

WISCONSIN LEGISLATIVE COUNCIL STAFF



00-176 3-15 Ref.  
2-16 last day  
▽

**RULES CLEARINGHOUSE**

Ronald Sklansky  
Director  
(608) 266-1946



Terry C. Anderson, Director  
Legislative Council Staff  
(608) 266-1304

Richard Sweet  
Assistant Director  
(608) 266-2982

One E. Main St., Ste. 401  
P.O. Box 2536  
Madison, WI 53701-2536  
FAX: (608) 266-3830

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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 00-176**

AN ORDER to create chapter NR 754, relating to environmental insurance requirements for liability exemptions for voluntary remediation.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

12-08-00 RECEIVED BY LEGISLATIVE COUNCIL.

01-04-01 REPORT SENT TO AGENCY.

RNS:MCP:tlu;rv

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached      YES       NO

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## CLEARINGHOUSE RULE 00-176

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### 2. Form, Style and Placement in Administrative Code

a. The rule should cite s. 227.11 (2) as providing rule making authority; it should not cite s. 292.15 (2) (ae) 3m. and (e), Stats., as these sections do not address the authority of the department to promulgate rules. The rule should cite all of s. 292.15, Stats., as being interpreted by the rule, since the rule interprets more than sub. (2) (ae) 3m. (See s. NR 754.13 (6), in particular.)

b. The rule does not seem to contain enough substance to warrant creating a separate chapter. The bulk of the rule could be collapsed into a single section, consisting of three subsections that correspond to ss. NR 754.07, 754.11 and 754.13, and placed in ch. NR 726. An additional section could be devoted to the subject of s. NR 754.15 since, as is noted below, this section appears to need considerable expansion and elaboration.

c. In s. NR 754.01, the first statutory citation should read "s. 292.15 (2) (ae) 3m. and (e), Stats."

d. The introduction to s. NR 754.05 should read: "In this chapter:". Also, since this section merely repeats statutory definitions, it seems unnecessary to include both a reference and a note fully explaining each definition. If the department believes that the note is helpful to the reader, then the entire statutory definition should be repeated in the body of the rule.

e. In s. NR 754.07, "all voluntary parties" should be replaced by "a voluntary party."

f. Section NR 754.11 (1) should be written in the active voice: "A voluntary party seeking insurance under this chapter shall apply to the department on a form provided by . . . ."

g. If the department is to specify the forms to be used to apply for insurance, is the list of information to include in an application in s. NR 754.11 (2) necessary?

#### 4. Adequacy of References to Related Statutes, Rules and Forms

Section NR 754.11 refers to a form. The requirements of s. 227.14 (3), Stats., should be met.

#### 5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Section NR 754.13 (1) to (5) should be written in the same tense as sub. (6), indicating that the conditions are met at the time the determination is made: "The voluntary party *has submitted* . . . ."; "The department *has approved* . . . ."; etc.

b. The first clause of s. NR 754.15 should be omitted, as should the comma following the word "property." However, this provision does not elucidate at all the requirement of s. 292.15 (2) (ae) 4, Stats.--what maintenance and monitoring is required? Where are the requirements specified and how does a voluntary party know, in advance, what will be required?

**FISCAL ESTIMATE**  
DOA-2048 N(R10/94)

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.  
Amendment No. if Applicable

**Subject**

Creation of NR 754.

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues
- Decrease Existing Appropriation       Decrease Existing Revenues
- Create New Appropriation

- Increase Costs - May be possible to Absorb Within Agency's Budget       Yes       No
- Decrease Costs

Local:  No local government costs

- 1.  Increase Costs
  - Permissive       Mandatory
- 2.  Decrease Costs
  - Permissive       Mandatory

- 3.  Increase Revenues
  - Permissive       Mandatory
- 4.  Decrease Revenues
  - Permissive       Mandatory

5. Types of Local Government Units Affected:
- Towns       Villages       Cities
  - Counties       WTCS Districts
  - School Districts       Others

**Fund Sources Affected**

- GPR       FED       PRO       PRS       SEG       SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used in Arriving at Fiscal Estimate**

**SUMMARY OF BILL/RULE** - 1999 Wisconsin Act 9 requires the department to promulgate rules that describe the insurance requirements that must be met by a voluntary party in order to receive a liability exemption when natural attenuation is used as a remedial option. This rule requires that all voluntary parties seeking a Certificate of Completion before groundwater standards have been met obtain insurance through the department.

**FISCAL IMPACT** - The department does not anticipate significant fiscal impacts from this rule. Parties seeking this optional liability exemption will be required to pay a one-time insurance fee to the department for insurance coverage. The department will then submit this fee to the contracted insurance underwriter to pay the insurance premiums required under the state's master insurance contract. As a result, we anticipate no net impact from this rule on the state. This rule is optional for parties who choose to conduct a voluntary cleanup and seek the voluntary party liability exemption using natural attenuation, where groundwater enforcement standards are being exceeded.

**Long-Range Fiscal Implications**

The long term fiscal impacts of the rule are uncertain. Since this rule allows more sites to obtain the liability exemption, the department may receive an increase in sites entering into the voluntary cleanup process. This would result in increases in program revenue due to payment of required oversight fees and could require additional staff time.

Agency	Prepared By	Phone No.	Authorized Signature	Phone No.	Date
NR	Joe Polasek	(608) 266-2794		(608) 266-2794	11/16/2000

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD  
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create ch. NR 754 related to environmental insurance requirements for liability exemptions for voluntary remediation.

RR-06-01

Analysis Prepared by Department of Natural Resources

Statutory authority: s. 227.11(2), Stats.

Statutes interpreted: s. 292.15, Stats.

Section 292.15(2)(ae)(3m), Stats., directs the department to promulgate rules to describe the requirements that must be met by a voluntary party seeking a Certificate of Completion, where natural attenuation is employed as the remedial action. The 1999-2001 State Budget (1999 Wisconsin Act 9) created s. 292.15(2)(ae), Stats., which allows parties to use natural attenuation as a remedy to obtain the voluntary party liability exemption. This section includes a provision where the DNR may require a voluntary party to obtain environmental insurance if the voluntary party wants to receive a Certificate of Completion before the groundwater enforcement standards are met through natural attenuation. This rule requires that all voluntary parties who apply for the liability exemption under this section obtain environmental insurance to cover the cost to cleanup the environment if natural attenuation fails.

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SECTION 1. Chapter NR 754 is created to read:

**NR 754.01 Purpose.** This chapter establishes rules and procedures promulgated under s. 292.15(2)(ae)3m. and (e), Stats., that the department shall use to determine if voluntary parties have met the requirements under s. 292.15(2)(ae), Stats., related to environmental insurance for voluntary parties seeking liability exemptions using natural attenuation.

**NR 754.03 Applicability.** This chapter applies to voluntary parties seeking an exemption from liability for voluntary party remediation under s. 292.15(2)(ae), Stats., where groundwater contamination is in concentrations that exceed enforcement standards and the department determines that natural attenuation will restore groundwater quality in accordance with rules promulgated by the department.

**NR 754.05 Definitions.** In this chapter:

(1) "Department" has the meaning specified in s. 292.01(2), Stats.

Note: Section 292.01(2), defines "department" to mean the department of natural resources.

(2) "Natural attenuation" has the meaning specified in s. 292.15(1)(am), Stats.

Note: Section 292.15(1)(am), Stats., defines "natural attenuation" to mean the reduction in the mass and concentration in groundwater of a substance, and the products into which the substance breaks down, due to naturally occurring physical, chemical and biological processes, without human intervention.

(3) "Voluntary party" has the meaning specified in 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 754.07 Insurance requirement.** A voluntary parties seeking a liability exemption under s. 292.15(2)(ae), Stats., shall pay the department the one-time insurance fee, submit an application form and comply with the requirements and procedures described in this chapter for the property to obtain coverage under the state's master insurance contract.

**NR 754.11 Insurance application and fees. (1) GENERAL.** A voluntary party seeking insurance under this chapter shall apply to the department on a form provided by the department and submitted to the following address: VPLE Coordinator - Bureau for Remediation and Redevelopment, P.O. Box 7921, Madison, WI 53707-7921.

Note: The VPLE Environmental Insurance Application Form is available by telephoning the Remediation and Redevelopment Information Line at 1-800-367-6076 or (608) 264-6020 or by writing the Remediation and Redevelopment Program, Department of Natural Resources, P.O. Box 7921, Madison, WI., 53707-7921 or from the web site: <http://www.dnr.state.wi.us/org/aw/rr/>

(2) **APPLICATION CONTENTS.** An insurance application form, shall include, but is not limited to:

- (a) Name, address and designated contact person.
- (b) Information on site conditions.
- (c) Groundwater monitoring data.
- (d) Alternative remedies that may be necessary if natural attenuation fails.
- (e) Such additional information required as necessary by the State's insurance underwriter in order to provide insurance under s. 292.15(2)(ae), Stats.

(3) **FEE PUBLICATION.** The department shall establish and publish the insurance fees on an annual basis.

(4) **FEE CALCULATION.** The insurance fee shall be based on the following:

- (a) The cost of the insurance premium.
- (b) A contribution towards the state's deductible.
- (c) Other direct expenses which are necessary to administer the program.

(5) **FEE PAYMENT.** The insurance fee is non-refundable.

**NR 754.13 Certificate of completion.** The department shall issue the voluntary party a certificate of completion pursuant to s. 292.15(2)(ae), Stats., 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 pursuant to ch. NR 726 or 746, whichever is applicable.

(2) The department has approved the request for case closure for the property.

(3) The voluntary party has submitted to the department a completed insurance application form.

(4) The voluntary party has paid the department the appropriate insurance fee as specified in this chapter.

(5) The voluntary party has reimbursed the department for any department costs incurred under ch. NR 749 or 750.

(6) All of the conditions in s. 292.15(2)(ae)1. to 6., Stats., have been met.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on February 28, 2001.

The rules shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin \_\_\_\_\_

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Darrell Bazzell, Secretary

(SEAL)



## REPORT TO LEGISLATURE

NR 754, Wis. Adm. Code  
Environmental insurance requirements for liability exemptions for voluntary remediation

Board Order No. RR-06-01  
Clearinghouse Rule No. 00-176

### Statement of Need

Section 292.15, Stats., allows voluntary parties (VP) to work with the department to investigate and remediate brownfield properties in order to receive a Certificate of Completion. The Certificate grants an exemption from future environmental liability. A statutory change in the 1999-2000 budget was created in response to requests by parties who wanted to allow the use of natural attenuation as a final remedy to receive a Certificate before ch. NR 140 groundwater standards were met. The rule addresses the concern that the state takes on a potentially expensive responsibility to clean up groundwater at those sites where natural attenuation fails after the Certificate is issued. Chapter NR 754 will allow parties to receive a transferable Certificate before ch. NR 140 groundwater standards are met, after fulfilling the requirement of purchasing environmental insurance.

To implement the rule, the department has entered into a master insurance contract to insure all sites that want to obtain the liability exemption using natural attenuation. This rule and the associated policy will protect the department from high environmental cleanup costs in the event that natural attenuation fails, at a reasonable cost to the voluntary party program participant.

### Modifications as a Result of Public Hearing

The rule was modified to clarify that since the master state contract option is being used, the voluntary party does not need to take any action to maintain the insurance. Section NR 654.11(2)(e) and (4)(c) were modified to have the language more specific. Section NR 754.15 was removed because it was essentially the same as the requirement in the statute and it is unnecessary to repeat statutory language.

### Appearances at the Public Hearing and Their Position

**January 17, 2001**

#### **Madison**

In support:

Don Gallo, Reinhart, Boerner, P.O. Box 514000, Milwaukee, WI 53203-3400

In opposition – none

As interest may appear:

Andrew Savagian, 2817 Foxwood Terrace, Madison, WI 53713  
Lee Madden, P.O. Box 620434, Middleton, WI 53562-0434

**Milwaukee**

In support:

Mark C. Treter, Reinhart, Boerner, 1000 N. Water Street, Milwaukee, WI 53202

In opposition – none

As interest may appear:

Scott Petterski, Envirogen, Inc., 2835 N. Grandview Blvd., P.O. Box 90, Pewaukee, WI 53072  
Daniel L. Brilles, Arcadis Geraghty & Miller, 126 N. Jefferson St., Suite 400, Milwaukee, WI 53202  
Thomas W. Kroeger, STS Consultants, 6735 N. Braeburn Avenue, Glendale, WI 53209  
Steven M. Keith, Milwaukee Co. Dept. of Public Works, 2711 W. Wells St., Room 215,  
Milwaukee, WI 53208  
Michael Dodge, 1000 N. Water Street, Milwaukee, WI 53203  
Margaret Brunette, P.O. Box 12436, Milwaukee, WI 53212

**Green Bay**

In support – none

In opposition – none

As interest may appear:

Jackie Mirkes, STS Consultants, 1035 Kepler Drive, Green Bay, WI 54311

**Eau Claire**

In support – none

In opposition – none

As interest may appear:

William Barry, Ayres Associates, Box 1590, Eau Claire, WI 54701

Response to Legislative Council Rules Clearinghouse Report

See attached response.

Final Regulatory Flexibility Analysis

The Department does not expect any impact on small businesses as a result of this rule because the decision on whether or not to purchase this insurance is voluntary.

January 23, 2001

Response to  
Legislative Council Clearinghouse  
Comments

Clearinghouse Rule 00-175: NR 754

Comments on Form, Style and Placement in Administrative Code:

All the requested changes have been made, except for the following:

Comment 2.b. "The rule does not seem to contain enough substance to warrant creating a separate chapter. The bulk of the rule could be collapsed into a single section, consisting of three subsections that corresponding to ss. NR 754.07, 754.11 and 754.13, and placed in ch. NR 726. An additional section could be devoted to the subject of s. NR 754.15 since as noted below, this section appears to need considerable expansion and elaboration."

While the rule is short, the Department would like to create it as a separate chapter for several reasons. First, it is not appropriate to include this material in any other chapter. Ch. NR 726 relates to requirements for case closure and this proposed rule relates to obtaining a Certificate of Completion to obtain the Voluntary Party Liability Exemption. Putting this information in NR 726 would be confusing and lead people to understand that insurance would be required for case closure. Case closure is different than a Certificate of Completion and these should remain distinct. Also, NR 750 that relates to the Voluntary Party Liability Exemption process would not be the appropriate section because that section focuses on fees and application processes and this insurance requirement is a distinct topic. Second, there is a strong possibility that there may be statutory changes in the future which would require expansion of this rule. Environmental insurance is a growing area in brownfields cleanup and statutory changes could be made to require it for other sites in the voluntary party liability exemption process. Third, depending on how this insurance system works, the rule may need to be expanded to further describe the mechanisms to meet the insurance requirements. Keeping this rule as a separate section should leave open the possibility that it can be easily and clearly changed or expanded in the future as the program evolves.

Comment 2.d. "The introduction to s. NR 754.05 should read: "In this chapter:". Also, since this section merely repeats statutory definitions, it seems unnecessary to include both a reference and a note fully explaining each definition. If the department believes that the note is helpful to the reader, then the entire statutory definition should be repeated in the body of the rule."

The introduction to this section has been changed to "In this chapter:". The department will retain the reference and a note fully explaining each definition to maintain consistency with the other chapters in the NR 700 rule series.

2.g. "If the department is to specify the forms to be used to apply for insurance, is the list of information to include in an application in s. NR 754.11 (2) necessary?"

As noted in the Legislative Council Clearinghouse comments (see below), the proposed rule must meet the requirements of s. 227.14(3), Stats. To do so, the rule will include a note that refers to the application form and how the form can be obtained. The application form will not however be finalized by the time the proposed rule is submitted to the Natural Resources Board. The list of information is important to be in the rule so that the department can develop the application form that requests the necessary information to obtain the insurance and so external parties will know what type of information will be required on the application form.

#### Comments on Adequacy of References to Related Statutes, Rules and Forms:

"Section NR 754.11 refers to a form. The requirements of s. 227.14(3), Stats., should be met."

In order to met the requirements of the statute, a note has been added to the rule which refers to the application form and how the form can be obtained.

#### Comments on Clarity, Grammar, Punctuation and Use of Plain Language:

Comment 5.a. "Section NR 574.13 (1) to (5) should be written in the same tense as sub. (6), indicating that the conditions are met at the time the determination is made: "The voluntary party *has submitted*..."; "The department *has approved*..."; etc.

As requested, each of these sections have been changed so that they are written in the same tense as sub. (6)

Comment 5.b. "The first clause of s. NR 754.15 should be omitted, as should the comma following the word "property." However, this provision does not elucidate at all the requirements of s. 292.15(2)(ae)4, Stats.--what maintenance and monitoring is required? Where are the requirements specified and how does a voluntary party know, in advance, what will be required?"

The maintenance and monitoring requirements in s. 292.15(2)(ae)4, Stats., are generally institutional controls that are required to be put in place before the Certificate of Completion is issued which must be maintained by the property owner. Examples include a deed restriction to maintain a performance measure like a cap on the area of the property where contamination remains in place or a deed restriction that would prohibit the property to be used for non-industrial uses to protect against direct contact exposure

to contaminated soil. These maintenance and monitoring requirements are site specific requirements which are generally described throughout the NR 700 rule series but more specifically in NR 720 and NR 726. These requirements are also described in a series of DNR guidance documents.

Section NR 754.15 is essentially identical to the requirement in the statute (s. 292.15(2)(ae)4, Stats.) and since it is unnecessary to repeat the statutory language, it has been removed from the proposed rule. This will help to eliminate misunderstanding that the rule creates any additional requirements for the voluntary party beyond those that must be met for any site in the voluntary party liability exemption process.