

RR-5385

DATE: September 2, 2009

TO: RR Staff – DERF Project Managers

FROM: Terry Evanson – RR/5

SUBJECT: Consultant Selection Requirements in ch. NR 169, WI Adm. Code; Insurance Claims for DERF sites

Recently, there have been questions about retaining DERF eligibility when a responsible party changes consultants in the middle of an approved contract to conduct a site investigation. Several DERF applicants have changed consulting firms in order to pursue insurance coverage for their environmental cleanup costs.

What must an eligible applicant do if he/she wants to change consultants during a SI or RA under DERF?

Eligible applicants must adhere to the requirements of s. NR 169.11 in order to be eligible for DERF reimbursement of cleanup expenses. Section NR 169.11(1)(c)3 requires that eligible applicants comply with the cost and contracting provisions of ss. NR 169.13 and 169.23. Section NR 169.13 delineates eligible and ineligible costs. Section NR 169.23(8) requires that eligible applicants select a consultant through a qualification based selection process, or in other words, the bidding process set out in s. NR 169.23. The department must approve the consultant's workplan or proposal before the eligible applicant can enter into a contract with the consultant.

We recently sent a letter to all DERF applicants (<http://dnr.wi.gov/org/aw/rr/financial/dryclean/letter-08-09.pdf>) reminding them that failure to comply with the consultant selection process in ch. NR 169 will result in their costs being ineligible for reimbursement under DERF. If an eligible applicant wants to change consultants after having signed a contract that meets the requirements of ch. NR 169, the applicant must rebid the project and select a new consultant from among 3 to 6 bidders. In this situation, you should expect to receive new workplans and/or proposals for approval. You should not approve increases to total or unit cost due solely to a change in consultants. In some instances, the applicant may temporarily lose DERF eligibility and/or incur ineligible costs, if they change consultants in the middle of a scope of work.

Availability of insurance coverage for DERF eligible sites

State statute sets out the procedure for dealing with insurance, tax credits or payments from other persons that may pay for cleanup at dry cleaner sites. In accordance with ss. 292.65(4)(m), Stats., the eligible applicant must notify the department of any application to obtain insurance or tax credits, the status of the application, and the amount of any funds received. The statute does not specify the timing of the notification. However, if you become aware that a DERF applicant is seeking insurance coverage, please remind the applicant of their responsibility to comply with the statutory notification requirements.

The DERF does not reimburse any costs that are paid by a third party (such as an insurance company). In addition, any DERF reimbursed costs must be returned to the department if a third party subsequently pays those same costs (s. 292.65(8)(j)4 and (8m)).

Firms are beginning to offer “insurance archeology” services, in addition to typical consulting services, to dry cleaners in WI. The firm investigates the existence and applicability of pre-1985 business insurance policies because those policies covered environmental damages from sudden and accidental spills. In a recent meeting with one of these firms, we were told that if an insurance company agrees to “defend” the dry cleaner owner the insurance company usually pays for site investigation but rarely will pay for remedial action work. In addition, the insurance company rarely pays for past, completed SI work. So a claim must be made to the insurance company first and then the company may pay for future investigation work.

Here are some issues between the overlap of DERF and insurance coverage that DNR PMs should be aware of:

1. We recommend that DERF applicants retain their DERF eligibility by following the requirements of ch. NR 169, including the consultant selection requirements. If an eligible applicant wants to hire a firm that will do insurance archeology in addition to NR169 contract services, the applicant needs to go through the normal bid selection process in order to retain eligibility for reimbursement of costs incurred during the contract.
2. All costs not directly related to site cleanup, including insurance archeology investigation, are not eligible for reimbursement from DERF.
3. Any cleanup costs covered by insurance are ineligible for reimbursement. Eligible applicants must inform us of the amount of money they receive from insurance coverage for site cleanup.
4. There may be costs that are not covered by insurance that are DERF eligible. Applicants may submit those costs for reimbursement but will need to clearly delineate which costs are covered by insurance and which are eligible for reimbursement by DERF.
5. Applicants can choose to conduct a SI outside of the DERF process and subsequently conduct an RA in accordance with ch. NR 169 and be eligible for reimbursement of the RA costs.
6. The DERF deductible applies to costs that are eligible for DERF reimbursement. Cleanup costs paid by an insurance company cannot be applied to the DERF deductible.