60-day extension.
- February 2021 to April 2021 – The department submitted the proposed permanent rule for consideration at the February 2021 NRB meeting, then withdrew the submittal and sought further input from stakeholders.
- **April 2021 – The department proposed a limited version of the rule that included only the creation of chs. NR 756 and NR 758, and is consistent with the previously approved emergency rule. The NRB adopted the limited permanent rule.**

In addition to meetings scheduled to serve the rulemaking process, the department provided regular updates at the external advisory group, the Brownfields Study Group (BSG).

- September 28, 2018 – Rulemaking process update at public BSG meeting
- January 25, 2019 – Rulemaking process update at public BSG meeting
- May 10, 2019 – Update on NR 700 rule revisions, upcoming topics, website at public BSG meeting
- October 10, 2019 – NR 700 Rule Changes Update at public BSG meeting
- February 21, 2020 – NR 700 Rule Changes Update at public BSG meeting
- October 8, 2020 – Update and Briefing on Proposed Rule Changes to Wis. Admin. Code chs. NR 700 – 799 (single-purpose public BSG meeting)
- November 13, 2020 – NR 700 Rule Changes Update at public BSG meeting

The department also arranged targeted meetings to listen to specific stakeholder concerns as they arose throughout the rulemaking process:

Stakeholders	Meeting Dates
Brownfields Study Group, Wisconsin Paper Council (Emergency and Permanent Rule on Financial Assurance)	October 21, 2020
Brownfields Study Group, Wisconsin Paper Council, Wisconsin Manufacturers & Commerce (Permanent Rule)	March 1, 2021

This table is a summary of main comments on the rule. Please also see the full “NR 700-799 Revision Public Comments and DNR Responses” document with additional comments and details.

Major Public Comments Received	DNR Response if Comments Not Fully Accepted
<p>Chapter NR 756 should include the option for public utilities to use the net worth test to meet financial assurance requirements.</p> <p>The costs and discretion for financial assurance under chapter NR 756 need clarification.</p>	<p>The department initially revised the draft rule to include this option for public utilities; however, the adopted limited version of the rule does not include this revision.</p> <p>The department continues to work with the Contaminated Sediments External Advisory Group to clarify costs for financial assurance.</p>

Modifications Made

In response to comments, the department presented the Natural Resources Board with an option to adopt a limited version of the rule that eliminated proposed revisions to chs. NR 700-754 and included only the proposed creation of chs. NR 756 and NR 758, consistent with an existing emergency rule. The Natural Resources Board adopted the limited version of the proposed rule.

The department did not make any substantive revisions to the rule approved by the Natural Resources Board. The limited version of the rule relates to financial assurance requirements that apply at certain types of contaminated sediment sites, and it mirrors the approved corresponding emergency rule that was enacted on September 8, 2020, and extended twice by the Joint Committee on Review of Administrative Rules. The department is currently working with an external stakeholder group to develop consensus-based guidance for chapter NR 756, the first of the two proposed rule chapters.

See the attached *NR 700-799 Revision Public Comments and DNR Responses* document for a complete summary of public comments made during the comment period; however, please note that these public comments were initially directed to a broader proposed rule that included revisions to chs. NR 700-754 as well as the creation of chs. NR 756 and NR 758.

Appearances at the Public Hearing

No members of the public testified or registered for or against the proposed rule at the public hearing.

Changes to Rule Analysis and Fiscal Estimate

The limited proposed rule adopted by the Natural Resources Board includes only the creation of chs. NR 756 and NR 758, which implement new requirements created under 2015 Wis. Act. 204. The original version of the proposed rule contained revisions within chs. NR 700-754 that were removed from the proposed rule. Accordingly, all portions of the rule analysis, fiscal estimate, and economic impact statement pertaining to other proposed rule revisions within chs. NR 700-754 are eliminated and the estimated economic impacts of the rule are reduced to approximately \$65,181 to \$434,625 statewide per year.

The department also made minor corrections for style and formatting.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on statutory authority; form, style and placement in administrative code; and clarity, grammar, punctuation and use of plain language. The department made all requested changes except as follows:

LCRC 5. p. 2. LCRC suggested that in the proposed ch. NR 756, the department consider revising “Bonds shall be submitted” to be in the active voice and identify who should submit the bonds.

- The department did not revise to use active voice because the meaning is currently clear, the edit would require a significant and lengthier rewording and would cause this subsection to be out of sync with other subsections of the rule.

LCRC 5. p. 3. LCRC questioned whether the word “unplanned” is necessary in s. NR 756.07(5)(c), given the definition of “event” in this context.

- The department agrees that the word is not strictly necessary to convey a legal authority or duty; however, the word provides clarity in the form of a verbal signpost to help readers distinguish this type of financial responsibility from others.

Final Regulatory Flexibility Analysis

Rule revisions are not anticipated to cause small businesses to incur new costs, except in cases where the small business is a responsible party. Small businesses that are responsible for a hazardous substance discharge may be affected by revisions relating to interim action requirements, fees, and semi-annual reporting requirements. While the department does not have a defined data set for small business, staff conservatively estimates that 30% or fewer responsible parties are small businesses. In this case, the total annual statewide costs to small business may range from \$352,953 to \$624,386.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.