

**Comment Response Summary to DNR Remediation and Redevelopment Program Guidance - RR-041**

- **Original title “Guidance on Importing Soil onto Remediation Site Enrolled in VPLE”**
- **Revised Title “Obtaining DNR Approval Prior to Use of Imported Soil and Other Fill Materials on Voluntary Party Liability Exemption Sites”**

Based on the public comment period held between April 22 and June 5, 2015  
 Prepared by Michael Prager

December 2015

Thank you to the individuals that provided feedback on the Department of Natural Resources (DNR) proposed guidance originally titled “Guidance on Importing Soil onto Remediation Site Enrolled in VPLE” now titled “Obtaining DNR Approval Prior to Use of Imported Soil and Other Fill Materials on Voluntary Party Liability Exemption Sites”. The following table summarizes the comments received and the response to comments. Verbatim comments are attached following the comment response summary.

Summary of Comment	Name/Organization	Response to Comment
Guidance should be clearer about whether testing will always be needed.	William Gregg, Summit	We have modified the guidance to clarify that sampling is needed; however, there may be some limited cases when DNR agrees that sampling may not be necessary.
Guidance should be more clear about whether a Phase I environmental assessment is needed. Is a Phase I or other historical information needed if sampling is planned? Remove phrase “Phase I like.”	William Gregg, Summit Chris Valcheff, True North BSG, Liability Subgroup	The guidance was revised to clarify that a Phase I is not needed; however, information similar to what is found in a Phase I may be useful.
Some of the implied steps of the process are not listed (reviewing data and getting DNR approval to place fill after sampling results).	William Gregg, Summit	The guidance has been modified to clarify the process.
VPLE soil and materials management plan should be allowed to be part of another report (remedial action design, etc.) submitted to DNR.	William Gregg, Summit	Yes, the soil and materials management plan can be submitted as part of another report. The guidance was revised to make this clear.
Guidance should identify the types of “other fill material” this would apply to. Also, the	William Gregg, Summit	The guidance is clear that it applies to <u>any</u> material being brought to the VPLE site and

<p>sampling methods for other fill materials may be different than soil sampling.</p>		<p>provides several examples.</p> <p>The consultant should use approved sampling methods or propose a methodology appropriate for the material.</p>
<p>Guidance should add the need to sample the material after it has been imported.</p>	<p>William Gregg, Summit</p>	<p>The soil management plan will include sampling before the material is moved to the VPLE property; however, there may be cases when sampling after the material is placed on the VPLE site may be warranted.</p>
<p>Guidance should apply prospectively. Only apply it to sites enrolled in VPLE after a certain date or to sites that are not already subject to an approved remediation plan.</p>	<p>Arthur Harrington and John Antaramian, Godfrey and Kahn &amp; ECC</p>	<p>The guidance is aimed at parties who plan to bring new or additional material to an open VPLE property. There are more than 110 active sites in the VPLE program, the state doesn't want to assume liability for unknown materials placed at these sites. Sites where the DNR already issued a Certificate of Completion or approved placement of material would not follow this process.</p>
<p>Guidance should be more specific regarding what you need to sample for, the number of samples you have to take, etc. Specifically, are there situations when you would not have to sample for PAHs?</p>	<p>William Gregg, Summit Jeff Ramey, Pace Kristin Kurzka, Sigma</p>	<p>At this time, the DNR has chosen to be more flexible and make these determinations on a case by case basis working with the consultant based on the factors in the guidance. We hope that this flexibility will allow cost-effective approaches based on the site-specific situation.</p> <p>There could be cases when sampling for PAHs may not be necessary. For example, if there is not a known or suspected source on the borrow site, if there is known PAH contamination already on the VPLE site, if the soil is going to be under a cap, etc.,</p>

		then sampling for PAHs may not be necessary.
DNR should develop background PAH levels. It is hard to find any soil without low-level PAHs.	Adam Roder, Sigma	The RR program recognizes the need to develop background PAH levels and the Brownfields Study Group recommended that DNR establish statewide concentrations. Until the DNR undertakes a study, a voluntary party has the option to develop site-specific background levels.
What if the source of the fill has some impacts? What if there is no known source? Will an RP letter be sent/ BRRTS # be assigned to the source property?	Chris Valcheff, True North Kristin Kurzka, Sigma	These questions will be determined on a case by case basis. If there was a discharge of a hazardous substance on the borrow property, DNR may open a new LUST or ERP site and send an RP letter to the Responsible Party. In some cases, DNR may ask for more information to determine if there was a discharge.
If sampling is completed, how clean is "clean"? How will the WDNR respond to detectable concentrations below RCLs?	Chris Valcheff, True North	The Contaminated Materials Management Advisory Group is studying these issues.
Will the WDNR provide certification that that the fill material brought onto the VPLE site meets the guidance and was "approved" for placement?	Chris Valcheff, True North	DNR will issue site-specific approval letters to bring soil or other materials from one location to a VPLE property as described in the soil management plan, but will not certify that the fill is approved.
Add clarification that any soils or other fill materials brought onto a VPLE property prior to issuance of the Certificate of Completion must be subject to DNR review as part of a DNR-approved environmental investigation in order for such materials to be afforded the statutory VPLE exemptions.	BSG, Liability Subgroup	This clarification is correct and the guidance, specifically the 2 <sup>nd</sup> paragraph in the Overview section, states that the DNR approval of the soil management plan is needed for the environmental investigation to be complete and the property to qualify for the VPLE.

<p>Clarify how sites that may enter VPLE after soil has been placed on the property will be handled.</p>	<p>BSG, Liability Subgroup</p>	<p>If a property enters VPLE and there was some soil or other material placed on the site as part of cleanup, development, or for any other reason, the voluntary party and their consultant need to evaluate the material for hazardous substances as part of completing the site investigation. This process is the same for other recognized environmental conditions on the property.</p>
<p>Clarify how DNR will document (in the COC, on the GIS Registry, etc.) that approval was provided to move soil in different scenarios.</p>	<p>BSG, Liability Subgroup</p>	<p>The Contaminated Materials Management Advisory Group is looking at how to document various situations when material is moved to another location. The public VPLE site file will include copies of the management plan, sample results, approvals, etc., and the RR Database (BRRTS) will note that this approval was provided.</p>
<p>Sampling considerations – add to the sampling considerations that will be evaluated: (1) the “purposes of the fill” (e.g., whether the fill is part of the remedy or will be used as a clean cap); and (2) concentration and types of existing contamination.</p>	<p>BSG, Liability Subgroup</p>	<p>The guidance was revised to add these considerations.</p>
<p>Guidance doesn’t address how DNR will handle situations when the party requesting approval is not the voluntary party.</p>	<p>BSG, Liability Subgroup</p>	<p>We understand that in many situations various parties are involved with the cleanup and redevelopment of a property. The guidance was revised to clarify that we expect the Voluntary Party to coordinate with all contractors, tenants, owners, etc., who may be working on the property to make sure that material is not brought onto the property</p>

		without following this process.
Guidance doesn't address when approval of movement of material is not from DNR RR program.	BSG, Liability Subgroup	DNR understands that it can be confusing when different DNR programs, or other agencies, are involved with fill placement or make a waste determination regarding soil or other materials to be moved. The guidance was amended to clarify that the DNR RR project manager must approve the plan before materials are brought to a site that is in VPLE. A waste determination from the generator, or approval from other programs or agencies (DOT liaison, Waste and Materials Management program, storm-water program, local government, etc.), is not sufficient to comply with this guidance.
<b>After Placement</b> –Clarify how DNR will inform the Voluntary Party that the investigation must be updated (if DNR did not provide prior approval).	BSG, Liability Subgroup	The guidance recommends that sampling be done <u>before</u> the material is placed on the VPLE site. If material is put on the VPLE site without approval, DNR staff may reopen the Site Investigation. This request may occur at the time when a review is conducted by the project manager. The site investigation approval date will be changed after the sampling has been conducted and approved.
<b>Post COC situations</b> – clarify process if party wants to extend VPLE to new fill material.	BSG, Liability Subgroup	The "Post Certificate of Completion Situation" section recommends this process if a party is bringing material to a site that already received a COC. If soil was brought to the property after the COC, the DNR would not know if any other discharges occurred

		on the property after the COC was issued. Therefore, in most cases, the liability exemption provided when the Certificate of Completion was issued would not be extended to cover this new material.
<p><b>All Remedial Action Sites (Sites Not in VPLE)</b> Apply this guidance to all sites.</p> <p>For non-VPLE sites, what response will the DNR provide?</p> <p>Change language in All Remedial Action Sites section to say “could” rather than “is encouraged.”</p>	<p>Chris Valcheff, True North</p> <p>Chris Valcheff, True North</p> <p>BSG, Liability Subgroup</p>	<p>This guidance is limited to VPLE sites at this time because VPLE applies to the entire property and the state takes on liability at closure. The Contaminated Materials Management Advisory Group is looking at a range of issues and this change is something they may consider. As described in the document, DNR considers the VPLE guidance to be a best management practice for any site.</p> <p>If a plan is submitted with the technical assistance review fee, the DNR will write an approval to proceed letter.</p> <p>The language was changed to say “can also.”</p>

Michael,

I found the draft guidance to be rather wishy-washy about the need for testing imported materials. If you want data, don't suggest that obtaining fill from a "known" site and a "reputable" contractor is going to make a difference. Anyone can blow a hydraulic hose while loading clean fill into a truck. Also, why would you imply that Phase I due diligence may be sufficient? Change the name to "Testing Materials Prior to Importing to VPLE Sites" to emphasize the need for data. You may also want to add language that says the use of untested fill would/could void the liability protection offered by DNR in the Certificate of Completion.

The guidance seems to be missing a step or two involving assessing the data by comparing it to standards and getting approval from DNR prior to import. Don't you want to pass judgement on the import beforehand? Plans are good, but data rules! Also, I wonder if the guidance should suggest that the soil management plan be part of the Remedial Action Design, Implementation, Operation, Maintenance and Monitoring Plan – or at least it need not be a stand-alone document.

You mention recycled concrete and bank-run gravel (You might add topsoil and clay for liners/soil covers as common imports). Laboratories may be limited to TCLP-type testing for these large sized materials. You can't put a gravel sample in a 40-ml VOC jar! I think the guidance would be more helpful if it covered some of the details of sampling and analysis. Numbers of samples, making sure petroleum hydrocarbons are part of the analysis, etc.

Does the need for this guidance suggest that contaminated imported fill has been a big problem in Wisconsin? Or is this concern more of a theoretical legal concern? If it is critical to protecting the liability exemption being sought, you should consider adding the need for sampling the material after it has been imported. This would be akin to taking concrete cores for geotechnical evaluation on highways and poured foundations. Call it construction quality control sampling.

Thank you for the opportunity to comment.

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*Darsi:*

*Thank you for sharing the proposed DNR guidance on imported soil or fill to VPLE enrolled sites. The purpose of this brief e-mail is to provide the comments of John Antaramian and Arthur Harrington for the Department's consideration on this topic.*

*We think this guidance is very useful. However, we have one suggestion. We think that guidance should only apply prospectively to VPLE sites. We think it would be unfair to call into question potential fill importation or soil cover approval requirements for VPLE sites that are already enrolled in the program since there is a certain amount of unfairness to change the "rules of the game" for these sites. The existing sites that we refer to are those that are already the subject of a Certificate of Completion under VPLE or which have already received DNR approval for remediation for such sites. Therefore, we suggest the guidance be modified to only apply to sites that are enrolled into the VPLE program after an identified effective date or, in the alternative, to such sites that are not already the subject of approved DNR plans for remediation.*

*Best regards*

*Arthur Harrington and John Antaramian*

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Michael,

From the perspective of labs working with the consultants in WI for the statement below:

"Sampling Considerations

Voluntary parties and their consultants should propose what parameters to sample, how many samples to take, and other relevant considerations. "

More guidance needs to be provided to help standardize and set a starting point for contaminants of concern that should be considered for testing or eliminated by soil use or site history. The state of Illinois has created a similar guidance under their Clean Construction Demolition Debris (CCDD) regulation and created the attached table. A similar consideration should be proposed for the WI fill program, especially, if this guidance is expected to become regulation.

Thank you,

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Good afternoon Michael,

Sigma has recently experienced difficulty in locating soil without PAH impacts for use as imported clean soil at several sites including a VPLE project site. We have looked at multiple sources in accordance with WDNR draft guidance document RR-401 *Identifying and Documenting Characteristics of Imported Soil and Other Fill Materials Prior to Use on VPLE Sites* and relatively low concentrations of PAHs, apparently present in the soil as a result of non-point sources, have proven to be problematic in each case.

As a follow up to Kristin Kurzka's email on May 8, 2015 regarding the draft guidance document, Sigma is providing the following information in support of WDNR efforts to establish background concentrations for PAHs and/or to establish clean fill concentration limits with regard to PAHs because of the pervasiveness of PAHs in urbanized areas of Wisconsin.

Through our research and work experiences we have seen many studies about background PAHs in urban areas across the United States. State environmental agency responses range from not acknowledging background PAH concentrations to adopting formal background PAH concentrations into state regulations. By way of example, Sigma provides the following brief descriptions of how Illinois has integrated background PAH concentrations into state regulations and how Pennsylvania has established a "clean fill" management policy that accounts for the pervasiveness of PAHs from anthropogenic, non-point sources.

1. Title 35 of the Illinois Administrative Code, Part 742 Tiered Approach to Corrective Action Objectives, Appendix A, Table H establishes background concentrations of PAHs in the City of Chicago, metropolitan areas, and non-metropolitan areas in Illinois (refer to Attachment 1). These background levels are summarized in the attached summary spreadsheet (PAH Comparison Table.pdf) relative to current NR 720 Residual Contaminant Levels (RCLs). For reference, six to seven background PAH concentrations in Chicago, metropolitan areas, and/or non-metropolitan areas are higher than one or more NR 720 RCL for direct contact and/or protection of groundwater. More information about the PAH background studies in Illinois is included as Attachment 2.

2. The Pennsylvania Department of Environmental Protection has a formal policy on "clean fill" versus "regulated fill". Certain levels of PAHs are allowed in "clean fill" as included in Attachment 3 and summarized in the attached summary spreadsheet (PAH Comparison Table.pdf). Thirteen PAH concentrations allowed in "clean fill" in Pennsylvania are higher than one or more NR 720 RCLs for direct contact and/or protection of groundwater.

The purpose of these examples is to demonstrate that non-detectable PAH concentrations as a target for "clean soil" or "clean fill" may be an unattainable approach for urbanized areas. Therefore, Sigma supports WDNR efforts to establish background PAH concentrations. Background PAH information should be incorporated into "clean soil" importing or exporting soil management decisions. Likewise, background PAH concentrations would be beneficial in differentiating potential point-source releases from other anthropogenic sources such as airborne deposition from combustion, runoff from

asphalt-paved surfaces, vehicle exhaust, etc. A possible approach to help address PAHs attributed to non-point sources is to only apply NR 720 RCLs to known point source releases and historic fill situations.

We believe that the WDNR should aggressively pursue a background PAH study to better understand the background PAH issue and its implications to business / property redevelopment in Wisconsin.



Attachment 2 USGS  
Background PAH Study



Attachment 1 IAC  
Title 35 Part 742 TAC



PAH Comparison  
Table.pdf

Thank you for your consideration.

Adam

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Michael – All in all a great idea, and I encourage getting something like this applied to ALL sites, but some questions do arise:

- 1) What constitutes “Past History of the Property where the soil and other fill materials are coming from”? Do you need a Phase 1 ESA?
- 2) Do you need to do a Phase 1 or some other “past history of the property” if you plan to sample the fill material?
- 3) If no reason to suspect contaminants from the fill facility, do you need to do sampling at all?
- 4) If sampling is completed, how clean is clean? How will the WDNR respond to detectable concentrations below RCLs?
- 5) If sampling is completed and contaminants are detected but there is no indication of a “release” having occurred at the fill origination site, how will that material be classified? Clean?
- 6) If sampling is done at a site that there is no reason to suspect contamination and contamination is discovered, will that lead to generation of a BRRTS number for the fill source site?
- 7) Will the WDNR provide certification that that the fill material brought onto the VPLE site meets the guidance and was “approved” for placement – regardless of the contaminant concentrations that may be identified in the fill material (e.g., below background or considered background level concentrations)?

- 8) For non-VPLE sites, what will the WDNR provide as a response to the soil and materials management plan?
- 9) How will historic sites be handled? Can a non-VPLE site obtain a response from the WDNR by performing sampling of the fill material placed at the property in question?

I'll reiterate again that the Illinois CCDD program has a lot of great things in it that would be helpful to apply to Wisconsin. Let me know if there is anything that I might be able to help with or if you need further clarification to any of the questions I have for this guidance document. Thanks!!

**Christopher H. Valcheff**  
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Michael,

We provide the following comments regarding the draft RR-041 *Identifying and Documenting Characteristics of Imported Soil and Other Fill Materials Prior to Use on VPLE Sites*.

- 1 – Does the definition of “other fill materials” include top soil, utility backfill consisting of clear stone or pea gravel, traffic bond for pavement or building sub-base, mulch and/or landscaping materials?
- 2 – Under what circumstances would source material generated within an urban environment not need to be analyzed for PAHs?
- 3 – What are the implications for the fill material source property should low level impacts (likely not point source related) be detected at concentrations greater than NR 720 RCLs? i.e. will RP letters be issued, will the soil be considered impacted and therefore subject to management per NR 700?

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## **Topics/Recommendations Concerning Draft Guidance Document RR-041 Discussed at the May 28, 2015 Meeting of Certain Members of the Brownfields Study Group/Liability Subcommittee**

The following provides a summary of certain topics/recommendations with respect to DNR's draft guidance document RR-041 discussed at the May 28, 2015 meeting of certain members of the Brownfields Study Group/Liability Subcommittee. These topics/recommendations are being submitted to DNR for consideration during the public comment period on draft RR-041.

- 1. Overview:** add examples of "other fill material."
- 2. Overview:** clarify that the topic of the guidance is being considered by other task groups and, thus, this guidance may be superseded or impacted by subsequent guidance.
- 3. Applicability:** add clarification that any soils or other fill materials brought onto a VPLE property prior to issuance of the Certificate of Completion must be subject to DNR review as part of an DNR-approved environmental investigation in order for such materials to be afforded the statutory VPLE exemptions.
- 4. Guidance:** distinguish between the procedures for bringing soils or other fill materials onto a site that is currently within the jurisdiction of the VPLE program (e.g., undergoing investigation/remediation pursuant to VPLE review) versus sites that enter into the VPLE program after soils or other fill material are brought onto the site.
- 5. Guidance:** clarify under various timing scenarios how the GIS Registry and Certificates of Completion will document the DNR-approved investigation and final determinations governing soils and other fill materials. For example, if soils or other fill materials are brought onto a site after a Certificate of Completion is issued, then clarify how DNR will update the Certificate of Completion and GIS Registry, if the DNR-approved environmental investigation has been updated to address the new fill materials.
- 6. Sampling Considerations:** add to the sampling considerations that will be evaluated: (1) the "purposes of the fill" ( e.g., whether the fill is part of the remedy or will be used as a clean cap); and, (2) concentration and types of existing contamination.
- 7. More than a Phase I May be Needed:** remove or clarify references to "Phase I-like" documentation. Referencing a Phase I could be confusing and could lead to the conclusion that a Phase I is required for source material. It appears the focus of the evaluation should be the considerations outlined in the paragraph discussing "sampling considerations" and the need for information that adequately characterizes the materials. This information could take the form of a Phase I, sampling and/or other historical documentation of the uses of the source property.
- 8. DNR Plan Review** – the guidance does not adequately address how DNR will approve the relocation of soils or other fill materials onto a VPLE site when the party requesting approval is not the Voluntary Party in the VPLE program or approval for the relocation is not from the DNR's Remediation and Redevelopment program.
- 9. After Placement Actions** – Clarify how DNR will inform the Voluntary Party as to how the DNR approved environmental investigation must be updated if DNR did not approve the placement of soils or other fill materials onto a site prior to a Certificate of Completion being issued. For example, will DNR provide correspondence updating the date of the DNR-approved environmental investigation?

**10. Post Certificate of Completion Situations** – clarify that if a Certificate of Completion has issued, then the DNR-approved environmental investigation would need to be updated to obtain coverage under VPLE for any fill material brought to the site after the Certificate of Completion has issued. Likewise, if coverage under the VPLE program is not desired for fill material brought to a site after the Certificate of Completion has issued, then it is not necessary to update the DNR-approved environmental investigation.

**11. All Remedial Action Sites (Sites NOT in VPLE)**- clarify that this process “could” be used, rather than “is encouraged” to be used.