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RE: Midwest Environmental Justice Organization comments on NR 700 proposed changes

Dear Mr. Gordon:

Firstly, we commend the WI DNR and others who worked on the proposed changes to the NR 700 rules. This was undoubtedly a significant amount of work, especially during a time when the DNR's staff and resources are stretched and limited.

We think there are several improvements proposed in the rules that will help better protect Wisconsin's citizens and environment. However, we focus our comments on a few key areas in which we think the rules are lacking, need revisions, and/or need clarification.

MEJO's core mission is to identify and address disparate effects of toxins and other pollution on the most vulnerable in our society (pregnant women, children, elderly, already ill), minorities, and low-income people. We work to engage these groups in understanding how pollution affects them, to reduce/avoid their exposures and sources of pollution, and to build their capacities to engage collectively in public and political decisionmaking about these issues.

We hope that the Wisconsin DNR can be a national leader in making environmental justice a priority in its environmental policies. To this end, the department should incorporate environmental justice approaches of federal agencies and mandated by Presidential Executive Order 12898, which states that: "To the greatest extent practicable and permitted by law...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States..." (Clinton, 1994). Further, given that some contaminated facilities (or portions of facilities) in Wisconsin fall under federal laws, it is very appropriate that Wisconsin

DNR also make environmental justice part of its core mission and incorporate environmental justice into all of its policies.

The main two areas in which we see gaps or problems throughout the NR 700 rules are: (1) lack of attention to requirements for characterizing, managing, remediating contaminated sites that will help identify and address effects of toxic substances on the most vulnerable people, minorities and low-income people; and (2) vague public notification and engagement requirements that lack authority and do not prioritize communication with the most vulnerable, minorities, and low-income people. To some extent the lack of attention to these issues in the proposed NR 700 changes is likely due to the fact that the external advisory group that helped the DNR develop these changes only included one environmental organization with the majority of the others being industry/legal representatives (and 10 government representatives).

In this light, we outline below areas in specific chapters in the NR 700 rules that could incorporate language that would help government staff and public health experts better identify and work to prevent/reduce effects of hazardous substances on more vulnerable groups, minority and low-income populations, and also help to more effectively engage these groups in decisionmaking about pollution that affects their health and livelihoods.

Thanks for considering our comments,

Sincerely

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**NOTE: DNR headings and language are in BLACK and MEJO comments and questions are in GREEN, with specific comments and questions underlined.**

## **NR 700 GENERAL REQUIREMENTS**

### **NR 700.03 Definitions**

**66(p)** “Vapor action level” means the concentration of vapors from volatile compounds at or above the 1-in-100,000 ( $1 \times 10^5$ ) excess lifetime cancer risk or is at or above a hazard index of 1 for non-carcinogens.”

**Comments/questions:** We strongly oppose the change from a 1-in-1,000,000 excess lifetime cancer risk for carcinogens (what WI DNR used previously) to a 1-in-100,000 excess lifetime cancer risk. Wisconsin should, in line with other states (e.g., California), require the most protective vapor intrusion health standards possible in order to provide the most protection for vulnerable groups such as children, elderly, pregnant women, and ill. This proposed change, instead, will result in all the action levels for vapor intrusion (soil, slab, indoor air) being ten times less protective than they were previously—putting the most vulnerable people more at risk. We think this change is going in the wrong direction—the Department should continue to use the 1-in-1,000,000 excess lifetime cancer risk for one chemical (assuming that’s what this refers to) and an even more protective standard for mixtures (see questions and comments below)

We strongly recommend that the cumulative excess cancer risk and hazard indices for exposure to chemical mixtures be at least as or more protective than for individual contaminants, or 1-in-10,000,000 excess lifetime cancer risk, in order to account for uncertainties about effects of individual chemicals in the mix, synergistic effects of mixtures, and to provide a protection factor for extremely potent endocrine disruptors and other highly toxic chemicals that might be in the mixture (including some that might not be measured). These extra protection factors are necessary to protect particularly vulnerable groups such as fetuses, developing children, and people who are already ill.

Please explain the rationale for the change to a less protective excess lifetime cancer risk level. Also, please clarify the following: Do the excess lifetime cancer risk and the hazard index levels described here (as proposed changes) refer to individual compounds (one at a time) or mixtures? Are exposures considered additively or synergistically? Most vapor intrusion situations involve more than one chemical together (often several that are known or possible carcinogens and/or

associated with other significant non-carcinogenic health effects, and unknown compounds). Consequently, the language here and throughout the NR 700 rules should clarify these critical specifics.

## **NR 714 PUBLIC INFORMATION AND PARTICIPATION**

### **General comments about this chapter:**

Timely and meaningful communication and engagement with those people who are most at risk from and vulnerable to hazardous substances—children, elderly, ill, minorities, low-income—is absolutely critical to preventing harmful exposures among these groups. Communication and engagement with these groups is also key to engaging them in learning about risks (in order to prevent/reduce exposures) and in public and political decisionmaking relevant to the risks.

We suggest that the DNR incorporate requirements in this chapter in line with 1994 Federal Executive Order 12898 on Environmental Justice, which requires (Sec 5-5) that: “(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations. (c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.” Adding to this, we recommend that outreach and engagement events include people from all racial/ethnic backgrounds near contaminated sites that might be affected by the contamination.

In this light, the NR 714 chapter on the public participation and notification requirements should require that RPs and/or the DNR prioritize communications and engagement with the most vulnerable people as well as minorities and low-income people near contaminated sites. This would, in turn, be facilitated by first identifying who and where these groups are in other chapters in the NR 716 requirements (see comments below). Further, minorities and/or non-English speakers or people from non-American cultural backgrounds who might be affected by contamination should be identified and appropriate communications developed for them (if identified near site).

Further, the NR 714 chapter appears to require no meaningful mechanisms for *ongoing* DNR engagement with the public or requirements that the DNR or RPs respond to citizens’ questions and/or comments related to contaminated sites. The entire NR714 chapter lacks any authority overall and we suspect it is widely ignored (and we have seen many contaminated site situations in

which it is). Communication/notification actions outlined appear to be totally optional and/or voluntary and most are, problematically, based on the RP's discretion.

Finally, specifics in various section are vague and lacking clarity about important requirements and criteria for decisionmaking about when/how/what/with whom to communicate. This is very problematic, as communication and engagement with the public, especially those most vulnerable, is extremely important aspect of protecting public and environmental health. We recommend that this chapter have the same level of specificity as other chapters in the NR 700.

**Detailed comments about specific sections in the NR 714 Chapter are below.**

**NR 714.03 Definitions.** In this chapter:

(1) "Public meeting" means a meeting held for general informational purposes and that is not required by statute.

**Comments/questions:** Are any public meetings about contaminated sites required by statute? Shouldn't they be in at least some circumstances?

(2) PROPOSED DEPARTMENT-FUNDED REMEDIAL ACTIONS.

(a) For sites or facilities where a department-funded remedial action is proposed pursuant to s. 292.11 or 292.31, Stats., or both, the department shall publish a public notice as a class 1 notice under ch. 985, Stats., upon selection of a proposed remedial action in accordance with ch. NR 708 or 722. The availability of the department's proposed remedial action for public review shall be included in the public notice, including the identification of a department contact person, and his or her phone number and mailing address.

(b) The department shall be responsible for conducting or directing appropriate public participation and notification activities for sites or facilities where a response action is funded wholly or in part by the department and conducted pursuant to s. 292.11 or 292.31, Stats., and where the department is overseeing response actions conducted wholly or in part by responsible parties under a contract signed pursuant to s. 292.31, Stats.

**Comments/questions:** Public notices about remedial actions should also be mailed to people, including all property owners and facilities near the remediation (schools, daycares, churches, retirement homes, etc.), especially in cases in which the remedial action could involve exposures to

vulnerable groups to contaminated media from the remediation (e.g., emissions of toxic chemicals in air, piles of contaminated soil).

(3) PUBLIC RECORDS. The department shall make available to the public for inspection upon request, in compliance with ss. NR 2.19 and 2.195, site or facility-specific information and decisions concerning response actions.

**Note:** The public may request a time to view department files regarding the investigation and remediation of contaminated property by contacting the regional environmental program associate.

**Comments:** All documents submitted or transmitted to the department should be made available to the public online.

(4) PUBLIC MEETINGS. The department may **SHALL** hold a public meeting to consider comments on any proposed investigation of contamination or any other proposed response action if there is sufficient public interest, or for any other reason.

**Comments:** This should be changed to “The department **shall** hold a public meeting...”. The public is often unaware of serious problems (such as harmful toxin levels that are invisible to them), and therefore not demonstrate “sufficient public interest.” Project managers have entirely too much discretion in implementing NR 700 series rules. The public interest is not served when the project managers limit the transparency of the process and departmental action.

**NR 714.07 Public participation and notification requirements for responsible parties.**

(1) EVALUATION OF NEED FOR PUBLIC PARTICIPATION AND NOTIFICATION. In order to promote effective and meaningful public participation and notification, responsible parties shall conduct all necessary public participation and notification activities, unless otherwise directed by the department. Responsible parties shall evaluate the need for and the level of public participation and notification, based on the following criteria:

**Comments/questions:** We strongly question designating the RP as being responsible for evaluating the need for public participation and notification activities and for conducting these activities. Clearly, RPs are not neutral parties and have reasons to be biased towards minimizing risks and/or not sharing important information about the contamination associated with their activities. As private, rather than public, entities, RPs are not accountable to citizens and political

processes and representatives (as government agencies are). DNR is relinquishing its duty to serve and protect citizens to “”responsible parties, whose only obligations are to its shareholders.

Further, based on extensive published risk perception and citizen engagement research, as well as decades of community experience, we know it is unlikely that the public is going to trust RP’s information and motives, especially when they are the ones responsible for the contamination. Consequently, the public participation will be very constrained and of limited value in meaningfully communicating risks and engaging people in discussions and decisionmaking about the contaminant issue at hand.

While many people also have a considerable amount of distrust for government agencies, government staff are more likely to be trusted to share accurate information about contamination and related risks than the companies or other private entities responsible for causing and/or managing the contamination. Given this, we recommend that this section be re-written to require that the department (when appropriate in collaboration with other government agencies—e.g., health agencies) be responsible for public participation and notification activities (RPs can also be included in these activities when appropriate).

Further, language in this section needs to be clarified. Based on what and whose criteria are the RPs or others held responsible for public participation/notification expected to evaluate whether public participation and notification are necessary, what level notification/participation should occur, when, and who should be notified/engaged? Which of the below criteria are most important? Are all of them considered, or is one or another criteria considered more important in certain circumstances? Who decides? For example, if there are known threats to public health (recognized by DNR and/or public health agencies), but little or no public concern about these threats because people aren’t aware of them, does this mean the RP can decide that public notification and participation activities are not necessary? We have seen cases in which this is what appears to have happened. We have also seen cases in which there is significant public concern about health threats (e.g., 100s of people at meetings, sending complaints) and yet the RP and the agencies downplay the threats and therefore no public notification or participation occurs.

**Please clarify the language in this section and provide specific criteria and details about what is required by whom, when, and what/whose guidelines for decisions they will follow.**

(a) *Threats.* Known or potential threats to public health, safety or welfare or the environment that may be reduced by providing information to the public.

**Comments/Questions:** Again, on what and whose criteria are determinations about “known or potential threats to public health, safety, or welfare or the environment” based? This is a very broad statement—it includes public health environmental health, safety. Are assessments of whether there are known or potential threats to these entities based on RPs criteria? DNR criteria? EPA criteria? Public health agency criteria? Health experts? **Please clarify.**

Such generalizations and lack of specific criteria give project managers wide discretion in areas such as public health where they have no expertise. We recommend that assessments of health threats be based on EPA health criteria and standards (which requires someone to make decisions who is aware of and has expertise on these standards).

(b) *Public concern.* Level of public concern about a specific site, facility or discharge or the number or status of sites, facilities or discharges which require a response action within a particular geographic area.

**Comments/question:** Again, on what and whose criteria are determinations about “level of public concern about a specific site, facility or discharge” made? **Please clarify.** Again, complete discretion amounts to the ability to do nothing, to not notify the public, and say that the public interest is being served (which is erroneous).

(c) *Additional information needed.* The need to contact the public in order to gather information about the response action, including immediate or interim actions.

**Question:** What does this mean?

(2) CONTENT OF PUBLIC NOTIFICATION. If responsible parties or the department determine that public notification is necessary at a site or facility, responsible parties shall include, and the department may direct the responsible parties to include specific language regarding the following information as part of the public notification:



**Comment:** Again, as discussed above, criteria for this determination (whether or not public notification is necessary at a site or facility) need to be clarified. All information should include appropriate translation for non-English speaking groups near the contaminated site.

(a) *Description.* A description of the contamination, including the type, volume and characteristics of the contamination.

**Comment:** Notification should include: information about potential health risks of contaminants, especially to more vulnerable groups (pregnant women, children, etc), ways vulnerable people can reduce/avoid exposures, specifics about where the contamination is on the site in relation to at-risk and vulnerable groups.

(b) *Mitigation.* Response actions that are planned or underway to contain, reduce or eliminate the threat of the contamination.

**Comment:** This should include how response actions might affect identified most at risk and vulnerable groups near contamination.

(3) METHODS OF PUBLIC NOTIFICATION. Notice shall be provided to the public by means designed to reach those members of the public directly or indirectly affected by the discharge of a hazardous substance and the implementation and operation of any proposed or actual remedial action. The department may **Shall** direct the responsible party to undertake any of the following public participation activities, and may **Shall** require departmental approval of materials prepared by the responsible party in order to conduct these activities.

**Comments/questions:** Again, based on what and whose criteria are decisions made about if/when public notification is necessary, and which members of the public should be notified? What are the criteria for when the notices should occur? On what and whose criteria are decisions made which members of the public are directly or indirectly affected by the discharge of a hazardous substance and the implementation and operation of any proposal or remedial action? Are any of the notification methods listed here (a-j below) considered sufficient, or some combination of them, or all of them? Who decides which one(s) is/are most appropriate and when they should happen? Please clarify.

Also, as above, we question and oppose the designation of the RP as responsible for public notification for the reasons we stated above. We think the department, as a public entity legally and politically accountable to citizens and political representatives, should be completely responsible for these critical risk communication activities. Also, all the language about notification should be changed from “may” to “shall.”

Further, most importantly, all kinds of notifications should prioritize communications with those most at-risk and vulnerable, including non-English translation when appropriate (as specified below).

**Following from the above section:**

The department may **Shall** also undertake any of these activities, including personal contacts by department staff. Notice to the public may be provided by any of the following methods:

**Comment:** Options a–d, f, h,j, k below should add this phrase “including non-English translation (when non-English speakers have been identified in the vicinity of the contaminated site) or separate language should be added to specify this for these items..”

- (a) Public notice in local newspapers,
- (b) Block advertisements, including but not limited to posters in areas frequented by the public.
- (c) Distributing leaflets door-to-door in the vicinity of the site or facility.
- (d) Letters to individual households or personal contacts by responsible parties or their representatives. (e) Contacting appropriate government officials, including but not limited to law enforcement, emergency response and health officials to inform them of the circumstances and the response actions that are underway to contain, reduce or eliminate the threat of the contamination.
- (f) Contacting media by preparing radio, newspaper or television announcements, including public service announcements
- (g) Contacting any interested individuals and groups who have asked to be kept informed of site or facility activities at various points in the process, including any other site-specific information itemized by the requestor that is available from the responsible party, including but not limited to sample results, emergency or interim actions, disposal of wastes removed from the site, requests for case closure or enforcement actions.
- (h) Holding advertised public informational meetings designed to provide the public an opportunity to ask questions and receive answers from the responsible party, the department, or both.

(i) Establishing a clearinghouse, toll-free telephone number or internet location where the public may obtain more information about the site or facility and the proposed or actual remedial actions, as well as submit comments and receive responses regarding activities that may generate noise, dust, odors, traffic or similar local concerns.

(j) Using any other appropriate mechanisms to contact and inform the public, including the opportunity to submit public comments on proposed remedial activities and to receive written responses.

**Comment:** ADD (k) contacting neighborhood associations and other groups in the community near the contaminated site to let them know about the circumstances and inviting them to participate in meetings and other events related to the contamination.

(4) POSTING OF SIGNS. (a) Unless otherwise directed by the department, responsible parties shall post one or more department-issued signs, including non-English translation (when non-English speakers have been identified in the vicinity of the contaminated site in the following manner, when any of the following conditions are found at a site or facility:

5. Any other information the department may request.

**Comment:** ADD (e) Non-English translation should be provided in situations where there are non-English speaking people live, work, or play in the vicinity of the contaminated site.

## **NR 716 Site investigation**

**NR 716.01 Purpose.** The purpose of this chapter is to ensure that site investigations provide the information necessary to define the nature, degree and extent of contamination, define the source or sources of contamination, determine whether any interim actions, remedial actions, or both are necessary at the site or facility, and allow aan interim or remedial action option to be selected that complies with applicable environmental laws. Nothing in this chapter shall be construed to require plans or reports that are more detailed or complex than is justified by the known scope of contamination or the complexity of the site or facility. This chapter is adopted pursuant to ss. 227.11 (2), 287.03 (1) (a), 289.06, 292.11, 292.15 and 292.31 and ch. 292, Stats.

**General comment:** If the purpose of this chapter is to characterize a site in order to (in part) understand what human, biological, and environmental receptors are at risk, and therefore what

actions are necessary to prevent and/or mitigate risks in order to comply with applicable environmental laws, it should require the identification of the numbers, characteristics, and locations of the people who are most vulnerable or at risk (children, fetuses, elderly, ill, minorities, poor). This information, in turn, would assist in RPs, the department, and others in notifying, communicating, and engaging with the most vulnerable people in following NR 714 requirements.

We specify below particular requirements that could be added to better identify and prevent exposures to most vulnerable people, minorities, and low-income.

**NR 716.07 Site investigation scoping.** Prior to conducting the field component of a site investigation required under s. NR 716.05, responsible parties shall evaluate all of the following relevant items, considering the location of the site or facility, to ensure that the scope and detail of the field investigation are appropriate to the complexity of the site or facility:

- (1) History of the site or facility, including industrial, commercial or other land uses that may have been associated with one or more hazardous substance discharges at the site or facility.
- (2) Knowledge of the type of contamination and the amount of the contamination.
- (3) History of previous hazardous substance discharges or environmental pollution.
- (4) Environmental media affected or potentially affected by the contamination.

**ADD (x)** Locations near within .5 mile of site where vulnerable people (pregnant women, children, elderly, ill), minorities and low-income live; locations of buildings where more vulnerable people, minorities, low-income people live, go to school, work, and/or play near site (schools, daycares, community centers, retirement homes, etc); approximately how many people in these groups are in these locations.

- (5) Location of the site or facility, and its proximity to other sources of contamination.
- (6) Need for permission from property owners to allow access to the site or facility and to adjacent or nearby properties.
- (7) Potential or known impacts to receptors, including vulnerable people (pregnant women, children, elderly, ill), minorities and low-income, public and private water supplies; buildings and other cultural features; and utilities or other subsurface improvements. This evaluation shall include mapping the location of all water supply wells within a 1,200 foot radius of the outermost edge of contamination.
- (8) Potential for impacts to any of the following:
  - (ba) Species, habitat or ecosystems sensitive to the contamination.

- (cb) Wetlands, especially those in areas of special natural resource interest as designated in s. NR 103.04.
- (dc) Outstanding resource waters and exceptional resource waters as defined in ss. NR 102.10 and 102.11.
- (ed) Sites or facilities of historical or archaeological significance.
- (9) Potential interim and remedial actions applicable to the site or facility and the contamination.
- (10) Immediate or interim actions already taken or in progress, including any evaluations made of whether an interim action is needed at the site or facility.
- ADD (x) Potential impacts of interim and/or remedial actions on vulnerable people, minorities, low-income people near site.
- (11) Any other items, including climatological conditions and background water or soil quality information, that may affect the scope or conduct of the site investigation.
- (12) The need to gather data to determine the hydraulic conductivity of materials where contaminated groundwater is found and, for sites with petroleum-product contamination discharged from a petroleum storage tank, to determine whether the site satisfies the risk screening criteria in s. NR 746.06 and the closure criteria in s. NR 746.07 or 746.08.

**NR 716.09 Site investigation work plan.**

(2) CONTENTS. The work plan shall include all of the following information, unless otherwise directed by the department:

Comment: This section should include requiring a description of how locations, numbers, and characteristics of most vulnerable groups will be identified, as well as the potential pathways of exposures to these groups to contaminants at the site (based on information above)

**NR 716.11 Field investigation.**

(3) The purposes of the field investigation shall be to:

ADD (e) To provide enough information to identify most at-risk and vulnerable groups to contaminants released from the site.

(5) The field investigation shall include an evaluation of all of the following items:

(b) The impacts of the contamination upon **receptors** including the most at-risk and vulnerable people, minorities, low-income people near the site.

(e) The extent of contamination in the source area, in soil and saturated materials, and in groundwater.

(f) The extent, both vertically and horizontally, of groundwater contamination. Piezometers shall be used to determine the vertical extent of contamination, as appropriate to the situation.

**Note:** Indoor air samples are expected to be collected and analyzed in most cases where vapor migration into an occupied residential setting is likely. A residential setting may include single or multiple family housing, and educational, childcare, and elder care facilities. Sampling and analysis is conducted to determine levels of the contaminants of concern. Indoor air sampling is not recommended in locations where the contaminant of concern is currently used in commercial or industrial operations.

**Comment:** We strongly agree with the additions related to vapor intrusion. Would suggest adding, as above, prioritizing subslab and indoor vapor monitoring in buildings where the most vulnerable people, minorities, and low-income people live, work, and play.

#### **NR 716.15 Site investigation report.**

(2) REPORT CONTENTS. The site investigation report shall include all of the following information required under this subsection, and under subs. (3) through (6):

(f)(e) *Methods of investigation.*

**Comment:** this section should include description of methods for identifying where vulnerable people, minorities, and low-income people are living, working, playing, and/or going to school and how they might be exposed to contamination from site.

(g)(3) *Results* RESULTS. A Include in the site investigation report a detailed narrative description of the results of the site investigation, reference the appropriate visual aids under sub. (4), and include including all of the following:

**Comment:** Should include map of locations of where vulnerable people, minorities, and low-income people are living, working, playing, and/or going to school and may be (or have been) affected by current or past contamination, releases, accidents, etc.

**NR 720 Soil Cleanup Standards**

**Comment:** We strongly support the comments submitted by Citizens for Safe Water Around Badger on this section of the rules